Employment at Will and Scientific Management: The Ideology of Workplace Control

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I. INTRODUCTION

The doctrine of employment at will was set forth in 1877 by Horace Gray Wood. According to Wood, the legal principle governing the relationship between employer and employee was that the relationship, unless expressly agreed otherwise, could be terminated by either party at any time for any reason. Although Wood's rule lacked any substantial basis in judicial precedent, it proved so congenial to American industrial society that it quickly became established as the accepted legal theory.

One year later, Frederick Winslow Taylor introduced the technique of "scientific management" at the Midvale Steel Company's machine shop near Philadelphia. The Midvale workers were highly skilled machinists who bitterly resisted the implementation of Taylor's system; nevertheless, through various methods, Taylor succeeded in imposing his theories of work organization on the Midvale employees. Those theories eventually revolutionized the practices of American management.

Until very recently, both scientific management and employment at will were integral components within the framework of the

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2. Id. at 272.
6. "It is impossible to overestimate the importance of the scientific management movement in the shaping of the modern corporation and indeed all institutions of capitalist society which carry on labor processes." H. Braverman, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY 86 (1974).
American industrial order. Scientific management was a concept ideally suited to the high-volume, standardized mode of industrial production which prevailed in the United States into the 1970's. Likewise, the employment at will doctrine resisted any meaningful judicial curtailment until the last decade.

The historical and functional relationship between the legal principle and the managerial system illustrates the manner in which the common law served to sustain a particular stratification of economic power in this country during a critical stage of industrial development, and continues to do so at the present time. The employment at will principle established the employer's legal power to dictate all terms and conditions of employment in the workplace and to discharge with impunity any employee who failed to satisfy those conditions. As a consequence, employers were provided with a means of economic duress by which to extend and consolidate their control over the worker and the processes of production in a crucial period of industrial transformation. Scientific management, both as

9. E.g., Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917) (enforcing "yellow dog" contract whereby employees agreed as a condition of employment that they would not join the United Mine Workers Union).
10. Near the end of the nineteenth century, the organization of the processes of production in the American economic system underwent a significant change. That change has been described as a process depending upon the "homogenization of labor," or the reduction of jobs "to a common, semiskilled denominator." D. GORDON, R. EDWARDS & M. REICH, SEGMENTED WORK, DIVIDED WORKERS: THE HISTORICAL TRANSFORMATION OF LABOR IN THE UNITED STATES 100 (1982). [hereinafter cited as SEGMENTED WORK, DIVIDED WORKERS] The most important features of that historical development can be summarized as follows:

During the first three decades of the twentieth century, the corporate push toward homogenization compressed more and more production jobs into relatively homogeneous, more or less semiskilled operative work. Many contemporary observers called the new system that this homogenization produced the drive system. The drive system involved three principal dimensions: (1) a reorganization of work, facilitated by both mechanization and job restructuring, which produced increasingly homogeneous employment for production workers; (2) a rapid increase in plant size, particularly among the larger corporations, which reinforced the spreading impersonality of wage labor; and (3) a continuing expansion of the foreman’s role, which added an insistent supervisory impetus to the new system of employer control.

Id. at 128.

With respect to the dimension of control, which is the focus of the inquiry here, the authors observe:

In order to achieve greater control over the labor process, corporations made heavier and heavier use of foremen and superintendents. As skills were reduced and craft workers were replaced in many industries, foremen substituted their own authority for the coordinative and managerial activities that craft workers had formerly pro-

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a practical managerial strategy and as an ideological program, was an analogous manifestation of underlying structural change in the economic environment.\textsuperscript{11} And, while scientific management was de-

vided. The first three decades after 1900 culminated in what [one scholar] calls the “foreman’s empire”. . . . The growth in the supervisors’ power lent a further commonality to the working conditions of semiskilled operatives, for all workers were equally vulnerable to the power and caprice of the bosses’ representatives.

*Id.* at 135.

David Montgomery, a labor historian who published seminal studies on the subject of worker control, advances similar conclusions. Montgomery notes that American management undertook radical reorganization of the labor process in the early years of the twentieth century, and he points out that “[t]he scientific management movement of Frederick Winslow Taylor and his disciples was the articulate and self-conscious vanguard of the businessmen’s reform effort.” D. MONTGOMERY, WORKERS’ CONTROL IN AMERICA 113 (1979). After reviewing the response of workers to the management effort, Montgomery summarizes:

> Over the demise of customary factory management, based on the autonomy of the skilled craftsman and the personal authority of the foreman, there developed a bitter battle of standards. Scientific management and trade-union rules sought to transform industrial practice in mutually exclusive ways. The conflict reached its greatest intensity during periods of abundant employment after 1909, when scientific management spread rapidly through metal-working industries and became increasingly concerned with personnel relations. Simultaneously, the level of strike activity rose rapidly, and large numbers of workers took part in devising forms of organization which transcended older craft union lines.

