

WORKING BACKWARDS: HOW EMPLOYMENT REGULATION HURTS UNEMPLOYED MILLENNIALS

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Think back, if you will, to Paris about eight years ago when the French government proposed reforms to its labor code that would have made it easier for employers to dismiss young employees. Millions hit the streets in protest.¹ Cars were torched. About 3,500 people were brought into custody,² most of them young, many of them unemployed. When the youth unemployment rate is officially at 21.6 percent, as it was in France at the time,³ that is obviously a big problem. Just as obviously, the riots did not help.

By contrast, the proposed reforms just might have. Granted, they would have made first jobs less secure. An employer would have been able to hire an inexperienced employee, knowing that if it did not work out, he could end the relationship in the first two years, no questions asked—something that would not otherwise have been possible in France.⁴ But the protesters were wrong to believe that a secure job was somehow being snatched away from them. Most did not have any job yet, and if they wanted to change that, they needed to recognize that laws making it hard for employers to terminate unsatisfactory employees or hire employees they want can dis-

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1. Elaine Sciolino and Craig S. Smith, *Protests in France Over Youth Labor Law Turn Violent*, N.Y. TIMES (Mar. 29, 2006), <http://www.nytimes.com/2006/03/29/international/europe/29france.html?pagewanted=all> [<http://perma.cc/4CHA-YK79>].

2. *More than 1 million protest French jobs law*, CNN (Apr. 4, 2006), <http://edition.cnn.com/2006/WORLD/europe/04/04/france.jobslaw/> [<http://perma.cc/HJW4-ZZ7N>].

3. YOUTH UNEMPLOYMENT RATE, AGED 15-24, BOTH SEXES, UN DATA, <http://data.un.org/Data.aspx?d=MDG&f=seriesRowID%3A630> [<http://perma.cc/WSY3-DUDK>].

4. *See Fresh job law protests in France*, BBC NEWS (Apr. 4, 2006), <http://news.bbc.co.uk/2/hi/europe/4874414.stm> [<http://perma.cc/WC3U-TS36>].

courage employers from hiring employees, particularly untested job applicants.⁵

In the end, the French government backed down.⁶ As a result, some of those protesters are probably still unemployed. But while the employment outlook for young people here in the United States is not quite so grim, the further we move toward the famously protective French model, the worse we can expect it to be.

Our unemployment rate for those aged 20 to 24 was 11.5 percent in September—down from a year ago, but still almost three times the rate for those over the age of 35. Just to be clear, those figures both understate and overstate the problem. It overstates the problem in the sense that it includes only those in the job market. If you're in school, you're neither in the numerator nor the denominator. It understates it in the sense that it excludes, among other things, those working part-time because part-time employment is all they are able to find, and those reluctantly pursuing additional educational credentials, only because they could not otherwise get a job.⁷

One hears a lot of overwrought talk these days about a so-called “war on women,” but if there's a demographic out there that we ought to be worrying about, it is young people, the perennial newcomers to the economy. Well-meaning employment laws primarily benefit those who already have jobs, often at the expense of those who do not. In that respect, they are like so many progressive policies. They help those on the second to last rung of the ladder, often at the expense of those on the bottom rung.

Many of these laws and policies may be attractive or even justifiable when viewed individually, but when piled one on top of the other, they can become a difficult-to-surmount obstacle to youth employment. For low-skilled young people trying to get their first jobs, the most immediate threat may be the

5. See Richard Epstein, *Contractual Solutions for Employment Law Problems*, 38 HARV. J.L. & PUB. POL'Y 787 (2015); but see J.H. Verkerke, *Employment Regulation and Youth Employment: A Critical Perspective*, 38 HARV. J.L. & PUB. POL'Y 801 (2015).

6. See *France to replace youth job law*, BBC NEWS (Apr. 10, 2006), <http://news.bbc.co.uk/2/hi/europe/4895164.stm> [<http://perma.cc/7RQT-R6J7>].

7. Labor Force Statistics from the Current Population Survey, BUREAU OF LABOR STATISTICS, available at <http://www.bls.gov/web/empsit/cpseea10.htm> [<http://perma.cc/2BZP-T6A5>] (showing youth unemployment rate, and unemployment rates for ages 35-44 years, 45-54 years, and 55 years and over at 4.4%, 4.1%, and 3.9%, respectively).

steep minimum wage hikes adopted recently in various cities. In Seattle, the minimum wage increase will be over 60 percent; in San Francisco, 39 percent; in Oakland, 36 percent.⁸

In the past, one of the only things that economists used to agree on was that minimum wage hikes kill jobs. These days, however, there are empirical studies going both ways, at least when it comes to modest increases.⁹ But if the claim is that minimum wage hikes generally do not affect employment rates, that is an extraordinary claim, and extraordinary claims require extraordinary evidence. I would rank such a study as somewhat more plausible, but not much more plausible, than a study showing that mothers do not love their children, which if someone were to argue with me, I would smile politely and find someone with whom I could converse.

