A Preliminary Inquiry Into the Attitudes Toward Work that Should be Fostered by Socially Responsible Employers

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A PRELIMINARY INQUIRY INTO THE ATTITUDES TOWARD WORK THAT SHOULD BE FOSTERED BY SOCIALLY RESPONSIBLE EMPLOYERS

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Work is one of the pillars of identity for modern men and women.¹ In the history of Western Civilization, attitudes toward work have shifted and changed and cycled.² For example, Homer has Odysseus assist in the building of houses; but only four-hundred years later, Greek citizens in the age of Pericles looked down on physical labor as demeaning and servile.³ The Greek word for work, ponos, also means “pain”; Ponos is also the god of hardship and toil in Greek mythology.⁴ A recent study indicates that the work year of the average employed American has increased 163 hours between 1969 and 1987, or the equivalent of a full month per year.⁵ A survey of 24 million shift workers revealed recently that the number of American shift workers (largely in the manufacturing and retail sectors) working overtime is at an all time high — 12.6%, or roughly 5 hours per week for every worker.⁶ In 2002, labor productivity in the United States grew by 9.2% — the highest increase in more than 20 years, and higher than the productiv-
ity increase for Japan, Korea or Taiwan. More so, perhaps, than at any other time, Americans tend to see themselves and their worth intimately tied up in their careers.

Yet, it would be misleading not to emphasize the various splits in public opinion toward work. While many Americans enjoy working hard and being paid well for what they do, many more hate their jobs and disassociate themselves from what they do at work. Moreover, the modern tendency toward more hours of work and two-earner marriages is linked to various social problems including increase in stress-related diseases, sleep deprivation, an increase in sleep disorders, and inadequate time for family obligations. One study found that between 1960 and 1986 the time parents actually had to be with their children fell ten hours per week for whites and twelve for blacks; and this so-called “parenting deficit” can be linked to poor school performance, mental problems, drug abuse, and teen suicides. A recent poll found that workers who were satisfied with their jobs tended to be ones who enjoyed a balance between work and family. Not surprisingly, this result mirrored one of the leading findings of a major American sociological study done twenty years earlier. The importance of an Aristotelian balance between private and public involvement, between work and family, is being re-discovered by empirical studies as important to American social health at the start of the 21st century.

Part I of this paper traces the evolution of modern attitudes toward work. Part II traces the jurisprudence of attitudes towards work as reflected in the common and statutory law. Finally, Part III attempts to sketch the outlines of an attitude toward work that could be embraced beneficially by socially responsible employers.

I. A BRIEF HISTORY OF WESTERN ATTITUDES TOWARD WORK

Laying stress upon the importance of work has a greater effect than any other technique of living in the direction of binding the individual more closely to reality; and in his work he is at least securely attached to a part of reality, the human community.

While Sigmund Freud saw much of work’s significance in its role as a link from man to reality, most ancient writers accepted the view that work was a punishment to be endured. The writer of Genesis saw work as God’s punishment of man for the fall in the Garden of Eden: “[C]ursed is the ground because of you; in toil you shall eat of it all the days of your life…” A similar theme, work as a necessity to be endured or, better still, avoided, is sounded by the writer of Ecclesiasticus who states:

The wisdom of the scribe depends on the opportunity of leisure; and he who has a little business may become wise.

How can he become wise who handles the plow, and who glories in the shaft of the goad, who drives oxen and is occupied with their work, and whose talk is about bulls?

In contrast, Eastern religious thought, particularly in the teachings of Buddha (who lived and taught in the sixth century B.C.), emphasizes obligations between master and servant. The employer, for example, should assign work according to ability and capacity, pay adequate wages, provide for medical needs, and grant occasional bonuses. The employee, in turn, should be diligent and not lazy, honest and obedient and not cheat his master, and should be earnest in his work. The Buddha saw work as the most effective means of controlling crime – when people are provided with a means of earning a sufficient income, they will be content and free from fear or anxiety, and thus the country will be peaceful and free from crime. The Buddhist view on economic activity is a theme we revisit in some detail below.

The praise of leisure can be found in the works of the ancient Greeks who saw it as necessary for a life of contemplation. In this context, Aristotle quotes with approval the following lines from Hesiod:
That man is best who sees the truth himself; Good too is he who harkens to wise counsel. But who is neither wise himself nor willing to ponder wisdom, is not worth a straw.24

Indeed, one authority states that “[c]ondemnation of labor is general in ancient writers… The only ancient praise of labor is found in Hesiod, Works and Days lines 298-321; and Vergil, Georgics, Bucolics.”25 Other classic scholars suggest that in the four centuries between Hesiod and Aristotle, the Greek attitude toward labor went through a transformation. In the earliest days of ancient Greece (circa 850 B.C.), both Paris and Odysseus helped in the building of houses.26 Hannah Arnedt attributes this to the need for self-sufficiency and independence in the Homeric hero and contrasts it to the disdain for labor on the part of other classics authors, which she attributes to their perception that labor of the body necessitated by bodily needs is slavish.27 Others from a sociological viewpoint suggest that the transition from rural agrarian Greece to the city-states, which made heavy demands upon the time of their free citizens, accounted for the change in attitude toward labor as inherently degrading and servile.28 Whatever the origin of the classical Greek attitude toward work/labor, it provided the dominant view of work until the Middle Ages.29

“Before the nineteenth century’s close, if you worked, you labored or toiled.”30 By the close of the nineteenth century, work had become a broad and shallow generic term which encompassed all effort expended toward the accomplishment of a task. A noted scholar suggested that labor in its most correct sense refers to the activity which allows a species to perpetuate itself and which is consumed in the perpetuation leaving nothing behind.31 Karl Marx proposed, however, that work is a distinguishing characteristic of humanity and correctly denotes a contribution to culture, the product of effort over and above that required to sustain animal existence (life).32 The classical distinction may be illustrated as follows: a teacher labors in the classroom but works at night on her novel.33

Certainly attitudes toward work have fluctuated from time to time, but without denying the small swings what we propose to trace here are some of the major transformations in dominant social attitudes. The Middle Ages witnessed the start of such a change. The fall of civilization, the reduction of the great urban centers to fractions of their original size, and the return of the world to a rural condition were all catalysts to this change. By the second century A.D., Rome’s population dropped to 20,000-30,000 from over 1.2 million.34 People lived in frontier conditions. Hobbes’ line from Leviathan is appropriate to the early Middle Ages: life was “solitary, nasty, brutish, and short.”35 The sine qua non of life was harsh, unending physical labor. The monks in the monasteries led the way, or so it seems.

