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Abstract

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Keywords

labor law, worker rights, legislation, labor markets, public policy

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Labor and Employment Law | Labor Economics | Labor Relations

Comments

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WORKERS' RIGHTS: RETHINKING
PROTECTIVE LABOR LEGISLATION

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ABSTRACT

This paper focuses on a few directions in which protective labor legislation might be expanded in the United States over the next decade and the implications of expansion in each area for labor markets. Specifically, it addresses the areas of hours of work, unjust dismissal, comparable worth, and plant closings. In each case, the discussion stresses the need to be explicit about how private markets have failed, the need for empirical evidence to test such market failure claims, the need for economic analysis of potential unintended side effects of policy changes, and the existing empirical estimates of the likely magnitudes of these effects.

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I. Introduction

While the last fifty years have seen the federal government become involved with macroeconomic and labor market policies to stimulate increased employment, they also have seen the rapid growth of programs and legislation that seek to mandate conditions under which workers may be employed. These latter policies fall under the rubric of "social insurance programs" (e.g., workers' compensation, unemployment compensation, and the social security retirement, survivors, and disability programs) and "protective labor legislation" (e.g., minimum wage, maximum hours, child labor, occupational safety and health, private employees retirement income security, antidiscrimination, and mandatory retirement laws).

All of these policies seek to mandate protection for workers in areas in which society perceives that workers have a "right" to be protected. Whether these be areas of pecuniary compensation (e.g., insurance against unemployment, work injury, nonwork disability, or promised retirement benefits not being delivered) or nonpecuniary conditions of employment (e.g., occupational safety and health), in each case the implicit judgement was reached that private markets had in some sense failed and that government intervention was required. In each case the policies also led to market repercussions, as federally mandated changes in the employment relation invariably led employers to react to the changing constraints they faced. In some cases these responses resulted in increased employment, however, in other cases they resulted in a reduction in employment opportunities.¹

This paper focuses on a few directions in which protective labor legislation might be expanded in the United States over the next decade and the implications of expansion in each area for employment policy. Somewhat surprisingly to the noninformed observer, perhaps, protective labor legislation is far less comprehensive in the United States than it is in many other western

countries. While this may result from greater union strength in these countries and unions achieving through legislation many things that are left to the collective bargaining process in the United States, it does leave much room for expansion in protective labor legislation here.

For example, while in the United States we have an overtime pay premium to discourage employers' use of overtime hours and to encourage additional employment, several European countries have more stringent rules that require prior governmental or employee approval before any overtime can be worked.² Or, to take another example, while for the most part in the United States employers can unilaterally terminate employees-at-will unless specific contract provisions protect the workers, in most European countries such dismissals are subject to various governmental review processes that may lead to reinstatement and/or severance pay if they are deemed unjust.³

The plan of this paper is as follows. I begin in the next section with a discussion of hours of work legislation in the United States that presents a conceptual framework for analyzing proposed changes in protective labor legislation. A rationale from the perspective of an analytical labor economist for many forms of protective labor legislation is that they are attempts to correct for failures of private markets and overtime hours legislation is analyzed in this framework. The discussion stresses the need to be explicit about how private markets have failed, the need for empirical evidence to test such market failure claims, the need for economic analysis of potential unintended side effects of proposed policy changes, and empirical estimates of the likely magnitudes of these effects.

The next three sections adapt this framework to address three areas of proposed forms of protective labor legislation that have begun to receive public attention and that have considerable implications for employment policy. These

respectively are policies relating to "employment at will", "comparable worth", and "plant closings". A brief final section provides some concluding remarks.

II. Hours of Work Legislation⁴

The overtime pay premium provisions of the Fair Labor Standards Act (FLSA) currently regulate only two dimensions of the hours of work relationship, the number of hours after which the overtime premium goes into effect (forty) and the premium's level (time and a half). As noted above, in their legislation, several European countries regulate other dimensions; for example, they require either prior governmental approval for overtime, for employees to give their consent to working overtime, or both.⁴ A bill to amend the FLSA introduced into Congress in 1979 by Representative Conyers would similarly have prohibited mandatory assignment of overtime in the United States, as well as raised the overtime premium from time and a half to double time and required premium pay after 35 rather than 40 hours.⁵ Although hours of work legislation will probably not be an area of great legislative effort over the next decade, a brief summary of the history of such legislation in the United States and a discussion of my prior attempt to analyze the Conyers proposal will help to provide the analytic framework I will use throughout this paper.

The earliest forms of hours of work legislation in the United States were initiated at the state level, applied to women and children and had the aim of reducing fatigue and exhaustion.⁶ For example, in 1879 legislation regulating maximum hours of work was introduced in Massachusetts, where its supporters claimed that long workweeks were exhausting and caused women to age prematurely.⁷ The first hours laws covering men in the private sector were also at the state level and covered occupations in which long workweeks adversely affected third parties or employees themselves. An 1890 Ohio law limited hours

of workers who operated trains in the hope that this would reduce railroad accident rates and protect the traveling public. This law was quickly followed by state laws limiting workweeks in mining to protect miners, who were subject to unhealthy and unsafe working conditions.⁸

In each of these cases a rationale (from the perspective of an analytical labor economist) for the protective labor legislation is found in the fact that the marginal social cost of longer workweeks exceeded the marginal private cost to employers. In the absence of government intervention these divergencies persisted because low family income levels did not permit many women and children the luxury of turning down low wage-long hours jobs, because no good alternatives to the railroads existed for long-range travel and railroad passengers were not always accurately informed about railroad employees' workweeks, and because the limited alternative employment opportunities in mining communities often restricted the occupational choice of individuals in those areas. In each case, then, markets failed, in the sense that compensating wage, or price, differentials did not arise to compensate employees, or third parties, for the full risks they incurred because of long hours of work. The case for government intervention was strong; the only real question is why the legislation took the form of outright restrictions on hours rather than the use of tax or penalty schemes to increase employers' marginal private cost of longer hours.⁹

At the federal level, throughout the early 1930s bills were repeatedly introduced into Congress to limit the length of the workweek. While the goal of protecting existing employees from the ills associated with excessive fatigue remained, a second explicit purpose of such legislation was to increase employment by spreading the available work. Ultimately on June 25, 1938, the Fair Labor Standards Act, with its overtime provisions, was enacted.

Once again, the provisions of the Act can be rationalized in terms of the divergence between private and social costs. Even if employers and their employees in the 1930s were satisfied with long workweeks, their private calculations ignored the social costs borne by the unemployed. The time and a half rate for overtime can be thought of as a tax to make employers bear the full marginal social cost of their hours decisions; it was meant to reduce the use of overtime hours and, to the extent that the increased costs do not substantially reduce total manhours demanded, stimulate employment.¹⁰ Furthermore, if employees were not satisfied with long workweeks during the 1930s but, because of market imperfections, did not have the freedom to choose employment with employers who offered shorter workweeks, the direct payment of the tax to employees who worked longer workweeks can be understood as an attempt to remedy this imperfection.¹¹

Although coverage under the overtime pay provisions of the FLSA has increased substantially over the last half century, the premium itself has remained constant at time and a half. Periodically, as in the Conyers bill, proposals have been introduced in Congress to raise the premium to double time. The underlying argument made to support the increase is that while unemployment remains a pressing national problem, the use of overtime hours has increased in recent years. Moreover, the argument follows, since the enactment of the FLSA, the deterrent effect of the overtime premium on the use of overtime has been weakened by the growing share of hiring and training costs, fringe benefits, and government mandated insurance premiums in total compensation. Many of these costs are quasi-fixed or employee related (e.g., vacation pay, holiday pay, sick leave, hiring costs), rather than hours related, in the sense that they do not vary with overtime hours. An increase in these quasi-fixed costs reduces employers' marginal costs of working their employees overtime relative to their

costs of hiring additional employees. The growth of these costs, it is claimed, has been at least partially responsible for the increase in overtime and therefore an increase in the overtime premium paid by employers is required to offset this adverse effect.