*Id.* at 134.

11. Scientific management was more than a method of organizing production; the system also possessed an important ideological component. See P. THOMPSON, THE NATURE OF WORK 129-30 (1983); and *see infra* text accompanying notes 80-88. The evolution of contract law in this country occurring during the same general period is illustrative of the ideology manifested at the particularized level of labor relations. One recent analysis summarizes the point as follows:

> The second great change in society [during the nineteenth century] was the dissolution of many of the traditional bonds among people that had characterized the social relations of earlier periods. The social meaning of work, property, and community were increasingly fragmented as socioeconomic processes based on competition and individual self-interest reorganized the social universe. Traditional social environments had hardly been idyllic and certainly embodied forms of alienation and class domination that ought not to be idealized. But the rise of capitalism—with its universal market in which people and things were everywhere made subject to the exigencies of money exchange—generated a dramatic and dislocating social upheaval. Within a short stretch of historical time, people experienced and were forced to adapt to the appearance of the factory and the slum, the rise of the industrial city, and a violent rupture of group life and feeling that crushed traditional forms of moral and community identity in favor of that blend of aggression, paranoia, and profound emotional isolation and anguish that is known romantically as the rugged individual.

> How could people have been persuaded or forced to accept such massive disruptions in their lives? One vehicle of persuasion was the law of contracts, which generated a new ideological imagery that sought to give legitimacy to the new order. To speak of “ideological imagery” is to imply that there is a reality behind the image that is concealed and even denied by the image. The reality was the new system of oppressive and alienating economic and social relations. Contract law denied the
clining as a feature of industrial organization, the legal theory underwent its own phase of evolutionary disintegration.\textsuperscript{12}

Initially, this article examines the theoretical and practical bases of scientific management as articulated by Taylor. It next traces the development of the employment at will doctrine and explores the common social, political, and economic ground which supported the two systems, emphasizing the method by which the law explained and furthered the growth of the managerial construct. In conclusion, the article argues that emerging legal theories modifying employment at will are merely indicative of the accommodation of new phases of industrial domination.

\textbf{II. THE NATURE AND PURPOSE OF SCIENTIFIC MANAGEMENT}

Taylor described the process of scientific management as consisting of three distinct phases.\textsuperscript{13} The first stage, according to Taylor, was for the manager to assume the burden of "gathering together all of the traditional knowledge which in the past has been possessed by the workmen and then of classifying, tabulating, and reducing this knowledge to rules, laws and formulae which are immensely helpful to the workmen in doing their daily work."\textsuperscript{14} Management was obliged to learn the actual techniques of production, knowledge which was at that time primarily under the control of workers.\textsuperscript{15}

The second step necessary to the system was to delineate and rigorously maintain a separation between the conception of work and its execution.\textsuperscript{16} In Taylor's view, workers were to be "relieved" of

\begin{itemize}
  \item The nature of the system by creating an imagery that made the oppression and alienation appear to be the consequences of what the people themselves desired.
  \item As a sociological concept, the term "ideology" can be understood to refer to a communal consciousness which is reflective of certain values but which distorts the underlying reality giving rise to those values. In that sense, ideology is "false." The critique of ideology, among other ends, "seeks to isolate the fundamental beliefs and interpretations that are the basis of the ideology, and to criticize them in order to expose their falsity." While critique may attempt to "dissolve the legitimizing powers of ideologies," it does not presuppose the vantage of "true consciousness." R. Bernstein, \textit{The Restructuring of Social and Political Theory} 108-09 (1976).
  \item For a recent discussion of the decline of the at will employment rule, see Catler, \textit{The Case Against Proposals to Eliminate the Employment At Will Rule}, 5 \textit{Indus. Rel. L.J.} 471 (1983).
  \item See generally H. Braverman, \textit{supra} note 6, at 112-21.
  \item \textit{The Principles of Scientific Management}, \textit{supra} note 5, at 36.
  \item For a detailed treatment of the extent to which craft production at the end of the nineteenth century remained under workers' control and Taylor's efforts to change that situation, see D. Clawson, \textit{Bureaucracy and the Labor Process} 126-44 (1980).
  \item Clawson asserts that the "split" between the conception of work and its execution is
any opportunity to design the work process and plan for its implementation. Thus, "[a]ll possible brain work should be removed from the shop and centered in the planning or laying-out department, leaving for the foremen and gang bosses work strictly executive in its nature." 17 The "rules, laws and formulae" which were derived from the first step were utilized to "replace the judgment of the individual workman" and to introduce uniformity into the work process. 18