“[N]ew ideas about work began to appear in connection with the contemporary development of the great monastic brotherhoods, which gradually become great productive enterprises…”36 The most influential order in the West was that of St. Benedict who composed his rules for monks in the early sixth century.37 Rule XLVIII of the Benedictine Order declares: “Idleness is the enemy of the soul and therefore, at fixed times, the brothers ought
to be occupied in manual labor, and again at fixed times, in sacred reading.\textsuperscript{38} It has been estimated that under this rule Benedictine monks spent about 4-5 hours each weekday on direct religious duties, 6 hours for labor which usually meant labor in the fields, and 4 hours for reading.\textsuperscript{39}

The spark for a new work ethic was carried with the monks who pushed forward into new fields to convert the pagans by demonstrating the superiority and material advantages that were held by energetic and intelligent Christians. They worked with the peasants in the plowing, planting and harvesting.\textsuperscript{40} They cleared forests, built stone monasteries in the Italian tradition, planted vineyards, practiced herbal medicine, and worked fine metals.\textsuperscript{41} Idleness was condemned as an opportunity for licentiousness.\textsuperscript{42} The function of work was not to generate material wealth for its own sake but to discipline the soul. Work was thought of as ennobling rather than degrading, as an opportunity for Christian service to God.\textsuperscript{43}

A number of authors attribute positive ideas about work to the rise of the Protestant ethic.\textsuperscript{44} The root of the Protestant work ethic can be traced to the sixth century and the rules for Benedictine monks.\textsuperscript{45} However, initially these new ideas were confined to the members of monastic brotherhoods and tended to lose their force as the monastic orders gained economic power. Martin Luther, himself once a monk, criticized the idleness of monks who lived off the labor of serfs as other landlords did.\textsuperscript{46} By this time in the late Middle Ages, however, the agrarian feudalism of the early Middle Ages had undergone significant change. Merchants and master craftsmen had become increasingly wealthy and powerful; and the cities had emerged as centers for trade and fabrication. The standard bearers for the idea that work was ennobling had become the new men of the late Middle Ages: the merchants, traders, and artisans. They sought to dignify their own pursuits, which contrasted sharply with the prevailing powerbrokers — the large landholding nobles and lords of the church; and, of course, their path to wealth and power was the path of work.

appropriately, a former Augustinian monk, Martin Luther (1483-1546), led the Protestant Reformation which ushered in a profound change in social attitudes toward work.\textsuperscript{47} Luther preached and wrote on the strict separation of the church and state and on what he termed the “two kingdoms” — the spiritual and the temporal.\textsuperscript{48} He wrote repeatedly against usury (lending money at interest), a continuation of a then prevalent Catholic teaching.\textsuperscript{49} One of the other Catholic teachings which he apparently did not recant was the work ethic from his monastic life. Indeed, Luther modeled a life of hard work for his followers frequently working to the point of exhaustion. Luther, himself, says:

Before I married, no one had made up my bed for a whole year; the straw was rotting from my sweat. I was tired, and wore myself out with work during the day, so that I just fell into bed oblivious of everything.\textsuperscript{50}

Under the influence of the Old Testament, John Calvin (1509-1564), the Swiss theologian and reformer, gave his blessing to the possession of wealth as a mark of God’s favor.\textsuperscript{51} Although the above represents the popular view, at least one observer demurrers: “I believe that it will come to be seen that in this field [comfort of the wealthy] much of what has been ascribed to Calvinism is not distinctly Calvinism at all, and that the prudential element in Puritan ethics was fully shared by typical Anglicans — indeed, also by Lutherans of the period. By the early 18th century..., the divine sanction of the acquisition as well as the charitable use of wealth had become a commonplace lodged in most Christian minds, Calvinists included.”\textsuperscript{52}

Some authors include the founder of Methodism, John Wesley (1703-1791) as an advocate of the work ethic.\textsuperscript{53} He, perhaps, in the mold of Luther, did as much or more by his example as by his words.\textsuperscript{54} An itinerant preacher, Wesley traveled 225,000 miles over “abominable roads” on horseback to give approximately 40,000 sermons.\textsuperscript{55} His day started at 4 a.m.,
he preached his first sermon at 5 a.m., and — scrupulously husbanding his time — averaged three to four sermons per day for the last 50 years of his life.56 Somewhat paradoxically, Wesley praised sobriety, industry, and stewardship while expressing grave reservations about wealth as a hindrance to holiness.57 “If a man received 500 pounds a year and spent 200 pounds, he owed God 300 pounds. If he received 200 pounds and spent only 100 pounds, did he ‘give God the other hundred?’ If not, he robbed him ‘of just so much!’”58 His book sales allowed him to support two sisters and, by the close of his life, give away about 1,000 pounds annually to “the deserving poor.”59 Karl Marx (1818-1883) wrote of the alienation of labor caused by the imposition of work in a capitalist society.60 His theory, in a loose sense, built upon the foundations laid by the religious reformers of the Middle Ages and the Reformation.61 For Luther and Calvin, work — including trade and commerce for Calvin if not for Luther — was a calling, the pursuit of which had the sanction of God. Max Weber asserted that “the only way of living acceptably to God… [was] through the fulfillment of the obligations imposed upon an individual by …his calling.”62 The same ethic urged Protestants to follow one’s calling diligently and accept one’s involvement in worldly affairs as one’s calling. Perfection was not found in pursuing noble occupations but in accepting one’s station in life with humility. Thus, religion provided authority for the status quo as well as anesthetic for the masses.

What constitutes the alienation of labor? Marx, at one point in his writings, attributes alienation to three factors.63 First, modern industrial work is external to the worker and not part of his nature.64 Consequently, second, the work is not fulfilling but rather generates a feeling of misery instead of well-being because the worker denies himself in the act of working.65 Third, the work is physically exhausting and mentally debasing rather than developing the worker’s energies and potential.66 The result, according to Marx, is that the modern industrial worker feels himself to be freely active only in his animal functions — eating, drink-
of any such emotion as love or desire, ease, which is the negative or absence of labour — ease not labour — is the object. In so far as labour is taken in its proper sense, love of labour is a contradiction in terms.\footnote{73}

In a similar vein, Studs Terkel in Working (1972) writes:

This book, being about work, is, by its very nature, about violence — to the spirit as well as to the body. It is about ulcers as well as accidents, about shouting matches as well as fistfights, about nervous breakdowns as well as kicking the dog around. It is, above all (or beneath all), about daily humiliations. To survive the day is triumph enough for the walking wounded among the great many of us.

It is about a search, too, for daily meaning as well as daily bread, for recognition as well as cash, for astonishment rather than torpor; in short, for a sort of life rather than a Monday through Friday sort of dying. Perhaps immortality, too, is part of the quest.\footnote{74}

E.F. Schumacher, a British economist, contrasts a Buddhist economic model of work to the western model. In his model, Schumacher emphasizes the development of character, the simplification of wants, and the involvement of the worker in the larger community.\footnote{75} Yet, emphasizing the distinction raised earlier, the search for meaning in labor is misplaced. Even in his pessimism, Freud argued that the answer to the question of life’s meaning could be found only in religion.\footnote{76} Schumacher and Terkel would agree on, at least, one common thread in their observations: both Buddhist and the modern materialist seek, optimistically, for some meaning in their work.

