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"IN DEFENSE OF THE CONTRACT AT WILL" — SOME DISCUSSION COMMENTS AND QUESTIONS

MATTHEW W. FINKIN*

FOR THIS 50th Anniversary issue of the Journal, members of the faculty of the Southern Methodist University School of Law were asked for a "work in progress" to illuminate for the readership the variety of issues the faculty engages with. The request came at a time when I was preparing materials for a seminar on Individual Rights and Responsibilities in the Workplace, and working on an outline for a proposed treatise on the law of the individual employment relationship. A word of background on these will serve as a useful preface to what follows.

My shift in interest from organized to unorganized employees is the result of demographic and legal change. As the labor market moves toward the year 2000, it will increasingly be comprised of white collar jobs, especially of a professional, semi-professional, administrative, and managerial character. These employees will tend not to be represented by unions; in fact, the unionized share of the civilian non-agricultural work force will most likely decline from its current low of about 19% to perhaps 10%. This is not to reduce unions to insignificance in a workforce of perhaps one hundred million; but, it is to

* Professor of Law, Southern Methodist University. I should like to express my thanks to my colleagues Peter Winship, Thomas Mayo, and Werner Ebke for commenting upon what follows; despite their sage advice, I have chosen to proceed with these "comments and questions."
suggest that the law will have to pay increasing attention to the interests of the rising cohort of relatively well-paid white collar employees.

The primary legal change of interest is at the state level. The firmness of the nineteenth century rule that all employment, unless agreed to the contrary, is an employment at will and that, as a consequence, employees can be fired for any reason or no reason at all, is eroding. The rule had already been eroded by state and federal legislation forbidding discharge on grounds offensive to the law — joining a union, officially complaining of below minimum wage, opposing an employer practice of unlawful employment discrimination, and the like. But now the courts have become more open to the extension of the common law to the individual employment relationship. Paramount among these developments is the judicial willingness to afford a remedy for a discharge in violation of public policy, such as a refusal to perjure oneself at the employer's command. However, the courts have also proven amenable to binding employers to their stated policies governing conditions or duration of employment (found in handbooks, policy manuals, and the like), to expanding tort law to deal with the abusive or malicious discharge, and to expanding an implied covenant of good faith and fair dealing as an employer obligation under the contract of employment.

The law school curriculum eventually will have to come to grips with these developments. As yet, however, there are no published instructional materials, and so we must patch it as we go along. In fact, the Journal's request came in the wake of the appearance of two recent articles which I had assigned for the first meeting of my seminar to set the stage for the remainder of the course. These virtual companion pieces by Professor Richard Epstein, an exemplar of the Chicago school, extoll the doctrine of employment at will\(^1\) and attack the Norris-LaGuardia and Wagner

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Acts respectively, and are accompanied in the latter instance by critical commentary and Professor Epstein's own, rather sharp rejoinder.

The thought struck me that, in traditional "cases and materials" style, many of these as yet uncompiled casebooks on individual employment law will commence with Epstein's defense of employment at will as a jumping off point for classroom discussion, much as Henry Simons' Some Reflections on Syndicalism is used in a course on the Labor Act. In fact, Epstein's critical posture, looking askance at recent judicial limitations on employment at will, seems designed for nothing so much as to play just that role. Accordingly, to give some idea of what I am about, to give a glimpse of the current state of labor law teaching and thought in Dallas (and, perhaps indirectly, in Hyde Park), and simply as a facility for the casebook editors of the future, I offer below a set of equally traditional "comments and questions" to be appended, all or in part, to the inevitable excerpt from Epstein; but, casebook compilers take note: gratuity in lieu of attribution preferred.

These "comments and questions" are in no particular order. They are designed — or thrown together — for the traditional pedagogical function of facilitating classroom discussion: to explore the issues the author raises; to probe the reach of his position; to place the issues in historical context; to connect these issues with the larger theme of individual rights and responsibilities in employ-

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4 Epstein, Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler, 92 Yale L.J. 1435 (1983) [hereinafter cited as Epstein III]. Although Getman and Kohler are friends of mine, I have declined to deal broadly with their exchange with Epstein primarily because I am here more concerned with his treatment of the contract at will than his treatment of the New Deal, and, secondarily, because I learned in my childhood in Brooklyn to avoid a fight not of one's own making.

5 52 J. Pol. Econ. 1 (1944).
ment; and, to raise some questions concerning the sources of legal theory, the role of law in the employment relationship, and the role of legal scholarship.

In the absence of the obligatory Epstein excerpt, however, let me sketch in the broad outlines of his argument. Epstein starts with the common law of the last quarter of the 19th Century, ostensibly as a benchmark. At that time,

the area of labor relations was governed by a set of legal rules that spanned the law of property, tort, and procedure. There was no set of rules for labor cases as such. Since the advent of the New Deal, these common law principles have largely given way to a complex body of statutory and administrative law that treats labor law as a separate and self-contained subject.  

Moreover, the judge-made law of the last quarter of the nineteenth century had it right, as is evidenced in the Tennessee Supreme Court’s 1884 decision in *Payne v. Western & Atlantic Railroad.* In that case the Railroad’s general agent issued an order to all employees forbidding them to trade at a store owned by the plaintiff on pain of discharge. The affected store owner sued in tort, claiming that the order was intended maliciously to drive him out of business; indeed, he had been at pains to locate his store at the railhead, and the company’s employees were his major source of custom. The court nevertheless saw no tort in the orders an employer rightfully could give his employees:

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

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6 Epstein II, *supra* note 2, at 1357 (emphasis added).
7 81 Tenn. 507 (1884).
There are four reasons why “the nineteenth century view is superior to the emerging modern conception.”

First, like a partnership, which is terminable at will, the doctrine that presumes employment to be at will unless expressly agreed to the contrary actually “works to the mutual benefit of the parties.” It allows management efficiently to monitor employee performance. But it also allows employees reciprocally to monitor managerial performance. If employees become dissatisfied, if management behaves arbitrarily or abusively, the employee is free to quit. “The employee is not locked into an unfortunate contract if he finds better opportunities elsewhere or if he detects some weakness in the internal structure of the firm.” A high quit rate is not costless to an employer. It causes higher than usual training costs and imposes a reputational loss; a company which is known to be a bad place to work will find it hard to recruit and retain qualified labor without paying a premium.