Finally, the third feature of Taylor's system was the "task idea." The "task idea" demanded that management plan in detail the work to be done by each worker, and "specif[y] not only what is to be done but how it is to be done and the exact time allowed for doing it." 19

Taylor's formulation of scientific management illustrates that it is a concise and highly rationalized approach to the organization of work. But Taylor himself was aware that the import of his theory could be accurately conveyed only through concrete example; in his view, the existing method of production, which he referred to as "initiative and incentive," was too deeply engrained in the industrial consciousness to be altered solely by reason. Therefore, Taylor argued:

The universal prejudice in favor of the management of "initiative and incentive" is so strong that no mere theoretical advantages which can be pointed out will be likely to convince the average manager that any other system is better. It will be upon a series of practical illustrations of the actual working of the two systems that the writer will depend in his efforts to prove that scientific management is so greatly superior to other types. 20

The first example offered by Taylor is the one which has become commonly associated with scientific management. It involves the task of loading pig-iron by a worker whom Taylor referred to as Schmidt. 21 The Schmidt episode is important not only as a demonstration of the manner in which Taylor's method can be applied, but also because it reveals with particular clarity the precise objectives

"a fundamental factor determining the class structure of modern Western society." Id. at 258.
17. F. TAYLOR, Shop Management (1903), in F. TAYLOR, SCIENTIFIC MANAGEMENT 98 (1947).
18. The Principles of Scientific Management, supra note 5, at 37.
19. Id. at 39.
20. Id. at 35.
21. Taylor describes "Schmidt" as "a little Pennsylvania Dutchman who had been observed to trot back home for a mile or so after his work in the evening, about as fresh as he was when he came trotting down to work in the morning." Schmidt was also extremely industrious and had a reputation "of placing a very high value on a dollar." Id. at 43-44.
of the system.

At the Bethlehem Steel Company, pig-iron was loaded by hand into rail cars. A gang of workers, of whom Schmidt was one, carried a 92-pound pig up a ramp, dropped it into the rail car, and repeated the task. The average amount loaded per man per day was 121/2 tons; each worker was paid a daily wage of $1.15.

After observing the workers for several days, Taylor concluded that a "first-class pig-iron handler" was capable of loading between 47 and 48 tons of iron per day. He approached Schmidt and inquired whether Schmidt would like to become a "high-priced man" who would be paid a wage of $1.85. Schmidt agreed to load the pigs exactly as instructed by Taylor's assistant. Schmidt was directed when to pick up a pig, when to walk, when to throw down the pig, and when to rest. At the end of the day Schmidt had loaded 471/2 tons of iron.

Taylor subsequently noted that for the next three years Schmidt continued to load approximately the same amount of iron and to earn a wage of $1.85, thereby receiving 60 percent higher wages than were normally paid in the area. In exchange for the 60% increase in wages, Schmidt quadrupled the amount of effort expended for the benefit of the employer.

Taylor's version of the experiment with Schmidt clarifies two essential attributes of scientific management in its application to the labor process. First, it is a systematic means of quantifying the amount of labor power necessary to accomplish a given task. Second, it is a mechanism for establishing detailed control over the worker.

22. Id. at 42. Taylor subsequently provides a detailed explanation of the method used to determine the figure of 47 tons. He adds that only about one man in eight in the gang was capable of doing so much work. That man, Taylor said, was "so stupid that he was unfitted to do most kinds of laboring work . . . ." Id. at 60-62.

23. In his record of the conversation with Schmidt, Taylor repeatedly mentions the $1.85 daily wage. He explains, "[w]ith a man of the mentally sluggish type of Schmidt it is appropriate and not unkind, since it is effective in fixing his attention on the high wages which he wants and away from what, if it were called to his attention, he probably would consider impossibly hard work." Id. at 46. Because Schmidt was selected largely on the basis of his reputation for thrift, it is unlikely that Schmidt failed to grasp the mathematical relationship between 12 tons and 47 tons of pig iron, and $1.15 and $1.85.

24. Braverman comments:

Taylor was to discover (and to complain) that management treated his "scientific incentives" like any other piece rate, cutting them mercilessly so long as the labor market permitted, so that workers pushed to the Taylorian intensity found themselves getting little, or nothing, more than the going rate for the area, while other employers—under the pressure of this competitive threat—forced their own workers to the higher intensities of labor.