A complete analyses of the desirability of raising the overtime premium requires answers to a number of empirical questions. Would higher overtime pay rates relative to the quasi-fixed costs of employment induce employers to reduce their usage of overtime hours? Would reductions in overtime hours be "converted" to full-time jobs or "lost" to capital substitution or output reductions? Would employers comply with the legislation? Would workers who previously worked overtime, moonlight at second jobs and reduce the employment opportunities for unemployed individuals? Would the unemployed have the skills necessary to fill any new jobs that might be potentially created? Finally, what would be the income distribution consequences of the proposed policy change? Empirical analyses directed at answering all of these questions led us to conclude that raising the overtime premium would not be an effective way of stimulating employment growth, even though it would lead to a reduction in overtime hours, and that it would not have desirable income distribution consequences.¹²

Raising the overtime premium paid by employers might make sense for another reason, however, if the revenue that would accrue from such an increase was not distributed to employees in the form of higher premium pay received by them for overtime. Instead, the revenue from any increase in the tax on overtime would go directly to aid the unemployed; for example it could be contributed to the unemployment insurance fund or to employment and training program budgets. Unless it can be demonstrated that market imperfections prevent currently employed workers from freely choosing the length of their workweeks and that the

existing overtime premium does not fully compensate these workers for the disutility associated with long workweeks, then no increase in the premium paid to employees is justified. One can thus logically be in favor of raising the tax paid by employers when they use overtime hours but not in favor of raising the overtime premium paid to employees.

What about the Conyers proposal to legislate the prohibition of mandatory overtime, as is done in several European countries. Presumably such a proposal can be viewed as being based upon the belief that market imperfections persist in the labor market and that the overtime premium does not fully compensate employees for the disutility associated with mandatory overtime. One may question, however, if markets have failed here. There appear to be a variety of overtime hours provisions offered in the labor market; for example, only 16 percent of the individuals in the 1977 Michigan Quality of Employment Survey who reported working overtime also reported that the overtime hours decision was made unilaterally by their employer and that overtime was mandatory in the sense that employees who refused it suffered a penalty.¹³ In addition, roughly 20 percent of employees covered by major collective bargaining agreements in 1976 had explicit provisions in their contracts that gave them the right to refuse overtime.¹⁴

To the extent that labor markets are competitive and establishments do offer a variety of overtime hours provisions (e.g., employer determines, employee determines, penalty for refusal), compensating wage differentials should arise. To attract labor, establishments that offered distasteful mandatory overtime provisions would have to pay higher straight-time wages, higher overtime premiums, or higher fringe benefits than establishments in which such provisions did not occur. If fully compensating wage differentials exist, there is no case for legislative prohibitions against mandatory overtime.

Evidence on the extent to which such compensating wage differentials currently do exist is of importance to policy makers.

In fact, the only empirical study done on the topic found that, on average, such compensating differentials did not exist.¹⁵ This provides some support in favor of a prohibition of mandatory overtime, although the benefits from such legislation would have to be weighed against the potential costs; the latter include reduced employer flexibility in scheduling production, and thus, increased production costs, which would lead in turn to lower employment levels. The study also found, however, that compensating differentials did exist for union members. That is, unions were able to win for their members through the collective bargaining process what the market on average did not produce.¹⁶ The workers most "in need" of the prohibition on mandatory overtime then are nonunion workers.

III. Employment-At-Will

Judging by the spate of articles in both academic journals and the popular press, reform of the employment-at-will doctrine to provide nonunion workers with protection against "unjust dismissal" appears to be one of the most pressing labor issues of the decade.¹⁷ Put in simplest terms, the doctrine of employment-at-will asserts that both employers and employees have the right to terminate an employment relationship at any time. Of concern to workers is that under such a system they have no statutory protection against arbitrary decisions by employers to dismiss them.

Unlike virtually all European nations, which have specific legislation that prohibit unjust dismissals and that often mandate the use of labor courts and/or industrial tribunals to resolve disputes, for the most part in the United States the doctrine of employment-at-will continues to prevail.¹⁸ Unionized workers

with specific contract provisions that govern discharges, as well as tenured teachers and workers under some civil service systems are not subject to this doctrine and all workers receive some protection if they are dismissed for reasons that are prohibited under other federal statutes (e.g., race, sex, or age discrimination) since they may file suit for remedy under those statutes. Estimates, however, are that over 60 million workers in the United States have virtually no protection against unjust dismissal.¹⁹

Concern over the issue arises because it is also estimated that each year around 4 to 5 percent of the labor force are discharged from their jobs.²⁰ While the majority of these discharges may be justified, due to willful and deliberate misconduct, some may be unrelated to a worker's productivity on the job and/or the penalty of dismissal may seem excessive relative to the worker's actions.

In the union sector, where contract language often protects workers from arbitrary dismissals, discharge rates tend to be lower.²¹ Moreover, approximately half of unionized workers who are discharged and who appeal these discharges through an arbitration process, as specified in their contracts, are reinstated.²² One researcher has estimated that if nonunion workers had similar rights to appeal their dismissals to impartial arbitrators and did so at the same rate that dismissed union workers did, that approximately 150,000 discharged nonunion workers would be reinstated each year.²³ To the extent that these workers suffer serious economic losses, employers are not bearing the full marginal social cost of unjustly dismissing workers, and a case for government intervention may exist.

In recent years, public policy in the United States relating to the employment-at-will issue has preceeded primarily through state judiciary systems. As of 1984, more than twenty state courts had adopted "public policy"

or "whistle-blowing" exceptions to the doctrine. In these states workers cannot be discharged for actions that are consistent with public policy (e.g., refusing an employer's request to commit perjury, refusing an employer's request not to serve on a jury, reporting a violation of an OSHA standard). Similarly, thirteen state courts had adopted "implicit contract" exceptions. In these states, some of which also have public policy exceptions, workers cannot be dismissed "without cause" if actions taken by the employer (e.g., oral statements, established past practices, statements in personnel manuals) implicitly promises such protection.²⁴

These exceptions, however, appear to apply primarily to those dismissed executive and managerial employees who have the financial resources necessary to pursue redress through the courts. The majority of discharged workers are lower level blue-collar workers whose reasons for dismissal typically don't fall under the exceptions.²⁵ While several state legislatures have introduced bills requiring "just cause" for dismissal and requiring mediation and/or arbitration of disputes, no state bill has come to vote since 1975, and the only federal attempt at such legislation similarly failed to come to vote.²⁶ Some observers have argued that a federal statute is required and pressure for such legislation may continue to build.²⁷

To understand the potential rationale for such legislation, it is useful, as in the previous section, to consider several models of the labor market.²⁸ Consider first a simple competitive labor market with many buyers and sellers of labor, in which skills of workers are completely general, in the sense that a worker's productivity is not firm-specific. In such a world, proponents of the employment-at-will doctrine argue that it is an equitable or fair form of contract since either party can terminate the contract at will. Workers can quit if they perceive better opportunities elsewhere and firms can dismiss

workers if they perceive that workers' productivity has fallen below their wages. In the latter case dismissed workers would suffer no permanent loss, since their skills would be perfectly transferable. However, since job search takes time, there would be a loss of income during the job search process. How large the loss of income would be in part depends upon whether being dismissed adversely affects the time it takes to find a job.

Proponents of employment-at-will also argue that it is an efficient form of contract since either party can terminate it if the other party reneges on the agreement. Knowledge that each party reserves this right decreases the chances that workers will not put forth expected levels of performance and that employers will not provide promised pecuniary and nonpecuniary forms of compensation. Thus, efficiency is promoted and monitoring costs are reduced.

If in such a world an employer justly discharges a worker for malfeasance, the worker might suffer a loss of income but this loss would be deserved. Proponents claim that firms would have little incentive to unjustly discharge workers because information that they were doing so would reduce the attractiveness of the firm to prospective future employees and increase voluntary turnover of existing employees. On both counts, employers' labor costs would go up; unjust discharges would lead to "reputational costs" and would be costly to the firm.

In evaluating potential losses to workers from unjust discharges, it is useful to consider four different situations. First, consider the employment relation in casual or secondary labor markets; markets in which neither firms nor workers have incentives to maintain stable long-term relationships. In such markets, workers frequently voluntarily or involuntarily change jobs and the stigma from being dismissed is not likely to be a permanent one. The loss to workers from unjust dismissal are likely to be only short-run in nature.

