Notes

1. Code of Ethics for Government Service passed by the U.S. House of Representatives in the 85th Congress (1958) and applying to all government employees and office holders.
2. Code of Ethics of the Institute of Electrical and Electronics Engineers, Article IV.
3. For case histories and descriptions of what befalls whistleblowers, see Rosemary Chalk and Frank von Hippel, "Due Process for Dissenting Whistle-Blowers," *Technology Review* 81 (June–July 1979): 48–55; Alan S. Westin and Stephen Salisbury, eds., *Individual Rights in the Corporation* (New York: Pantheon, 1980); Helen Dudar, "The Price of Blowing the Whistle," *New York Times Magazine,* 30 October 1979, pp. 41–54; John Edsall, *Scientific Freedom and Responsibility* (Washington, D.C.: American Association for the Advancement of Science, 1975), p. 5; David Ewing, *Freedom Inside the Organization* (New York: Dutton, 1979); Ralph Nader, Peter Petkas, and Kate Blackwell, *Whistle Blowing* (New York: Grossman, 1972); Charles Peter and Taylor Branch, *Blowing the Whistle* (New York: Praeger, 1972).
4. Congressional hearings uncovered a growing resort to mandatory psychiatric examinations.
5. For an account of strategies and proposals to support government whistleblowers, see Government Accountability Project, *A Whistleblower's Guide to the Federal Bureaucracy* (Washington, D.C.: Institute for Policy Studies, 1977).
6. See, e.g., Samuel Eliot Morison, Frederick Merk, and Frank Friedel, *Dissent in Three American Wars* (Cambridge: Harvard University Press, 1970).
7. In the scheme worked out by Albert Hirschmann in *Exit, Voice and Loyalty* (Cambridge: Harvard University Press, 1970), whistleblowing represents "voice" accompanied by a preference not to "exit," though forced "exit" is clearly a possibility and "voice" after or during "exit" may be chosen for strategic reasons.
8. Edward Weisband and Thomas N. Franck, *Resignation in Protest* (New York: Grossman, 1975).
9. Future developments can, however, be the cause for whistleblowing if they are seen as resulting from steps being taken or about to be taken that render them inevitable.
10. Case A is adapted from Louis Clark, "The Sound of Professional Suicide," *Barrister,* Summer 1978, p. 10; Case B is Case 5 in Robert J. Baum and Albert Flores, eds., *Ethical Problems of Engineering* (Troy, N.Y.: Rensselaer Polytechnic Institute, 1978), p. 186.
11. I discuss these questions of consultation and publicity with respect to moral choice in chapter 7 of Sissela Bok, *Lying* (New York: Pantheon, 1978); and in *Secrets* (New York: Pantheon Books, 1982), Ch. IX and XV.

Employment at Will and Due Process

PATRICIA H. WERHANE — TARA J. RADIN

In 1980, Howard Smith III was hired by the American Greetings Corporation as a materials handler at the plant in Osceola, Arkansas. He was promoted to forklift driver and held that job until 1989, when he became involved in a dispute with his shift leader. According to Smith, he had a dispute with his shift leader at work. After work he tried to discuss the matter, but according to Smith, the shift leader hit him. The next day Smith was fired.

Smith was an "at will" employee. He did not belong to, nor was he protected by, any union or union agreement. He did not have any special legal protection, for there was no apparent question of age, gender, race, or handicap discrimination. And he was not alleging any type of problem with worker safety on the job. The American Greetings Employee Handbook stated that "We believe in working and thinking and planning to provide a stable and growing business, to give such service to our customers that we may provide maximum job security for our employees." It did not state that employees could not be fired without due process or reasonable cause. According to the common law principle of Employment at Will (EAW), Smith's job at American Greetings could, therefore, legitimately be terminated at any time without cause, by either Smith or his employer, as long as that termination did not violate any law, agreement, or public policy.

Smith challenged his firing in the Arkansas court system as a "tort of outrage." A "tort of outrage" occurs when employer engages in "extreme or outrageous conduct" or intentionally inflicts terrible emotional stress. If such a tort is found to have occurred, the action, in this case, the dismissal, can be overturned.

