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19TH CENTURY LOCAL UNEMPLOYMENT COMPENSATION INSURANCE LAW IN THE 21ST CENTURY GLOBAL ECONOMY

David L. Gregory*

Written by invitation for the Santa Clara University School of Law, Law Review Symposium, "Meeting Human Needs: Examining the Safety Net for Working America," January 30, 2004.

"[T]he drafters [of state unemployment compensation law] could not have envisioned a world of interstate telecommuting"¹

I. INTRODUCTION

I am very honored to be an invited participant in this compelling and very timely symposium, and I applaud the vision and the hard work of the Santa Clara Law Review editors to bring this fine event to fruition.

Symposia give law professors all-too-rare opportunities to meet with intellectual colleagues usually admired only from afar. This, believe it or not, leads me to the central theme of my article. We humans, especially law professors, are necessarily physically bound by constraints of time and space. The law, as the legal realists appreciated at the beginning of the twentieth century, and as critical legal scholars² reminded us

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1. *Allen v. Comm'r of Labor*, 794 N.E.2d 18 (N.Y. 2003) (reaching a unanimous decision on a matter of first impression).

2. See DAVID KAIRYS, *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*

throughout the last quarter of the century, is likewise bound by social and political—indeed, by literally physical—constraints.

The challenge, and the opportunity, of this symposium is to throw off those chains. As Karl Marx probably could not have imagined at the time he wrote *The Communist Manifesto*, we live in a world today in which we may hear the following slogan: “workers of the cyberspace world, unite!”

In the best Catholic and Jesuit tradition of this Catholic law school, this symposium challenges us to pour the new wine into new wineskins—for as the Gospel rhetorically asks, who would preposterously pour new wine into old wineskins (causing them to burst and wasting the new wine)?³ And, to continue the timeless themes, while Jesus tells us that the poor will always be with us, this does not invite resigned fatalism. Rather, it is a radical call to action. He mandates us to perform the corporal works of mercy. Indeed, the Gospel Beatitudes begin by reminding us that the poor in spirit are blessed, for theirs is the kingdom of God.⁴ We ultimately will be judged by our kindness and charity to those in need—whatever we do for the least, we do for, and to, God.

Santa Clara University and its School of Law are under the patronage of St. Clare, best friend of St. Francis of Assisi and foundress, not coincidentally, of the Poor Clares—as the beautiful artwork over the main altar of the University’s church so wonderfully reminds us. And, in a convergence of Franciscan, Dominican, and Jesuit charisms, this symposium is held two days after the feast day of St. Thomas Aquinas, whose great wisdom should inspire us, and within the Catholic liturgical week of the beginning of Jesus’ public ministry. In the local synagogue, He read from the prophecies of Isaiah, proclaiming that He comes to preach good news to the poor, freedom to prisoners, and sight to the blind⁵—not a bad agenda, that!

We must strive to better meet human needs. We can attempt to patch the increasingly threadbare social safety net. Working America can also endeavor to create new nets.

Forty years ago, Michael Harrington’s great expose, *The*

(1998).

3. *Luke* 5:37; *Mark* 2:22; *Matthew* 9:17.

4. *Luke* 6:20; *Matthew* 5:3.

5. *Luke* 5:18-19.

Other America,⁶ was the catalyst for the Kennedy and Johnson administrations' domestic war on poverty—a war that could not be effectively fought, let alone won, while the Rev. Dr. Martin Luther King, Jr. reminded us that we were ineffectively prosecuting wars of international imperialism.

Today, with the federal minimum wage law hopelessly obsolete, Bill Quigley⁷ charts the agenda for the living wage law—a decent and fair wage considerably above the disgracefully inadequate federal minimum wage law.

My contribution to this symposium is decidedly and deliberately more modest, at least in its initial steps. Of course, I hope that the positive ramifications may eventually be more sweeping.