According to one observer, the creation of low-paid clerical jobs which offer little of the variety, status, or generally higher pay once associated with white collar work has swelled the ranks of disaffected white collar workers in the U.S.\footnote{77} In addition, for example, in 1975, the average pay for typists was $123 per week compared with $182 per week for blue-collar workers.\footnote{78} Interestingly, typing is viewed by some as “pink-collar” rather than white collar work because it is a job dominated by women; the differential between typing and blue-collar work roughly approximates the differential between male and female wages in the U.S.\footnote{79} By further contrast, prior to 1920, white collar workers earned 50-100% more than blue-collar workers.\footnote{80} This drop in pay, status, and variety of work for white collar workers may account for two trends in the U.S. work force: (1) the increase in unionization in white collar jobs; and (2) the statistical insignificance of the difference between negative attitudes toward work expressed by white collar and blue collar workers.\footnote{81}

A University of Michigan study conducted in the early 1970s asked workers to rank the importance to them of 25 aspects of work.\footnote{82} The top seven listed in the order in which they were ranked were:

1. Interesting work.
2. Enough help and equipment to get the job done.
3. Enough information to get the job done.
4. Enough authority to do the job.
5. Good pay.
6. Opportunity to develop special abilities.
7. Job security.\footnote{83}

The same study found a significant increase in worker dissatisfaction among workers under 30 years of age.\footnote{84} One commentator suggests that GM’s disastrous experience with the Lordstown Plant can be attributed directly to the younger (average age: 24 years) and better educated workers at that facility refusing to put up with the inflexible work rules and monotony of the assembly line.\footnote{85} It might be tempting then to suggest that attitudes toward work are a generational affair, except that the same generation that gave the U.S. the Lordstown GM strike is also represented by the “Yuppies” of the 1980’s, a group of young, upwardly mobile professionals who
prize career ahead of marriage, family, and other serious relationships.86

A pluralistic nation of approximately 280 million Americans will generate a rich diversity of values and attitudes toward work. Some observers have suggested that attitudes toward work can be accurately classified along class lines or by color of the worker’s collar. We are reluctant to adopt a blue-collar/white-collar dichotomy; however, recent polling suggests an income above $75,000 per year correlates positively with job satisfaction.87 Work is seen by many people in the United States as an important activity; and, unlike the Biblical or predominant Greek view, work is not universally tolerated merely as a curse. If anything, lack of work or unemployment is the modern curse. Most Americans would probably agree with Albert Camus (1913-1960), the French existentialist writer, when he said, “Without work all life goes rotten. But when work is soulless life stifles and dies,”88 or with the Lebanese poet Kahlil Gibran, who wrote, “For to be idle is to become a stranger unto the seasons, and to step out of life’s procession, that marches in majesty and proud submission towards the infinite.”89 Yet, we speculate that the classical distinction between the nature of labor and the nature of work may account for some of the difference between the two extreme attitudes.

The Reagan years (1981-1989) witnessed a small boom in the once discredited notion that a person’s worth might be measured by his or her wealth.90 It was fashionable once more to be wealthy and to flaunt wealth in Washington, DC circles. At the same time, a discouraging rise was witnessed in the negative attitude that poor people somehow must somehow be lazy or otherwise unworthy of wealth, and by implication, deserving of poverty. President Reagan in his 1986 State of the Union Address claimed that welfare is a “narcotic, a subtle destroyer of the human spirit” and that the measure of a welfare system must be the portion of unemployed on welfare who return to work.91 Such a notion must have been received with no little bitterness among the recipients of Aid to Dependent Children (ADC) and the permanently disabled who are sustained by Social Security. We believe a better reasoned view would praise wealth generated by honest labor while recognizing the principle of compassion and advocating dignity for the least well-off among us.

The 1990’s brought the era of the dot com and technology related companies. Fueled by feverish investor speculation, the young and technologically-conversant cashed in on a white-hot economy with eye-watering salaries and lavish perks. The lack of profits led to an end of the “irrational exuberance” and the turn of the century saw a mild recession followed by a swelling in the ranks of self-employed, from 8.7 million in 1999 to 9.3 million in 2003.92 Yet Americans, probably more than some other peoples, see their identity and self concepts intimately involved in their work. Thus, many, if not most, Americans want to do work that is interesting and challenging and presents an opportunity for self-actualization. This aspect of the American character provides and will continue to provide a great deal of challenge for managers. Similarly, many workers in the U.S., because they see their self-worth tied up in their calling — to use the Calvinist term, are sensitive to wage issues and seek to be treated fairly at the pay window.

II. ATTITUDES TOWARD EMPLOYMENT FOSTERED BY AND REFLECTED IN AMERICAN COMMON LAW AND STATUTES

In the absence of legislative action, the courts serve as a useful barometer of prevailing attitudes and social policy.93 In this section we attempt to trace the origins of the employment-at-will doctrine and examine the exceptions to employment-at-will as carved out by the courts, and more recently, the legislature. We conclude by comparing American at-will employment with European law.

A. Employment at will: bad history and eventually bad law

Employment at will comes to America by way of courts, not legislatures.94 It was born in a cli-
mate of “unbridled, laissez-faire expansionism, social Darwinism, and rugged individualism.”95 It finds its roots in a treatise by Horace Wood written in 1877 in which he described the at-will doctrine and cited, as authority, four cases which had adopted it.96 Most scholars agree that prior to 1877, most American colonies followed the English rule of annual contracts.97 Wood’s treatise led to nationwide adoption of the rule, although scholars now almost unanimously agree that his statement was “not supported by the authority upon which he relied, and that he did not accurately depict the law as it then existed.”98 The reasoning for the widespread adoption of the rule by state courts of the day is well illustrated in the dispute between a businessman named L. Payne and a railroad company, the Western and Atlantic Railroad Company.99 For reasons not divulged in the Supreme Court of Tennessee’s written opinion, a dispute arose between the parties which resulted in the railroad company prohibiting any of its employees from transacting business with Payne, at peril of their jobs.100 In its opinion on the subsequent tort action, the court conceded that the railroad company’s actions had deprived Payne of customers and destroyed his business, and was thus “censurable.”101 The court went on to conclude, however, that “…men must be left, without interference to buy and sell where they please, and to discharge or retain employes [sic] at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se.”102 Relying heavily on the notion that employees are free to choose their employers, the court applied the same highly formalistic “mirror image” rule that formed the basis of the law of offer and acceptance103 to reason employment should be at the will of both parties.