Smith's case went to the Supreme Court of Arkansas in 1991. In court the management of American Greetings argued that Smith was fired for provoking management into a fight. The Court held that the firing was not in violation of law or a public policy, that the employee handbook did not specify restrictions on at will terminations, and that the alleged altercation between Smith and his shift leader "did not come close to meeting" criteria for a tort of outrage. Howard Smith lost his case and his job.[1]

The principle of EAW is a common-law doctrine that states that, in the absence of law or contract, employers have the right to hire, promote, demote, and fire whomever and whenever they please. In 1877, the principle was stated explicitly in a document by H. G. Wood entitled *Master and Servant.* According to Wood, "A general or indefinite hiring is prima facie a hiring at will."[2] Although the term "master-servant," a medieval expression, was once used to characterize employment relationships, it has been dropped from most of the recent literature on employment.[3]

In the United States, EAW has been interpreted as the rule that, when employees are not specifically covered by union agreement, legal statute, public policy, or contract, employers "may dismiss their employees at will . . . for good cause, for no cause, *or even for causes morally wrong,* without being thereby guilty of legal wrong."[4] At the same time, "at will" employees enjoy rights parallel to employer prerogatives, because employees may quit their jobs for any reason whatsoever (or no reason) without having to give any notice to their employers. "At will" employees range from part-time contract workers to CEOs, including all those workers and managers in the private sector of the economy not covered by agreements, statutes, or contracts. Today at least 60% of all employees in the private sector in the United States are "at will" employees. These employees have no rights to due process or to appeal employment decisions, and the employer does not have any obligation to give reasons for demotions, transfers, or dismissals. Interestingly, while employees in the *private* sector of the economy tend to be regarded as "at will" employees, *public*-sector employees have guaranteed rights, including due process, and are protected from demotion, transfer, or firing without cause.

Due process is a means by which a person can appeal a decision in order to get an explanation of that action and an opportunity to argue against it. Procedural due process is the right to a hearing, trial, grievance procedure, or appeal when a decision is made concerning oneself. Due process is also substantive. It is the demand for rationality and fairness: for good reasons for decisions. EAW has been widely interpreted as allowing

employees to be demoted, transferred or dismissed without due process, that is, without having a hearing and without requirement of good reasons or "cause" for the employment decision. This is not to say that employers do not have reasons, usually good reasons, for their decisions. But there is no moral or legal obligation to state or defend them. EAW thus sidesteps the requirement of procedural and substantive due process in the workplace, but it does not preclude the institution of such procedures or the existence of good reasons for employment decisions.

EAW is still upheld in the state and federal courts of this country, as the Howard Smith case illustrates, although exceptions are made when violations of public policy and law are at issue. According to the *Wall Street Journal,* the court has decided in favor of the employees in 67% of the wrongful discharge suits that have taken place during the past three years. These suits were won not on the basis of a rejection of the principle of EAW but, rather, on the basis of breach of contract, lack of just cause for dismissal when a company policy was in place, or violations of public policy. The court has carved out the "public policy" exception so as not to encourage fraudulent or wrongful behavior on the part of employers, such as in cases where employees are asked to break a law or to violate state public policies, and in cases where employees are not allowed to exercise fundamental rights, such as the rights to vote, to serve on a jury, and to collect worker compensation. For example, in one case, the court reinstated an employee who was fired for reporting theft at his plant on the grounds that criminal conduct requires such reporting.[5] In another case, the court reinstated a physician who was fired from the Ortho Pharmaceutical Corporation for refusing to seek approval to test a certain drug on human subjects. The court held that safety clearly lies in the interest of public welfare, and employees are not to be fired for refusing to jeopardize public safety.[6]

During the last ten years, a number of positive trends have become apparent in employment practices and in state and federal court adjudications of employment disputes. Shortages of skilled managers, fear of legal repercussions, and a more genuine interest in employee rights claims and reciprocal obligations have resulted in a more careful spelling out of employment contracts, the development of elaborate grievance procedures, and in general less arbitrariness in employee treatment.[7] While there has not been a universal revolution in thinking about employee rights, an increasing number of companies have qualified their EAW prerogatives with restrictions in firing without cause. Many companies have developed grievance procedures and other means for employee complaint and redress.