This paper focuses on a critique of the New York Court of Appeals' very troubling July 2, 2003 decision in *Allen v. Commissioner of Labor*.⁸ In this case of first impression, the court unanimously decided that a telecommuting worker physically based in Florida, but electronically linked by computer mediated technology to her work in New York, was ineligible for benefits under the New York Unemployment Insurance Law.⁹

The unemployment compensation insurance regime is primarily one of state law. The New York Court of Appeals' recent unanimous decision will have profound and pernicious consequences in dramatically accelerating the involuntary race to the bottom by the growing sector of unemployed cyberspace workers whose employment is only peripherally defined, if at all, by physical work sites.

Before turning to *Allen*, first a brief overview of the evolving contingent and cyberspace workforce is necessary.¹⁰

6. MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* (1962).

7. See KAIRYS *supra* note 2 and accompanying text.

8. *Allen v. Comm'r of Labor*, 794 N.E.2d 18 (N.Y. 2003).

9. *Id.* at 22.

10. I certainly realize that there are important and significant differences among and between types of contingent workers. Some of the leading, most recent scholarship has appeared in the *Santa Clara Law Review*. See Patricia Ball, Comment, *The New Traditional Employment Relationship: An Examination of Proposed Legal and Structural Reforms for Contingent Workers from the Perspectives of Involuntary Impermanent Workers and Those Who Employ Them*, 43 SANTA CLARA L. REV. 901 (2003); see also Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153 (2003); Kevin

II. THE C-FORCE WORKFORCE: A BRIEF OVERVIEW

During the booming late nineties when, purportedly, times were good, they were not good for everyone. The Clinton administration slashed the social safety net.¹¹ As living wage champions especially appreciated, the devastation was most concentrated among the poor and the working poor.¹² As the tidal wave of market criminality more recently reveals, the materialist excesses of the past decade have enormous negative consequences.¹³

As national politics heats up for the November 2004 election, and as globalization inexorably permeates law and society, data abounds. Most of it is alarming, accentuating the dramatic disparities between the executive elites and working people.¹⁴ Computer technology enabled breathless productivity growth of 7.2% in mid-2003, a level of growth not seen in

J. Doyle, *The Shifting Legal Landscape of Contingent Employment: A Proposal to Reform Work*, 33 SETON HALL L. REV. 641 (2003). Some contingent workers are temporary full-time employees; others are part-time. Some are part-time permanent (permatemps), such as those at United Parcel Service. Of course, there is the great divide between employees and independent contractors. There are litanies of further distinctions and refinements, the subjects of a major forthcoming American Bar Association treatise on the contingent and alternative workforce, which are anything but fungible and monolithic. My shorthand, catch-all term "c-worker" focuses especially on telecommuting, computer mediated workers, for purposes of this short article.

11. See David L. Gregory, *Br(e)aking The Exploitation of Labor?: Tensions Regarding the Welfare Workforce*, 25 FORDHAM URB. L.J. 1 (1997); David L. Gregory, *Introduction to the Colloquium on the Welfare Workforce*, 73 ST. JOHN'S L. REV. 747 (1999).

12. See KAIRYS, *supra* note 2 and accompanying text.

13. See generally Susan J. Stabile, *Enron, Global Crossing, and Beyond: Implications for Workers*, 76 ST. JOHN'S L. REV. 815 (2002) (exploring the impact that the collapses of Enron, Global Crossing, and other corporations had on workers); Janis Sarra, *Rose-Colored Glasses, Opaque Financial Reporting, and Investors Blues: Enron as Con and the Vulnerability of Canadian Corporate Law*, 76 ST. JOHN'S L. REV. 715 (2002) (discussing the negative impact Enron had on workers, creditors, and investors).