The notion that profit-making enterprises are insensitive to the price of unskilled labor should not be an easy sell. Not surprisingly, even the studies that purport to justify relatively modest hikes have problems. Perhaps the most famous of them, the Card and Krueger study, waited eight months before it looked to see the effects of an increase in minimum wages, and found that employment actually increased.¹⁰

But a study such as this may not take account of other ways that employers can reduce costs. And these changes may not take place over eight months. Last year, Applebee's announced, for example, that it would install tabletop tablets that allow cus-

8. See Danielle Paquette, *The early results from America's experiments with higher minimum wages*, WASH. POST (Aug. 4, 2014), <http://www.washingtonpost.com/news/storyline/wp/2014/08/04/the-early-results-from-americas-experiments-with-higher-minimum-wages/> [<http://perma.cc/8YMG-3Z7Y>] (showing numbers in Seattle); John Coté, *Higher minimum wage wins with big support in SF and Oakland*, SFGATE (Nov. 4, 2014), <http://www.sfgate.com/bayarea/article/Higher-minimum-wage-in-SF-leading-easily-in-early-5871304.php> [<http://perma.cc/RQ6E-HGYU>].

9. See *Why some economists oppose minimum wages*, ECONOMIST, Jan. 22, 2014, <http://www.economist.com/blogs/economist-explains/2014/01/economist-explains-11?zid=309&ah=80dcf288b8561b012f603b9fd9577f0e> [<http://perma.cc/PG3L-HS4W>].

10. David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 AM. ECON. REV. 772, 773 (1994).

tomers to order and pay without the need for a waiter.¹¹ Those tablets won't be fully installed for a few more months.¹²

More fundamentally, the minimum wage increase studied by Card and Krueger was modest in comparison to those in Seattle, San Francisco, and Oakland.¹³ It also occurred at a time when the inflation rate was more than twice what it is today. It would be hard to argue that a 60 percent increase will not affect unemployment.

Recent college graduates face different hurdles, which are symbolized in the dreaded unpaid internship. In the book *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy*, journalist Ross Perlin rails against this modern rite of passage, telling interns they have "nothing to lose but [their] cubicles."¹⁴ Perlin urges interns to rise up and organize against this "simmering injustice."¹⁵ Alas, he misses the point. These positions are not the result of some evil conspiracy. They evolved out of the modern legal and economic environment. Until that changes, a lot of twenty-five-year-olds will be living in their parents' basements.

There are some inevitable hurdles that new entrants to the workforce will confront. Young people even with great educational credentials are unknown quantities to employers and, hence, risky to hire, especially in a legal environment in which employee terminations can lead to costly legal disputes. School transcripts give very little insight into a job applicant's charac-

11. Alex Konrad, *Applebee's Will Install 100,000 Intel-Backed Tablets Next Year In Record Rollout*, FORBES (Dec. 3, 2013), <http://www.forbes.com/sites/alexkonrad/2013/12/03/applebees-intel-tablet-rollout/> [<http://perma.cc/7X46-UC5M>].

12. Steve Rosen, *Applebee's plans to bring tablet computers to every table next year*, KANSAS CITY STAR (Dec. 3, 2013), <http://www.kansascity.com/news/local/article333068/Applebee's-plans-to-bring-tablet-computers-to-every-table-next-year.html> [<http://perma.cc/HT36-5UFD>] (stating that the restaurant chain "will install 100,000 tablet computers in its more than 1,800 locations nationwide by the end of next year"); see also Sean William, *Why Applebee's Tablets May Need a Reboot*, MOTLEY FOOL (Aug. 16, 2014) <http://www.fool.com/investing/general/2014/08/16/why-applebees-tablets-may-need-a-reboot.aspx> [<http://perma.cc/G3TY-VZXP>] (stating that Applebee's plans to finish installing tablets in 2015 and "expects to be near halfway complete with the rollout by year's end").

13. See Card & Krueger, *supra* note 10, at 772 (showing increase from \$4.25 to \$5.05 per hour).

14. ROSS PERLIN, *INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY* 203 (2011).

15. *Id.* at 223.

ter and temperament. The proliferation of internships over the last thirty-five years is in part a response to these problems. Now, few would suggest doing away entirely with laws giving legal protection to existing employees. To be clear, that's not what I'm arguing here.

