Employment and Employee Rights

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Employment and Employee Rights
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Preface

This book is the outcome of a long series of studies on employee rights. In 1985, having written a book on employee rights, one of the authors optimistically speculated that many of the issues that book explored would no longer be relevant in 2000. Affirmative action and equal opportunity initiatives would have by and large solved inequalities in the workplace, and the “glass ceiling” phenomenon would be a thing of the past. Whistleblowing legislation would be in place, the Privacy Act would cover employers in the private as well as the public sectors, and threats to worker safety would occur only in the remotest parts of the economy. The elusive goal of workplace due process would have been achieved, and most places of work would encourage more participatory management.

Today, in 2002, these goals have not been achieved. While there is increased focus on diversity, and while there is much less discrimination in hiring, glass ceilings for women and minorities are still in place for senior positions in many firms. Due process in the private sector remains elusive, whistleblowers are often treated as pariahs, and privacy throughout the political economy in every area is practically nonexistent. We have seen an increased focus on employee teams, and more employee participation on the plant floors and assembly lines. The reduction and flattening of managerial hierarchies means that employees and middle managers have increased responsibilities. At the same time layoffs and other forms of workforce reductions have increased to such an extent that the notion of employee loyalty to a particular firm is no longer a consideration. The need for further work in this area has inspired us to write this book.

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This is a book about rights in the workplace. Although much of the literature on employment focuses on employee rights, we shall consider the rights of both employees and employers. We argue that the recognition and protection of employee and employer rights in the workplace, even in the absence of Constitutional or other legal directives, both coincides with our considered moral judgments and benefits multiple stakeholders, including employers, employees, shareholders, and firms themselves.

In particular, this book is about rights in employment in the United States. We defend this focus from two perspectives. First, because employment rights are not top priorities in the private sector of the economy in this country, it would be inappropriate for us, as American thinkers, to critique employment practices elsewhere. Second, it is important to target practices in the United States for analysis since these employment practices are commonly exported and copied around the world, not merely by American-based multinational corporations but also by other governments and other international and global corporations. As in other areas of commerce, the United States is often held up as a role model for free-market economic growth and well-being. A book such as this about the shortcomings as well as positive features of the American model for employment is an important step toward preventing the export of the employment-related ills that already plague the American workplace.

In the first part, Rights, Employee Rights, and Employment-at-Will, we discuss the moral and legal landscape and traditional assumptions about rights in employment. Chapter 1 begins with a theoretical exposition of rights theory interpreted through the lens of a postmodern conception of social construction. This point of view acknowledges that rights theory is a historically late Western frame-
work for evaluating human behavior. We nevertheless argue that rights talk, while parochially developed, is a widely accepted mode of internal and cross-cultural evaluation, and human rights are thus provisional candidates for cross-cultural or global principles. Still, as we point out in the last section of the chapter, despite American political and legal preoccupations with rights, rights in the workplace are not part of that preoccupation. Indeed, employment is often thought of as a purely economic, even a human, phenomenon.

Chapter 2 focuses on the legal background for employee rights. We begin by sorting out traditional distinctions between the public and private sectors of our political economy, and the contemporary erosion of those distinctions. We point out that the Constitution and Bill of Rights protect political rights of individuals and corporations against the state, but do not apply, except with regard to egregious behavior, to private affairs such as within families or in employment in the private sector. This chapter sets the stage for chapter 3, which is devoted to a more extensive discussion of employment-at-will. Employment-at-will is a widely accepted common law American doctrine that, in the absence of contracts or laws, employment agreements are “at-will” arrangements that can be severed at any time, by either party, without any explanatory requirement or good reasons.

In the last chapter of this section, we show how employee rights, in particular the rights to due process and whistleblowing, can coexist with employment-at-will. Procedural due process is the requirement that some sort of mechanism be established to adjudicate employment practices, particularly those involving layoffs, firing, transfers and any practices for which there might not be mutual employee–employer consent. Substantive due process is the demand for good reasons for employment practices – reasons, we argue, that are required of any sound management activity. Chapter 4 ends with a discussion of Christopher McMahon’s proposal for workplace democracy, a proposal that would circumvent the need for establishing separate employee and employer rights.