Next, consider the situation I have previously discussed; a situation of competitive labor markets with completely general skills. We know that in such a world workers bear the full costs of acquiring skills and hence firms have no investments in workers.²⁹ Reputational costs would discourage firms from unjustly dismissing workers, however if they did, permanent losses to workers would occur only if information about the workers' true productivity could not eventually overcome the signal given by their dismissals.

Third, consider the situation in which skills are firm-specific. In this case workers and firms share the cost of training and have incentives to maintain stable relationships.³⁰ Firms would appear to have little incentive to unjustly dismiss workers; if they did, however, dismissed workers' losses might be permanent because their productivity with other employers would be lower.

Finally, consider the situation of general skills, where firms use upward sloping age-earnings profiles to motivate increased attachment and increased productivity by employees.³¹ With such implicit contracts, workers are initially paid less than their marginal product but eventually are paid more. While reputational costs would discourage firms from unjustly dismissing workers who were in the stage of their life-cycles in which marginal productivity was less than wages, if they did, these workers would suffer permanent losses.

Proponents of employment-at-will essentially would argue then that in structured internal labor markets, where workers and firms have long-term attachment, there are strong incentives for employers not to unjustly discharge workers (the last two situations). In casual labor markets, or markets where general training prevails (the first two situations), there are fewer incentives, however in these cases it appears that discharged workers' losses would only be temporary. Given the perceived benefits from allowing employment-at-

will, any policy recommendation should relate to short-term compensation for unjust discharge, not to restricting employers' rights to dismiss workers. Moreover, proponents would argue that once government restricts employers' rights to dismiss workers, it opens up the possibility of future restrictions on other dimensions of the employment relation such as promotion, transfers, and lesser disciplinary actions.

Critics of employment-at-will, of course, would disagree with this analysis. They would argue that labor markets are not competitive and that firms have dominant power. Worker opportunities may well be limited by the structure of labor markets and the absence of viable alternatives implies that dismissed workers may suffer permanent losses. If worker alternatives are limited, firms need not fear any reputational costs associated with unjust dismissals. Moreover, since discharges are almost always an individual rather than a collective phenomenon, it is unlikely in any case that potential employees would be aware of any discharges (let alone unjust ones) and thus that firms would suffer any reputational costs. Viewed in this way, employment-at-will does not seem equitable and seems to favor employers over employees. They focus on modifying this policy because of the severe costs they feel it imposes on unjustly dismissed workers; costs which are much more severe than any other personnel action a firm may take.³²

The case then for modifying employment-at-will is similar to the case for intervening in the overtime hours decision. If labor markets are not competitive, employers will not take the full marginal social cost of unjust dismissals into account in making dismissal decisions. Specifically, they will ignore the social costs of involuntary unemployment and/or dismissed workers having to accept jobs at wages that are not commensurate with their productivity. Viewed this way, the appropriate policy recommendation is to put a "tax" on unjust

dismissals to increase employers' costs of taking such actions. In fact, this is exactly what the policy of a number of European countries is, calling for severance pay if dismissals are found to be unjust.³³

Ultimately, of course, which position is correct and the appropriate public policy depend upon the answers to a number of questions. What are the characteristics of people who are unjustly dismissed? Do they suffer prolonged spells of unemployment? Do they suffer permanent earnings losses from their dismissal? Not surprisingly, given that data do not permit us to distinguish unjust from just dismissals, we currently have answers to none of these questions. Some studies, however, do provide information on related questions.

First, as compared to unemployment insurance recipients, unemployed workers who are disqualified from receiving unemployment insurance benefits because they were dismissed for misconduct tend to be younger, lower wage, nonwhite, and unmarried.³⁴ Dismissal rates also tend to be higher at small firms than at large firms and for short-term employees than for long-term employees.³⁵ Together, these facts suggest that dismissed workers are often short-term employees in casual labor markets; a situation in which I argued above that unjust dismissal is likely to lead only to temporary earnings loss.

Second, survey information suggests that employers are less likely to hire an employee dismissed for cause, than they are one who was laid-off or who voluntarily quit.³⁶ Yet data on durations of spells of unemployment from five states suggest that in two of the states where workers dismissed for misconduct were disqualified from receiving unemployment insurance for the duration of their spell, these durations of unemployment were considerably shorter than those of otherwise comparable unemployment insurance recipients.³⁷ Denial of unemployment insurance benefits apparently prods discharged workers to return to employment relatively quickly and, on average, they succeed, even if employers

are less willing to hire them. For the most part these discharged workers were unemployed for only relatively short spells.

We have no information, though, on the post-unemployment earnings loss suffered by these dismissed workers vis-a-vis the losses suffered by unemployment insurance recipients; one might suspect that the lack of unemployment insurance benefits causes the former to settle for lower positions. Moreover, we do not even have any information on the absolute magnitudes of the post-unemployment earnings losses for discharged workers. Without such information for unjustly dismissed workers, it is difficult to suggest what the appropriate policy should be.

It is interesting to note, however, that public policy in European countries typically takes the form of first mediation and then formal labor court or industrial tribunal proceedings, with workers deemed to be unjustly discharged being awarded severance pay. In most cases the severance pay is short-run, rarely exceeding six months in duration.³⁸ Reinstatement is rare; this makes sense in terms of our analytical framework, in that raising the cost to employers of "unjust" discharges is more efficient than an outright prohibition of the action.

One possible reform then is to propose federal legislation on the subject. For example, one might require that discharge disputes go to arbitration or industrial tribunals and that severance pay be awarded in cases of "unjust" discharges. Rather than expanding the federal bureaucracy, however, it may make more sense to work within existing state legislation, specifically those dealing with unemployment insurance.

All states currently penalize unemployed workers who have been discharged due to misconduct connected with work and who apply for unemployment insurance benefits. While each state has its own interpretation of misconduct, misconduct

typically includes violations of company rules, insubordination, refusal to perform work, and excessive absences. In a number of states it must be "willful and deliberate" for a penalty to occur. Fifteen states provide benefits to penalized individuals after a waiting period of typically three to ten weeks, while the remainder disqualify these individuals for at least their duration of unemployment.³⁹ It is interesting to note that of the fifteen states that provide benefits after a waiting period, the judiciary in only one, Nebraska, currently has adopted an implicit contract exception to the employment-at-will doctrine. Apparently the judiciary is acting as if the provision of some unemployment insurance benefits to discharged workers may reduce the pressure they feel to adopt implicit contract exemptions, although they never mention such benefits in their decisions.

Given that the provision of unemployment insurance benefits to unjustly dismissed workers would provide financial support similar to severance pay benefits, one wonders why pressure for reform does not take the form of devising ways to have state unemployment insurance systems more rigorously examine "dismissals for misconduct" and to encourage them to award benefits without extra waiting periods in cases in which the dismissal was deemed excessive.⁴⁰ While this might require claim evaluators to hold more thorough and expeditious hearings than they currently do, in principle this type of examination is what the system should be doing anyway. The only weakness of this approach is that to the extent that the unemployment insurance payroll tax is not perfectly experience-rated, employers would still not be bearing the full marginal social cost of their dismissal decisions.⁴¹

Moving away from an employment-at-will policy would not be costless. Suppose, as in many European nations, we moved towards a system of using labor courts or industrial tribunals to resolve discharge grievances for nonunionized

employees. To the extent that doing so increases employers' costs of terminating workers, it should induce them to devote more resources to ascertaining the likely productivity of potential applicants and to more frequently terminating workers prior to the end of their probationary periods.⁴² In a growing economy, the result would be a slow-down in the rate of growth of employment, with the lost employment opportunities being concentrated among lower productivity workers (where minimum wage laws prevent employers from offering low initial wages to compensate for uncertainty about productivity). We also should expect to see increased turnover of members of this group during their probationary periods. The limited data cited earlier suggest that dismissals are currently concentrated among low-skilled workers in casual employment relationships and it seems ironic that the very group that it is hoped would be protected by the policy change, would be the group that would appear to bear most of the cost of the change.