14. See generally ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* (2001) (revealing the effects that fast food has had on culture and society, as well as uncovering the truth of the existence of shadow and subsistence economies operating off the books); BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* (2001). Having worked as a waitress, motel housekeeper, maid with a housecleaning service, nursing home aide, and WalMart associate, Ehrenreich explains life as a low wage worker and her failure to make ends meet. Ehrenreich's experience is especially scary because, as she noted, she was single, white, and had no children, unlike so many living in close to the poverty line.

twenty years.¹⁵ Meanwhile, job loss rivals that of the Hoover era; more than two and one-half million manufacturing jobs, one of every seven manufacturing jobs, has vanished since 2000.¹⁶ Job growth is, at best, thoroughly anemic. Nine million remain officially unemployed;¹⁷ the actual number of unemployed off the government's official screens, including those too discouraged to work, and those underemployed, would be millions more by any conservative measure. Thirty-four million people, including twelve million children, remain in poverty.¹⁸ Household debt is at an all time high, and savings rates are nonexistent.

Contingent and part-time workers are among those most likely to lack health care insurance coverage at work, and are disproportionately among the more than forty million Americans without health care insurance.¹⁹

Leftist macroeconomic and cultural commentators apocalyptically warn of the end of work, even among the high tech, high wage c-workers and c-executives, who previously thought themselves invulnerable to the vicissitudes of the global economy.²⁰ The North American Free Trade Act

15. See generally Bureau of Economic Analysis (providing data on quarterly percent changes in real gross domestic product), at <http://www.bea.doc.gov/bea/dn/home/gdp.htm> (last visited Mar. 19, 2004); Lisa Takeuchi et al., *Now Hiring!; Jobs Are Coming Back, But Not Where You Might Expect*, TIME, Nov. 24, 2003, at 48 (discussing the effect of technology on job availability), available at 2003 WL 66980332.

16. See generally 150 CONG. REC. H7 (daily ed. Jan. 20, 2004) (statement of Rep. Brown) (discussing jobs and the economy), available at <http://thomas.loc.gov/>; Katrina vanden Heuvel, *What Recovery?*, NATION, Dec. 22, 2003, at 4 (discussing the effect of the loss of one in seven manufacturing jobs in Ohio), available at 2003 WL 70556006.

17. See generally BUREAU OF LABOR STATISTICS, CURRENT POPULATION SURVEY (providing seasonally adjusted unemployment levels of people sixteen years of age and older), at <http://www.bls.gov/cps/home.htm> (last visited Mar. 19, 2004).

18. See Mario Cuomo, *Share the Benefits and the Burdens*, L.A. TIMES, June 2, 2003, at B11, available at 2003 WL 2409394.

19. Carlos Tejada, *Part-Timers' Health Care Costs Are Issue in Work-Force Strife Affecting Supermarket Chains*, WALL ST. J., Oct. 22, 2003, at B1.

20. See JEREMY RIFKIN, THE END OF WORK (1995). Rifkin's premise is that computer technology, and other productivity enhancers, are eliminating jobs internationally and across the board. His book is a platform for the often cited points that a billion people live on less than a dollar a day, and that three billion people live on less than three dollars a day, creating enormous downward pressures on high wage Western economies in a race to the bottom. Many more recent commentators cite data largely bearing him out. See, e.g., WILLIAM GRIEDER, ONE WORLD READY OR NOT: THE MANIC LOGIC OF GLOBAL

(NAFTA) and its analogs were naively seen as afflicting only the obsolete, uncompetitive, low-skill workers in post mature, rust belt sectors. Now, however, high-tech, high-wage, c-worker, and c-executive jobs are seen as very vulnerable to global competition, especially from China and India.²¹ Obviously, many workers are low-wage and low-skill, and without any realistic hope of ever regaining a foothold in the Darwinistic neo-liberal economic regime.