In part II, New Models of Employment and Employment Relationships, we explore arguments for guaranteeing rights, particularly for employees, which are derived from relational, developmental, and economic bases. Chapter 5 investigates the function of roles and role morality in employment. Recognizing the limits of role morality invites new thinking about employment practices that goes beyond traditional approaches and can serve as a basis for deriving
employee rights. We suggest that employees are individuals with rights, not merely employees. As such, employees and employers not only have rights to be respected, but they also have responsibilities to each other and further obligations to act independently of their assigned roles.

Chapter 6 begins with an analysis of “meaningful work.” The importance of work being meaningful for each individual is often discussed, but what “meaningful” signifies is different for different people and different occupations. This is a term that is often used with sufficient vagueness so as to be vacuous. We shall nevertheless attempt to arrive at a definition that defines meaningful work as work that an individual enjoys, excels in, and has some control over—work that creates a sense of satisfaction and preserves employee autonomy and employment choices. In response to a demand for meaningful work, in these turbulent times with changing labor conditions, employers have developed models of outplacement and employability with the idea that well-trained flexible employees and managers can find meaningful work in a number of employment settings. The chapter ends with an examination of such practices.

We end part II with chapter 7, written with Norman Bowie, depicting a series of arguments defending employee rights as economic value added for employers and companies. Appealing to the writings of Jeffrey Pfeffer and others, we argue that reasonable employment practices—including careful hiring, continuous training, team management, decentralization and participation in management decision-making, high compensation, financial transparency, and employment security—create more economic value for companies that employment practices to the contrary.

Finally, in part III, The Evolving Workplace, we conclude by exploring new dimensions of employment. Chapter 8 outlines challenges to diversity, and we defend the position that equitable employment practices are both fair and also, if carried out properly, contribute to economic value added. Recent changes in the workplace, resulting from variables such as technology and the changing economic climate, make it even more important for employees to exercise control over their careers. Even with employment-at-will as the default rule, it does not mean that employee rights must be ignored. In chapter 9 we propose a model that incorporates growing workplace diversity, builds upon our understanding of the legal landscape, and expands upon our justifications for recognizing and protecting rights. Such a model introduces the notion that every
employee is his or her own contractor – that employment is not a matter of obedience or dependency, but should be thought of as a craft or profession with independent standards and justifications. The employee/professional in this model is neither a cost nor asset to the firm; rather he or she is an investor in a reciprocal employment exchange where independence, rights, and responsibilities of each party are equally respected. A professionalism approach to employment provides one vehicle through which employment rights can be protected. Professionalism not only ensures that employee rights, as well as employer rights, are protected, but also empowers employees to take charge of their careers so that they are able to protect their rights themselves. This creates economic value for the firm, and benefits multiple stakeholders as well.
The first section of this book discusses the American workplace and the underlying rationale for employee rights and presents some of the obstacles to their recognition and protection. Chapter 1 develops a theory of rights that takes into account postmodern theories of social construction and at the same time provides an evaluative mechanism for judging employee concerns. We will contend that morality does demand employee rights, but when employment is approached primarily as an economic phenomenon, that mindset does not always take into account the human dimensions of the phenomenon. In chapter 2 we will argue that the political distinction between the public and private sectors of our political economy contributes to thinking about private sector employment differently from civil service. This, in turn, affects how we think about employee rights in the private sector. In chapter 3 we analyze and critique the doctrine of employment-at-will (EAW), a common law principle that employment agreements are voluntary arrangements that can be terminated at any time, by either party, with or without reasons. Finally, chapter 4 explores the right to due process and develops the notion of a democratized workplace.
We shall begin by laying out a theory of moral rights from which we can derive rights in employment. Moral rights theory is a somewhat recent Western philosophical construction – a mental model or way of framing our experiences that postulates moral rights as evaluative mechanisms for judging and improving upon human behavior. Despite the parochial roots of moral rights theory, and keeping that qualification in mind, we shall conclude that moral rights are candidates for general evaluative principles, justifiable standards by which to judge a range of human phenomena including employment and employment practices.