The opinion is heavy with reluctance. The majority acknowledged, for example, that “great loss” may result from this rule, and that corporations and individuals can do “great mischief and wrong” that may seriously injure or ruin others, but ultimately held that in the absence of illegality, i.e., a statute, the law was powerless to stop employment at will.104 In an eerily omniscient dissent, Justice Freeman warned of the rising size of corporations in America, and their ability to command large numbers of employees.105 If employers could dictate where employees traded, he reasoned, what was to stop them from coercing employees to cast their votes a certain way, or to do anything not strictly criminal?106 In Freeman’s analysis, applying the “mirror image” rule yielded a very different result than the majority opinion:

Employment is the means of sustaining life to himself and family to the employee, and so he is morally though not legally compelled to submit. Capital may thus not only find its own legitimate employment, but may control the employment of others to an extent that in time may sap the foundations of our free institutions. Perfect freedom in all legitimate uses is due to capital, and should be zealously enforced but public policy and all the best interests of society demands it shall be restrained within legitimate boundaries, and any channel by which it may escape or overlap these boundaries, should be carefully but judiciously guarded.107

Thus, just as employees worked for moral reasons, so should employers act for moral reasons. The employment at will rule has now been adopted and codified by all states108 except Montana, which, as discussed infra, has expressly eschewed the rule.

Any harm predicted by Justice Freeman was probably many years away, as the frontier to the West had not yet closed, and most people grew up on working farms and could seek alternative employment when terminated for whatever reason. An exception were the craftsmen whose livelihood depended not on farming, but on their skills. In order to protect themselves from harsh applications of the employment at will doctrine, they formed some of the country’s earliest trade unions.109 As the eighteenth century came to a close, printers,
carpenters, cabinet makers, and cordwainers (shoemakers) all went on strike in efforts to improve working conditions.110

The reaction from the courts through the early part of the twentieth century to union activity was not kind,111 as unions were seen as a breeding ground for Communist and other worrisome activities.112 This judicial hostility ended with the Great Depression and the resulting New Deal,113 which saw governmental attitudes towards unions shift towards one of encouragement. The stigma traditionally associated with not having a job was ameliorated, even eviscerated, by the widespread unemployment that accompanied the Great Depression. Structural unemployment, as a natural byproduct of a modern economy, contributed to the shaping of these attitudes. While these forces indicated a trend towards employee-friendly policies, the employment at will doctrine survived relatively unscathed.

The Second World War saw another shift in attitudes towards organized labor. Labor leader John L. Lewis helped create the Congress of Industrial Organizations in the 1930s when his former union, the American Federation of Labor, was unresponsive to the needs of lower wage factory workers.114 The United Mine Workers, which he led for over 40 years,115 went on to strike twice in violation of its own no-strike pledge.116 The resulting consequences to homes, trains, and industry that relied heavily on coal were devastating.117 The 1947 Taft-Hartley Act was passed as a result of Lewis’ activities, and labor has not fully recovered since then.118 By 1973 the number of union members as a percentage share of the U.S. workforce was down to 24%,119 and by 2003 it was down to 13%.120 Even as union membership went down, however, the number of workers who say they would vote for a union at their company increased, from 30% in 1984 to 47% in 2003,121 perhaps a reflection of the worker insecurity engendered by the employment-at-will rule, never really absent from the courts.

B. Exceptions to employment at will: (the break in the dam)

The employment at will doctrine, given to us by the courts, has resulted in employees helpless to seek redress when their employment is terminated even in the face of “great loss” caused by “great mischief and wrong”122 by employers. The harshness of this application led to an eventual softening of the rule as courts created exceptions to the rule. Almost immediately after the exposition and widespread adoption of Wood’s Rule, for example, the federal government passed the Lloyd-La Follette Act that protected federal employees from the rule.123 Many state governments also exempt their own employees from the employment-at-will rule.124

Perhaps the earliest signs the employment-at-will doctrine was softening came immediately after the Second World War, when women entered the workforce in droves.125 The employment-at-will doctrine meant that women were powerless to confront sexual exploitation in the workplace, as they could lose their jobs for any reason whatsoever. This placed women in the position of having to choose between their sexual integrity and their economic well-being.126 From these sorry beginnings, the law of sexual harassment in the workplace began to take root, finding its seed in Title VII of the Civil Rights Act.127
Modern jurisprudence ameliorating the employment at will rule can be divided into two categories: the “public policy” exception, and various state and federal statutes that protect workers from discharge.

**The public policy exception** The public policy exception to the employment-at-will doctrine can be traced to a California case from 1959 that held that an at-will employee could not be fired for refusing to commit perjury as directed by his employer. To rule otherwise, the court reasoned, would be to “encourage criminal conduct” and would “contaminate the honest administration of public affairs.”

More than two decades later, the California courts expanded the exception by declaring that an action for wrongful discharge is a tort (with accompanying tort remedies), and not, as some businesses argued, solely based on breach of contract.

Under public policy exception analysis, courts generally require plaintiffs to meet four elements:

(a) a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the **clarity** element);

(b) that dismissing employees under the circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy (the **jeopardy** element);

(c) the plaintiff’s dismissal was motivated by conduct related to the public policy (the **causation** element); and

(d) the employer lacked overriding legitimate business justification for the dismissal (the **overriding justification** element).

While still narrowly construed by most courts, the public policy exception has emerged as the strongest weapon the courts can wield in the battle to ameliorate the effects of the employment at will doctrine. Courts in all but six states have now found public policy exceptions to the employment at will doctrine.

Other situations where courts have found a public policy exception include the termination of a doctor employee for refusing to work on a project to develop saccharin (the safety thereof the plaintiff believed to be medically debatable), termination of an employee for refusing to date the factory foreman, termination where the employee refused to take a polygraph, termination where the employee reported illegal activity because of a statutory duty to do so, and where a bartender was fired for refusing to serve a visibly intoxicated person.

In some states, the public policy exception has developed alongside a related doctrine: implied covenant of good faith and fair dealing. In these cases, an employment contract, either implied or express, has governed the relationship between employee and employer. Even if the contract specifically provides for termination at the will of the employer, courts have generally held that employers must act in good faith when terminating employees. In one famous example, the Massachusetts Supreme Court held that a defendant corporation that fired an employee under an at-will clause in an employment contract prior to paying a large bonus due to the employee had failed to act in good faith.

In another intersection between contract law and the tort of wrongful discharge, some courts have read an implied employment contract (and thus, employment for a definite term as opposed to at-will) from the conduct of the parties. Such a contract can be demonstrated by an express contract, a clear and unequivocal expression regarding job security, whether oral or written, or where an employer’s policies or procedures instill a legitimate expectation of job security.