Increasingly as exemplified in *Allen*, the displaced unemployed may be high tech, computer mediated workers, referred to as c-workers to designate both their computer and contingent attributes.²² In October 2003, Intel Chairman Andy Grove forecasted that Silicon Valley, sooner than later, would resemble Detroit, as high tech, high wage c-jobs largely disappeared there and migrated to India and China.²³ As one views the macro world order, the “contingent bloc” is an increasingly significant part of the workforce, and computer mediated workers are an increasingly important part of the contingent bloc.²⁴

CAPITALISM (1997); *see also, e.g.*, JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002); RETHINKING THE EAST ASIA MIRACLE (Joseph Stiglitz & Shahid Yusuf eds., 2001) (discussing jobs fleeing to India and China). Apprehension over the loss of jobs in high-tech environments is not just leftist paranoia. *See* Andy Kessler, *Verizon Workerless?*, WALL ST. J., Oct. 7, 2003, at B2 (cataloging loss of jobs in the telephone industry as a result of technology).

21. *See* Terry Pristin, *One Victim When Jobs Go Overseas: U.S. Office Space*, N.Y. TIMES, Oct. 8, 2003, at C8 (reporting the estimate that America will lose as many as 500,000 information technology jobs by the end of 2004 to companies overseas in China, India, and Russia); Steven Greenhouse, *I.B.M. Explores Shift of Some Jobs Overseas*, N.Y. TIMES, July 22, 2003, at C1:

I.B.M.'s internal discussion about moving jobs overseas provides a revealing look at how companies are grappling with a growing trend that many economists call off-shoring. In decades past, millions of American manufacturing jobs moved overseas, but in recent years the movement has also shifted to the service sector, with everything from low-end call center jobs to high-paying computer chip design jobs migrating to China, India, the Philippines, Russia and other countries.

22. *See supra* note 9 and accompanying text. The noticeable growth of contingent workers throughout the 1990s spurred the American Bar Association to prepare the first-ever legal treatise on this segment of the workforce. I am among the senior editors of the treatise. *The Contingent and Alternative Workforce* is scheduled for publication in 2005.

23. Michael Schroeder & Timothy Aepfel, *Skilled Workers Mount Opposition to Free Trade, Swaying Politicians*, WALL ST. J., Oct. 10, 2003, at A1.

24. *See generally* ZEV CHAFETS, DEVIL'S NIGHT AND OTHER TRUE TALES OF DETROIT (1990) (cataloging urban pathologies of Detroit, the first city in the U.S. to sink below a population of 1,000,000 after having once approached a

The International Teleworkers Association estimates that there are twenty-eight million home-based workers, and predicts that this number will increase by six million by 2007.²⁵ “However you measure it, these numbers mean there are vastly more of us lingering in our pajamas every morning while the rest of the working world dashes for a bus or train.”²⁶ Temporary and part-time contingent jobs may be among the first to experience measurable expansion and contraction before and after the economic ripples are felt by the full-time, permanent workforce.²⁷ Microsoft may be the paradigm user of contingent workers, a flexible and malleable concentric ring around a much smaller core of permanent full time workers.²⁸

The most recent data regarding c-workers lead to the conclusion that their position in today’s economy is volatile.

At the trough of the last recession in the early 1990’s, temporary workers represented 1.03 percent of the work force. It was not a terribly significant component of the labor force. That changed dramatically over the course of the 1990’s. In April of 2000, temporary-worker penetration of the labor force peaked at just over 2 percent. Since then, it fell back to a low of 1.64 percent in April. The current penetration rate is 1.7 percent. Of the 2.6 million jobs that have been lost in this cycle, just under 550,000 have been

population of almost 2,000,000 at the height of its manufacturing power in the 1950s); MICHELINE MAYNARD, *THE END OF DETROIT* (2003) (tracing the collapse of auto companies headquartered in the United States, including General Motors, Ford, and what used to be Chrysler, in the face of global competition).