Second, and contrary to the conventional argument that employees at will have an imbalance in bargaining power with their employers, the at will doctrine is actually “fair.” The argument that contracts can be set aside because of a seeming inequality of bargaining power “is wholly incompatible with the liberal ideal that most contracts are for the mutual benefit of both sides, regardless of their original endowments of wealth.” Moreover, the very prevalence of at will employment evidences that it is fair to employees. “It is hardly plausible that contracts at will could be so pervasive . . . if they did not serve the interests of employees as well as employer.” Indeed, if inequality of bargaining power were a pervasive element of the employment relationship,

we should expect to see conditions that exist in no labor

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9 Epstein I, supra note 1, at 957.
10 Id. at 953.
11 Id. at 969.
12 Id. at 953.
13 Epstein II, supra note 2, at 1360.
14 Epstein I, supra note 1, at 955.
market. Wages should be driven to zero, for no matter what their previous level, the employer could use his (in-exhaustible) bargaining power to reduce them further, until the zero level was reached. Similarly, inequality of bargaining power implies that the employee will be bound for a term while the employer (who can pay the peppercorn consideration) retains the power to terminate at will. Yet in practice we observe both positive wages and employees with the right to quit at will.\textsuperscript{15}

In fact, as the Tennessee Supreme Court "rightly stressed in \textit{Payne}, the contract at will is \textit{sought} by both persons."\textsuperscript{16} Nor is this to say that the at will employee is without needed protection. One feature "common to contracts of this sort" requires the employer to give notice or pay damages in lieu of notice. These severance pay provisions give employees "added protection against arbitrary discharge."\textsuperscript{17} Further, the common law appropriately should step in in those "cases in which discharge . . . is inconsistent with the performance of some public duty or with the protection of some public right."\textsuperscript{18} In addition, the common law does place limits on what employers may do for it prevents the private use of force and it refuses to enforce promises induced by coercion (narrowly defined) or fraud.

Third, the at will relationship is cheap to administer; inasmuch as the employer is free to fire for virtually any reason or no reason at all, there are no grounds for an employee legally to complain, and so costly litigation is precluded. Finally, the at will rule reflects a basic "orientation in favor of limited government and the maximization of private autonomy."\textsuperscript{19} Economic freedom — freedom of contract — is to be valued no less than freedom of speech or religion, and, presumably, freedom of contract includes the employer's ability to hire (and fire)

\textsuperscript{15} \textit{Id.} at 973.
\textsuperscript{16} \textit{Id.} at 954 (emphasis added).
\textsuperscript{17} \textit{Id.} at 967.
\textsuperscript{18} \textit{Id.} at 952.
\textsuperscript{19} Epstein II, \textit{supra} note 2, at 1359.
at will, free of limitations imposed unilaterally by the courts. "If governmental regulation is inappropriate for personal, religious, or political activities, then what makes it intrinsically desirable for employment relations?"\textsuperscript{20}

I hope this is a fair (if crude) account of the basic lines of Epstein's argument; but the reader is urged to consult the original in case of disbelief. And now,

\textit{Some Discussion Comments and Questions}

1. The troubadour, Bertrans of Born, to poeticize the equal of My Lady Maent of Montaignac, took the most beautiful feature of each of a number of famous women to create what did not exist in real life, a "borrowed lady" or, as the Italians translated it, "Una donna ideale." Epstein engages in much the same process concerning the 19th century common law:

The actual common law, however, is often highly unruly. Judges themselves often have profound disagreements as to the first premises in the legal debate, and in any event the number of decisions is simply too great to allow harmony to reign. . . . In speaking of "the" common law, therefore, I am referring to the best set of private-law rules that can be devised to handle the problem of labor relations.

Epstein II, supra note 2, at 1358-59.

If Epstein's "common law" is an ideal one, one that never existed as a coherent whole in any one jurisdiction, why should he mention the \textit{Payne} decision at all? Why, that is, should he not simply propound his own best set of (ahistorical) rules? Or is \textit{Payne} needed to lend a touch of historical (or elegaic) authenticity to the validity (or achievability) of the ideal? If, as appears to be the case, the claim is at least partially an historical one, should Epstein treat \textit{Payne} a little more fully, and in the context of its times?

2. If a fuller account of \textit{Payne} is called for, it would have

\textsuperscript{20} Epstein I, supra note 1, at 954 (emphasis added).
to mention that the decision was sharply divided on just the issue the majority so confidently addressed. The dissenters pointed out that it is a feature "of the common law, that it has growth and expansive power to meet the wants of an advancing and necessarily complex civilization..." Payne v. Western & Atlantic Railroad, 81 Tenn. 507, 531 (1884) (Freeman & Turney, J.J., dissenting). The order issued by the railroad's general agent "is a wrong done to the freedom of the employe to buy where he chooses or may find it to his interest to buy." Id. at 534.

It is argued that a man ought to have the right to say where his employes shall trade. I do not recognize any such right. A father may well control his family in this, but an employer ought to have no such right conceded to him. In the case in hand and like cases under the rule we have maintained, the party may always show by way of defense that he has had reasons for what he has done; that the trader was unworthy of patronage; that he debauched the employe, or sold, for instance, unsound food, or any other cause, that affected his employes' usefulness to him, or justified the withdrawal of custom from him. This is not in any way to interfere with the legal right to discharge an employe for good cause, or without any reason assigned if the contract justifies it.

Id. at 542 (emphasis added). The dissenters stressed that the increasing size of companies employing immense numbers of employees demanded a sound public policy to restrain employers within "legitimate boundaries." Id. at 543.

The principle of the majority opinion will justify employers, at any rate allow them to require employes to trade where they may demand, to vote as they may require, or do anything not strictly criminal that employer may dictate, or feel the wrath of employer by dismissal from service. 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 con-
control the employment of others to an extent that in time may sap the foundations of our free institutions.

_Id_. at 544.

(a) Are the _Payne_ dissenters saying that governmental regulation of the employment relationship is "intrinsically desirable," or are they saying that the common law properly steps in to correct an abuse of the exercise of prerogative by a private center of power? If the "maximization" of "private autonomy" is a legal desideratum, why should it not include a degree of employee autonomy from employer control — including, as the _Payne_ dissenters argued, the employee's freedom to shop where he pleases?

(b) Does Epstein's argument to freedom of contract, and so his use of "private" to qualify "autonomy," mean that he would find objectionable a governmental order telling one where not to shop? Throughout the nineteenth and much of the twentieth century, the Constitution was not thought to limit the orders government could give to its own employees, as another famous Tennessee case makes clear. _Scopes v. State_, 154 Tenn. 105, 112, 289 S.W. 363, 365 (1927). See generally, Van Alstyne, _The Demise of the Right-Privilege Distinction in Constitutional Law_, 81 Harv. L. Rev. 1439 (1968). However, that aspect of the law has changed. See generally, O'Neil, _The Private Lives of Public Employees_, 51 Ore. L. Rev. 70 (1971). Today, it would be possible to challenge an order by a governmental employer, telling employees where they may not shop, as an infringement of the individual employee's liberty. The constitutional test is that which applies to any challenge to a governmental infringement upon economic liberty; that is, the governmental employer need only establish a minimally rational connection between its order and the legitimate needs of the employment. _Kelly v. Johnson_, 425 U.S. 238 (1976) (sustaining a hair length rule for policemen). Is this not essentially the same approach taken, as a matter of common law, in the _Payne_ dissent? Would not the common law thus act to limit an excessive private infringement upon the employee's individual liberty just as
the Constitution now would act to limit an excessive public infringement? Could the superintendent’s order in Payne survive even so unexacting an examination?