While the public policy exception to the rule of employment-at-will has been widely adopted and provides employees some modicum of protection from unfair terminations, caution is called for in placing too much stock in the courts and their ability to fashion judicial remedies for a judicially-created problem. In one case, for example, a court refused to find a public policy exception when an employee was fired when he attempted to correct “misleading” and “false” information.
given by his employer to the outside world.\textsuperscript{144}
It took almost twenty years and several high profile business scandals to give rise to the Sarbanes Oxley Act and its requirements for key employees to ensure corporate truth in financial statements.\textsuperscript{145}

\textbf{State and federal laws protecting employees from discharge.} In addition to the judicially-created public policy exception to the employment-at-will doctrine, the federal and state legislatures have also contributed towards its amelioration. At the federal level, perhaps the most significant, and most often cited, exception are the protections provided by Title VII of the Civil Rights Act of 1964 against discrimination because of race, color, religion, sex, or national origin.\textsuperscript{146} The “because of…” sex” language has been judicially interpreted to prohibit sexual harassment as a result of \textit{quid pro quo} or a hostile environment.\textsuperscript{147}

In addition to Title VII (and its predecessor, the Civil Rights Act of 1870),\textsuperscript{148} however, a whole host of federal laws today now serve to restrict an employer’s right to unilaterally terminate an employee for any reason. These include the Fair Labor Standards Act of 1938,\textsuperscript{149} the Anti Kickback Act of 1946,\textsuperscript{150} the Labor Management Relations Act of 1947,\textsuperscript{151} Age Discrimination in Employment Act of 1967,\textsuperscript{152} the Consumer Credit Protection Act of 1968,\textsuperscript{153} the Occupational Safety and Health Act of 1970,\textsuperscript{154} the Rehabilitation Act of 1973,\textsuperscript{155} the Employee Retirement Income Security Act of 1974,\textsuperscript{156} the Drug-Free Workplace Act of 1988,\textsuperscript{157} the Employee Polygraph Protection Act of 1988,\textsuperscript{158} the Americans with Disabilities Act of 1990,\textsuperscript{159} and the Family and Medical Leave Act of 1993.\textsuperscript{160}

State legislatures have been even more active in protecting an employee from the effects of the employment-at-will doctrine. Many of the state laws passed are codifications of judicial decisions, or attempts to help the judiciary by declaring what is, in effect, public policy of the state. State laws have been passed, for example, that prohibit employers from retaliating against employees for reporting violations of state or federal law,\textsuperscript{161} employees holding or expressing political opinions or exercising political rights,\textsuperscript{162} employees serving on National Guard duty,\textsuperscript{163} employees serving on jury duty,\textsuperscript{164} and for employees filing workers’ compensation claims.\textsuperscript{165} The most extreme example of state action in this area is Montana, which passed the Wrongful Discharge from Employment Act of 1987, barring discharge without good cause, in retaliation for refusing to violate public policy, for reporting a violation of public policy, or in violation of the express provisions of a written personnel policy.\textsuperscript{166} On the other end of the spectrum is Arizona, which passed a law to declare employment-at-will the law of the state, and prohibiting the judiciary from declaring otherwise.\textsuperscript{167}

\textbf{C. Plant closing laws}

Plant closing laws also provide an interesting insight into modern attitudes on the significance of work. Plant closings, a generic term referring to the closure of factory and non-factory sites, were epidemic in the 1970’s.\textsuperscript{168} States passed plant closing laws in response to the demands of the gigantic number of people who lost their jobs; an estimated 32 to 38 million people lost their jobs in the United States due to permanent plant closures in the decade of the 1970’s.\textsuperscript{169} Twenty-two states passed plant closing laws between 1981 and 1987 alone.\textsuperscript{170} National plant closing laws were enacted in Great Britain, Japan, Sweden, West Germany, and Canada.\textsuperscript{171} The Canadian law, for example, required companies contemplating a plant closure or major layoff to provide two months advance notice or an equivalent amount of severance pay.\textsuperscript{172}

Finally, in 1988, Congress passed the Worker Adjustment and Retraining Notification Act (WARN) as a part of trade reform legislation.\textsuperscript{173} The acronym “WARN,” of course, should actually have been changed to “WN,” because the “adjustment” and “retraining” portions of the act were gutted by Congress before passage. President Reagan allowed the act to become law without his signature. It provides, with some exceptions, that companies with over 100 employees must give their employees sixty days notice of any major layoff or plant closure.

For comparison, a study of the various state laws in place by 1987 showed that states not
only required notice to workers but that various states also required severance pay, outplacement assistance, retraining and education assistance, and continuation of health insurance.\textsuperscript{174} Eleven states required retraining and education assistance for displaced workers.\textsuperscript{175} Five states mandated that the company closing the plant provide aid to employee buyouts.\textsuperscript{176}

**D. Comparison to E.U.**

Employment security in the European Union is much greater than job security in the United States. Most of the E.U. countries provide for discharge only for cause after a statutorily fixed probationary period.\textsuperscript{177} Some of the E.U. countries require, for instance, that companies of a certain size have members of labor on the company’s board of directors.\textsuperscript{178} Additionally, as one study confirmed, while American workers are experiencing a decline in privacy in the workplace, EU countries have taken the lead in establishing broad privacy rights.\textsuperscript{179}

**E. Summary – Why Americans need greater job security**

As modern American courts struggle to come to grips with the harshness of the employment-at-will doctrine (a struggle punctuated with the occasional tussle with an aggressively pro-business legislature), two themes emerge. First, there is a growing recognition that employment may be a “fundamental right.” Whether the law recognizes it or not, employment is the main economic lifeline for almost all Americans. The reluctance to adopt employment as a fundamental right stems from the private nature of employment, as opposed to other fundamental rights (free speech, exercise of religion, etc.) which are more intrinsically tied with governmental action. Courts should not hide behind Wood’s Rule, however, when confronted with the modern reality of work. Just as courts have expansively interpreted Title VII to interfere with a completely “at-will” employer-employee relationship, courts should recognize the fundamental importance of employment to average Americans.

Second, and in the alternative, rather than declare a fundamental interest in employment, the courts may adopt the E.U. model of property right in employment.\textsuperscript{180} In 1974, the U.S. Supreme Court ruled, for example, that federal employees have a “property” interest in their jobs and the due process provisions of the Fifth Amendment apply before that property can be taken away.\textsuperscript{181} That property right should be extended to all employees, not just those of the federal government, and the nature of that property right should be defined and articulated. As a property right, the due process and equal protection components of the Fourteenth Amendment would automatically apply, and the employment-at-will rule would finally be subject to a constitutional muzzle.\textsuperscript{182}

Neither of these outcomes will sit well with more aggressive business-oriented politicians or some courts that have zealously preserved the right of employers to fire their employees at will. Businesses, the argument goes, need the flexibility to treat labor the same as any other sort of capital or asset.\textsuperscript{183} The great hinted fear is that if a business runs into rocky waters, it may not be able to shed employees due to the greater employee protection, and the weight of the employees would ensure the business’s doom. Such dark predictions are red herrings. The treatment of employment as a fundamental right or as property does not mean that employers would be powerless to discharge employees when necessary; it would simply place a check point of fundamental fairness in front of that process.