Interestingly, substantive due process, the notion that employers should give good reasons for their employment actions, previously dismissed as legal and philosophical nonsense, has also recently developed positive advocates. Some courts have found that it is a breach of contract to fire a long-term employee when there is not sufficient cause—under normal economic conditions even when the implied contract is only a verbal one. In California, for example, 50% of the implied contract cases (and there have been over 200) during the last five years have been decided in favor of the employee, again, without challenging EAW.[8] In light of this recognition of implicit contractual obligations between employees and employers, in some unprecedented court cases *employees* have been held liable for good faith

breaches of contract, particularly in cases of quitting without notice in the middle of a project and/or taking technology or other ideas to another job.[9]

These are all positive developments. At the same time, there has been neither an across-the-board institution of due process procedures in all corporations nor any direct challenges to the *principle* (although there have been challenges to the practice) of EAW as a justifiable and legitimate approach to employment practices. Moreover, as a result of mergers, downsizing, and restructuring, hundreds of thousands of employees have been laid off summarily without being able to appeal those decisions.

"At will" employees, then, have no rights to demand an appeal to such employment decisions except through the court system. In addition, no form of due process is a requirement preceding any of these actions. Moreover, unless public policy is violated, the law has traditionally protected employers from employee retaliation in such actions. It is true that the scope of what is defined as "public policy" has been enlarged so that "at will" dismissals without good reason are greatly reduced. It is also true that many companies have grievance procedures in place for "at will" employees. But such procedures are voluntary, procedural due process is not *required,* and companies need not give any reasons for their employment decisions.

In what follows we shall present a series of arguments defending the claim that the right to procedural and substantive due process should be extended to all employees in the private sector of the economy. We will defend the claim partly on the basis of human rights. We shall also argue that the public/private distinction that precludes the application of constitutional guarantees in the private sector has sufficiently broken down so that the absence of a due process requirement in the workplace is an anomaly.

Employment at Will

EAW is often justified for one or more of the following reasons:

1. The proprietary rights of employers guarantee that they may employ or dismiss whomever and whenever they wish.
2. EAW defends employee and employer rights equally, in particular the right to freedom of contract, because an employee voluntarily contracts to be hired and can quit at any time.
3. In choosing to take a job, an employee voluntarily commits herself to certain responsibilities and company loyalty, including the knowledge that she is an "at will" employee.
4. Extending due process rights in the workplace often interferes with the efficiency and productivity of the business organization.
5. Legislation and/or regulation of employment relationships further undermine an already overregulated economy.

Let us examine each of these arguments in more detail. The principle of EAW is sometimes maintained purely on the basis of proprietary rights of employers and corporations. In dismissing or demoting employees, the employer is not denying rights to *persons.* Rather, the employer is simply excluding that person's *labor* from the organization.

This is not a bad argument. Nevertheless, accepting it necessitates consideration of the proprietary rights of employees as well. To understand

what is meant by "proprietary rights of employees" it is useful to consider first what is meant by the term "labor." "Labor" is sometimes used collectively to refer to the workforce as a whole. It also refers to the activity of working. Other times it refers to the productivity or "fruits" of that activity. Productivity, labor in the third sense, might be thought of as a form of property or at least as something convertible into property, because the productivity of working is what is traded for remuneration in employee-employer work agreements. For example, suppose an advertising agency hires an expert known for her creativity in developing new commercials. This person trades her ideas, the product of her work (thinking), for pay. The ideas are not literally property, but they are tradable items because, when presented on paper or on television, they are sellable by their creator and generate income. But the activity of working (thinking in this case) cannot be sold or transferred.