In the second part of this chapter we begin to address a simple question: if moral rights make sense, at least in an economically-developed Western democratic republic such as the United States, a republic founded on a clearly stated Bill of Rights, why are employee rights an issue, particularly in such a situation? In this chapter, we suggest that conflicting notions of rights, particularly as linked to freedom and property, underlie disparate treatment of employees and inconsistent recognition of employee rights.

Rights talk\(^1\) has become a prevailing moral currency all around the world. In the United States, the Constitution and Bill of Rights outline protections for basic rights and freedoms for all citizens. This is not merely an American phenomenon, however. Similar protections surface on behalf of political rights to freedom and democratic participation, rights of the underrepresented such as women and minorities, religious freedoms, and even property rights in many countries around the world. Many of these rights are spelled out in
the United Nations *Universal Declaration of Human Rights*. The *Declaration* also proposes more specific economic rights such as rights to work, to form unions, to choose employment, to have safe and decent working conditions, to receive equal and fair pay, and even to receive an annual holiday.

Rights talk is grounded on a set of assumptions derived from moral theory. Among these is that human beings have intrinsic value, that is, they are of value because of their human status, regardless of particular historical, religious, or cultural situations or abilities. Because human beings have intrinsic value, it follows that they have certain basic rights, ordinarily called *human rights* or *moral rights*, to which everyone should be entitled. We call this set of rights moral rights or human rights because the rights involved are so fundamental and so inviolable that every person should be deemed to be entitled to them, regardless of his or her particular social, political, historical, or even cultural situation. According to rights theorists, they are universal equal rights (Werhane, 1985). The reality, though, is that human rights or moral rights often translate into entitlements that are not actually recognized and respected equally in every culture or society.

An assumption underlying the notion of rights concerns the classes of human beings for whom rights claims make sense. As Rainer Forst states, “Every conception of human rights – by which I understand fundamental rights every human being can claim as a human being – presupposes . . . a conception of the moral person who is the author and addressee of such claims” (Forst, 1999: 43–4). We ordinarily restrict the expression “moral person” to a limited class of human beings, not merely to all those who are capable of interests, but rather to those who can make self-conscious choices based on some acceptable reasoning processes. Persons can self-consciously analyze their own actions; they can, to at least some extent, control and change their own lives; they can deliberately positively or negatively affect the lives of others; and they can engage in self-evaluation and in the deliberative evaluation of others. In addition, they can give reasons – reasons that make sense to others – for their judgments and decisions. Moral persons are thus those human beings who can be held responsible for their choices and actions (Gewirth, 1996).

We also extend intrinsic value to less rational human beings, such as children, the senile, the mentally ill, and the mentally handicapped, not merely because they are “look alikes,” but because they
were formerly or are potentially moral persons. They have emotions, they are capable of interests, they feel pain, and they sometimes even exhibit a modicum of choice. They are not considered full-fledged moral persons, however, because they do not exhibit sufficient rationality and self-awareness to identify them with adulthood and a broad capability for free choice.

This moral intuition is reflected in American law, where not all human beings are guaranteed the same rights. Full entitlement to all legal rights is restricted to legal persons, just as full entitlement to all moral rights is restricted to moral persons. Within the law, guardians are appointed to protect the interests of human beings such as children who are not considered legal persons. Children, for example, cannot commit to binding contracts. Parents, however, or comparable guardians, can engage in contracts on their behalf (Sterk, 1988).

It follows, according to defenders of rights, that basic moral rights are those entitlements intended to respect and protect what is uniquely characteristic of human beings. A more specific set of rights – basic liberties – is restricted to persons. The right to life, the right not to be enslaved, and the right not to be tortured are ordinarily classified as basic moral rights of all human beings since, without respect for life or pain, human existence would be intolerable.

The right not to be enslaved is linked to a right of considerable importance in our society, that is, the right to freedom or liberty. While liberty might be said, arguably, to be a Western socially constructed idea, it nevertheless captures what appear to be a set of important if not unique human characteristics: our abilities to make, write, and change our own histories; to change creatively our ingrained habits and our political, social and even religious beliefs, both positively and negatively; and to manipulate, for good or for ill, our natural environment. Freedom or liberty is a basic moral right for persons, because without being able to exercise free choice, we would not be able to develop our full capabilities. The ability to reason, in turn, implicitly underlies our notion of freedom or liberty, because without this ability, we could not exercise our freedom.