I spent the better part of the first three decades of my life in Detroit and grew up a few miles from the Ford Motor Company Rouge factory—once the largest single integrated factory complex in the world. Working summers during college on the General Motors Cadillac car assembly lines as a member of the United Auto Workers, I have occasionally thought that Detroit and Appalachia, the home of my Cherokee and Scotch-Irish forebears, augured the future of the United States—namely, small pockets of concentrated wealth surrounded by vast seas of poverty and social, economic, and cultural despair, laced through with guns and drugs.

25. See Lisa Belkin, *How to Make Your Telecommute Work*, N.Y. TIMES, Oct. 26, 2003, § 10 (Job Market), at 1.

26. *Id.*

27. Kris Maher, *The Jungle: Focus on Recruitment, Pay, and Getting Ahead*, WALL ST. J., Oct. 28, 2003, at B10 (“A lot of layoff victims have found themselves in a similar fix during the downturn, taking a temporary job in their old industries that is comparable to a former position.”).

28. I have previously explored Microsoft’s contingent workforce dynamics. See David L. Gregory & William T. Leder, *Employee or Independent Contractor? Vizcaino v. Microsoft Corporation*, 47 LAB. L.J. 749 (1996).

from reductions in temporary staffing.

Historically, rising numbers of temporary workers are a leading indicator for the broader labor market. In general, temps are the first to be hired, and the first to be fired.²⁹

From April to June of 2003, the number of temporary employees rose to 1.7% of all workers.³⁰ “This rise may be small in magnitude, but it represents a significant trend and a practical opportunity for unemployed workers.”³¹ “And the June employment figures showed an increase for the second month in a row. That is a sign things could be starting to stabilize.”³²

“The number of people working ‘part time for economic reasons’ rose to 4.6 million in July [2003] . . . from 3.1 million three years ago, according to the federal Bureau of Labor Statistics. That number tends to rise sharply during recessions and drop in better times.”³³ In October 2003, “the number of people working part time because they could not find full-time work fell by 139,000 to 4.8 million.”³⁴

III. ALLEN V. COMMISSIONER OF LABOR.

ENTER MS. MAXINE E. ALLEN—HAPPY INDEPENDENCE DAY?

In *Allen v. Commissioner of Labor*,³⁵ the New York State Court of Appeals decided that Maxine Allen, a former employee physically located in Florida, but who telecommuted to her employer’s New York workplace via the Internet and telephone, was not entitled to unemployment compensation under New York law.³⁶ This convoluted legal fiction rubbed salt into her practical wound, since she had previously been determined ineligible for unemployment compensation in Florida for having “voluntarily quit” her job.³⁷

29. Kenneth N. Gilpin, *Temporary Workers: A Barometer of Recovery*, N.Y. TIMES, July 6, 2003, § 3 (Money & Business/Financial Desk), at 6.

30. Robert C. Pozen, *Jobless But Not Hopeless*, N.Y. TIMES, July 8, 2003, at A23.

31. *Id.*

32. Gilpin, *supra* note 29, § 3, at 6.

33. Janny Scott, *Working, but Barely Enough to Get By*, N.Y. TIMES, Aug. 24, 2003, § 10 (Job Market), at 1.

34. David Leonhardt, *3 Months of Job Growth Best in Three Years*, N.Y. TIMES, Nov. 8, 2003, at A1.

35. *Allen v. Comm’r of Labor*, 794 N.E.2d 18 (N.Y. 2003).

36. *Id.*

37. *Id.* at 20.