Caution is necessary, though, in relating productivity to tangible property, because there is an obvious difference between productivity and material property. Productivity requires the past or present activity of working, and thus the presence of the person performing this activity. Person, property, labor, and productivity are all different in this important sense. A person can be distinguished from his possessions, a distinction that allows for the creation of legally fictional persons such as corporations or trusts that can "own" property. Persons cannot, however, be distinguished from their working, and this activity is necessary for creating productivity, a tradable product of one's working.

In dismissing an employee, a well-intentioned employer aims to rid the corporation of the costs of generating that employee's work products. In ordinary employment situations, however, terminating that cost entails terminating that employee. In those cases the justification for the "at will" firing is presumably proprietary. But treating an employee "at will" is analogous to considering her a piece of property at the disposal of the employer or corporation. Arbitrary firings treat people as things. When I "fire" a robot, I do not have to give reasons, because a robot is not a rational being. It has no use for reasons. On the other hand, if I fire a person arbitrarily, I am making the assumption that she does not need reasons either. If I have hired people, then, in firing them, I should treat them as such, with respect, throughout the termination process. This does not preclude firing. It merely asks employers to give reasons for their actions, because reasons are appropriate when people are dealing with other people.

This reasoning leads to a second defense and critique of EAW. It is contended that EAW defends employee and employer rights equally. An employer's right to hire and fire "at will" is balanced by a worker's right to accept or reject employment. The institution of any employee right that restricts "at will" hiring and firing would be unfair unless this restriction were balanced by a similar restriction controlling employee job choice in the workplace. Either program would do irreparable damage by preventing both employees and employers from continuing in voluntary employment arrangements. These arrangements are guaranteed by "freedom of contract," the right of persons or organizations to enter into any voluntary agreement with which all parties of the agreement are in accord.[10] Limiting EAW practices or requiring due process would negatively affect freedom of

contract. Both are thus clearly coercive, because in either case persons and organizations are forced to accept behavioral restraints that place unnecessary constraints on voluntary employment agreements.[11]

This second line of reasoning defending EAW, like the first, presents some solid arguments. A basic presupposition upon which EAW is grounded is that of protecting equal freedoms of both employees and employers. The purpose of EAW is to provide a guaranteed balance of these freedoms. But arbitrary treatment of employees extends prerogatives to managers that are not equally available to employees, and such treatment may unduly interfere with a fired employee's prospects for future employment if that employee has no avenue for defense or appeal. This is also sometimes true when an employee quits without notice or good reason. Arbitrary treatment of employees *or* employers therefore violates the spirit of EAW—that of protecting the freedoms of both employees and employers.

The third justification of EAW defends the voluntariness of employment contracts. If these are agreements between moral agents, however, such agreements imply reciprocal obligations between the parties in question for which both are accountable. It is obvious that, in an employment contract, people are rewarded for their performance. What is seldom noticed is that, if part of the employment contract is an expectation of loyalty, trust, and respect on the part of an employee, the employer must, in return, treat the employee with respect as well. The obligations required by employment agreements, if these are free and noncoercive agreements, must be equally obligatory and mutually restrictive on both parties. Otherwise one party cannot expect—morally expect—loyalty, trust, or respect from the other.

EAW is most often defended on practical grounds. From a utilitarian perspective, hiring and firing "at will" is deemed necessary in productive organizations to ensure maximum efficiency and productivity, the goals of such organizations. In the absence of EAW unproductive employees, workers who are no longer needed, and even troublemakers, would be able to keep their jobs. Even if a business *could* rid itself of undesirable employees, the lengthy procedure of due process required by an extension of employee rights would be costly and time-consuming, and would likely prove distracting to other employees. This would likely slow production and, more likely than not, prove harmful to the morale of other employees.