H. BRAVERMAN, supra note 6, at 107.
These two aspects of the system enabled Taylor and employers in general to substantially erode the power of workers on the shop floor. To understand how that diminution was effected, it is necessary to consider the model of production Taylor sought to replace.

Taylor criticized the "initiative and incentive" method of management on the ground that it permitted workers to engage in "soldiering," or the systematic withholding of labor. Under that system, workers retained control over the manner in which work was done and expended labor only to the extent they deemed appropriate for the wage which they were receiving. As Taylor explained:

The causes for ["universal soldiering"] are, briefly, that practically all employers determine upon a maximum sum which they feel it is right for each of their classes of employees to earn per day, whether their men work by the day or piece.

Each workman soon finds out about what this figure is for his particular case, and he also realizes that when his employer is convinced that a man is capable of doing more work than he has done, he will find sooner or later some way of compelling him to do it with little or no increase of pay.

Consequently, the wage bargain struck under conditions prior to scientific management involved a balance of power grounded on some measure of parity relative to control over the means of production.

Taylor recognized that increased productivity could be attained only by altering the methods of production. The "greatest obstacle" which confronted management in that endeavor was "the ignorance of the management as to what really constitutes a proper day's work for a workman." So long as workers possessed the greater knowl-

25. Clawson, for example, states:

One individual stands far above all others in the contribution he made to solving this critical problem [of workers' control over production] facing the capitalist class. Frederick Winslow Taylor at once excelled in three different respects: (1) he produced by far the best analysis of the existing situation, an understanding of the nature of the problem confronting employers; (2) he developed the solution for this problem, an alternative means of organizing and structuring the production process and the relations of production; and (3) he was himself the most important person directing the implementation of the policies he proposed. Frederick Taylor was the Napoleon of the war against craft production, directing some battles himself and acting through lieutenants in other cases, but he was more than that. He was also the theoretician who comprehended the situation and explained the solutions to the problems that had baffled so many before him. Taylor represented the unification of theory and practice in the cause of the capitalist class.


26. Shop Management, supra note 17, at 33.

27. See generally D. Clawson, supra note 15, at 36-54.

edge and skill concerning the work process, management would be forced to rely on the worker's "initiative" in supplying labor. Any increased productivity was purchased through an "incentive" over and above the daily wage fixed by the employer.

In part, scientific management was a device used to measure labor, thus enabling management to specify an acceptable level of labor output. A significant corollary of the system was a transformation of the attitudes engendered by the concept, which constituted its ideological dimension. Taylor sought to persuade workers as well as employers that it was the function of management to establish standards of productivity, rather than the province of labor to do so.

Scientific management, as Taylor insisted, was not driven solely by improved technology, nor was it necessarily associated with innovation in technique. It was more appropriately regarded as a matter of belief. Because Taylor perceived some gradual obfuscation of that point, he was emphatic concerning the nature of his theory. In his words:

Scientific management is not any efficiency device, not a device of any kind for securing efficiency; nor is it any bunch or group of efficiency devices. It is not a new system of figuring costs; it is not a new scheme of paying men; it is not a piecework system; it is not a bonus system; it is not a premium system; it is no scheme for paying men; it is not holding a stop watch on a man and writing things down about him; it is not time study; it is not motion study nor an analysis of the movements of men; it is not the printing and ruling and unloading of a ton or two of blanks on a set of men and saying, "Here's your system; go use it." It is not divided foremanship or functional foremanship; it is not any of the devices which the average man calls to mind when scientific management is spoken of. The average man thinks of one or more of these things when he hears the words "scientific management" mentioned, but scientific management is not any of these devices.29

Rather, Taylor stated, scientific management "involves a complete mental revolution" on the part of both workers and managers. Each group must acknowledge and accept its respective duties in the industrial system, and "without this complete mental revolution on both sides scientific management does not exist."30

Taylor's model of the industrial order, in brief, was dependent upon management's ability to sever critical dimensions of the work

29. F. TAYLOR, Taylor's Testimony Before the Special House Committee in SCIENTIFIC MANAGEMENT, supra note 5, at 26 (1947).
30. Id. at 27.
Employment At Will and Scientific Management process from the worker’s control. The initial step in Taylor’s method was to quantify precisely the amount of labor necessary to achieve a given result. From that determination, the “fair day’s work”—that is, the objective result of a given measure of labor—could be calculated.

The second integral aspect of scientific management concerns management’s ability to extract the desired quantity of labor from the worker within a specified time in exchange for a specified wage. An analysis of this dimension establishes the linkage between scientific management and employment at will. Taylor’s own writings, again, provide an appropriate perspective.