Allen lived in New York at the time her employment with Reuters America, Inc. commenced on October 21, 1996.³⁸ In July of 1997, Reuters permitted Allen to relocate to Florida for personal reasons, where she continued to work until March 16, 1999, at which time Reuters opted to no longer retain Allen as a telecommuting employee.³⁹

As a telecommuter, Allen's work responsibilities remained very much the same as they were when she was physically located within New York.⁴⁰ She maintained normal business hours, continued to have close contact with supervisors, and was required to submit timesheets, request vacation and sick time, and obtain permission for any changes in her daily schedule.⁴¹

In March of 1999 after informing her that it would no longer maintain the telecommuting arrangement, Reuters gave Allen the option to return to work at its New York office.⁴² Allen did not accept the position in New York and her employment with Reuters ceased.⁴³

Initially, after filing for unemployment insurance in Florida in April of 1999, Allen was approved to receive \$275 per week.⁴⁴ However, the decision was reversed after Reuters objected on the basis that Allen purportedly voluntarily left her job without cause.⁴⁵ On the advice of the Florida Department of Labor and Employment, Allen then filed an interstate claim in an attempt to receive \$375 per week in unemployment compensation insurance benefits pursuant to New York law.⁴⁶ She filed in May of 1999 and listed her former employer's New York address.

In October, however, the New York Commissioner of Labor informed Allen that she was not eligible to receive benefits.⁴⁷ The Commissioner based his decision on New York State Labor Law section 511 and the determination that Allen's employment was not localized within New York State,

38. *Id.* at 19-20.

39. *Id.*

40. *Id.*

41. *Allen*, 794 N.E.2d at 19-20.

42. *Id.* at 20

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Allen*, 794 N.E.2d at 20.

but rather in Florida, thereby rendering her ineligible for unemployment benefits under the New York unemployment compensation insurance regime.⁴⁸

In February 2000, an administrative law judge overruled the Commissioner's decision, holding that because the employee's work was under the direction and control of the employer's New York office, Allen was indeed entitled to unemployment benefits under the New York system.⁴⁹

The Unemployment Appeal Board next addressed the question of Allen's unemployment benefits, and on August 23, 2000, determined, as the Commissioner had, that Allen was not eligible for benefits.⁵⁰ The New York Court of Appeals heard the case on appeal of the Board's decision.⁵¹

In this unanimous decision on a matter of first impression, the court of appeals recognized that "the drafters of the uniform rule could not have envisioned a world of interstate telecommuting."⁵² There are no other decisions from any other state's highest court addressing the status of interstate telecommuters' unemployment benefits claims.⁵³

The New York Court of Appeals relied on its 1949 decision in *In re Mallia*,⁵⁴ which set forth a four-part test to be used when applying New York State Labor Law section 511.⁵⁵ As the court explained, the test is to be applied successively, beginning with (1) localization, (2) location of base of operations, (3) source of direction and control, and (4) the employee's residence.⁵⁶ In Allen's case, the court deemed her work localized in Florida because she was physically located in Florida.⁵⁷ By focusing exclusively on the employee's physical presence in Florida, rather than on the practical dynamics of the employee's performance of the New York work, the judicial inquiry simplistically concluded after mechanically and formulaically applying only the first component of the succes-

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 22.

53. *See Allen*, 794 N.E. 2d at 22.

54. *In re Mallia*, 86 N.E.2d 577 (N.Y. 1949).

55. *See Allen*, 794 N.E.2d at 21.

56. *Id.*

57. *Id.* at 22.

sive four-part test.⁵⁸

As noted in *Allen* and *In re Mallia*, the relevant parts of New York State Labor Law section 511 definition of “employment” are:

1. General definition. “Employment” means any service under any contract of employment for hire, express or implied, written, or oral . . .

. . .

2. Work localized in state. The term “employment” includes a person’s entire service performed within or both within and without this state if the service is localized in this state. Service is deemed localized within the state if it is performed entirely within the state or is performed both within and without the state but that performed without the state is incidental to the person’s service within the state, for example, is temporary or transitory in nature or consists of isolated transactions.

3. Work within and without the state. The term “employment” included a person’s entire service performed both within and without this state provided it is not localized in any state but some of the service is performed in this state and

a. the person’s base of operations is in this state; or

b. if there is no base of operations in any state in which some part of the service is performed, the place from which such service is directed or controlled is in this state; or

c. if the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, the person’s residence is in this state.

. . . .

