AN INTRODUCTION TO THE REGULATION OF LEASING AND EMPLOYMENT AGENCIES

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Among the noteworthy developments in labor market institutions worldwide, two stand out: the rise in contingent work and the concomitant rise in and sophistication of third party providers servicing the market for contingent workers. For the United States, the latter has not been taken to represent a radical challenge to the existing policy or legal framework. It has been taken to require adjustments to the existing scheme, but not a fundamental rethinking of it. As much cannot be said for continental Europe, as the papers in this collection evidence; nor for Australia, which has built upon a system geared to market intermediation by private agencies to effect larger public purposes.

Because the United States is not represented in these studies a preliminary word on the U.S. scene may be in order. Almost from the outset, America enjoyed a remarkable degree of labor mobility. The need of workers newly arrived on American shores or newly removed from farms or towns to find work matched the needs of prospective employers to find workers. How to match them up posed a problem. The first employment agency set up as such was operated by William Meyer in Philadelphia in 1756.[1] He advertised that, for a fee, he could supply employers with apprentices, journeymen, day laborers, and slaves.[2] Even then, as later, jobbers of labor had an odious reputation. Innkeepers on the waterport advanced money to sailors that they recouped by shipping their debtors out, earning them the sobriquet of "crimp" (or landshark).[3] In the 1830s, private "intelligence" offices were known for fleecing job seekers.[4] In the 1880s, these agencies

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1. WALTER LICHT, GETTING WORK: PHILADELPHIA, 1840-1950, 122 (1992).
2. *Id.*
3. PAUL GILJE & HOWARD RICH, KEEPERS OF THE REVOLUTION 194 (1992); Marcus Rediker, *The Anglo-American Seaman as Collective Worker, 1700-1750*, *in* WORK AND LABOR IN EARLY AMERICA 252, 256 (Stephen Innes ed., 1988).
4. ALEXANDER KEYSSAR, OUT OF WORK 32 (1986).

were called "leeches engaged in sucking the life blood from the poor," by one critic[5]—though they were the prevalent means of securing work in a wide variety of occupations.[6] By 1930, as Irving Bernstein put it, "To the extent that the disorganization that characterized the American labor market in the twenties could be called a system, it was dominated by private fee collecting agencies."[7] Abuse was rampant. As he goes on to explain,

> Frequently run by crooks, these exchanges were distinguished for such practices as misrepresentation of wages, extortionate fees, kickbacks to foremen, inducement of discharges to increase business, white slavery, and blacklisting of union members.[8]

The concern for human exploitation was shared in Europe. Subcontracting of labor—*marchandage* in France,[9] *cesión de trabajadores* in Spain[10]—were unlawful practices in many jurisdictions. According to Els Sol, the International Labor Organization had called for the abolition of profit-driven employment agencies fast upon its founding in 1919.[11] This took concrete form in ILO Convention No. 34 (1935), proposing the abolition of profit-making employment agencies in favor of a state monopoly. Several European nations followed suit, establishing publicly operated employment exchanges with exclusive jurisdiction.

In the United States (and Australia), the situation was more complicated. The abuses of private agencies had been well-documented and, despite the United States Supreme Court's commitment to economic *laissez-faire* as a constitutional limit on legislative intervention, in 1916, the Court sustained Michigan's ability to regulate employment agencies in general, and specifically in forbidding agencies to refer applicants to employers who had not requested them.[12] But the following year, the Court held unconstitutional a Washington law, adopted by popular initiative, a referendum of the general electorate that outlawed for-profit

5. *Id.* at 259.

6. *E.g.*, domestic service. DAVID KATZMAN, SEVEN DAYS A WEEK 101-104 (1981).

7. IRVING BERNSTEIN, A HISTORY OF THE AMERICAN WORKER 1920-1933: THE LEAN YEARS 239 (1960).

8. *Id.*

9. Christophe Vigneau, *Temporary Agency Work in France*, 23 COMP. LAB. L. & POL'Y J. 45 (2001).

10. Miguel Rodríguez-Piñero Royo, *Temporary Work and Employment Agencies in Spain*, 23 COMP. LAB. L. & POL'Y J. 129 (2001).

11. Els Sol, *Targeting on Transitions: Employment Services in the Netherlands*, 23 COMP. LAB. L. & POL'Y J. 81 (2001).

12. Brazee v. Michigan, 241 U.S. 340 (1916).

employment agencies,[13] just what Convention No. 34 would later mandate. But more: In 1928, the Court held unconstitutional a New Jersey statute regulating the fees such agencies could charge.[14] Though the constitutional doctrine relied upon was abandoned by 1940, widening the field for state regulation, abolition of for-profit employment agencies was never legislatively assayed again. Instead, even as publicly operated employment exchanges were widely adopted, the states extended and amended their regulatory regimes governing employment agencies and, more recently, have confronted the issues posed by the growth of employment leasing, all this on a state-by-state basis. Interestingly, rather little of this has drawn attention in the legal literature; indeed, the last comprehensive compilation of statutes was published in 1986,[15] and of the caselaw in 1968.[16] The expansion of the head-hunting, job placement, and especially employment leasing industries, has drawn rather little attention to the regulatory regime in which these companies operate.