It is also not clear what the effect of moving further away from an employment-at-will policy would be on the level of unionization in the economy. European nations are much more heavily unionized than the United States and this has allowed the unions to win through national legislation many things which more typically would be part of collective bargaining agreements in the United States. Limitations on the rights of employers to assign overtime and dismiss workers are two examples. Strong national unions led to these policies in Europe, not visa versa.

Some people argue that limitations on employment-at-will in the United States would be a pro-union policy. They argue that unions have the skills to represent nonunion workers in cases involving unjust dismissals and that nonunion employers' resistance to unions would diminish if nonunion workers legislatively were granted the protection that union contracts often provide.

Hence, passage of such legislation might stimulate the growth of unions. Others argue, however, that legislative provision of this protection would decrease the demand for union services and hence would hurt unions.

A careful econometric study using data on unionization rates by state during the 1964-1980 period found that the adoption by state judiciary of implicit contract exceptions to the employment-at-will doctrine seemed to be associated with a decline in unionization rates, suggesting that passage of national legislation would have an adverse effect on unions.⁴³ However, while unions tend not to place the issue of employment-at-will high on their legislative agendas and have not actively lobbied for the passage of unjust discharge protection bills at the state level, in general they have been supportive of such legislation.⁴⁴ This is not the first time that econometric evidence on the effects of labor market legislation on union growth has had little effect on the positions unions take with respect to the legislation.⁴⁵

IV. Comparable Worth

Some two decades after the passage of the Equal Pay Act of 1963 and Title VII of the 1964 Civil Rights Act, which together prohibit (among other things) sex discrimination in wages on any given job and sex discrimination in access to employment opportunities, it is still common to observe that on average females earn less than males, females are distributed across occupations in a quite different manner than males, and earnings in occupations that are dominated by females tend to be lower than earnings in those dominated by males, even after one controls for traditional proxies for productivity.⁴⁷ The frustrations generated by these outcomes have led to pressure for the adoption of the principle of comparable worth, a principle that at least one participant in the debate has called "the women's issue of the 1980s."⁴⁸

Put in simplest terms, proponents of comparable worth assert that jobs within a firm can be valued in terms of the skill, effort, and responsibility they require, as well as the working conditions they offer. Two jobs would be said to be of comparable worth to a firm if they were comparable in terms of these characteristics. The principle of comparable worth asserts that within a firm, jobs that are of comparable worth to the firm should receive equal compensation.

While some efforts to implement comparable worth have taken place in the private sector, the major push for comparable worth has occurred in the state and local government sector.⁴⁹ By the mid 1960s over a dozen states had passed comparable worth legislation covering state employees, although these laws were rarely enforced. Starting with a 1974 State of Washington study, a number of states have undertaken formal job evaluation studies to see how their compensation systems mesh with the principle of comparable worth.⁵⁰ In several cases, this has led to "voluntary" implementation of comparable worth through the legislative and collective bargaining processes (e.g., Minnesota, Connecticut, New York), or to court ordered implementation (Washington).⁵¹ By the summer of 1985, over a dozen states had begun the process of implementing some form of comparable worth in their employees' compensation systems.

Comparable worth initiatives have also been undertaken at the local level in over 50 cities, counties, and school districts. Many of these units are in the states of California, Minnesota and Washington. Comparable worth wage adjustments were implemented in San Jose, California after a well-publicized strike of municipal employees over the size of the adjustments and the publicity this strike received undoubtedly influenced the spread to other California units. Minnesota passed a law in April 1984 requiring political subdivisions to do job evaluations and then to revise their compensation structure in accord

with comparable worth. Finally, the early Washington comparable worth study mentioned above attracted attention to the issue in that state.

At the federal level, hearings on comparable worth have been conducted by several Congressional committees.⁵² While support for the principle has been espoused by some Congressional Democrats, in 1985 the U.S. Civil Rights Commission and the U.S. Equal Employment Opportunity Commission, both dominated by Reagan administration appointees, each came out against comparable worth.⁵³

Once again we can consider a simple stylized competitive labor market model to understand the cases for and against comparable worth.⁵⁴ In a competitive labor market a firm hires employees in an occupation or job category until the category's marginal product equals its real wage. A category's marginal product represents its "worth" to an employer. However, this is not necessarily fixed over time, but rather depends upon the number of employees hired in the category and all other job categories, the quantity of capital available to employees to work with, the production technology, and the quality of employees in the various job categories. The worth of a job then can not be determined independent of the qualifications of its incumbents and may well change over time. This suggests that job evaluation surveys cannot be a one-shot event, but rather must be constantly updated; the worth of a job to an employer is not necessarily constant over time.⁵⁵

Now move to the level of the labor market as a whole. The aggregation of individual firm's demand curves for each occupation leads to market demand curves for the occupation. The supply of labor to each occupation/job category will depend upon workers' qualifications, the pecuniary and nonpecuniary forms of compensation every job offers and the distribution of preferences across workers for the various jobs. If there are no barriers to occupational mobility, a worker will move between jobs until the "net advantage" he or she

perceives from each is equalized. Such movements lead to an equilibrating structure of occupational wage differentials; this depends upon the distribution of workers' qualifications and "tastes" for the various jobs.

In this stylized competitive world, all of the factors that comparable worth advocates believe should affect wages (skill, effort, responsibility, and working conditions) would affect wages, since these factors would influence the underlying supply and demand schedules. However, the weight the market would place on each factor in determining wages would reflect the entire distribution of employees' tastes for, and employers' valuation of, each factor, not necessarily the weight assigned by a job evaluation scheme. Put another way, if workers have heterogeneous preferences with respect to various nonpecuniary conditions of employment, the relative wage each occupation would pay would depend upon employers' relative demands for the various occupations. Job characteristics would not be the only determinant of wages.⁵⁶

If in such a world females clustered into lower-paying occupations than males who had comparable productivity related characteristics (e.g., education), this would reflect only systematic differences in tastes between males and females for the nonpecuniary characteristics offered by the various jobs. For example, married females with children might have strong preferences for jobs that do not require travel, long hours, or work that must be brought home in the evenings. Given their preferences, males and females would have made optimal career choices and no government intervention would be required.

Of course, this conclusion presupposes the validity of the assumptions of the model and there are a number that proponents of comparable worth seriously challenge. The first is the assumption that there are no barriers to occupational mobility. If women are systematically excluded from high paying occupations, one cannot claim that the structure of earnings is the result of volun-

tary choice. A market economist would respond that an appropriate long-run remedy in this case would be to break down occupational barriers through actions including rigorous enforcement of Title VII of the Civil Rights Act. However, such actions would provide only for gradual improvement of the welfare of the discriminated against group, as they would have to wait for vacancies to occur in the higher paying male jobs. In addition, for jobs that require training, this policy would benefit primarily new entrants whose time horizons are sufficiently long to enable them to profitably undertake the necessary training.

In the absence of a policy that could 1) create "male" jobs for all qualified females who want them, 2) identify the older women whom historic discrimination prevented from making different occupational choices early in their lives and who now could not afford to profitably undertake the necessary investment if the barriers to entry were broken, and 3) would provide resources to these women now so that they could undertake the training, it could be argued that a policy calling for comparable worth might make sense. Its justification would be based on equity considerations; one would have to conclude that these would outweigh any efficiency losses that might result. Some of these losses are discussed below.

The second assumption challenged is that wages in female dominated occupations are determined in competitive markets. There is considerable evidence that employers in some female dominated occupations, such as public school teachers and hospital nurses, appear to have monopsony power.⁵⁷ As is well-known, in this circumstance there is a range over which one can "legislate" a higher wage without suffering any employment loss. Whether the wage that would be set under a comparable worth wage policy would fall in such a range cannot be determined a priori and, in any case, the vast majority of females are not employed in these

occupations. A remedy that insures that employers in these markets actively compete for workers might make more sense than comparable worth.⁵⁸

The case for comparable worth thus seems to rest on the argument that the current occupational distribution of female employees is based on discriminatory barriers which existing legislation has not broken down. Even if one could enforce these laws, breaking down barriers does not help experienced older workers who have invested heavily in occupation-specific training and whose time horizon is now too short to profitably undertake new occupational investments. Comparable worth is one of several policies that could provide a remedy for these workers.⁵⁹ Whether it is a desirable policy depends upon one's perceptions of how the benefits it provides contrast with the efficiency losses it induces. Just as with one's perception about the value of the minimum wage, given the trade-offs involved, ultimately one's position on comparable worth must depend on value judgements.