4. . . .

b. Work within the state. Service performed within this state but not otherwise within the foregoing provisions of this section is employment if contributions are not required with respect to such service under corresponding provisions of an unemployment compensation law of any

58. *Id.*

other state.⁵⁹

In *In re Mallia*, the court based the definition on the following:

- (1) All the employment of an individual should be allocated to one State and not divided among several States in which he might perform services, and such State should, of course, be solely responsible for benefits payable to him;
- (2) the State to which his employment is allocated should be the one in which it is most likely that the individual will become unemployed and seek work.⁶⁰

The *Allen* decision was hardly one of enlightened statutory interpretation. By focusing exclusively on the physical presence in Florida of the employee, the court sent the message that it will not entertain some bizarrely perceived and endless flood of claims that would somehow follow if the court more realistically focused on the employer's epicentral locus—New York—where the employee's services were received and effectuated by the employer. The court stated:

[T]he purpose of the uniform rule was to create uniformity among states and to end uncertainty in the application of state unemployment compensation rules. . . . In our view, physical presence is the most practicable indicium of localization for the interstate telecommuter who inhabits today's "virtual" workplace linked by Internet connections and data exchanges.⁶¹

IV. CONCLUSION

The decision of the New York Court of Appeals in *Allen* was unanimously and completely wrong, further cementing New York's notorious reputation as one of most employee-hostile of the major states. It is the last major state to retain the unvarnished and unmodified doctrine of employment at will.⁶² So situated in this larger pro-employer architecture, *Allen* is of a fully predictable piece with a very regressive jurisprudence.

One hopes that the pernicious ramifications of *Allen* will not infect the thinking of the high courts of other states, but I

59. N.Y. LABOR LAW § 511 (McKinney 2004).

60. *Mallia*, 86 N.E.2d at 580 (quoting Social Security Board, Employment Security Memorandum No. 13 (1937)).

61. *Allen*, 794 N.E.2d at 22 (citation omitted).

62. See *Horn v. N.Y. Times*, 790 N.E.2d 753 (N.Y. 2003).

am hardly sanguine. The first impression status of the issue, and the historic influence that the Court of Appeals of New York has had upon the courts of other states, cannot be underestimated.

Meanwhile, contrary to the court of appeals' reasoning, physical presence of the employee is fading fast as, if indeed it ever was, "the most practical indicium of localization for the interstate telecommuter who inhabits today's 'virtual' workplace linked by Internet connections and data exchanges."⁶³ What is truly practical for workers in this ever-expanding age of wireless globalization? And what message is being sent to the computer workforce? On the one hand, these computer savvy workers have answered the call of government and society through their participation in the computerized workplace, but on the other hand, they are discouraged from joining the ranks of the cyber-brigade through its instability and the message sent from New York's highest court.

The court admits the obsolescence of the statutory regime, and confesses that the framers of the regime could not have imagined the world of cyberspace. Nevertheless, in precipitous obeisance to hidebound and dubious precedent from 1949, the court applies antique and brittle reasoning to dynamic facts, avoids any genuine inquiry into the complexities of the telecommuting employment relationship, and arrives at an unjust and rigid result. So much for the states being Brandeis' "laboratories of democracy."⁶⁴

At the very least, the court should have found the obvious from the plain facts—that her work was effectively directed and controlled from New York. Allen responded to her supervisors' inquiries from New York, and she was required to submit weekly status reports to the employer in New York.

Upon recognition that the framers did not, nor could they have been expected to, dream of the creation of cyberspace, the court implicitly acknowledged that the law is not viable for cyber workers. It is plainly wrong to apply 1949 law and precedent to a group of workers and, indeed, an entirely new employment landscape, not in existence at the time the law

63. *Allen*, 794 N.E.2d at 22.

64. Brandeis often referred to the states as the laboratories of democracy. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring); *Arizona v. Evans*, 514 U.S. 1, 2 (1995).

was created.