In his recollection of the episode at Midvale, Taylor dealt with the matter of economic power in the workplace. Taylor reports that upon becoming a foreman, he informed the machinists that he was now a member of management and that he “proposed to do whatever he could to get a fair day’s work out of the lathes.” That challenge “immediately started a war” which grew increasingly bitter. Taylor reports that he “used every expedient to make [workers] do a fair day’s work, such as discharging or lowering of wages of the more stubborn men who refused to make any improvement, and such as lowering the piece-work price, hiring green men, and personally teaching them how to do the work, with the promise from them that when they had learned how, they would then do a fair day’s work.” The workers responded to Taylor’s tactics by sabotaging machinery and by bringing intense pressure upon any other worker who increased his productivity.

After three years of struggle, Taylor emerged victorious, but he noted that such an achievement was gained at considerable expense: “For any right-minded man . . . this success is in no sense a recompense for the bitter relations which he is forced to maintain with all of those around him. Life which is one continuous struggle with other men is hardly worth living.” Taylor’s misgivings relative to the alienating effects of scientific management were prescient, for it soon became apparent that conflict was inherent in the nature of the system.

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32. Id. at 49-50.
33. Id. at 52.
34. “From its inception, a key part of Taylorism was struggle, an unyielding battle until one side or the other won an unequivocal victory . . . The foundation of Taylor’s approach was the realization that under a capitalist system workers and owners could not share authority and the direction of the work.” D. Clawson, supra note 15, at 246.
Generally, Taylor's method was an important contribution to the development of the American industrial system.\textsuperscript{35} Taylor himself envisioned the ultimate goal of scientific management to be an economic utopia created by constantly expanding industrial productivity where competition between capital and labor had been alleviated by abundance. Taylor's expectations, however, proved wrong; industrial conflict actually increased from around 1905, to historic levels in the early 1920's\textsuperscript{36}—precisely the time when Taylor's ideas had attained national prominence.\textsuperscript{37}

In any event, scientific management was a system imposed on workers through coercion and duress, and not through cooperation and mutual acceptance.\textsuperscript{38} The key legal mechanism for facilitating the growth of scientific management was the doctrine of employment at will.

\textbf{III. THE ORIGINS OF EMPLOYMENT AT WILL}

During the mid-nineteenth century, American law concerning employment contracts was in a state of transition.\textsuperscript{39} The English common law viewed employment as a social relationship characterized by mutual obligations on the part of master and servant. The employee typically was afforded some degree of protection through a presumption that employment was for a fixed period.\textsuperscript{40} For example, Blackstone in his \textit{Commentaries} formulated the rule governing employment as follows:

\begin{quote}
If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as
\end{quote}

\begin{itemize}
\item \textsuperscript{35} \textit{Id.} at 203; but see \textit{Segmented Work, Divided Workers}, supra note 10, at 146.
\item The debate concerning Taylorism is reviewed in \textit{P. Thompson}, supra note 11, at 122-52.
\item \textit{See infra} text accompanying notes 79-80.
\item The intense strike activity during this period is explained in terms of job control and political struggle.
American strikes were lengthy battles before the New Deal not because they were “as much political as economic” but because they involved crucial and fundamental battles over the control of the work place. And the terms of “admission to the polity” for the American working class were not something which was simply imposed by the government. The terms of admission were a particular form of the institutionalization of the pre-existing struggle for control of the work place. \textit{P. Edwards}, supra note 36, at 237.
\item \textit{See generally} \textit{Feinman}, supra note 3, at 122-25.
\item \textit{See Id.} at 119-22.
\end{itemize}
well when there is work to be done, as when there is not. Accordingly, unless otherwise stated, employment was usually regarded to be of definite duration.

A second device evident in English common law which tended to stabilize the employment relationship was the requirement of notice. Each party was obligated to notify the other of an intention to terminate the relationship prior to actually doing so. While the precise period varied, the notice requirement prevented precipitous action which would unduly disadvantage the other party.

American law on the question prior to 1877 reflected some ambivalence toward the English doctrine. In that year, Horace Gray Wood announced the “American” rule of employment contracts. Wood stated, “the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof.” Wood’s rule soon became recognized as the controlling legal principle in employment contracts. However, it was not supported in either precedent or policy.