This argument is defended by Ian Maitland, who contends,

> [I]f employers were generally to heed business ethicists and institute workplace due process in cases of dismissals and take the increased costs or reduced efficiency out of workers' paychecks—then they would expose themselves to the pirating of their workers by other employers who would give workers what they wanted instead of respecting their rights in the workplace. . . . In short, there is good reason for concluding that the prevalence of EAW does accurately reflect workers' preferences for wages over contractually guaranteed protections against unfair dismissal.[12]

Such an argument assumes (a) that due process increases costs and reduces efficiency, a contention that is not documented by the many corporations that have grievance procedures, and (b) that workers will generally give up some basic rights for other benefits, such as money. The latter is certainly sometimes true, but not always so, particularly when there are questions of

unfair dismissals or job security. Maitland also assumes that an employee is on the same level and possesses the same power as her manager, so that an employee can choose her benefit package in which grievance procedures, whistleblowing protections, or other rights are included. Maitland implies that employers might include in that package of benefits their rights to practice the policy of unfair dismissals in return for increased pay. He also at least implicitly suggests that due process precludes dismissals and layoffs. But this is not true. Procedural due process demands a means of appeal, and substantive due process demands good reasons, both of which are requirements for other managerial decisions and judgments. Neither demands benevolence, lifetime employment, or prevents dismissals. In fact, having good reasons gives an employer a justification for getting rid of poor employees.

In summary, arbitrariness, although not prohibited by EAW, violates the managerial ideal of rationality and consistency. These are independent grounds for not abusing EAW. Even if EAW itself is justifiable, the practice of EAW, when interpreted as condoning arbitrary employment decisions, is not justifiable. Both procedural and substantive due process are consistent with, and a moral requirement of, EAW. The former is part of recognizing obligations implied by freedom of contract, and the latter, substantive due process, conforms with the ideal of managerial rationality that is implied by a consistent application of this common law principle.

Employment at Will, Due Process, and the Public/Private Distinction

The strongest reasons for allowing abuses of EAW and for not instituting a full set of employee rights in the workplace, at least in the private sector of the economy, have to do with the nature of business in a free society. Businesses are privately owned voluntary organizations of all sizes from small entrepreneurships to large corporations. As such, they are not subject to the restrictions governing public and political institutions. Political procedures such as due process, needed to safeguard the public against the arbitrary exercise of power by the state, do not apply to private organizations. Guaranteeing such rights in the workplace would require restrictive legislation and regulation. Voluntary market arrangements, so vital to free enterprise and guaranteed by freedom of contract, would be sacrificed for the alleged public interest of employee claims.

In the law, courts traditionally have recognized the right of corporations to due process, although they have not required due process for employees in the private sector of the economy. The justification put forward for this is that since corporations are public entities acting in the public interest, they, like people, should be afforded the right to due process.

Due process is also guaranteed for permanent full-time workers in the public sector of the economy, that is, for workers in local, state and national government positions. The Fifth and Fourteenth Amendments protect liberty and property rights such that any alleged violations or deprivation of those rights may be challenged by some form of due process. According to recent Supreme Court decisions, when a state worker is a permanent employee, he has a property interest in his employment. Because a person's productivity contributes to the place of employment, a public worker is

entitled to his job unless there is good reason to question it, such as poor work habits, habitual absences, and the like. Moreover, if a discharge would prevent him from obtaining other employment, which often is the case with state employees who, if fired, cannot find further government employment, that employee has a right to due process before being terminated.[13]

This justification for extending due process protections to public employees is grounded in the public employee's proprietary interest in his job. If that argument makes sense, it is curious that private employees do not have similar rights. The basis for this distinction stems from a tradition in Western thinking that distinguishes between the public and private spheres of life. The public sphere contains that part of a person's life that lies within the bounds of government regulation, whereas the private sphere contains that part of a person's life that lies outside those bounds. The argument is that the portion of a person's life that influences only that person should remain private and outside the purview of law and regulation, while the portion that influences the public welfare should be subject to the authority of the law.