Cyberspace workers under the direction and control of New York but physically outside the state, like Maxine Allen, are rendered “virtually” stateless, punished for taking advantage of their company’s technological capabilities. Allen’s employer and, more importantly in this case, New York State, reaped the benefits of Allen’s employment because the fruits of her labor flowed to New York and she remained under the direction and control of her employer in New York. Perhaps this decision would be less shocking if *Allen* were a unique case. However, Allen is only one of a growing force of workers that is showing no signs of relenting. It is obviously absurd for the court to so automatically presume that the Florida locale is necessarily where the telecommuting Allen will seek new work, or that she is necessarily sited where she resides in Florida. The court makes residence tantamount to the location of the work, an obsolete notion in a telecommuting age. What, for example, of the California resident who travels to Oregon or Arizona to a physical office space, and thence, further telecommutes to provide work product to South Carolina or South Korea? California residence should properly begin, but not certainly end, the complex analysis—one far more complicated than the simplistic equation of the New York court that the worker’s physical residence determined work location.

Professor Harold Hongju Koh, the internationalist Dean-elect of the Yale Law School and Assistant Secretary of State during the Clinton administration, presciently predicted that the early twenty-first century will mark legal education’s transition from an emphasis on federal law to an emphasis on international law, just as, more than a century ago, legal education witnessed a transition from state law to federal law emphases.⁶⁵

The devolving states’ rights jurisprudence of the New York Court of Appeals, of which *Allen* is the most recent and simplistic example, is hardly a step in that direction. The court was correct in so far as it seeks uniformity, coherence, and stability among the states. Congress should act to provide for a more enlightened federal national statutory frame-

65. See *Yale Names a New Dean of Its Law School*, N.Y. TIMES, Nov. 5, 2003, at B9.

work from which state unemployment compensation administrative bureaucracies could calibrate workers' claims for benefits. A federal model, which places greater premium upon the realities of the work product effectuated by the employer, rather than on the local physical site of the out-of-state telecommuting c-worker, would best provide desired national standards' stability while vesting administration with the individual states. Without such measures, a growing number of workers will be rendered virtually stateless for purposes of unemployment benefits, and such result, surely, is not "practical."

With soaring unemployment rates and corporate distrust, legislators and the courts must make greater efforts to protect the interests of all displaced workers, especially c-workers who have relied on their right to collect unemployment benefits. These workers should not be excluded because of the antiquity of the laws. Indeed, the court of appeals could have taken the initiative and served Allen's equitable interests by changing the four-part test set forth in *In re Malia* from a successive test to a flat test, with no one factor being dispositive. A flat test would ease the rigidity of section 511 and better serve telecommuters.

Not least, telecommuting serves employer needs in the era of SARS and other travel fears due to terrorism. Perniciously, however, *Allen* manifestly discourages telecommuting, and telecommuters, the wrong jurisprudential signal in the era of globalization. Ultimately, with this counterproductive judicial suppression of telecommuting by the New York court, it is employers who may have the most to lose.

Physical location, local control, and subsidiarity do have their labor law merits.⁶⁶ Perhaps this paper has too harshly criticized the *Allen* decision. Witness, for example, this symposium.⁶⁷ It will be more enjoyable for the participants, certainly, because we will physically convene in the classic Platonic sense—at the table. And, that table is physically real; it, like employees, does not exist only, and certainly not pri-

66. See generally David L. Gregory, *Lessons from Publius for Contemporary Labor Law*, 38 ALA. L. REV. 1 (1986).

67. Of course, there is interesting law review literature developing as to whether law reviews are being eclipsed by cyberspace. See Symposium, *Forward: Law in Cyberspace*, 55 U. PITT. L. REV. 989 (1994). Still, on-site symposia seem infinitely more congenial, human, and humane, than, say, blogging.

marily, in cyberspace. Welcome to the feast.