Assuming one wants to seriously consider comparable worth as a national policy, there are a number of issues that must be addressed. First, there are a host of questions relating to the usefulness of current job evaluation methods for comparable worth studies. These include, but are not limited to, questions of sex bias in describing or evaluating jobs, the question of which characteristics should be valued, the statistical reliability of raters' evaluations, the correlation of ratings under alternative job evaluation methods, and whether market wages should be used in the determination of the "weights" different job attributes should receive. There is considerable debate over these issues, primarily by noneconomists, and the interested reader can pursue this debate elsewhere.⁶⁰

Second, supporters of comparable worth are quite explicit that the concept is to apply to individual employers and that job evaluation schemes are to be

establishment or firm-specific. This immediately suggests that, like many other forms of protective wage legislation, comparable worth legislation would have to have size class exemptions, because only relatively large firms would have enough employees to meaningfully consider conducting formal job evaluations. Comparable worth laws would apply then only to relatively large firms.

Now to the extent that a comparable worth wage policy succeeded in raising the wages of women in such large covered establishments, one might be tempted to deem the policy to be a success. However, this ignores several market repercussions that would occur.⁶¹ Employers in the covered sector would have an incentive to substitute male employees for female employees; thus we should observe a decline in female employment in this sector. To the extent that scale effects outweigh substitution effects, a decline in male employment in the covered sector should also occur. If these displaced male and female workers seek employment in small firms in the noncovered sector, wages of both males and females there would fall. Hence, while some women would gain (women who keep their jobs in large firms in the covered sector), other women would lose (women who lose their covered sector jobs and women initially employed in small firms in the noncovered sector). It is unclear whether women as a group, on balance, would actually gain.

In part, the answer depends upon the magnitude of the disemployment effects. One study of Australia, where the implementation of a comparable worth type system via wage tribunals saw the average female/male earnings ratio in the economy rise from .61 to .76 over a five-year period, concluded that the policy change decreased the rate of growth of female employment by 1.3 percent a year.⁶² This was approximately one-third the actual rate of growth of female employment during the period, so it represents a rather substantial decline. The same study concluded that the female unemployment rate was about .5 percent

higher at the end of the period, than it would have been in the absence of the comparable worth policy.

In the United States comparable worth wage policies are only beginning to be implemented, and then primarily in the state and local sector. As a result, estimated disemployment effects can be obtained only from simulations that use estimated systems of demand curves for male and female employees to provide estimates of male/female substitution as relative wages change. A detailed study of the state and local sector concluded that a 20 percent comparable worth wage adjustment for all females in the sector, would lead to only a 2 to 3 percent decline in female employment in the sector.⁶³ While one might expect gender substitution, and hence disemployment effects, to be greater in the private sector, existing studies of male/female substitutability in the private sector are not sufficiently precise to allow one to draw this conclusion.⁶⁴

In part, the answer also depends on whether women are employed disproportionately in the covered (large firm) or noncovered (small firm) sectors, the magnitude of the male/female wage differential in each sector, and the wage differentials between sectors? If women are disproportionately employed in small firms with large male/female wage differentials, which pay much less than large firms, on balance women as a group may lose by the policy. While it is well-established that wage levels vary by size class, evidence on the other questions is only sketchy. One study did find, however, that the proportionate representation of women in the U.S. manufacturing firms declines with establishment size.⁶⁵

Furthermore, if comparable worth is a firm-specific policy, it will do nothing to eliminate male/female wage differentials that exist because of differences in the sex distribution of employees across industries or across size classes of establishments within an industry. To the extent that women are

concentrated in low wage industries and/or low wage small firms, comparable worth will have only a limited effect on the average male/female wage differential in the economy.⁶⁶

Of course, a comparable worth wage policy might have supply-side effects. On the one hand, it would reduce the incentive females have to obtain training for higher paying "male" occupations, since increasing the wage in "female" occupations via comparable worth wage adjustments would reduce the return to training investments; this would lead to another efficiency loss. On the other hand, such wage adjustments might increase the attractiveness of "female" occupations to males and reduce the extent to which females were excluded from "male" occupations, since the wage advantage in "male" jobs would be smaller or no longer exist. We have no information on the likely magnitudes of these responses, which further hinders our evaluation of such a policy.

V. Plant Closing Legislation

Most European nations have some form of legislation relating to plant closings or large scale layoffs.⁶⁷ Typically they call for advanced notice by employers and employer negotiations with employees and government over whether the closing can be averted. Often they require severance pay for displaced workers and some, for example Sweden, have detailed programs of labor market services (retraining, placement, public works, wage subsidies) to facilitate adjustments. Canada similarly requires advance notice. In many of these countries small establishments with less than one-hundred employees are exempt from the requirements, perhaps due to the greater failure rate of small businesses or the belief that a shut down of a small business does not have a substantial effect on a community.

Plant closing legislation in the United States is much more modest.⁶⁸ As of early 1985, there is no federal law and only four state laws. Two, Maine and Wisconsin, require advance notice of plant shutdowns (with size class exemptions), and Maine also requires one week's severance pay per year of service for workers with greater than three years tenure. Connecticut, does not require advanced notice, but does require nonbankrupt firms to maintain health insurance and other benefits for workers unemployed by plant shutdowns for up to ninety days. Massachusetts similarly requires maintenance of health insurance and encourages, but does not require, advanced notice and severance pay.

Interest in plant closing legislation in the United States has grown since the deep recession of the mid-1970s and the relatively large number of plant closings and permanent layoffs in major manufacturing industries since then, undoubtedly stimulated this interest.⁶⁹ During the 1975-83 period over 125 bills relating to plant closings were introduced in 30 states; the majority in the northeast and midwest.⁷¹ More than ninety percent of these bills had provisions requiring advanced notice of shutdowns, while substantially smaller percentages required severance pay or economic assistance to either workers, employers, local governments, or potential buyers.

At the federal level, some 40 bills have been introduced into Congress since 1979. The National Employment Priorities Act, first sponsored by Gerald Ford and Walter Mondale in 1974, was active in Congress as HR 2847 in 1983 and, if passed, would have required advance notice if over fifteen percent of employees in an establishment were expected to lose their jobs due to a plant closing or relocation. Among its other provisions, it also called for severance pay for displaced workers along with weekly income maintenance benefits while they were unemployed for up to one year at eight-five percent of previous wages (one hundred percent if a worker was enrolled in a training program), mainten-

ance of all benefit and insurance plans, for the firm to pay relocation allowances if jobs were available in other establishments it operated, and for the firm to make payments for a year to the community in which the business was located to compensate it for lost tax revenue. A weaker form of the bill, HR1616 was reported to the floor of the House in 1985. It required employers to give 90 days advance notice of a plant shutdown or layoff involving at least 50 employees and for employers to consult with the employees or their union about the potential displacement.

Proponents of plant closing legislation argue that advance notice provisions will ease displaced workers' shock and facilitate their search for alternative sources of employment or training. Such notice also allows employers, workers and the community to see if ways exist to save the jobs, such as wage concessions, tax concessions, or seeking new ownership, including the possibility of employee ownership. If plants do shut, the maintenance of health insurance provide needed service for individuals during a period when stress leads to increased incidence of physical and mental ailments.⁷² Finally payments by firms to the communities in which the plants were located would help alleviate the extra demands placed on these communities for social services that the shutdowns cause; demands that would arise at the same time that local property and sales tax revenue were being reduced.