**III. ATTITUDE TOWARDS WORK**

**EMPLOYERS SHOULD EMBRACE TO BE SOCIA LLY RESPONSIBLE**

“Who saw life steadily, and saw it whole...”\textsuperscript{184}

To see life steadily and see it whole is a challenge for each of us; in short, it is the perspective that Aristotle argued is characteristic of the
moral position. Aristotle argued for a “golden mean” which avoided extremes and was the path of virtue.\textsuperscript{185} Other commentators phrased it this way:

\textit{Ethics [emphasis in original] is, first of all, the quest for, and the understanding of, the good life, living well, a life worth living. It is largely a matter of perspective: putting every activity and goal in its place, knowing what is worth doing and what is not worth doing, knowing what is worth wanting and having and knowing what is not worth wanting and having. It is keeping in mind the place of a business career in our life as a whole, not allowing limited business successes or even business success in general to eclipse our awareness of the rest of life.}\textsuperscript{186}

This is no small task and a goal not easily reached. We can see from the above discussion that Western Civilization has historically defied maintaining a balanced perspective on the topic of one’s work.

If we were to construct a continuum of attitudes toward work from the preceding material, we might start with the attitude that work is a curse imposed upon us for our falleness. The next position on the scale might be that work is a necessary evil imposed upon those of us who wish to eat. At the far end of the continuum, we might put the attitude that work is an opportunity for us to contribute to our culture while simultaneously achieving our potential. The difficulty arises when we attempt to fill in the middle of the scale; the mid-section seems blank — at least from a review of the historical attitudes of Western man.

Perhaps, a more uplifting view of work is available from an English economist who worked in the Third World. E. F. Schumacher argued, based on his concept of Buddhist Economics, that the function of work “is at least threefold: to give a man a chance to utilise and develop his faculties; to enable him to overcome his ego-centredness by joining with other people in a common task; and to bring forth the goods and services needed for a becoming existence.”\textsuperscript{187} Further, Schumacher adds that Buddhist economics must be very different from modem materialism, since “the Buddhist sees the essence of civilisation not in the multiplication of wants but in the purification of character.”\textsuperscript{188} Character is formed primarily by work and “work, properly conducted in conditions of human dignity and freedom, blesses those who do it and equally their product.”\textsuperscript{189}

Moral philosophy embraces three (3) major approaches to ethical problems: (a) consequential ethics; (b) ethics of duty; and (c) the ethics of virtue.\textsuperscript{190} All three have distinct, at least in theory, approaches to the question of how can we know whether an act is good/moral or bad. The consequential position is that an act is good if it produces good results -- frequently measured by utility. Ethics of duty measure the quality of the act by moral yardsticks constructed upon rules of moral duties. If the act measures up to the actor’s duty, it is moral. Finally, the ethics of virtue focuses on the character of the actor on the premise that we tend to become what we do. Hence, we are always in the process of defining ourselves. Our objective should always be to become a good person, “especially the kind of person who performs right actions by habit and by desire.”\textsuperscript{191} A good act, then, would be one that at a minimum complies with the rules, promotes good ends, and - most importantly - moves us in the right direction on becoming a good person.\textsuperscript{192}

These different approaches to ethics seem bewildering at first; but one synthesis is that they all tend to promote human dignity. Utilitarianism strives to increase the amount of happiness over unhappiness; Kant asserts that we must always treat humanity whether in ourselves or in others as an end and never merely as a means; and Aristotle argues that we should seek to define ourselves as one who habitually and by desire performs right
actions - actions which make us function better as human beings. Thus, at this point, we can declare that work that degrades human personality, work that causes pain or interferes with someone reaching her potential would tend to violate basic ethical precepts. But aside from that rather obvious exclusion, what types of attitudes should a socially responsible employer seek to foster toward work among its employees? For our purposes, a socially responsible employer is one who seeks more than profit maximization in making business decisions. It is an employer who seeks to be a good corporate citizen by contributing to the general welfare of the larger community or society even though it may mean some trade-offs or concessions in the area of profit-making.

Motivation theory teaches that the factors affecting job performance fall into two categories: (a) hygiene factors; and (b) motivation factors. Absence of hygiene factors leads to dissatisfaction and unhappiness; but presence of hygiene factors does not motivate. Absence of hygiene factors can prevent motivation; but — according to the theory — only motivational factors can motivate. Motivation factors include achievement, recognition, responsibility, advancement, and the characteristics of the job. These factors tend to be associated with esteem or ego needs and with self-actualization. The findings of the Michigan study seem to be consistent with this theory.

What attitudes then would a socially responsible employer foster among its workers? We think there are five beliefs that an employer would want to encourage in its workers: (1) moderation in the amount of work sought and expected; (2) pride in the work product and in the employing organization; (3) a meaningful voice in the management and direction of the work; (4) a measure of freedom in the performance of the work; and (5) conditions of human dignity predominate in both the performance of the work and in the organizational climate.

These five attitudes toward work represent midpoints between deficiencies and excesses, similar to Aristotle’s virtues. Thus, the belief that the amount of work expected of an employee should be moderate, neither too little nor too much, is a mean in the Aristotelian sense. Such an attitude is supported by the argument that too little work breeds boredom and wasting of time whereas too much work denies the opportunity for craftsmanship and tends toward employee burnout. Additionally, too much work tends to encourage employees to neglect their family and community obligations. Social research supports the notion

**We think there are five beliefs that an employer would want to encourage in its workers: (1) moderation in the amount of work sought and expected; (2) pride in the work product and in the employing organization; (3) a meaningful voice in the management and direction of the work; (4) a measure of freedom in the performance of the work; and (5) conditions of human dignity predominate in both the performance of the work and in the organizational climate.**
of balance with a finding that a meaningful public life cannot be maintained without a rewarding private life, and vice-versa.198

Second, pride in the work and the organization can be viewed as a midpoint between indifference or apathy, a deficiency, and arrogance or boastfulness, an excess. Pride in one’s work fosters craftsmanship and can be linked to a positive feeling about employment. It is associated with motivated employees who find their ego needs being met on the job. Unfortunately, as Freud points out this type of psychic pleasure from work “is not applicable generally; it is accessible to only a few people.”199 It is probably fair comment that such pleasure is more readily available in today’s society with its significantly higher education levels than it was in Freud’s day. Improving corporate attitudes toward work and workers might significantly extend the availability of such ego satisfaction.

Third, assuring that employees have a voice in the managing and conditions of work has been seen as one way to increase employee ethics and loyalty.200 Voice is different than control; and, in a sense, voice is also similar to Aristotle’s concept of a mean because it is between a deficiency, exclusion from the decision process or disenfranchisement, and an excess which would be domination or autocracy. Workers need a meaningful voice in their work to avoid alienation.