(c) Would Epstein find the order issued by the Western and Atlantic’s superintendent objectionable, as an impermissible infringement upon individual liberty, if the line were government owned and operated? If the line were government owned but leased to a private syndicate for operation?

(d) The Western and Atlantic Railroad runs approximately 138 miles from Atlanta, Georgia to Chattanooga, Tennessee. It was created by the Georgia legislature in 1836 as a state owned and operated line. Ga. Code §§ 73-115 (1845). See generally, J. Johnston, Western and Atlantic Railroad of the State of Georgia (1931). Pursuant to an 1870 Act of the Georgia legislature, the line was leased for a twenty-year period to a private company. The latter Act and the lease are reproduced, id. at app. A at 224-229; see also J. Stover, The Railroads of the South 1865-1900, A Study in Finance and Control 83-87 (1955).

3. Epstein argues, referring to the language of the Payne majority he quotes, that the contract at will was “sought” by the employees. Do you see any hint in the excerpt that employees “sought” to be governed by a contract that allowed them to be discharged at will, or “sought” to give the company the privilege of telling them where to shop? Inasmuch as the case came before the court upon the trial court’s sustaining the railroad’s demurrer, in a case to which no employee was a party, how could the Tennessee Supreme Court know anything of the circumstances surrounding the actual hire of employees? Did not the court simply imply the employer’s power of control as a matter of law irrespective of what the employees may have thought or desired?

(a) The Payne majority reasoned in the paragraph preceding the one Epstein quotes:

Is it [the employer’s order] unlawful? May I not refuse to
trade with any one? May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? And, if one of them, then why not all four? And, if all four, why not a hundred or a thousand of them?

*Payne v. Western & Atlantic Ry., supra,* at 518. The dissenters responded to this by distinguishing the authority of a father—a head of household—from that of an industrial employer. *Id.* at 542. Thus, the *Payne* majority did not rely upon freedom of contract, but on an extension of the antecedent law of domestic service which gave the master a property right in the servant's labor and something akin to proprietorship over the servant's activities, and even his body. In fact, two years after *Payne* the Tennessee Supreme Court was constrained to explain that the common law rule that allowed a master to use "moderate corporal correction" upon a servant applied only to apprentices and not to "ordinary" servants. *Tinkle v. Dunivant,* 84 Tenn. 503, 508 (1886). "The only times servants might legitimately disobey masters, said reformers, was when ordered to break God's law, and even then, servants must excuse their audacity 'in decent, and modest, though resolute manner'." D. Sutherland, *Americans and Their Servants: Domestic Service in the United States From 1800 To 1920*, 149 (1981) (citing a servant manual of 1821).

(b) In 1880, of a total labor force of over seventeen million, 3,290,000 were employed in manufacture and 1,130,000 in domestic service. *Historical Statistics of the United States, Colonial Times to 1970,* D11-25 at 127, D167-181 at 139 (1975). The retention of domestic servants was a practical and social necessity of the upper and upper middle class household of the period; roughly one in eight American households employed servants. D. Sutherland, *Americans and Their Servants, Domestic Service in the United States From 1800 To 1920,* 10 (1981). Could it reasonably be assumed that judges of the period, as community leaders, were very likely also employers of domestic servants?
(c) Despite fluctuations and regional variations, the servant class tended to be young, female, foreign-born or second generation immigrant, or black. "The striking characteristic shared by these people, regardless of race or nationality, was their lower class origins." *Id.* at 47. Further, the attitude of employers was captured nicely in a leading study of the period:

The employer is too often the autocrat in his own home. He considers that neither his neighbor nor the general public has anymore concern in the business relations existing between himself and his domestic employees than it has in the price he pays for a dinner service or in the color and cut of his coat.

L. Salmon, *Domestic Service* 121-22 (2d ed. 1911). "[T]he class line which was only faintly drawn in the early part of the century between employer and 'help' had been changed to a caste line which many employers believe it to their interest to preserve." *Id.* at 65. (The class line in legal terms was drawn far more sharply abroad, for in neither England nor France could domestic servants vote, being considered too dependent upon the employer to exercise a politically independent choice. T. McBride, *The Domestic Revolution, the Modernisation Household Service in England and France 1820-1920*, 15 (1976). "[T]he nineteenth-century domestic servant [in these countries] had the same status in the eyes of the law as a child, protected by and subject to the authority of the parent/employer." *Id.*).

Turning to industrial employment, about four-fifths of those employed in manufacture in 1880 were working under the factory system; but, 42% of manufacturing workers in 1880 were immigrants, in contrast to the immigrant composition of thirteen percent of the population as a whole. L. Fink, *Workingmen's Democracy, The Knights of Labor and American Politics* xii (1983). "If one adds to his figure workers of foreign parentage and of Afro-American descent, the resulting nonnative/nonwhite population clearly encompassed the great majority of
America's industrial work force.” *Id.* In addition, a considerable number of women were employed in industrial jobs, such as operatives in textile manufacture. The large “Waltham” style mills of New England were professedly paternalistic. “In the mid-nineteenth century, when the majority of the [mill’s] labor force consisted of young, unmarried women from rural New England, the company also regulated their behavior after working hours in order to reassure their parents. The boardinghouses were closed and locked at 10:00 p.m., church attendance was compulsory, and alcoholic consumption was prohibited.” T. Hareven & R. Langenbach, *AMOSKEAG: LIFE AND WORK IN AN AMERICAN FACTORY CITY* 14 (1978).

To round out this brief overview, just under 420,000 workers were employed specifically in rail transportation in 1880. W. Licht, *WORKING FOR THE RAILROAD: THE ORGANIZATION OF WORK IN THE NINETEENTH CENTURY* 31 (1983). Railway employment tended to be more nativist than factory employment, but reflected nevertheless a “strong association between ethnicity and occupational position.” *Id.* at 222. (In contrast to southern lines, however, northern railroads did not employ a large number of blacks.) Railway workers, in general, had earned a reputation as a hard drinking, even rowdy bunch, *id.* at 236-38; they tended as well to have a low rate of literacy: A study conducted on the Chicago, Burlington & Quincy Railroad in 1871 “indicated that more than a third of the line’s engineers could not read their train orders.” *Id.* at 225.

To be sure, male industrial and rail employment was freer than domestic service. The industrial employee did not live in the employer’s household, was not under the constant supervision of the household, and suffered from few of the demeaning badges of inferiority imposed upon domestics. Nevertheless, does the fact that the *Payne* majority was able to reason without hesitation from domestic to industrial employment, suggest that the judges simply translated their assumptions of employer prerogative (and, perhaps, social class) in domestic service to the in-
dustrial situation? According to one study, in the last quarter of the nineteenth century a majority of jurisdictions took the rate of pay (so much per week, month, or year) to rebut the presumption that the employment was at will, and to evidence agreement upon the duration of employment. This rule protected the employment security of relatively high paid, high status employees. The courts were sensitive to the occupational status of the salaried employee and occasionally were explicit about their bias. One court noted that the word "salary" was "more frequently applied to annual employment than to any other, and its use may impart a factor of permanency." Other courts buttressed the rule by referring to "the character of the employment" or the fact that "the employment was an important one."