Although interpersonal relationships on any level—personal, family, social, or employee-employer—are protected by statutes and common law, they are not constitutionally protected unless there is a violation of some citizen claim against the state. Because entrepreneurships and corporations are privately owned, and since employees are free to make or break employment contracts of their choice, employee-employer relationships, like family relationships, are treated as "private." In a family, even if there are no due process procedures, the state does not interfere, except when there is obvious harm or abuse. Similarly, employment relationships are considered private relationships contracted between free adults, and so long as no gross violations occur, positive constitutional guarantees such as due process are not enforceable.

The public/private distinction was originally developed to distinguish individuals from the state and to protect individuals and private property from public—i.e., governmental—intrusion. The distinction, however, has been extended to distinguish not merely between the individual or the family and the state, but also between universal rights claims and national sovereignty, public and private ownership, free enterprise and public policy, publicly and privately held corporations, and even between public and private employees. Indeed, this distinction plays a role in national and international affairs. Boutros Boutros-Ghali, the head of the United Nations, recently confronted a dilemma in deciding whether to go into Somalia without an invitation. His initial reaction was to stay out and to respect Somalia's right to "private" national sovereignty. It was only when he decided that Somalia had fallen apart as an independent state that he approved U.N. intervention. His dilemma parallels that of a state, which must decide whether to intervene in a family quarrel, the alleged abuse of a spouse or child, the inoculation of a Christian Scientist, or the blood transfusion for a Seventh-Day Adventist.

There are some questions, however, with the justification of the absence of due process with regard to the public/private distinction. Our economic system is allegedly based on private property, but it is unclear where "private" property and ownership end and "public" property and ownership begin. In the workplace, ownership and control is often divided. Corporate

assets are held by an ever-changing group of individual and institutional shareholders. It is no longer true that owners exercise any real sense of control over their property and its management. Some do, but many do not. Moreover, such complex property relationships are spelled out and guaranteed by the state. This has prompted at least one thinker to argue that "private property" should be defined as "certain patterns of human interaction underwritten by public power."[14]

This fuzziness about the "privacy" of property becomes exacerbated by the way we use the term "public" in analyzing the status of businesses and in particular corporations. For example, we distinguish between privately owned business corporations and government-owned or -controlled public institutions. Among those companies that are not government owned, we distinguish between regulated "public" utilities whose stock is owned by private individuals and institutions; "publicly held" corporations whose stock is traded publicly, who are governed by special SEC regulations, and whose financial statements are public knowledge; and privately held corporations and entrepreneurships, companies and smaller businesses that are owned by an individual or group of individuals and not available for public stock purchase.

There are similarities between government-owned, public institutions and privately owned organizations. When the air controllers went on strike in the 1980s, Ronald Reagan fired them, and declared that, as public employees, they could not strike because it jeopardized the public safety. Nevertheless, both private and public institutions run transportation, control banks, and own property. While the goals of private and public institutions differ in that public institutions are allegedly supposed to place the public good ahead of profitability, the simultaneous call for businesses to become socially responsible and the demand for governmental organizations to become efficient and accountable further question the dichotomy between "public" and "private."

Many business situations reinforce the view that the traditional public/private dichotomy has been eroded, if not entirely, at least in large part. For example, in 1981, General Motors (GM) wanted to expand by building a plant in what is called the "Poletown" area of Detroit. Poletown is an old Detroit Polish neighborhood. The site was favorable because it was near transportation facilities and there was a good supply of labor. To build the plant, however, GM had to displace residents in a nine-block area. The Poletown Neighborhood Council objected, but the Supreme Court of Michigan decided in favor of GM and held that the state could condemn property for private use, with proper compensation to owners, when it was in the public good. What is particularly interesting about this case is that GM is not a government-owned corporation; its primary goal is *profitability,* not the common good. The Supreme Court nevertheless decided that it was in the *public* interest for Detroit to use its authority to allow a company to take over property despite the protesting of the property owners. In this case the public/private distinction was thoroughly scrambled.

The overlap between private enterprise and public interests is such that at least one legal scholar argues that "developments in the twentieth century have significantly undermined the 'privateness' of modern business corporations, with the result that the traditional bases for distinguishing them from public corporations have largely disappeared."[15] Nevertheless, despite

the blurring of the public and private in terms of property rights and the status and functions of corporations, the subject of employee rights appears to remain immune from conflation.