One legal historian, in tracing the background of employment at will, describes the genesis of Wood’s rule as a “puzzling question.” He points out that Wood enjoyed a reputation as an accurate, conscientious scholar, and his treatises were held in high esteem. Yet, three important criticisms can be made concerning Wood’s formulation of the at will doctrine:

First, the four American cases he cited in direct support of the rule were in fact far off the mark. Second, his scholarly disingenuity was extraordinary; he stated incorrectly that no American courts in recent years had approved the English rule, that the employment at will rule was inflexibly applied in the United States, and that the English rule was only for a yearly hiring, making no mention of notice. Third, in the absence of valid legal support, Wood offered no policy grounds for the rule he proclaimed.
Nevertheless, despite its shortcomings, Wood's rule had been widely adopted by 1895.\textsuperscript{47}

The consequence of the at will principle was to shift the legal focus from a concept of status to one of contractualism. Employment, in other words, was viewed as an arrangement strictly consensual in nature, and because the contract was terminable at any time, legal action by an employee was effectively precluded.\textsuperscript{48} Given the legal presumption supporting at will employment, an aggrieved employee was required to prove a contract of definite duration prior to presenting evidence relevant to breach of the contract.\textsuperscript{49} Such a rule obviously enhanced the economic power of the employer. As one commentator observes:

If the contract is at will, no legal limits are set on the authority of the employer, especially on the key issue of dismissal. The employer is free to hire and fire unrestrained by the legal requirement that he have just cause for rescinding a contract not yet expired. Moreover, the contract at will is not a device for framing agreed-upon conditions to govern day-to-day activities. Since there is no definite duration, the terms of the contract are not binding for the future. The employer is free to modify them at any time, without notice.\textsuperscript{50}

Thus, the employee lacks sufficient legal interest to challenge either disciplinary action or a modification of the work environment.

If Wood's rule was inconsistent with precedent and lacking in any apparent social utility, the question arises as to why the rule was so promptly adopted. One explanation is that the rule "was an integral part of the development of an advanced capitalist economy in America."\textsuperscript{51} In one aspect, the rule precluded employees from asserting any meaningful claim of control within the enterprise.\textsuperscript{52} In addition, it provided for a means of discharging a worker without risk of


\textsuperscript{48} "Under the contract at will, the issue of breach does not arise, for the contract is so fleeting, so lacking in legal substance, that it provides no secure ground for the claim of an aggrieved party to be made whole, either through money damages or specific performance." P. SELZNICK, supra note 44, at 134.

\textsuperscript{49} The legal presumption underlying the at will rule amounted to a "virtual abdication of legal oversight" over the employment relationship. Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 HARV. L. REV. 1816, 1826 (1980).

\textsuperscript{50} P. SELZNICK, supra note 44, at 134-35.

\textsuperscript{51} Feinman, supra note 3, at 133.

\textsuperscript{52} Feinman argues that the rule was particularly aimed at middle managers, who at that time presented a greater potential threat to the power of capitalism than did the working class. Id.
challenge when the worker failed to comply with company standards, thus subjugating workers economically and even socially and politically.63

The at will doctrine, then, was in many respects a “legal anomaly.”64 Yet, it can be explained on one level as an immensely powerful and practical tool used by employers in the day-to-day operation of the enterprise. Through its means, workers could be effectively stripped of any appreciable degree of power in the enterprise.

On a more theoretical level, the law acted to legitimize the imbalance of economic strength which was generated under scientific management. Taylor’s system precluded workers from control at the very heart of the production process, thereby insuring that the surplus value resulting from that process would be distributed consistent with the needs of capital rather than the needs of labor.65 Contemporary judicial thought attempted to explain and legitimize that inequality in such a manner that at will employment appeared to be a manifestation of the consensual nature of civil society, rather than a mechanism of oppression.

IV. LIBERTY, PROPERTY AND LEGITIMACY

Towards the end of the nineteenth century, the legal principle which governed the economic exchange of labor and wages was predicated on notions of “freedom of contract.”66 In ideological terms, the law propounded the social value of voluntary interaction supported and enforced by neutral, abstract and autonomous rules promulgated by a disinterested judiciary. As one commentator observes, “[t]he central moral ideal of contractualism was and is that justice consists in enforcing the agreement of the parties so long as they have the capacity and have had a proper opportunity to bargain for terms satisfactory to each.”67

The ideological dimension of contractualism as a legal methodology fulfilled certain vital objectives. It was apologetic, in that it

53. In Payne v. Western & Ati. R.R., 81 Tenn. 507 (1884), the dissenting judges argued that the principle espoused by the majority would legally permit an employer to force employees to trade with a particular merchant, to vote for a particular candidate, or to “do anything not strictly criminal” upon pain of discharge. Thus, the political implications of the employment at will rule were evident from the rule’s inception.
54. Feinman, supra note 3, at 135.
55. See generally H. Braverman, supra note 6, at 45-58, for a contemporary analysis of the manner in which capitalism progressively alienates workers from the process of production to assure a maximum return on the investment in labor power.
56. See, e.g., Note, supra note 49, at 1825-28, and supra note 11.
denied the substantive economic inequality attendant upon the developing capitalist order.\textsuperscript{58} It was also legitimating, in the sense that it articulated an ideal of social utility based on consensus; the conflict of “rights” between worker and owner, for example, could be explained on the basis of some express or implied agreement.\textsuperscript{59} Those functions are apparent in one of the leading opinions of the time dealing with the employment relationship.