4. If the "nineteenth century view" is preferable to the emerging modern conception, why is that view limited to judge-made law? Epstein asserts that in the common law of that period there were no "separate set of rules" for labor cases. Putting aside the "separate set of rules" carried over from the prior law of the domestic relation of master and servant, Epstein ignores the extensive body of labor protective legislation that increasingly followed the growth of industry throughout the century. *See generally*, H. Farnam, *Chapters in the History of Social Legislation in the United States to 1860* (C. Day ed. 1938); F. Stimson, *Popular Law-Making*, Ch. XI ("Labor Laws") (1910); J. Commons & J. Andrews, *Principles of Labor Legislation* (1936); G. Paterson, *Wage-Payment Legislation in the United States* (BLS Bull. No. 229) (1918).

If the world view of the last quarter of the nineteenth century commends itself to us, should not that view include the perceptions and actions of the legislatures — the product of the same social, economic, and political system that produced the judges of the period?

5. Epstein does not mention that in 1887 the Tennessee
legislature forbade any corporation doing business in the state
to discharge any employee or employees, or to threaten to
discharge any employee or employees in their service for
voting or not voting in any election, state, county, or mu-
unicipal, for any person as candidate or measure submitted
to a vote of the people, or to threaten to discharge any
such employee or employees for trading or dealing or for
not trading or dealing as a customer or patron with any
particular merchant or other person or class of persons in
any business calling, or to notify any employee or em-
ployees, either by general or special notice, directly or indi-
rectly, secretly or openly given, not to trade or deal as
customer or patron with any particular merchant or per-
son or class of persons, in any business or calling, under
penalty of being discharged from service or such joint-
stock company, corporation or association doing business
in this state as aforesaid.

Ch. 208, Acts of 1887, quoted in State v. Nashville, C. & St. L.
Ry., 124 Tenn. 1, 135 S.W. 773, 774 (1911). The Act was
declared unconstitutional because it did not apply to all
employers, i.e. it did not include partnerships and sole
proprietorships. Id. That portion of the Act dealing with
voting was re-enacted to apply to all employers. See TENN.
CODE ANN. § 11347 (1934), and the editor’s note at 1583.

(a) By 1916 three-fourths of the states had laws forbid-
ding employers by threatening to discharge or to lessen
remuneration of an employee to influence his vote in any
election. J. Commons & J. Andrews, PRINCIPLES OF LABOR
LEGISLATION 371 (1967 reprint ed.). The very prevalence
of these laws suggests a widespread practice. See, e.g., L.
Goodwyn, THE POPULIST MOMENT: A SHORT HISTORY OF
THE AGRARIAN REVOLT IN AMERICA 286 (1978) (“Students
of the 1896 campaign have agreed on the fact of overt
employer intimidation of pro-Bryan factory workers into
casting ballots for McKinley.”). See also, W. Licht, WORK-
ING FOR THE RAILROAD, supra, at 230-31. In fact, the ques-
tion of employer control of employee politics emerged as
a serious issue as early as the 1840's. A. Wallace,
Rockdale: The Growth of an American Village in the Early Industrial Revolution 420-21 (1978). And as a political one in the immediate post-Revolutionary period. H. Rock, Artisans of the New Republic 51-55 (1984) (and the anti-federalist broadside of 1808 reprinted at 54). So long as the employee is free to quit, however, so long as he is not in peonage, why should he not be allowed to surrender his political autonomy any more than his commercial autonomy as a condition of employment? Does not the very prevalence of the condition evidence that it is fair? Or is the employee's freedom of contract, to purchase goods where he chooses, of lesser value than his freedom of political choice or expression?

(b) The connection between political liberty (which Epstein would appear to view as insulated from employer control as the performance of a "public duty" or a "public right") and "industrial liberty," that is, a degree of individual freedom from employer control, drawn by the Payne dissent and by the Tennessee legislature, was scarcely unique. (Art. 16 of the Constitution of Utah, quoted in Holden v. Hardy, 169 U.S. 366, 381 (1898), required the legislature to prohibit "[t]he political and commercial control of employees.") The linkage of industrial liberty with political liberty was a characteristic concern of the ensuing period of reform up to the Labor Act. See generally, M. Derber, The American Idea of Industrial Democracy 1865-1965 (1970) and D. Rodgers, The Work Ethic in Industrial America 1850-1920 (1978). In the words of John D. Rockefeller, "Surely it is not consistent for us as Americans to demand democracy in government and practice autocracy in industry." J. Rockefeller, The Personal Relation in Industry 86 (1923). Or Louis Brandeis, "Either political liberty will be extinguished or industrial liberty must be restored." L. Brandeis, The Curse of Bigness 34 (1934). Or Robert F. Wagner, "If into this condition of affairs [the accumulation of capital] we should inject the archaic notion of master and servant, what kind of citizenship will inhabit the continent in the
next generation?" 75 Cong. Rec. 4918 (1932). Has the connection between subordination in the workplace and political liberty — or political passivity — proved totally illusory? Have we ceased to be concerned about it? Cf. 11 C.F.R. § 114.3(a)(1)(1984) (A corporation's partisan political communications in a federal election may be directed to a restricted class of stockholders and executive personnel, but may not be directed to its nonexecutive employees).

(c) The employer is rarely all-controlling of the employee's actions and thoughts. One does have a life away from employer dominance in one's family and friends; one can find sodalities from which to draw a sense of identification, self-worth, and independence, such as religious, ethnic, political, fraternal, and labor organizations. Consequently, although management may regard the employee as a utensil, it cannot be concluded that employees necessarily regard themselves as such. A. Kraditor, THE RADICAL PERSUASION 1890-1917, 138 (1981). See generally, D. Halle, AMERICA'S WORKING MAN: WORK, HOME, AND POLITICS AMONG BLUE-COLLAR PROPERTY OWNERS (1984). Epstein, however, sees no reason why an employer cannot demand "exclusive loyalty" as a condition of employment. Epstein II, supra note 2, at 1373. Toward that end he would legalize the Yellow Dog Contract, by which the employee agrees not to join a union as a condition of employment. One of the justifications for unions rests upon the relationship between the exercise of industrial democracy and the exercise of one's citizenship in a political democracy. See generally, H. Wellington, LABOR AND THE LEGAL PROCESS 26-27 (1968); see, e.g., D. Bensman, THE PRACTICE OF SOLIDARITY: AMERICAN HAT FINISHERS IN THE NINETEENTH CENTURY 222 (1985) ("In their workshops and through their unions, they [unionized skilled workers of the nineteenth century] had to think about matters of organizational strategy, about political economy, about social change."). Should an employer legally be empowered to demand exclusive loyalty as a condition of employ-
ment? If so, what other of these groups — political, fraternal, ethnic or religious — would Epstein allow an employer to proscribe as an interference with its privilege to secure the employee's exclusive loyalty? Would the employer similarly be empowered to condition employment upon the relinquishment of certain family ties or friendships?