Opponents of the legislation argue that, in addition to restricting the free mobility of capital, advance notice legislation would have a number of other adverse effects on firms.⁷³ They claim it would increase worker turnover and decrease productivity, as those productive workers with the best opportunities elsewhere would leave and the morale of remaining workers would suffer. It also would decrease the likelihood that buyers of the plant's product would place new orders, that banks would supply new credit, that suppliers would

continue to provide services, and that the firm could sell the plant to potential buyers. Finally, it would depress corporate stock prices. Such a provision, plus the others that directly increase the costs of plant shutdowns, effectively increase the cost of reducing employment and thus should encourage firms not to expand operation in states where such laws are in effect. Opponents argue then that it is a self-defeating regional policy, in that, if adopted, it would discourage creation of new jobs in snowbelt states.

In evaluating the case for plant closing legislation, it is again useful to stress the divergence between private and social costs. Employers currently do not bear the full social costs of plant shutdowns, both because unemployment insurance is imperfectly experience rated and because the costs these actions impose on communities are not taken into account by them. As such, imposing a "tax" on plant closings makes sense; it would have the effect of discouraging the action. Of course, to avoid depressing new employment growth in snowbelt states, the tax would have to be nationwide; critics have inadvertently supported the case for federal instead of state legislation.⁷⁴

Two additional points should be noted. First, the community effects of worker displacement depend partially upon the number of jobs lost relative to the size of the local labor market. In a given size market, it is hard to ascertain what the differential effects on the community would be of an establishment with one hundred employees shutting down, of an establishment with one thousand employees permanently laying off one hundred of them, or of one hundred establishments each laying off one employee. Viewed this way, size class exemptions under the law make less sense, as does the distinction between plant shutdown and layoff. In addition, the costs the community faces for any given displacement will be higher the smaller is the local labor market and the higher

is the area unemployment rate. The latter suggests that the "tax" per displaced worker should increase as unemployment rates increase.

Second, to say that employers should pay a "tax" on plant closings does not necessarily imply that the revenue from this tax should go to displaced workers in the form of severance pay, just as an increase in the tax on overtime should not necessarily go to workers in the form of an increased overtime premium (see Section II). However, if displaced workers' losses are greater than those incurred by other unemployed workers covered by the unemployment insurance system and if it can be shown that these losses were not already compensated for by the market in the form of higher pre-unemployment wages, a case for worker compensation might be made on equity grounds.

To understand the losses workers suffer from a plant shutdown or permanent layoff, it is useful to again consider several simple competitive labor market models. Consider initially the situation in which all skills are perfectly general. In this case workers would accept jobs with an employer whose risk of shutdown or permanent layoff were high only if they received a wage premium to compensate them for their lost earnings during the time they expected to be unemployed searching for new employment. In such a world, worker losses would only be transitory, since their skills are assumed to be perfectly general. Their post-unemployment wages might be less than their pre-unemployment wages, however this would reflect only that they had moved to less risky jobs. This points out that a comparison of post- to pre-unemployment wages may overstate the permanent losses workers face.

In fact, several studies suggest that labor markets do compensate workers for their risk of unemployment; jobs with higher risk of subsequent unemployment, ceteris paribus, pay higher wages. While the provision of unemployment insurance indicates that society believes that markets are not working per-

fectly, the same studies also suggest that as expected, higher unemployment insurance benefits lead to smaller wage premiums for risk of unemployment.⁷⁵

Permanent losses for workers would occur, however, if workers had previously invested in firm-specific skills and they did not anticipate layoffs or plant closings. In this situation, post-unemployment earnings would be less than current earnings and no predisplacement wage differential would have arisen to compensate these workers for the risk involved in their investments. When industries reach a period of decline (e.g., auto and steel), it is likely that potential new employees (to the extent that there are any) will be aware of the risks and will demand wage premiums to compensate them. However, older workers who invested decades earlier when times were good, would be "locked-in" to the industry because of the specificity of their skills and would receive no compensating differentials.

The notion that compensating wage differentials for risk of unemployment will arise primarily for workers with relatively short job tenure has not been tested. The study of mandatory overtime cited in Section II did find, however, that compensating wage differentials for that unfavorable job characteristic existed only for employees with less than three years tenure.⁷⁶ To the extent that this result carries over to risk of unemployment, permanent losses would be suffered primarily by workers with long tenure. This implies that severance pay plans and job assistance programs for displaced workers should focus on workers with relatively long tenure. As noted earlier, the Maine law requires three years tenure for severance pay and then increases severance pay with experience. Such a structure makes sense.⁷⁷

One must be aware, though, that since employers share the costs of investment in firm-specific training, they also will share the losses from unanticipated (at the time of the training) plant closings. To make them pay for the

above programs for senior workers with specific training would increase their losses and discourage all employers from making future investments in firm-specific training. To avoid this perverse incentive, in the presence of specific training such programs might be funded out of general revenues.

The situation would be very different, however, if employees worked in structured internal labor markets where employers used upward sloping age-earnings profiles to motivate increased attachment and productivity by employees. As noted in Section III, in such a world workers are initially paid less than the marginal productivity but eventually are paid more. Over their expected tenure with the firm they receive an expected present value of compensation equal to their present value of productivity. Any unanticipated plant shutdown would cause permanent losses for experienced workers and the employers would not directly share in these losses. A stronger case for program costs to be borne directly by the employer can be made in this case.

The discussion so far has focused on losses that workers suffer after displacement occurs. What about possible losses in the years prior to displacement?⁷⁸ If employees anticipate forthcoming plant closings or layoffs, they will cease their investments in firm-specific training and one should observe a flattening in their age-earnings profiles prior to the displacement. In contrast, if they fail to anticipate such displacements, they will continue their investments and no such flattening will occur. In the later case, failure by employers to provide workers with information that displacements were forthcoming would have erroneously led workers to undertake investments that were sure not to pay off. In fact, one careful study of displaced workers found that the slope of age-earnings profiles did tend to flatten prior to displacement for permanently laid-off workers but did not for workers involved in plant

shutdowns. Apparently layoffs tend to be anticipated, while plant shutdowns are not.⁷⁹

The above finding provides a further rationale for advance notice for plant closing (but not for layoffs) legislation; it would provide incentives for workers not to make wasted investments in firm-specific training. Other empirical evidence provides additional support for the policy. One study in Maine found that advanced notice did appear to speed up labor market adjustments to plant closings; area unemployment rates peaked earlier in situations where advanced notice took place, although long-run unemployment rates were not affected.⁸⁰ Another early study of thirty-two plant closings found that advance notice of closings rarely led to increased quit rates or decreased productivity.⁸¹ To further protect against these things occurring, the receipt of severance pay and/or job assistance programs could be restricted to employees who remained with the plant until it shut down; this in fact is done in Maine. Finally, it is estimated that over the last decade advanced notice permitted about 60 cases of employee ownership to arise to avert plant shutdowns; these "saved" about 50,000 jobs and in only four or five cases did the firm subsequently go out of business.⁸²

One should caution, however, that a study of the earnings loss displaced workers suffer found that advanced notice provisions did not appear to reduce earnings loss.⁸³ The policy may aid worker transitions but it does not seem to affect their long-run prospects. More generally, this and other studies concluded that workers with high education levels and general skills suffer only small earnings losses from labor market displacement.⁸⁴ In contrast, unionized workers in heavy manufacturing industries (e.g., steel and auto) suffer substantial earnings losses, 25 percent plus, in the first two years after displacement and still have annual losses in the range of 10 to 15 percent after six years.

Given estimated wage differentials paid to union workers of at least this amount, it is difficult to say how much of this loss merely represents that dissipation of union rent. Finally, workers in less heavily unionized industries with higher rates of turnover, and where long-term attachment of workers to firms is less prevalent, and less specific training occurs, suffer some short-run losses but virtually no long-run losses.

A number of studies also indicate that older workers, women, and workers with long tenure suffer the greatest losses from displacement.⁸⁵ Earnings losses also appear to be higher when area unemployment rates are high and in relatively small labor market areas.⁸⁶ These findings further support the notion that labor market adjustment policies should be targeted on older workers and that resource allocation formulas should have area unemployment rate triggers, as various training and extended unemployment insurance benefit programs have had in the past.