In \emph{Adair v. United States},\textsuperscript{60} decided in 1908, the Supreme Court invalidated legislation safeguarding the rights of railway workers to join unions. The Erdmann Act of 1898\textsuperscript{61} had been enacted to alleviate industrial conflict such as the Pullman strike of 1894, led by Eugene Debs.\textsuperscript{62} Congress determined that a system which afforded workers a right to organize and which provided for the arbitration of disputes would assist in preventing strikes.\textsuperscript{63} Section 10 of the Act explicitly stated that it was unlawful for an employer to “discriminate against any employee because of his membership in such a labor corporation, association, or organization 
. . . .”\textsuperscript{64} The Court’s rationale in \emph{Adair} exemplifies the manner in which a judicial decision may protect the economic interests of one group by purported reliance on democratic ideals.\textsuperscript{65} Further, the

\textsuperscript{58} “The element of apology comes in because legal thought denies or mediates with a bias toward the existing social and economic order.” Kennedy, \textit{The Structure of Blackstone’s Commentaries}, 28 \textit{Buffalo L. Rev.} 209, 217 (1979).

\textsuperscript{59} “The first and simplest liberal technique for resolving private law conflicts of rights is for the judge to point to an agreement between the parties, a statute, or a common law precedent that has unequivocally settled the conflict in advance. In each case, this amounts to a claim that one of the parties has already voluntarily relinquished the right she now asserts.” \textit{Id.} at 356-57; see also supra note 11.

\textsuperscript{60} 208 U.S. 161 (1908).

\textsuperscript{61} 30 Stat. 424 (1898).

\textsuperscript{62} For an historical account of the Debs “rebellion” see S. Lens, \textit{The Labor Wars} 89-126 (1974).

\textsuperscript{63} The legislative history underlying the Act is reported in S. REP. NO. 591, 55th Cong., 2d Sess.; H.R. Rep. 454, 55th Cong., 2d Sess. (1898).

\textsuperscript{64} 30 Stat. 424, 428 (1898).

\textsuperscript{65} The Court in \emph{Adair} held that [w]hile . . . the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.

208 U.S. at 174.
Adair holding was designed to shield the at will doctrine from future legislative depredation, and it successfully did so until NLRB v. Jones & Laughlin Steel Co. in 1937. 66

A supervisor named Adair discharged a worker, O.B. Coppage, 67 allegedly because of Coppage's membership in the Order of Locomotive Firemen. The federal government prosecuted Adair, and the Federal District Court found him guilty of violating Section 10 of the Act. 68

On appeal, the Supreme Court perceived the issue to be whether or not Congress could prohibit an employer from discharging an employee "simply because of his membership in a labor organization." 69 It concluded that the guarantees of liberty and property in the Fifth Amendment precluded legislation protecting workers against discharge for union activity. The labor bargain was a transaction not constitutionally subject to governmental regulation.

The Court's analysis proceeds along two related lines. First, it characterizes the matter as one involving the allocation of "rights" which are derived from the concept of liberty. Second, the exchange of labor is regarded as the sale of an object which can be categorized as "property."

Concerning the liberty aspect, the Court notes that "[i]t was the right of [Adair] to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employe' of the railroad company upon the terms offered to him." 70 Thus, the liberty to reach voluntary agreement on terms and conditions of employment was guaranteed by the Constitution. Coppage had no "right" to be free from the employer's discriminatory infliction of economic harm because Coppage had surrendered that "right" by accepting employment. 71

66. 301 U.S. 1 (1937). In Jones & Laughlin Steel Co., the Court held that employees in industry have a fundamental right to organize and select representatives of their own choosing for collective bargaining, and discrimination or coercion upon the part of their employer to prevent the free exercise of this right is a proper subject for condemnation by competent legislative authority. Id. at 33-34.

67. Another party named Coppage subsequently was involved in litigation arising under a Kansas statute prohibiting employment contracts which were conditioned upon an employee's nonmembership in a labor organization. The Supreme Court struck down the statute, relying upon the Adair rationale. Coppage v. Kansas, 236 U.S. 1 (1915).


69. 208 U.S. at 171.