6. The contract of employment is historically rare, having arisen only in the past two hundred years and then in only certain countries.

We can see several reasons for the slow growth of contractual employment. One is that men who can spend the hours of their working days at their own discretion regard it as an indignity to put themselves under the orders of another man. The issue is not how hard they shall work or how much they shall get, but whether they shall work as they choose or as they are told. The distinction most Greeks drew, M. I. Finley has said, was not "between one kind of work and another, so much as between working for oneself, which was the mark of the free man, and working for another, working for hire, which was the mark of the slave. Hence, with the exception of domestic service, we find free and slave working side by side in every kind of occupation, skilled and unskilled. Even in the mines there were some free men who took small concessions and worked them themselves. What we rarely find is the free wage labourer, for such a man was 'under the restraint of another', in Aristotle's phrase, and even the poorest Greek avoided that position if he possibly could."

E. Phelps Brown, THE ECONOMICS OF LABOR 10 (1962) (reference omitted). Under the ancien regime, for example, in which domestic servants were economically better off than the free day laborer, the duty of obedience required by the domestic status was nevertheless a persistent source of significant friction. See generally, S. Maza, SERVANTS AND MASTERS IN EIGHTEENTH-CENTURY FRANCE (1983) and C. Fairchilds, DOMESTIC ENEMIES: SERVANTS & THEIR MASTERS IN OLD REGIME FRANCE (1984). Cf. R. Bendix, WORK AND AUTHORITY IN INDUSTRY xlviii (1974
ed.) ("Under favorable circumstances authority may be benign, but it cannot function without inequality.") The French revolutionaries did not abolish domestic labor; but they did seek to eliminate the element of status:

Every man can contract his services and his time, but he cannot sell himself nor be sold: his person is not an alienable property. The law knows of no such thing as the status of servant; there can exist only a contract for service and compensation between the man who works and the one who employs him.

Constitution of the Year I [Declaration of the Rights of Man and Citizen], Art. 18 (June 24, 1793) reprinted in F. Anderson, THE CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE 1789-1907 173 (1967 reprint ed.). See also C. Fairchilds, DOMESTIC ENEMIES, supra, at 231-32. In fact, in post-Revolutionary America, the very term "servant" carried an element of opprobrium. Boniface v. Scott, 3 Serg. & Rawle. 351, 352 (1817) ("In Pennsylvania none are called servants whose persons are not subjected to the coercion of the master. . . . No person to whom wages would be due for his services would endure the name, as it would be considered offensive and a term of reproach."). So, too, did the rise of the factory system in early post-Revolutionary America occasion concern in "a society peopled by citizens living in rough equality and independence and [result in] the correspondingly widespread fear of overweening authority." J. Prude, THE COMING OF INDUSTRIAL ORDER: TOWN AND FACTORY LIFE IN RURAL MASSACHUSETTS 1810-1860 120 (1983). As the editors of a compendium of post-Revolutionary writing observe:

From the beginning, democratic opinion was suspicious of the concentrations of wealth and power private industry required and created. Men and women who had recently fought for liberty from the king could look at the new industrial capitalist and find a "purse proud aristocrat," a "Tory in Disguise." Americans were wedded to the self-sustaining family farm as the norm of social and economic organization and the locus of public virtue. Such a people
had an understandably difficult time accommodating the system of production, labor, and rewards that came with the factory. Industrial production radically altered the accustomed link between work and value — between the quantity of work invested and the economic value realized and between the quality of work done and the value of self-esteem. In this new "factory system," initiative, autonomy, and skill began to be replaced by passive attention, external discipline, and a predetermined, uniform product.


7. Does it continue to be a serious question today, as it was to the authors of the French Declaration in 1793, to American yeomen in the early decades of the nineteenth century, to the Payne dissenters in 1884, to the reformers of the Progressive era, and to the supporters of the labor legislation of the 1930s, what rights an employer purchases by the act of hiring? May it control one's off duty economic conduct, as in Payne? May it control the language one speaks in to one's co-workers? See Garcia v. Gloor, 609 F.2d 156 (5th Cir. 1980). One's manner of dress? See Carroll v. Talman Federal Savings & Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979); EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981) and EEOC Dec. No. 85-9, FEP Cases 1893 (1985). Cf. W. Weyl, The New Democracy 157 n.1 (1964 repr. of 1912 ed.) ("It is highly significant of the fierce egalitarianism of our grandparents that the wearing of a uniform, even by a railroad conductor, was hotly repelled as unworthy of a free-born American.") and D. Sutherland, Americans and Their Servants, supra, at 129-30 ("As late as 1901, Miss Mary Murphy, president of a Chicago servant girl union, voiced the 'prevailing sentiment' of her three hundred members when reassuring one woman of the union's position on uniforms: 'Wear uniforms? Nay, nay, Pauline; nay, nay.' "). The length of one's hair? See Willingham v. Macon Telegraph Pub., 507 F.2d 1084 (5th Cir. 1975); and NHA,

[S]ome workers at this Litton Industries division say that [plant manager] Mr. Gant acts less friendly when there are no outsiders around. “He asks me when I come back from the bathroom how long I've been gone,” complains Diana Williams, a 27-year-old wire winder. It reminds her of the time, four years ago, when he bawled her out for not smiling at him during one of his work-area-tours; “he said I had better cheer up or else.”

8. Epstein points out that when an employee quits, the law protects employer trade secrets the employee may have carried away physically or in his head. Epstein I, supra note 1, at 974 n. 45. One treatise traces this employer protection to the nineteenth century law of the employment contract:

Since one of the implied stipulations in a contract of service is that the servant will observe good faith towards his master, a servant who uses for his own personal advantage, and to the detriment of his master, information imparted or materials intrusted to him in the course of a confidential employment and for the purposes of that employment, is guilty of a breach of duty.

1 C. Labatt, Commentaries on the Law of Master and
To be sure, the specific protection of trade secrets is concerned with an appropriation of the employer's property; but as the treatise makes clear, the law developed out of a judicially implied obligation to exercise good faith toward the employer. It is for that reason that an employee breaches his duty toward the employer if he engages in a personal transaction that conflicts with the interests of his employer. *Id.*, § 284 at 866. However, one of the recent developments Epstein decries is the judicial implication of a similar if generalized obligation of "good faith and fair dealing" on the part of employers toward employees. Are you persuaded that a judicially implied obligation of good faith should be unidirectional?