The expansion of employee protections to what we would consider just claims to due process gives to the state and the courts more opportunity to interfere with the private economy and might thus further skew what is seen by some as a precarious but delicate balance between the private economic sector and public policy. We agree. But if the distinction between public and private institutions is no longer clear-cut, and the traditional separation of the public and private spheres is no longer in place, might it not then be better to recognize and extend constitutional guarantees so as to protect all citizens equally? If due process is crucial to political relationships between the individual and the state, why is it not central in relationships between employees and corporations since at least some of the companies in question are as large and powerful as small nations? Is it not in fact inconsistent with our democratic tradition *not* to mandate such rights?

The philosopher T. M. Scanlon summarizes our intuitions about due process. Scanlon says,

> The requirement of due process is one of the conditions of the moral acceptability of those institutions that give some people power to control or intervene in the lives of others.[16]

The institution of due process in the workplace is a moral requirement consistent with rationality and consistency expected in management decision-making. It is not precluded by EAW, and it is compatible with the overlap between the public and private sectors of the economy. Convincing business of the moral necessity of due process, however, is a task yet to be completed.

Notes

1. *Howard Smith III* v. *American Greetings Corporation,* 304 Ark. 596; 804 S.W. 2d 683.
2. H. G. Wood, *A Treatise on the Law of Master and Servant* (Albany, N.Y.: John D. Parsons, Jr., 1877), p. 134.
3. Until the end of 1980 the *Index of Legal Periodicals* indexed employee-employer relationships under this rubric.
4. Lawrence E. Blades, "Employment at Will versus Individual Freedom: On Limiting the Abusive Exercise of Employer Power," *Columbia Law Review,* 67 (1967), p. 1405, quoted from *Payne* v. *Western,* 81 Tenn. 507 (1884), and *Hutton* v. *Watters,* 132 Tenn. 527, S.W. 134 (1915).
5. *Palmateer* v. *International Harvester Corporation,* 85 Ill. App. 2d 124 (1981).
6. *Pierce* v. *Ortho Pharmaceutical Corporation* 845 NJ 58 (NJ 1980), 417 A.2d 505. See also Brian Heshizer, "The New Common Law of Employment: Changes in the Concept of Employment at Will," *Labor Law Journal,* 36 (1985), pp. 95–107.
7. See David Ewing, *Justice on the Job: Resolving Grievances in the Nonunion Workplace* (Boston: Harvard Business School Press, 1989).
8. See R. M. Bastress, "A Synthesis and a Proposal for Reform of the Employment at Will Doctrine," *West Virginia Law Review,* 90 (1988), pp. 319–51.
9. See "Employees' Good Faith Duties," *Hastings Law Journal,* 39 (198). See also *Hudson* v. *Moore Business Forms,* 609 Supp. 467 (N.D. Cal. 1985).
10. See *Lockner* v. *New York,* 198 U.S. (1905), and Adina Schwartz, "Autonomy in the Workplace," in Tom Regan, ed., *Just Business* (New York: Random House, 1984), pp. 129–40.
11. Eric Mack, "Natural and Contractual Rights," *Ethics,* 87 (1977), pp. 153–59.

12. Ian Maitland, "Rights in the Workplace: A Nozickian Argument," in Lisa Newton and Maureen Ford, eds., *Taking Sides* (Guilford, CT: Dushkin Publishing Group), 1990, pp. 34–35.
13. Richard Wallace, "Union Waiver of Public Employees' Due Process Rights," *Industrial Relations Law Journal,* 8 (1986), pp. 583–87.
14. Morris Cohen, "Dialogue on Private Property," *Rutgers Law Review* 9 (1954), pp. 357. See also *Law and the Social Order* (1933) and Robert Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," *Political Science Quarterly,* 38 (1923), pp. 470; John Brest, "State Action and Liberal Theory," *University of Pennsylvania Law Review* (1982), pp. 1296–1329.
15. Gerald Frug, "The City As a Legal Concept," *Harvard Law Review,* 93 (1980), p. 1129.
16. T. M. Scanlon, "Due Process," in J. Roland Pennock and John W. Chapman, eds., *Nomos XVIII: Due Process* (New York: New York University Press, 1977), p. 94.