Not so internationally. As the papers in this collection demonstrate, the demand for contingent labor created a demand for service providers, a demand not efficiently met by state actors and to which private entrepreneurs responded, despite legal restrictions or prohibitions. The demand for change became irresistible. In 1949, the ILO promulgated Convention No. 96, which authorized limited exceptions to the rule laid down in Convention No. 34. The ILO capitulated in Convention No. 181 in 1997. This Convention abandoned the prohibition of profit-making agencies and proposed the adoption of a system of governmental licenses and regulation. In particular, Article 12 required domestic legislation to define the respective responsibilities of the private agency and the user enterprise over the following:

(a) collective bargaining;

(b) minimum wages;

(c) working time and other working conditions;

(d) statutory social security benefits;

13. Adams v. Tanner, 244 U.S. 590 (1917). Justice Brandeis dissented at length, relying on a number of studies documenting the abuses of employment agencies.

14. Ribnik v. McBride, 277 U.S. 350 (1928). Justice Stone dissented, joined by Justices Brandeis and Holmes, much along the line of Brandeis' dissent in *Adams v. Tanner*, *id.*

15. KEN ELVERUM, REGULATION OF PRIVATE EMPLOYMENT AGENCIES (1986). One study that examines the efforts in the 1950s and 1960s of the temporary help industry to define its status under law is GEORGE GONOS, THE CONTEST OVER "EMPLOYER" STATUS IN THE POSTWAR UNITED STATES: THE CASE OF TEMPORARY HELP FIRMS, 31 LAW & SOC'Y REV. 81 (1997).

16. Annot., *Regulation of Private Employment Agencies*, 20 A.L.R.3d 599 (1968).

(e) access to training;

(f) protection in the field of occupational safety and health;

(g) compensation in case of occupational accidents or diseases;

(h) compensation in case of insolvency and protection of workers claims; and,

(i) maternity protection and benefits, and parental protection and benefits.

In the American context, some of these issues are addressed by federal law—the placement of temporary and leased workers under collective bargaining, for example,[17] some by state law—worker compensation[18] and wage liability,[19] for example, some by both, such as occupational safety and health,[20] and some not at all for want of any legal obligation in the matter, *e.g.* to afford training. Howsoever decided, sensibly or not, these questions do not require a fundamental reconsideration of the law given the pre-existing context legitimating, but regulating a market mediated approach to labor contracting. Not so in Europe where, until recently, the very idea of dealing in the labor of another for profit was thought immoral and often unlawful.

The papers in this collection explain and explore different European approaches to this sea-change: France and Germany have attempted to balance by law the facilitation of the market and the protection of the workers in it, as Christophe Vigneau and Peter Schüren explain.[21] Spain has had what seems a most tortured experience having had the farthest way to come, as Miguel Rodríguez-Piñero Royo explains.[22] Spain seems at 6s and 7s still, at least to we two non-European observers. The "Swedish model," explored by Birgitta Nyström, differs sharply from these.[23] It abandoned the restriction on private employment agencies in 1993, and while legislating in certain particulars, has relied on the "social partners," on

17. Comment, *Collective Bargaining Under the Model of M.B. Sturgis, Inc.: Increasing Legal Protection for the Growing Contingent Workforce*, 5 U. PA. J. LAB. & EMP. L. 167 (2002).

18. *E.g.*, Texas Workers Compensation Ins. Fund v. Del Industrial, Inc., 35 S.W.3d 591 (Tex. 2000) (on the relationship of the state's Staff Leasing Act to workers' compensation law).

19. *E.g.*, Black v. Employee Solutions, Inc., 725 N.E.2d 138 (Ind. App. 2000).

20. *E.g.*, Halterman v. Radisson Hotel Corp., 523 S.E.2d 823 (Va. 2000) (hotel not negligent under state law in failing to inform dispatched workman of exposure to hazardous chemicals, nor would liability be imposed under federal "multi-employer workplace" rule as this required only that the receiving employer inform the dispatching employer, not the dispatched employee, of the hazard).

21. Vigneau, *supra* note 9; Peter Schüren, *Employee Leasing in Germany: The Hiring Out of an Employee as a Temporary Worker*, 23 COMP. LAB. L. & POL'Y J. 67 (2001).

22. Rodríguez-Piñero Royo, *supra* note 10.

23. Birgitta Nyström, *The Legal Regulation of Employment Agencies and Employment Leasing Companies in Sweden*, 23 COMP. LAB. L. & POL'Y J. 173 (2001).

collective bargaining to balance the interests concerned. The Netherlands, examined by Els Sol, has used legal regulation extensively—far more than Sweden—and has done so to facilitate the market far more aggressively than France and Germany.[24]

The Australian situation, explored by Anthony O'Donnell and Richard Mitchell, stands out as an effort to harness private actors to achieve public purposes.[25] As they explain,

> Through the use of tender conditions, contracts, and outcome-linked payment structures, the Commonwealth sought to establish a functioning market in employment services. Yet, paradoxically, this has meant bringing a large number of hitherto private providers of private employment services into contractual relations with the state such that their activities are subject to a far greater degree of regulation than before . . . .[26]

Though of interest to students of labor market regulation, we believe the importance of these papers transcends the precise confines of the assigned topic. They should prove of value to political scientists, sociologists of law, and others interested in exploring why and how different nations come to different solutions to a common social problem. The *Comparative Labor Law & Policy Journal* is thankful to the authors for the obvious effort they have devoted to the project and pleased to make the fruits of their labor available to the readership.

24. Sol, *supra* note 11.

25. Anthony O'Donnell and Richard Mitchell, *The Regulation of Public and Private Employment Agencies in Australia: An Historical Perspective*, 23 COMP. LAB. L. & POL'Y J. 7 (2001).

26. *Id.* at 38.