9. The Knoxville Iron Company, a coal mining company, has 200 employees. Employees may elect to be paid in either of two ways. They may be paid in cash on the Saturday nearest the 20th of the month for all work done up to the preceding 1st of the month; or they may be paid once a week in orders redeemable in coal at the Company yard at the rate of 12 cents per bushel. The company pays about 75 percent of its wages in coal vouchers. Many of the lower paid workers are paid in vouchers which they sell at a discount to the Company in order to get money to live on, but the higher wage earners draw more in coal orders than do smaller wage earners.

(a) Would a system of payment *exclusively* in company scrip redeemable only in goods at the company store, rest upon coercion or misrepresentation as Epstein uses those terms? To the extent the company inflates its prices at the company store it would unilaterally be reducing the promised wage, and so redemption after the very first pay period might result in a fraud. But thereafter the employee is effectively on notice that his future wage is subject to reduction in real purchasing power by the company's action. If he continues in service has he not, in effect, agreed to work at a whatever lower wage rate the company sets? And as long as the wage, even if paid in pro-
verbial peppercorns, is above subsistence, does that not indicate the system is "fair" to the worker?

(b) Knoxville's employees are free to be paid in cash and, from what appears, they are free to quit; that is, they are not being held in peonage for debt. Moreover, the payment of coal miners in coal vouchers was a common practice in the industry. In Epsteinian terms, would the very prevalence of this system of payment not indicate that it is for the "mutual benefit" of the parties, else employees would not "agree" so to be paid?

(c) In the Knoxville Iron Company case the price per bushel is stated — it is not left up to unilateral employer determination — and alternative payment in cash is available. Those who have the resources or resourcefulness to await the pay period can secure full cash payment. Is not the employer encouraging thrift and abstinence by this policy? Would the state be acting impermissibly to impair freedom of contract if it required all wages to be redeemable in cash? 

Cf. A. Smith, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 142 (E. Cannan ed. 1937) (reference omitted) ("Whenever the legislature attempts to regulate the differences between masters and their workmen, its counsellors are always the masters. When the regulation, therefore, is in favour of the workmen, it is always just and equitable; but it is sometimes otherwise when in favour of the masters. Thus the law which obliges the masters in several different trades to pay their workmen in money and not goods, is quite just and equitable.") In 1899, the Tennessee legislature did require that all such vouchers be redeemable in money, which measure withstood constitutional attack on freedom of contract grounds before the Tennessee Supreme Court. Harbison v. Knoxville Iron Co., 103 Tenn. 421, 53 S.W. 955 (1899). The purpose of the Act "is to place the employer and the employe upon equal ground in the matter of wages. . . ." 53 S.W. at 960. The United States Supreme Court affirmed on the strength of the Tennessee

10. Are you persuaded by Epstein's distinction, allowing the state to forbid fraud or force but disallowing the state to take account of the relative economic positions of the parties? John Stuart Mill was not so inflexible. "[W]hy should people be protected by their government ... against violence and fraud, and not against other evils, except that the expediency is more obvious?" J. Mill, *Principles of Political Economy*, Book V, Ch. 2 at 796 (W. Ashley ed.) (1909). *See also*, id. Ch. XI at 964 (defending the circumstances under which a maximum work hours law would be a justifiable exception to *laissez-faire*). Commenting upon *Knoxville Iron*, Learned Hand opined:

> For the state to intervene to make more just and equal the relative strategic advantages of the two parties to the contract, of whom one is under the pressure of absolute want, while the other is not, is as proper a legislative function as that it should neutralize the relative advantages arising from fraudulent cunning or from superior physical force. At one time the law did not try to equalize the advantages of fraud, but we have generally come to concede that the exercise of such mental superiority as fraud indicates, has no social value, but the opposite. It may well be that the uncontrolled exercise of the advantages derived from possessing the means of living of other men will also become recognized as giving no social benefit corresponding to the evils which result. If so, there is no ground for leaving it uncontrolled in the hands of individuals.


How far is Epstein's reasoning prepared to go: are child labor, factory safety, and occupational health laws to be considered impermissible as restrictions on freedom of contract? Even in the era of *laissez-faire* Epstein extolls, the courts were scarcely of a single mind, as he recognizes. *Compare Johnson v. Goodyear Mining*, 127 Cal. 4, 59 P. 304 (1899) with *State v. Brown & Sharp Manuf.*., 18 R.I. 16,
Again, Hand opined that that very fact proved vexing at the time:

[I]t is too late for the adherents of a strict laissez faire to condemn any law for the sole reason that it interferes with the freedom of contract. Similarly it is no reason to declare invalid such acts because they may work to the disadvantage of individuals of exceptional strength or skill, a favorite reason given by some judges for such decisions. If this were a reason, it must apply equally to the statutes which prescribe safety appliances, which are often unnecessary for individuals of unusual prudence and watchfulness; and it must also apply to many sanitary statutes which prescribe minimum conditions of healthfulness, which are unnecessary to persons of singular robustness.


11. Epstein argues that if bargaining power were really unequal, if, that is, the labor market really was one-sided, employees would be driven to destitution. Does this make sense? Is one's bargaining power, flowing from the workings of the labor market, like pregnancy, something one either has or has not, or does it admit of degrees?

(a) Presumably the following contract would evidence a lack of bargaining power in Epsteinian terms:

"I agree at all times to be subject to the orders and commands of said — or his agents, perform all work required of me — or his agents shall have the right to use such force as he or his agents may deem necessary to compel me to remain on his farm and to perform good and satisfactory services. He shall have the right to lock me up for safekeeping, work me under the rules and regulations of his farm, and if I should leave his farm or run away he shall have the right to offer and pay a reward of not exceeding $25 for my capture and return, together with the expenses of same, which amount so advanced, together with any other indebtedness, I may owe — at the expiration of above time, I agree to work out under all rules and regulations of this contract at same wages as above, commencing — and ending —.

"The said — shall have the right to transfer his interest in
this contract to any other party, and I agree to continue work for said assignee same as the original party of the first part.”

Reprinted in R. Ely, Studies in the Evolution of Industrial Society 407 (1903). This contract, contemplating the private use of force, Epstein presumably would disallow even though the employees professed themselves “satisfied and contented” with it. Id. at 408. On the other hand, a ten-year contract of employment remunerated at a generous percentage of sales presumably would evidence a considerable amount of employee bargaining power. But see Reliable Pharmacy v. Hall, 54 Wis. 2d 191, 194 N.W.2d 596 (1972). Is there nothing in between? Cf. Smith Baking v. Behrens, 251 N.W. 826, 827-28 (Neb. 1933).

(b) In the absence of statutory prohibition, would the University of Chicago Law School pay its faculty in orders redeemable in books of the University of Chicago Press? If not, does this suggest that the degree to which the labor market limits an employer’s ability to dictate terms of employment varies? Does it follow that employees must be reduced to peonage before the law should be allowed to notice and so redress a seeming excess in an employer’s exercise of its power?