In Defense of the Contract at Will

RICHARD A. EPSTEIN

The persistent tension between private ordering and government regulation exists in virtually every area known to the law, and in none has that tension been more pronounced than in the law of employer and employee relations. During the last fifty years, the balance of power has shifted heavily in favor of direct public regulation, which has been thought strictly necessary to redress the perceived imbalance between the individual and the firm. In particular the employment relationship has been the subject of at least two major statutory revolutions. The first, which culminated in the passage of the National Labor Relations Act in 1935, set the basic structure for collective bargaining that persists to the current time. The second, which is embodied in Title VII of the Civil Rights Act of 1964, offers extensive protection to all individuals against discrimination on the basis of race, sex, religion, or national origin. The effect of these two statutes is so pervasive that it is easy to forget that, even after their passage, large portions of the employment relation remain subject to the traditional common law rules, which when all was said and done set their face in support of freedom of contract and the system of voluntary exchange. One manifestation of that position was the prominent place that the common law, especially as it developed in the nineteenth century, gave to the contract at will. The basic position was sell set out in an oft-quoted passage from *Payne v. Western & Atlantic Railroad:*

> [M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se.* It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.[1]

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In the remainder of this paper, I examine the arguments that can be made for and against the contract at will. I hope to show that it is adopted not because it allows the employer to exploit the employee, but rather because over a very broad range of circumstances it works to the mutual benefit of both parties, where the benefits are measured, as ever, at the time of the contract's formation and not at the time of dispute. To justify this result, I examine the contract in light of the three dominant standards that have emerged as the test of the soundness of any legal doctrine: intrinsic fairness, effects upon utility or wealth, and distributional consequences. I conclude that the first two tests point strongly to the maintenance of the at-will rule, while the third, if it offers any guidance at all, points in the same direction.

I. THE FAIRNESS OF THE CONTRACT AT WILL

The first way to argue for the contract at will is to insist upon the importance of freedom of contract as an end in itself. Freedom of contract is an aspect of individual liberty, every bit as much as freedom of speech, or freedom in the selection of marriage partners or in the adoption of religious beliefs or affiliations. Just as it is regarded as prima facie unjust to abridge these liberties, so too is it presumptively unjust to abridge the economic liberties of individuals. The desire to make one's own choices about employment may be as strong as it is with respect to marriage or participation in religious activities, and it is doubtless more pervasive than the desire to participate in political activity. Indeed for most people, their own health and comfort, and that of their families, depend critically upon their ability to earn a living by entering the employment market. If government regulation is inappropriate for personal, religious, or political activities, then what makes it intrinsically desirable for employment relations?

It is one thing to set aside the occasional transaction that reflects only the momentary aberrations of particular parties who are overwhelmed by major personal and social dislocations. It is quite another to announce that a rule to which vast numbers of individuals adhere is so fundamentally corrupt that it does not deserve the minimum respect of the law. With employment contracts we are not dealing with the widow who has sold her inheritance for a song to a man with a thin mustache. Instead we are dealing with the routine stuff of ordinary life; people who are competent enough to marry, vote, and pray are not unable to protect themselves in their day-to-day business transactions.

Courts and legislatures have intervened so often in private contractual relations that it may seem almost quixotic to insist that they bear a heavy burden of justification every time they wish to substitute their own judgment for that of the immediate parties to the transactions. Yet it is hardly likely that remote public bodies have better information about individual preferences than the parties who hold them. This basic principle of autonomy, moreover, is not limited to some areas of individual conduct and wholly inapplicable to others. It covers all these activities as a piece and admits no ad hoc exceptions, but only principled limitations.

This general proposition applies to the particular contract term in question. Any attack on the contract at will in the name of individual freedo