These earnings losses estimates do not take account of the effects of existing income replacement programs, such as unemployment insurance and trade adjustment assistance. In cases where displaced workers were eligible for trade adjustment assistance, first year net income losses were substantially reduced.⁸⁷ However, these benefits did not appear to affect long-run net income losses and they did appear to increase displaced workers' duration of unemployment.⁸⁸ To speed up the process of labor market readjustment, any plan that proposes that compensation be paid to displaced workers probably should call for lump sum payments, rather than weekly benefits while unemployed.

So far the discussion has ignored the role of unions. Workers covered by collective bargaining in the United States have some protection against plant closings. Employers must bargain with unions over the effects of plant closings (e.g., severance pay, pension recall and transfer rights, seniority), although

they are under no obligation to bargain over the decision to close.⁸⁹ If a union wants certain rights, such as advance notice of anticipated closings, they must win it at the bargaining table. Moreover, the recent Milwaukee Springs II decision by the National Labor Relations Board affirms employers' rights to transfer work from union plants to nonunion plants to avoid high union wages during the course of a contract unless the language in the contract specifically prohibits it.⁹⁰

A recent survey of provisions relating to plant closing provisions in major collective bargaining agreements (agreements covering one thousand or more workers) found that over one-third contained some provisions relating to worker participation in decisions about the effects of plant closing or relocation decisions, with severance pay provisions being the most common.⁹¹ However, only slightly more than ten percent of these contracts called for advanced notice.⁹² Presumably coverage in smaller agreements is less extensive.

While union protection against plant closings thus seems limited, it must be remembered that one important role unions play is to acquire information and to communicate it to members on the true economic conditions of the firms at which they work. The study of the changes in the steepness of age-earnings profiles prior to plant closings or layoffs discussed above also found that the profiles became flatter for union members.⁹³ Apparently they better anticipated labor market displacement than nonunion workers, and thus were less likely to make wasted investments in firm-specific training. Furthermore, while there is not yet evidence that unions win larger compensating wage differentials for anticipated plant shutdowns or layoffs than the market produces for nonunion workers, there is a growing body of literature relating to other unfavorable job characteristics that suggests larger compensating differentials arise in the

union sector.⁹⁴ As with overtime hours and employment-at-will legislation, the major need for plant closing legislation may well be in the nonunion sector.

Finally, it must be stressed that whatever form plant closing legislation takes it is subject to problems relating to bankruptcy and noncompliance. Almost by definition bankrupt firms will not have the resources to fund benefits for displaced workers and in the absence of substantial penalties for noncompliance, incentives for compliance are limited. If the goal is to aid both communities and displaced workers in a timely fashion, it seems clear that public insurance of provision of benefits may be required in these cases. This leads logically to the notion of a "Plant Shutdown Benefit Guarantee Corporation," which might be financed in an analogous manner to the Pension Benefit Guarantee Corporation.

VI. Concluding Remarks

This paper has focused on four areas in which protective labor legislation might be expanded in the United States over the next decade, specifically the areas of hours of work, unjust dismissal, comparable worth, and plant shutdowns. In each case I have tried to provide a rationale for government intervention, to discuss if empirical evidence supports this rationale, to discuss potential unintended side effects of the proposed policy changes that are relevant for employment policy, and to discuss how proposed legislation might be structured. Space and time constraints have precluded my consideration of a number of other areas of likely expansion, including disability, retirement income, and occupational safety and health policies.

Several themes emerge from the paper that are worth mention. First, the case for legislation and the appropriate form that legislation should take often depend crucially on the empirical nature of labor markets. Are workers who are

required to work overtime compensated in the form of higher wages? Do unjustly dismissed workers typically suffer permanent losses? Do wage differentials by gender arise because of occupational barriers? Have displaced workers who invested in firm-specific skills been compensated for risk of displacement by the market? Do wage profiles slope upward because of firm-specific training or life-cycle incentive compensation arrangements? We unfortunately don't have answers to some of these questions; they are required to design policies in the areas discussed above.

Second, unionized workers, both directly through the collective bargaining process and indirectly through winning wage differentials to compensate them for unfavorable job characteristics, appear to have much more protection in many of these areas than do nonunion employees. The major beneficiaries of legislation in these areas would be nonunion workers. While strong protective labor legislation and strong unions coexist overseas, one wonders if the growth of protective labor legislation in the United States would decrease the demand for unions and further reduce the share of the workforce that is organized.

Third, there are reasons to propose size class exemptions in each of the above areas. However, such exemptions stratify employment into a covered (large establishment) sector with "good" working conditions and a noncovered (small establishment) sector with "poorer" conditions. The workers most in need of protection may well be employed in smaller establishments; the design of the legislation may frustrate its objectives.

Finally, it is worth restressing that what is seen as worker protection by some, is seen as sources of economic inefficiency by others.⁹⁶ While I have tried to articulate many of the benefits and costs of proposed policies, and to suggest in several places ways to minimize the costs, ultimately decisions about

these policies will have to involve much more explicit value judgements than are presented here.

Footnotes

1. For example, higher overtime pay premiums may stimulate employment growth (Ehrenberg and Schumann (1982)), while the accumulated evidence shows that higher minimum wage rates reduce employment opportunities for teenagers (Brown, Gilroy and Cohen (1982)).

2. National Board for Prices and Income (1970).

3. Stieber (1980b).

4. The material in this section draws heavily from Ehrenberg and Schumann (1982) (1984).

5. HR 1784 introduced into Congress on February 1, 1979. This bill never reached a vote.

6. Commons and Andrews (1920), Paulsen (1959) and Phelps (1939).

7. Cahill (1932), pp. 106-107.

8. Paulsen (1959), p. 114.

9. The well-known preference of Congress and state legislatures for standards rather than tax-subsidy schemes may reflect only the fact that the majority of their members are lawyers who are comfortable with the standards approach.

10. Initial drafts of the legislation established outright prohibitions of long hours. The idea of instituting a penalty for overtime instead apparently arose only as a compromise during the late stages of the debate. See Paulsen (1959), Phelps (1930), and Grossman (1978) for legislative histories of the FLSA).

11. Hundreds of court decisions handed down since the FLSA was enacted confirm that Congress had the dual intent of inducing employers to reduce hours of work and increase employment and of compensating employees for the burden of

long workweeks. See, for example, Walling v. Youngerman-Reynolds Hardwood Co., Ala. 1945, 65 S.Ct. 1242, 1250; 325 U.S. 419; 89 L.Ed. 1705, rehearing denied; 66 S.Ct. 12; 326 U.S. 804; 90 L.Ed. 489.

12. Ehrenberg and Schumann (1982).

13. Quinn and Staines (1979), pp. 90-91.

14. U.S. Bureau of Labor Statistics (1979).

15. Ehrenberg and Schumann (1984).

16. The finding that unionized workers receive compensating wage differentials for unfavorable job characteristics while nonunion workers often do not is not unique to the mandatory overtime area. Duncan and Stafford (1980) find similar results for three working conditions variables and a number of authors (see Ehrenberg (1985) for a survey) have found similar results for wage/injury risk tradeoffs.

17. See, for example, Block, Stieber and Pincus (1983), Bureau of National Affairs (1982), Business Week (1980), Epstein (1984), Rosen (1984), Stieber (1980a) (1980b) (1984) (1985), Stieber and Blackburn (1983), Stieber and Block (1983), and Stieber and Murray (1983). A search of on-line data bases turned up almost 100 articles on the topic, primarily in law journals, during the 1981-84 period.

18. For a discussion of European policies, see Stieber (1980a) (1980b), and Stieber and Blackburn (1983).

19. Stieber (1984).

20. Stieber (1985) and Block and Stieber (1983).

21. See Stieber (1985) and Block and Stieber (1983) for evidence that union discharge rates tend to be about half nonunion rates. Felder (1979) similarly found that discharges for misconduct per 1000 new spells of unemploy-

ment were much lower in highly unionized New York State than they were in four relatively low unionized southern states.

One must, of course, interpret these data with caution. One cannot distinguish whether these differences are due to the protection unions give to workers or to differences in the characteristics of workers (e.g., skilled or unskilled) or of jobs (e.g., structured internal labor market with premiums paid for a stable workforce or casual unstable jobs) between the union and nonunion sector.