12. It seems intuitively obvious that high quit rates resulting from employee dissatisfaction are likely to impose costs on employers. Such, for example, was the employee dissatisfaction with the Ford assembly line system in 1913 that the turnover rate reached 380 per cent; in effect, to add 100 men the company had to hire 963. D. Hounshell, From the American System to Mass Production 1800-1932 257 (1984). Should employers not strive therefore to reduce arbitrariness and unfairness as much as possible so to reduce the quit rate? One thorough study argued powerfully to just such a conclusion sixty-six years ago. S. Slichter, The Turnover of Factory Labor (1919). Have the economic consequences to which Epstein adverts so reduced arbitrariness over the past two-thirds of a century
to the point where we need not be concerned about fairness in the workplace?

(a) Assessing the actual causes and effects of employee turnover in cases less stunning than Ford's is a complicated business. In fact, "surprisingly few organizations make a systematic effort to evaluate the direct or indirect costs of turnover." W. Mobley, *Employee Turnover: Causes, Consequences, and Control* 16 (1982) (reference omitted). Quit rates are influenced by the state of the economy, the size, concentration, reward system, and other variables particular to the job, the work setting, and the incumbent's company, the individual's particular (and perhaps idiosyncratic) expectations, and non-work variables such as the spouse's career, choice of geographic locale and lifestyle, family responsibilities, and the like. *Id.* at 78-79. See also J. Price, *The Study of Turnover* ch. 5 (1977). Workers, for example, who have been in the company's employ for some time tend to remain with the employer. Sehgal, *Occupational Mobility and Job Tenure in 1983*, 107 Monthly Labor Rev. 18 (1984). These data may suggest: that such employees are willing to accept (or acquiesce in) aspects of the job that newer employees find dissatisfying, or, conversely, that younger workers are more eager to see if the "grass is greener;" that older workers, even if dissatisfied, are less able to move into new jobs than are younger workers, due to the acquisition of skills particular to the incumbent's employer and not needed by other employers, or due to accrued seniority or pension guarantees that are a disincentive to mobility; or, some combination of these or other factors. See J. Pencavel, *An Analysis of the Quit Rate in American Manufacturing Industry* ch. IV (Princeton Univ. Industrial Relations Section Research Report No. 114) (1970). Moreover, some quits are desirable from the perspective of the employer and other employees. The exiting of some older employees, for example, may open opportunities for the advancement of promising younger employees who might otherwise be lost to the employer. Given this
complexity, can we assume that a higher than "normal" quit rate will necessarily act as a corrective upon arbitrary or unfair managerial action with respect to a particular employee?

(b) Is the management of a unionized company, acting with knowledge of the availability of a union administered grievance-arbitration procedure, in addition to the training and reputational costs Epstein advert to, likely to be less careful about treating employees fairly than is a non-unionized company? One study of arbitration awards in the unionized sector concluded that grievants prevail about half the time, largely on fairness or arbitrariness grounds. I. Berg, M. Freedman & M. Freeman, MANAGERS AND WORK REFORM 149-150 (1978). Another study confirms that the absence of a union (and so the lack of a grievance system) accelerates quits. J. Pencavel, AN ANALYSIS OF THE QUIT RATE IN AMERICAN MANUFACTURING INDUSTRY, supra, at 24. It similarly confirms the hypothesis that the militancy of unions as well as their presence affects the quit rate. Id. at 25. How do non-union companies, lacking a grievance-arbitration procedure, assure that lower levels of management are treating employees fairly? Cf. Feller, A General Theory of the Collective Bargaining Agreement, 61 Cal. L. Rev. 663, 766 (1973) ("[T]o the extent that rules are embodied in a collective agreement, the grievance procedure operates as a mechanism by which higher management polices compliance with its orders by the lower ranks in the hierarchy.").

13. Employer countermeasures in the face of the developing body of law erosive of employment at will have been sketched in by one management practitioner (and former academic). Lopatka, The Emerging Law of Wrongful Discharge - A Quadrennial Assessment of the Labor Law Issue of the 80s, 40 Bus. Law. 1, 26-32 (1984). He explains that the emerging law carries the message that employers cannot expect to oversell employment opportunities, publish slick employee handbooks with reassuring job security statements, or
make grandiose claims of fairness and enlightenment in an undiscriminating effort to keep unions out and land the best personnel, without substantial risk of wrongful discharge liability.

*Id.* at 27. He recommends:

(i) sanitizing advertisements, handbooks, statements of policy and the like to avoid express or implied commitments to job security; (ii) giving express attention to discharge in such documents; (iii) abolishing formalized probationary periods; (iv) either abolishing formalized employee evaluations or assuring that they are fairly conducted; (v) executing formal disclaimers of job security, especially if accompanied by a previously unannounced benefit; (vi) executing explicit contracts of hire for a stated duration in cases where they make sense, such as employment in connection with the sale of the employee's business to the employer or the execution of a covenant not to compete; (vii) taking preventive measures to assure that discharge is not for reasons violative of public policy; (viii) establishing and publishing a formal internal grievance procedure, especially for the complaints of whistleblowers; and, (ix) listening to employees who object to work assignments on legal or ethical grounds, investigating the merits of these objections, and taking the time to explain the reasons for rejecting them.

Which of these are untoward? Are any of these actions useful or welcome? If equality of bargaining power is taken care of by the labor market, why, with the exception of negotiating a contract of explicit duration in special cases, is it assumed that employers have unilateral control over most of these "protective measures"?

14. Epstein argues that the case for employment at will is "strengthened" by a "feature common to contracts of this sort" — severance pay.

(a) The employee hired at will ordinarily takes the job upon such terms and conditions as the employer expressly or impliedly states in the job application, in a company manual, or in an employee handbook. As late as
1940, the prevailing view among employers was that severance pay provisions were not legally binding. E. Hawkins, DISMISSAL COMPENSATION 130-31 (1940) ("Barring those combined with retirement or saving plans, not a single company dismissal compensation scheme is on a contractual basis."). Nevertheless, it is for a court to decide whether the severance pay policy is an unenforceable gratuity, or a contractual term of employment, binding upon the employer by the employee's continuance despite the at will nature of the relationship. Compare MacCabe v. Consolidated Edison Co. of New York, 30 N.Y.S.2d 445 (N.Y. City Ct. 1941) with Hercules Power v. Brookfield, 189 Va. 531, 53 S.E.2d 804 (1949). Increasingly, the severance pay policy has become recognized as a contractual right. See, e.g., Ariganello v. Scott Paper, 588 F. Supp. 484 (E.D. Mich. 1982); but see Alfaro v. Stauffer Chemical, 172 Ind. App. 89, 362 N.E.2d 500 (1977) (In fact, whether an employee is contractually entitled to severance pay may now be governed by federal law. See Jung v. FMC Corp., 755 F.2d 708 (9th cir. 1985)). Is this process distinguishable from what the courts are currently doing in deciding whether other portions of an employer's stated policies rise to a level of a contractual commitment, for example, rules governing discipline and discharge? Compare Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983) with Reynolds Manuf. Co. v. Mendoza, 644 S.W.2d 536 (Tex. Civ. App. — Corpus Christi 1982 no writ); Compare Salmi v. Farmers Ins. Group, — Colo. App.—, 684 P.2d 264 (1984) (and the cases cited therein) with Enis v. Continental Illinois Nat'l Bank, 582 F. Supp. 876 (N.D. Ill. 1984). Is the employer's assurance of a fair procedure before it invokes its right to terminate analytically different, for contractual purposes, from its assurance of stated compensation upon termination?