Another candidate for a basic moral right is the right to equal consideration. The right to equal consideration – or the right to be treated as an equal – is a crucial element in defining the recognition and exercise of rights. The right to equal consideration might be the most basic right, or it might merely be part of the definition of moral rights. Its ontological status in the family of rights will not be decided
here, but its importance for the discussion of rights, in particular, as the philosophical basis for justifying equal opportunity, cannot be ignored (Dworkin, 1977).

Is liberty the most basic right? In a now classic text, *Basic Rights*, Henry Shue argues that security and subsistence preempt liberty:

Security and subsistence are basic rights . . . because of the roles they play in both the enjoyment and the protection of all other rights. Other rights [such as liberty] could not be enjoyed in the absence of security or subsistence, even if the other rights were somehow miraculously protected in such a situation. And other rights could in any case not be protected if security or subsistence could credibly be threatened. (Shue, 1980: 30)

What Shue has done is to turn the rights not to be harmed and to be left alone into a practical claim that without minimum security from harm and basic subsistence needs met, the right to be left alone creates the possibility of not living at all or of living under conditions of constant threats to life and/or survival. Even if rights are thought to be Western constructions, the notion of living under threatening and starvation conditions is an abhorrent idea to almost everyone on the planet.

According to Amartya Sen, the “liberty v. basic needs” debate that Shue introduces is needlessly skewed. Liberty and basic needs overlap and are inexorably interconnected. Without liberty, communities commit unthinkable atrocities; without food and security, individual capabilities cannot develop. If a person is forced to remain narrowly focused on maintaining the basic safety of his or her family, for example, that person is rarely able to develop the sorts of skills that will enable him or her to flourish as a citizen within the community. Both of these sets of rights, together, form the basis for human existence, choice, and well-being (Sen, 1992).

Embedded in this discussion is an important distinction: the distinction between negative and positive rights (Berlin, 1969). A negative right is a right to be left alone or not to be interfered with in some way. Positive rights, on the other hand, are rights to something and involve action on the part of others. An example is the right to security, which encompasses rights to protection and implies the need for actions on the part of others to protect or maintain that security. Freedom or liberty is sometimes depicted as a negative right – the right to be left alone to pursue one’s own
interests and choices. Freedom can also be seen as a positive right. As a positive right, freedom or liberty involves others to enable those choices to be available. The negative right to be left alone, too, if extended to include the right to make unrestrained choices, includes the active component of having to exercise choice in order to realize that right.

The distinction between positive and negative rights is important to the subject matter of this book. Freedom might seem to translate simply into the negative right not to be coerced, the right to be left alone, or the right not to be forced into involuntary behavior. Construed in such a way, freedom does not necessarily require any positive action on the part of others except for restraint from interference. This interpretation of freedom emerges frequently in business, as corporations argue that they should be left alone to do as they choose and engage in voluntary mutual agreements, without being subject to governmental scrutiny, so long as laws and others’ negative rights are not being violated (Nozick, 1974; Gauthier, 1987). What is particularly interesting is that many advocates of negative rights also defend the right to private ownership, an active right that requires involvement of other persons in order to protect property claims against counterclaims or infringements.

While mere noninterference might seem sufficient on its face, the reality is that people’s exercise of their freedom inevitably interferes with other people’s freedom when they are more aggressive than their peers in less propitious circumstances. For example, at the outset of the industrial revolution, adults were not literally forced into working in factories. Jobs were offered at certain wages, and people were “free” to choose for themselves whether or not to accept these offers. In addition, they were also “free” to quit if at any time they became dissatisfied with their wages or working conditions. Unfortunately, people were not truly “free” to reject or leave factory jobs, though, because the economic climate in the nineteenth century, in both Europe and the United States, was so difficult that people were compelled to take whatever positions they were able to find in order to survive.