Fourth, we believe freedom is another quality a socially responsible employer would seek to encourage in its employees. This freedom would include freedom to leave if the employee believed it was in his or her best interest as well as some freedom of choice surrounding the work and the conditions of work. Employees who have no exit option are not in a good position to stand up for their values or to contribute to improving the ethical climate of the organization.201

Finally, employees should feel that promoting and maintaining human dignity is one of the goals of the organization and that their work, in particular, is conducted under conditions that respect their own dignity as human beings. This again avoids the extremes of deficiency of human dignity, conditions which would be exploitive and de-humanizing, and excessive promotion of human dignity which could be characterized as grandiosity. Schumacher’s words are echoed here: “and work, properly done in conditions of human dignity and freedom, blesses those who do it and equally their product.”202 Even without the mysticism, it seems clear that work done in conditions of freedom and dignity will be superior to work done in the absence of freedom and dignity.

**CONCLUSIONS**

The history of attitudes toward work in Western Civilization indicates substantial shifts and swings between two somewhat polar views: (a) that work is a curse visited upon us by the Creator and involves an unavoidable task for those who wish to eat; and (b) that we are what we do and our inherent value is tied up in our careers.

American law, which made the dubious choice of establishing employment-at-will as the dominant rule of employment at the end of the 19th century, has begun its

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<td>&quot;Let him who would not work not eat&quot;</td>
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**Notes:**

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laborious shift away from that rule with mostly common-law decisions carving out important exceptions to the rule. Courts have recognized public policy exceptions, employment manuals as implied contract exceptions, and covenant of fair dealing exceptions. Courts have also expanded the range of cases qualifying for tortious discharge treatment. A long-term view might well be to foresee the extinction of employment at will as the dominant rule before the end of the 21st century when either the exceptions dominant the rule or Congress steps forward and legislates an employment right similar to what the European Union has already adopted. In short, the judiciary may be ahead of the legislative branches in recognizing the economic reality that work is most Americans’ most important economic relationship.

We suggest that an Aristotelian approach to attitudes toward work might generate a set of five attitudes or conditions which a socially responsible employer, that is a good corporate citizen with a desire to contribute to the general welfare, should encourage in its organization and among its employees. These attitudes, if adopted by employers, are likely to result in satisfied and happy workers who feel they have a good balance between their work and family lives. Those conditions or attitudes are: (1) moderation in the amount of work sought by employees and expected by the employer; (2) pride in the work product and in the employing organization; (3) a meaningful voice in the management and direction of the work; (4) a measure of freedom in the performance of the work and in the employment generally; and (5) conditions of human dignity should predominate in both the performance of the work and in the organizational climate/culture. Those conditions, at least preliminarily, might, if widely adopted, help establish a middle position on the continuum of attitudes toward work that could improve the quality of work life, and indeed life itself, for us all. ▲

ENDNOTES

1. See, e.g., Sam Keen, Fire in the Belly: On Being a Man 70 [Bantam Books’ 1991] (wherein he asserts “War, work, and sex, the triad of male initiation rites, form the pillars of male identity”).
2. See infra, material accompanying notes 15 to 92.
6. Talk of the Nation: Overtime [National Public Radio broadcast, Nov. 26, 2003] (quoting Alex Kein, research consultant and author of a report titled “Overtime in Extended Hours Operations: Benefits, Costs, Risks and Liabilities”). Mr. Kein also makes the point that more and more workers feel pressure to work overtime, as the manufacturing and retail sectors tend to operate on longer hours and see higher absenteeism and turnover, thus creating unstaffed shifts that need to be filled. Id. But see Gregg Easterbrook, The Progress Paradox: How Life Gets Better While People Feel Worse [2004] [documenting that in 1850 Americans worked 66 hours a week, 53 hours in 1900 and 42 hours today]. See Press Release, United States Department of Labor, Bureau of Labor Statistics, International Comparisons of Manufacturing Productivity and Unit Labor Cost Trends, Revised Data for 2002 (Mar. 26, 2004) [on file with author].
7. Survey conducted for a study by the Pew Research Center for the People & the Press.
8. See James Patterson and Peter Kim, The Day America Told the Truth: What People Really Believe About Everything that Really Matters 146-150 [Prentice Hall Press 1991] (wherein 58% of the workers interviewed agreed that managers took credit for work done by others and a $500,000 per year executive admitted that his decisions were influenced more by his desire for a bonus than for concern for the people in his company. To quote, “I was bought”). A recent AP poll revealed a growing amount of workplace stress experienced by employees. See Will Lester, Poll: Most Workers Satisfied, Stress, Benefits, Concern Some, CINCINNATI ENQUIRER, Sept. 5, 2004, at A13 [hereinafter “AP Poll”]. 34% of the 589 polled said that they were dissatisfied with the amount of stress in their jobs. Id.
9. See Schor, supra note 5, at 10-12. See also Talk of the Nation, supra note 6 (author of study discusses findings that increased overtime leads to health problems)
physical stress, poorer eating habits, sleep deprivation), safety problems (tired workers pay less attention on the job and are more prone to accidents), and productivity problems (workers perform poorly when they are tired and reach a point of diminishing returns on their productivity).


13 See K. Poll, supra note 10 (among the 589 polled, the ones most likely to be satisfied were workers who felt they had a good balance between their work and family lives).


18 Ecclesiastes 38:24-25 (Revised Standard Edition with Apocrypha).

19 See generally Venerable Dr. W. Rahula, What the Buddha Taught (Haw Tai Foundation Bangkok 2002) [1938].

20 Id. at 80 (quoting from the ancient Pali text Sigalo-sutta). According to the text, Buddha taught lay people should worship the six directions of east (parents), south (teachers), west (wife and children), north (friends, relatives and neighbors), nadir (servants, workers and employees) and zenith (religious men). Id. at 78.

21 Id. at 80.

22 Id. at 82. Unlike popular thought, the Buddha taught lay people to improve their economic condition, not to discard wealth. A story from the ancient texts tells of how a lay person asked Buddha to teach doctrines that would be conducive to happiness. The Buddha replied that there are four things which are conducive to a man’s happiness in this world. First, he should be skilled, efficient, earnest and energetic in whatever profession he is engaged, and know it well. Second, he should protect his income from thieves. Third, he should have good friends who are faithful, learned, virtuous, liberal and intelligent, who will help him along the right path away from evil. Fourth, he should spend reasonably, in proportion to his income, neither too much nor too little. He should not hoard wealth avariciously, nor should he be extravagant — he should live within his means. Another story tells of how Buddha counseled a great banker that a layman has four kinds of happiness. One is to enjoy economic security by just and righteous means. Two is to spend that wealth liberally on himself and his family, friends, and relatives and on deeds of merit. Three is to be free from debt. The fourth is to live a faultless and pure life without committing evil in thought, word or deed. See id.