(b) How "common" are severance pay policies? A recent survey of over 1,300 companies indicates that 65% percent of the office employees of large manufacturing companies (1000 or more employees) and 40% of the office
employees of smaller companies (less than 1000 employees) are covered by severance pay plans. Conference Board Rep. No. 813, Profile of Employee Benefits: 1981 Edition 46 (1981). Thirty-five percent of non-office employees, mainly in unionized employment, are entitled to severance benefits. Id. These data are virtually unchanged from a 1974 survey. Conference Board Rep. No. 645, Profile of Employee Benefits 79 (1974). In unionized employment alone, a separate survey of 400 collective bargaining agreements indicates that 51% made provision for some form of "income maintenance," of which 39% are in the form of severance benefits. Collective Bargaining Negotiations and Contracts § 53:1 (BNA) (1983). In addition, 60% of severance plans are limited to one or two weeks pay. Of those that do adjust for long-service, the median requirement for a managerial or clerical employee is to receive twenty-four weeks pay after twenty years of service. In other words, a third of white collar employees employed in large companies, 60% of those employed in smaller companies, and the overwhelming majority of non-unionized blue collar workers get no severance pay; and, for the majority of those that do, the compensation is often rather small.

(c) Severance pay, or "dismissal compensation" to use an earlier phrase, is not synonymous with unemployment compensation. The latter is intended to provide economic support while one is out of work and looking for a job. The former indemnifies the employee for the loss of the job itself; it is compensation for the termination of the relationship. E. Hawkins, Dismissal Compensation 5, 11 (1940). Some countries have legislated to require employers to pay dismissal compensation. Id., Ch. VIII. Indeed, John Stuart Mill thought that at least technological unemployment was a valid area for legislative concern:

[S]ince improvements which do not diminish employment on the whole, almost always throw some particular class of labourers out of it, there cannot be a more legitimate object of the legislator's care than the interests of those who
are thus sacrificed to the gains of their fellow-citizens and of posterity.

J. Mill, PRINCIPLES OF POLITICAL ECONOMY, Book I, Ch. VI at 99. (W. Ashley ed.) (1909) If severance pay is a desirable feature of the employment relationship, and in view of the limited coverage under privately adopted policies, should the legislature require that all employers comply with a schedule of severance pay, based upon length of service, for all involuntary dismissals not arising out of employee dereliction or misconduct? Might such a legislated system be devised to preclude much of the developing tort and contract law of abusive or wrongful discharge that Epstein finds objectionable? See, e.g., Vargas v. Royal Bank of Canada, 604 F.Supp. 1036 (D.P.R. 1985) (dealing with a Puerto Rico statute to that effect). See generally, Estreicher, Unjust Dismissal Laws in Other Countries: Some Cautionary Notes, 10 Employee Rel. L. J. 286 (1984).

15. In his rejoinder to Professors Getman and Kohler, Professor Epstein asserts that, "Getman and Kohler present no hint of any theory, normative or positive, relevant to labor relations, or indeed to any other legal area. Nonetheless it takes a theory to beat a theory . . . ." Epstein III, supra note 4, at 1455 (emphasis added).

Does it really take a theory to beat a theory? May not a theory expire of its own fatuousness? Or be dispatched summarily:

After we came out of the church we stood talking for some time together of Bishop Berkeley's ingenious sophistry to prove the non-existence of matter, and that everything in the universe is merely ideal. I observed that though we are satisfied his doctrine is not true, it is impossible to refute it. I never shall forget the alacrity with which Johnson answered, striking his foot with mighty force against a large stone, till he rebounded from it, "I refute it thus."


May not a theory be killed by a fact? Cf. Finkin, Revisionism in Labor Law, 43 Md. L. Rev. 23 (1984) (arguing that
two leading examples of "critical legal studies" labor theorizing are counter-factual). Was it not the increasing obviousness of its harshness that killed the Social Darwinism of the period Epstein celebrates?

This [American] version of Darwinism depended for its continuance upon a general acceptance of unrestrained competition. But nothing is so unstable as "pure" business competition; nothing is so disastrous to the unlucky or unskilled competitor; nothing, as Benjamin Kidd foresaw, is so difficult as to keep the growing number of the "unfit" reconciled to the operations of such a regime. In time, the American middle class shrank from the principle it had glorified, turned in flight from the hideous image of rampant competitive brutality, and repudiated the once heroic entrepreneur as a despoiler of the nation's wealth and morals and a monopolist of its opportunities.

R. Hofstadter, SOCIAL DARWINISM IN AMERICAN THOUGHT 1860-1915, 174 (1945). Should the rejection of Manchesterian economics and Sumnerian sociology by the body politic after the turn of the century play no role whatsoever in the divising of a contemporary legal theory of the employment relationship?

16. What is the function of a legal theory? What sources should it draw upon? How do we evaluate its merits?

(a) Epstein would appear to rely on the work of economists. But even economists see more in the employment relationship than Epstein seems willing to concede. Note one leading textbook, which he does cite, but not on this point,

Considerations other than material advantage enter into the relationship between employer and employee, for it is a relationship between people who look for loyalty, fairness, appreciation, and justice along with paychecks and productivity and who, if they believe they are denied them, can often respond with aggression, malice, and hatred.


(b) Why does Epstein insistently ignore the relevance of history? He extolls "the common law," but does not history, the judicial sense of our traditions and values
learned from past experience, play an important role in the growth of the common law? B. Cardozo, The Nature of the Judicial Process Lecture II (1921).

(c) No doubt Epstein is possessed of the firm and sincere conviction that “freedom of contract” is no less worthy of legal solicitude than freedom of speech and religion. Are you persuaded? Benjamin Cardozo, a product of the period Epstein extols and no tyro at the common law, was not. “Many an appeal to freedom,” he wrote, referring expressly to freedom of contract, “is the masquerade of privilege or inequality seeking to entrench itself behind the catchword of a principle.” Cardozo, Mr. Justice Holmes, 44 Harv. L. Rev. 682, 687-88 (1931). “Only in one field,” Cardozo opined, “is compromise to be excluded, or kept within the narrowest of limits,” that is, freedom of thought and speech. Id. at 688.