22. Stieber (1984).

23. Stieber (1985).

24. Stieber (1984). Three states--California, Massachusetts and Montana--also have "good faith and fair dealing" exceptions which hold that while an employee may be dismissed without cause, he or she must be dealt with fairly and in good faith. So, for example, firing an employee to avoid having to pay a commission on a large sale would fall under the exemption.

25. Stieber (1984).

26. The federal legislation, HR 7010, the Corporate Democracy Act was introduced in 1980 by Congressman Rosenthal. It defined "just cause" and prohibited employees from being fired without just cause, as well as specified social policy exceptions to the employment-at-will doctrine. This bill died in committee. At the state level California and four other states are currently considering legislation to prohibit unjust dismissal (Business Week (1985)).

27. Stieber and Murray (1983).

28. The material below borrows in places heavily from Epstein (1984) and Rosen (1984), although I do not always reach the same conclusions they do.

29. Becker (1975).

30. Becker (1975).

31. Lazear (1979).
32. Stieber (1980a).
33. Stieber (1980b) and Stieber and Blackburn (1983).
34. Felder (1979).

35. Stieber and Block (1983). Short-term employees were defined in this study as having six months to five years tenure and, in private communication to me, Stieber indicated he believes the majority fell in the upper end of the range.

36. Block, Stieber and Pincus (1983).
37. Felder (1979).
38. Stieber (1980a), p. 159.

39. UBA, Inc. (1984). In the latter case individuals often must regain employment and earn specified amounts before they become eligible for UI benefits during future spells of unemployment. All of the above penalties are for cases of "simple misconduct;" in cases of "gross misconduct" harsher penalties are often imposed.

40. Such a policy would be less generous to workers than the policies in some European nations, where compensation for unjust discharge is often awarded in addition to unemployment insurance benefits. See Stieber and Blackburn (1983), p. 70, for some examples.

41. For evidence on the extent of imperfect experience rating in the UI system and its effects on temporary layoffs, see Topel (1983).

42. European nations generally exempt employees in their first six months of employment from protection under unjust dismissal laws. See Stieber (1980a).

43. Neumann and Rissman (1984). No similar relationship was found for adoption of "public policy" exceptions. This result is to be expected, the latter exception does not relate to the services unions provide.

44. Stieber (1984).

45. For example, a long literature on the effects of state right-to-work laws for the most part suggest they have little effect on the level of unionization or union organizing success, yet unions place repeal of these laws high on their legislative agenda. See Ehrenberg and Smith (1985), p. 376, for citations to this literature.

46. This section draws heavily on material in Ehrenberg and Smith (forthcoming).

47. See, for example, Donald Treiman and Heidi Hartmann, eds. (1981).

48. This statement has been attributed in a number of places to former EEOC Chair Eleanor Holmes Norton.

49. Explanations for why this occurred include that public decision makers are more likely to be swayed by public opinion calling for such policies than are private profit maximizing firms and that increases in female wages in the public sector caused by comparable worth wage adjustments are likely to lead to only small employment losses because the demand for public employees is likely to be inelastic. I discuss the evidence on the latter point below.

50. The next two paragraphs summarize information found in Cook (1983), Ehrenberg and Smith (forthcoming), Tables 1 and 2, and National Committee on Pay Equity (1984).

51. In AFSCME v. State of Washington. For details see "Immediate Halt to Bias in Wages in State of Washington Ordered," New York Times, December 15, 1983. In September of 1985, a federal appeals court panel overturned this decision. See "Comparable Worth Rule Overturned," Washington Post, September 5, 1985.

52. See, for example, U.S. House of Representatives (1982).

53. "Equal Pay is Not Needed for Jobs of Comparable Worth, U.S. Says," New York Times, June 18, 1985, p. 12.

54. See Bergmann (1984) and Killingsworth (1984) (1985), respectively, for more complete analytical treatments of the cases for and against comparable worth.

55. That job evaluation scores must be reconsidered as internal and external conditions change has long been recognized by institutional economists. For a recent discussion, see Donald Schwab (1984).

56. Killingsworth (1985).

57. See Ehrenberg and Schwarz (forthcoming) for citations to this literature.

58. Killingsworth (1985).

59. Another remedy would be lump sum payments that are specified as a function of years of service in the occupation. This would have the advantage of making the size of the remedy a function of the magnitude of the loss and would not reduce employment of women in the occupation.

60. See, for example, Treiman (1979) (1984), Treiman and Hartmann, eds. (1981), Schwab (1984), Ehrenberg and Smith (forthcoming), Pierson, et al. (1984), Remick (1984), and Blumrosen (1979).

61. See Oi (1985) for a discussion of this issue.

62. Gregory and Duncan (1981).

63. Ehrenberg and Smith (forthcoming).

64. In the Australian data, Gregory and Duncan (1981) did find smaller disemployment effects in the public sector.

65. Blau (1977).

66. See Johnson and Solon (1984) for an estimate of how small this reduction might be.

67. Aboud, ed. (1984).

68. Burchell, et al. (forthcoming), Chapter 9, and Daily Labor Report, July 19, 1984, p. A5.

69. See Flaim and Sehgal (1985) for data on the numbers of workers who lost their jobs during the 1979-83 period due to plant shutdowns and permanent layoffs and these workers' subsequent labor market experiences.

70. For example, Bluestone and Harrison (1981).

71. This paragraph draws from material in Burchell, et al., Chapter 9.

72. See Bluestone and Harrison for citations to studies of this problem.

73. See, for example, McKensie, ed. (1982).

74. A nationwide program, however, might encourage the flight of jobs overseas.

75. See, for example, Abowd and Ashenfelter (1981) and Topel (1984).

76. Ehrenberg and Schumann (1982).

77. Flaim and Sehgal (1985) report that of the 5.1 million workers with greater than three years experience who lost their jobs during the 1979-83 period due to plant shutdowns or permanent layoffs, one-third had at least 10 years job tenure and one-third had five to nine years tenure. Almost two million additional displaced workers had two years tenure. So where one draws the cutoff will substantially affect program cost.

78. The discussion here draws on Hamermesh (1984).

79. Hamermesh (1984), Cordes, Goldfarb and Hamermesh (1985).

80. Folbre, Leighton and Roderick (1984). These authors are unable to ascertain, however, whether advance notice provisions lead to faster reemployment elsewhere or faster labor force withdrawal.

81. Weber and Taylor (1963). Flaim and Seghal (1985) also found that only 12 percent of workers who received any advance notice of plant shutdowns left prior to the plant closing.

82. See Whyte (1985). The term "saved" is a bit misleading since in the event of a plant shutdown the vast majority of workers would have ultimately found employment elsewhere. (See Flaim and Seghal (1985).)

83. Holen, Jehn and Trost (1981).

84. Holen, et al., Jacobson (1978) (1984), Jacobson and Thomason (1979), and Cropper and Jacobson (1982).

85. See Gordus, Jarley and Ferman (1981), Lipsky (1970), Stern (1972) and Holen, et al.

86. Jacobson (1984).

87. Jacobson (1984), Corson and Nicholson (1981), and Neumann (1978).

88. Corson and Nicholson (1981) and Neumann (1978).

89. See Greenfield (1984).

90. Milwaukee Springs II, 268 N.L.R.B. 601 (1984), enforced sub nom, United Auto Workers v. NLRB, 199 L.R.R.M. 2801 (D.C. Cir. 1984). See Schwab (1985) for a discussion of Milwaukee Springs, including whether the ruling really will affect relocation decisions.

91. U.S. Bureau of Labor Statistics (1981).

92. This figure is somewhat misleading as advance notice provisions are probably concentrated in situations where the possibility of future plant closings exist. In fact, Flaim and Seghal (1985) found that over 60 percent of workers displaced between January 1979 and January 1983 due to plant closings had received some advance notice.

93. Hamermesh (1984).

94. See, for example, Ehrenberg and Schumann (1982) on mandatory overtime and Dickens (1984) on risk of injury.

95. Between 1975 and 1981, in cases of plant shutdowns in Maine, only 23 percent of covered companies complied with advance notice requirements and only 56 percent provided required severance pay benefits. See Folbre, et al. (1984).

96. Sawhill (this conference).

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