25 DeGrazia, supra note 3, at 431.


29 DeGrazia, supra note 3, at 40.

30 Arendt, supra note 26, at 79.

31 Id. at 77-88, especially note 3 at 80.

32 This illustration would be accurate if the teacher taught “for a living” but wrote novels as an art form, an effort over and above that needed for her daily bread. Although common usage will continue to treat “work” and “labors” as synonyms, some increased sensitivity to this distinction which flows from ancient usage and exists across all the languages of Western Europe may help us better understand the materials from the ancient world.

33 DeGrazia, supra note 3, at 41.


35 Neff, supra note 28, at 47.

36 DeGrazia, supra note 3, at 41.

37 DeGrazia, supra note 3, at 41.

38 Neff, supra note 28, at 47.

39 DeGrazia, supra note 3, at 41.


41 ‘Idle hands do the Devil’s work’ is one cliché expressing this notion which conflicts with the praise of leisure found in the writings of the ancients. Frequently, Issac Watts, Against Idleness (1720) is cited for this sentiment as in Burton Stevenson, Home Book of Proverbs, Maxims, and Familiar Phrases 1216 (MacMillan Co. 1956). Similar sentiments, however, have been expressed by various writers in every age ranging from Chaucer in the 16th century to a Pharaoh in Egypt about 2500 B.C.

42 See generally Joseph Canning, A History of Medieval Political Thought 300-1450 19 (Routledge 1996).


45 Id.

46 H.G. Haile, Luther: An Experiment in Biography 153-54 (Doubleday & Co., Inc. 1980).

47 Id. at 94.


52 For more on John Wesley, see generally Stephen Tomkins, John Wesley: A Biography (Lion Publishing 2003) and Kenneth Collins, John Wesley, A Theological Journey (Abingdon Press 2003).


54 Maximin Piette, John Wesley in the Evolution of Protestantism 374-376 (Sheed and Ward, Ltd. 1979) [1937].


56 Stanley Edward Aying, John Wesley 250 [Collins 1979].

57 Id. at 260-61.


59 For an excellent discussion, see generally Moisei Postone, Time, Labor and Social Domination: A Reinterpretation of Marx’s Critical Theory (Cambridge University Press 1993).


61 See Jon Elster, An Introduction to Karl Marx 41 [Cambridge University Press 1986].

62 See id.

63 Karl Marx’s manuscript of 1844, quoted in Robert C. Solomon and Kristine Hanson, Above the Bottom Line: An Introduction to Business Ethics 40 [Harcourt, Brace, Jovanovich, Inc. 1983].

64 See id.


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ENDNOTES

70 Id. at 26.
71 Id. at 27.
72 Id. at 21.
73 Jeremy Bentham, Jeremy Ben-
74 Studs Terkel, Working xiii [Avon Books, 1972, 1974]. A similar perspective is offered by Alain de Botton, who wrote recently of the “conflicting imperatives in the workplace: an economic imperative that dictates that the primary task of business is to realize a profit, and a human imperative that leads employees to hunger for financial security, respect, tenure and even, on a good day, fun.” Alain de Botton, Workers of the Word, Relax, N.Y. Times, Sept. 6, 2004, at A17. De Botton’s conclusion is that workers should temper their expectations that work will deliver happiness. Id. E.F. Schumacher, Small is Beautiful: Economics as if People Mattered (Allen & Unwin, Ltd. 1954).


76 Row 1 973).
77 Matthyssen says: “Once Id.
78 Matthyssen says: “Once Id.
79 Matthyssen says: “Once Id.
80 Matthyssen says: “Once Id.
81 Matthyssen says: “Once Id.
82 See AP Poll., supra note 10, at 20. See AP Poll, supra note 10 (among the 589 polled, the ones most likely to be satisfied were workers who felt they had a good balance between their work and family lives).

84 This disposition to admire, and almost to worship, the rich and powerful, and to despise, or, at least, to neglect persons of poor and mean condition, though necessary both to establish and to maintain the distinction of ranks and order of society, is, at the same time, the great and most universal cause of the corruption of our moral sentiments. That wealth and greatness are often regarded with the respect and admiration which are due only to wisdom and virtue, and that contempt, of which vice and folly are the only proper objects, is often unjustly bestowed upon poverty and weakness, has been the complaint of moralists in all ages.” Adam Smith, The Theory of Moral Sentiments 61-62 [D.D. Raphael and A.L. Mache, eds., Liberty Press 1982 reprint of 1767 Oxford University Press].
95 Payne v. Western & A. R.R. Co., 81 Tenn. 507 (Tenn. 1884).
97 See Payne, supra note 99, at 519.
98 Id. at 543.
99 Id. at 544.
102 See Adair v. U.S., 208 U.S. 161 (1908) and Coppage v. Kansas, 236 U.S. 1 (1915) [both cases overturned state and federal laws that forbade employers to require employees to agree not to join a union]. These cases stem from a period of U.S. Supreme Court history known as the “Lochner” era [so named after Lochner v. N.Y., 198 U.S. 45 (1905)] in which the Court invalidated almost two hundred economic regulations from 1905 to the mid-1930’s. Some of the statutes overruled were decidedly pro-employee, such as statutes that set maximum working hours for bakers [Lochner, infra] and minimum wages for women (see Adkins v. Children’s Hospital, 261 U.S. 525 (1923)). Adair and Coppage were subsequently overturned [see NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)], thus ending any constitutional protection for the employment at will doctrine.
103 See Conrad Black, Franklin Delano Roosevelt, Champion of Freedom 306 (2003) [attributing the phrase to Roosevelt]
For instance, in Germany, employees have guaranteed rights through the National Works Constitution Act to "codetermination" by way of representation on the boards of large companies. Holley and Jennings, supra note 177 at 616. See also interview of Daniel Rush Finn, Ph. D. Economist at St. John’s University, Collegeville, Minnesota in God and Money [CNEWS, 1988].

Property rights are not created by the Constitution, but by existing rules or understandings that stem from an independent source, such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. See Board of Regents v. Roth, 408 U.S. 564, 577 (1970). As such, the legal framework for finding a property right in the right to work is not without precedent.

For a fairly persuasive argument that the micro-economic treatment of human labor as fungible with capital and equipment at the margins is morally indefensible see LaRue Tone Hosmer, The Ethics of Management 33-54 (1987).


See, e.g., Aristotle, The Ethics of Aristotle: The Nicomachean Ethics, trans. by J.A.K. Thomson, [Harmondsworth, Middlesex, England: Penguin Books, ltd., 1953, revised ed. 1976 by Hugh Tredennick] at pp. 101-107. At p. 102, Aristotle declares that "It [virtue] is a mean between two kinds of virtue, one of excess and the other of deficiency,..., virtue discovers the mean and chooses it. Thus from the point of view of its essence and the definition of its real nature, virtue is a mean; but in respect of what is right and best, it is an extreme."


Schumacher, supra note 75, at 54-55. Id. at p.55.

Id.