Critics of the notion of positive rights argue that they infringe on a person’s liberty by requiring active involvement in the achievement or the defense of the rights of others. Critics also contend that positive rights infringe on the right of the claimant by requiring rights protection, even when this is not desired by, or desirable to, that person. For example, the right to subsistence demands positive
action on the part of all of us to help those in need who cannot help themselves. This requirement allegedly infringes on the rights of those not in need by forcing them to contribute to the needy, and it also allegedly infringes on the rights of the needy to control their own destiny (Nozick, 1974).

In response, other philosophers argue that the distribution of property, talents, resources, and accidents of birth or environment are such that, unless positive rights are explicitly recognized, some people will have none of their rights respected (Rawls, 1971; Gewirth, 1978; Gewirth, 1996). Other proponents go further and assert that freedom does not exist for the individual unless everyone is able to exercise his or her freedom, and exercise it equally (Marx, 1844, 1963). While positive liberty, at least according to one interpretation, includes the right “to participate in the process by which my life is to be controlled” (MacPherson, 1973: 108), it is also claimed that “the only sensible way to measure individual liberty is to measure the aggregate net liberty of all the individuals in a given society” (MacPherson, 1973: 117). In an unequal society, that is, a society where not everyone can exercise his or her choices and control his or her life to the same extent, C. B. MacPherson concludes that each of us is required to restrain his or her freedom and assist others to develop theirs.

Many readers will find that this egalitarian definition of positive freedom requires too much from each of us to be realized. Its failure lies in not acknowledging personal achievements, achievements that will often, and sometimes deservedly, create inequalities. There is, nevertheless, a valuable insight to be acquired from a more moderate notion of positive freedom. If freedom requires that we protect individuals from coercion, it also should safeguard our abilities to make choices. In other words, freedom can be seen as protecting “the desire of the individual to be his own master . . . to be self-directed[,] . . . to be moved by his own conscious purposes[,] and] . . . to act and decide rather than be acted upon and decided for by others” (Berlin, 1969: 131).

Sen adopts a different approach. Sen develops a notion of “substantive freedoms – the capabilities – to choose a life one has reason to value,” and he links freedom to “the extent of the freedom that a person actually has” (Sen, 1999: 74). This “extent” has to do with capabilities, that is, with what a person can actually achieve, given his or her abilities and the satisfaction (or lack thereof) of basic needs in a particular community. A handicapped person in a wealthy
society will thus have fewer capabilities than others in his or her community, even when basic needs and security are addressed equally across the whole population. Moreover, the societal provisions for health and education will further influence these capabilities. In the United States, therefore, where healthcare is not universally guaranteed, those without insurance will be at a capabilities disadvantage, even though other basic needs are met (Sen, 1990).

While clearly arguing that a view of liberty as merely the right to be left alone is unsatisfactory, Sen, in developing this idea of substantive freedom, is not trying to make a value judgment about the necessity of equal freedoms. On the contrary, he wants us to take into account individual capabilities as well as equal access and equal opportunities in making judgments about the extent of freedom an individual may, is able to, or should enjoy.

Sen’s notion of freedom has been adopted by many philosophers because it takes into account the fact that the presence of autonomy (the right not to be coerced or the right to be left alone) is not alone enough to encompass what we mean by freedom. Freedom can be seen as that which protects the individual’s self-development, and this entails both the lack of coercion and opportunities for development. Interpreted in such a way, linking opportunities for positive enjoyment of autonomy and possibilities for self-development, turns freedom into an active right in that it imposes upon others the obligation to provide others access to the exercise of their freedom.

How, then, should freedom be defined? Freedom encompasses the right to autonomy, the right to be left alone, and the right not to be coerced. These are intrinsic to the exercise of free choice. Like all rights, though, freedom does not entail the right to do whatever one pleases. Freedom is an equal right circumscribed by the equal rights and interests of others. Freedom demands that people respect each other’s right to an equal opportunity to exercise self-development. Failure to do this constitutes a form of interference with freedom in that it prevents others from being able to exercise their freedom. Whether this idea makes sense in all cultures, or whether it is the most important right in every culture, remains to be debated. It is nevertheless that concept that has been generally adopted in the United Nations *Universal Declaration of Human Rights*, and more specifically in many countries as an ideal to which every person and every nation should aspire.