But the least we can do for struggling millennials is take a hard look at some of the ways in which employment laws, including employment discrimination laws, have backfired, doing no good or more harm than good for those who are supposed to benefit. It is not hard to find some of the backfires, ladies and gentlemen. The hard part is finding a fix that has a political chance of being adopted.

Let's start with Title VII's effect on small businesses. In theory, Title VII applies equally to hiring and firing.¹⁶ In practice, however, all employers know that they are far more likely to be sued for firing than failing to hire, just as divorcing a spouse is more explosive than declining a first date.

This is not what supporters expected when the law was passed in 1964, a time when some newspapers were running "Help Wanted, White" ads. But consider the irony: The best way for employers to avoid being wrongly accused of a Title VII violation is to avoid hiring someone who could turn out to be litigious if things do not work out. That creates a perverse incentive to avoid hiring the first African American or the first woman in a particular business or department. Skittish small employers worry especially that if they need to terminate their first female employee, for example, they're going to look bad. A law that was intended to end discrimination in hiring, thus, ends up encouraging it instead. This is not an easy problem to solve, but we should not forget that the original Title VII initially applied only to employers with more than 100 employees before ratcheting down to 25, and now it has been amended to go down to 15.¹⁷ State laws regulate even smaller employers.¹⁸ This history may

16. See 42 U.S.C. § 2000e-2 (2012) (rule on failing to hire or discharging employees).

17. *Id.* § 2000e(b) (definition of employer).

18. See STATE LAWS ON EMPLOYMENT RELATED DISCRIMINATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx> [http://perma.cc/V365-PNM6] (showing some states, such as Arkansas, Alaska, Georgia, and others that have discrimination laws that apply to employers with fewer than fifteen employees).

offer a lesson. There is certainly a case to be made that we would get less employment discrimination, rather than more, by increasing the minimum number of employees to 25 or higher.

Alternatively, one could amend the law to further limit the remedies as they apply to very small businesses. Another solution may be to allow prevailing employers or at least prevailing small employers to collect attorney's fees in most cases. It just so happens that the statute essentially says this,¹⁹ but it has been interpreted by the courts to mean something other than that.²⁰

Here's another high-impact area that needs reexamination: disparate impact liability. Ever since *Griggs v. Duke Power Co.*²¹ in 1971, and truly before that, the EEOC has been telling employers that not only must they refrain from actual discrimination on the basis of race or sex, but they must also use hiring criteria that will yield equal or near equal results for women and minorities, regardless of whether they are consciously or unconsciously discriminating, unless they can prove business necessity.²² For reasons hinted at by Justice Scalia in *Ricci v. DeStefano*,²³ I think it's unconstitutional, but more fundamentally, it's incoherent. *Every* job qualification has a disparate impact on some protected group. Disparate impact makes everything presumptively illegal. This drives everything underground. No employer can state its hiring criteria clearly without risking litigation. You can't even say, "We don't hire felons," and God help you if you try to administer any kind of standardized or non-standardized test to your job applicants. There is little or no evidence that, all things considered, this increases employment for racial minorities, and that is not because nobody has tried to show it.

There is some evidence in the case of the EEOC's policy on ex-offenders that it does the opposite. It encourages actual discrimination, as employers try to avoid applicant pools that they believe, rightly or wrongly, are likely to contain more ex-

19. See 42 U.S.C. § 2000e-5(g)(2)(B)(i) (2012).

20. See *Christiansburg Garment Co. v. Equal Emp't Opportunity Comm'n*, 434 U.S. 412, 420–22 (1978).

21. 401 U.S. 424 (1971).

22. *Id.* at 429–30.

23. See *Ricci v. DeStefano*, 557 U.S. 557, 594–96 (2009) (Scalia, J., concurring).

offenders.²⁴ So if you can hire from the elite college, rather than hiring from a part of town where there are more minorities, you have an incentive to do it.

In worldwide competition, we cannot offer employers the cheapest workforce or even the best educated, but we ought to be able to offer greater freedom and flexibility in selecting a team, so long as they are not motivated by race or sex. Meanwhile, too many millennials are stuck in internships by day, living in their parents' basements by night, or unemployed altogether. Here's to hoping they will understand a little more the reasons for their predicament and press for reform.

24. See, e.g., Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 451 (2006) (finding that "employers who check criminal backgrounds are more likely to hire African American workers, especially men," thus suggesting that "some employers discriminate statistically against black men and/or those with weak employment records").