70. Id. at 172-73.

71. Coppage, as a railroad worker, had no realistic alternative opportunities for employment. The "labor contractualism" articulated by the Court thus functioned merely "as the institutional basis of domination in the workplace." Klare, supra note 57, at 297.
There is, consequently, an appearance of formal equality and neutrality in the reconciliation of conflicting rights. As the Court observes in one particularly cogent passage:

It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.\textsuperscript{72}

The property aspect of the \textit{Adair} opinion similarly flows from the contractualist approach of the Court. The relationship between worker and owner is, in the Court's view, merely a commercial transaction. That which is purchased and sold is an object—a quantity of labor potential—over which either party can exercise dominion through ownership.\textsuperscript{73} Any social dimension of the relationship is thereby obliterated, and the exchange is so reduced in substance as to consist of a moment-by-moment exchange.\textsuperscript{74} The Court explicitly addresses the duration of employment contracts:

\begin{itemize}
\item \textsuperscript{72} 208 U.S. at 175.
\item \textsuperscript{73} The Court's analysis is akin to the "reification" of contractual relationships occurring in Blackstone's analysis of the common law. Labor, that is, becomes a "thing" to which one party is entitled. Such a conceptualization reduces the personal aspect of the relationship and results instead in the domination of objects. See Kennedy, \textit{supra} note 58, at 337-42 and 346-50.
\item Marx incisively described the nature of the labor "market" transaction in \textit{Capital}. Relative to the exchange through which the capitalist obtains ownership of labor potential to be realized from the worker, Marx observed with trenchant irony:

\begin{quote}
This sphere that we are deserting [the market], within whose boundaries the sale and purchase of labour-power goes on, is in fact a very Eden of the innate rights of man. There alone rule Freedom, Equality, Property and Bentham. Freedom, because both buyer and seller of a commodity, say of labour-power, are constrained only by their own free will. They contract as free agents, and the agreement they come to, is but the form in which they give legal expression to their common will. Equality, because each enters into relation with the other, as with a simple owner of commodities, and they exchange equivalent for equivalent. Property, because each disposes only of what is his own. And Bentham, because each looks only to himself. The only force that brings them together and puts them in relation with each other, is the selfishness, the gain and the private interests of each.
\end{quote}

\item Selznick says that "the encounter is as casual as the sale of a newspaper on a city street." P. \textit{Selznick}, \textit{supra} note 44, at 134.
\end{itemize}
In the absence . . . of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another . . . [Coppage] was at liberty to quit the service without assigning any reason for his leaving. And the defendant was at liberty, in his discretion, to discharge Coppage from service without giving any reason for so doing.\textsuperscript{76}

The "liberty" of the parties, accordingly, can be analogized in the Court's view to exchanges occurring between individuals having no fixed relationship other than the singular contact. Using that premise, the Court proceeds from its notion of the labor bargain through "contracts" involving "liberty" and "property" to a constitutional limitation on governmental power:

As the relations and conduct of the parties towards each other was not controlled by any contract other than a general agreement on one side to accept the services of the employee and a general agreement on the other side to render services to the employer—no term being fixed for the continuance of the employment—Congress could not, consistently with the Fifth Amendment, make it a crime against the United States to discharge the employee because of his being a member of a labor organization.\textsuperscript{76}

The holding in \textit{Adair}—that a worker cannot be protected by legislative action from a discriminatory discharge—is thus rationalized as a beneficial result flowing from the nature of civil society. The process of rationalization rests on the proposition that our social organization exists to insure order and harmony among the populace. Individual members of the society have consented to a derogation of some "natural" freedom in order to assure their protection by the state against the power of others, and consent is therefore the underlying basis of the social compact.\textsuperscript{77} From that assumption, it follows that Coppage's assent to Adair's offer of employment was a manifestation at one level of abstraction of the bond which sustains society as a whole. Consequently, Coppage's discharge for union activity was arguably supportable as the result of a viable economic democracy and not of oppressive capitalism.\textsuperscript{78}

\begin{footnotesize}
75. 208 U.S. at 175-76.
76. \textit{id.} at 176.
77. \textit{See generally} Kennedy, \textit{supra} note 58, at 354-82.
78. The argument can be given a modern formulation. \textit{See, e.g.,} M. Friedman, Capi-
\end{footnotesize}
The Adair litigation commenced in 1906 and reached the Supreme Court the following year. In 1903, Taylor presented a paper entitled "Shop Management," which soon became "the storm center of controversial discussion throughout the management world." By 1910, Taylor's ideas had become a subject of public interest, and he prepared a formal exposition of his views which was published in early 1911 as Principles of Scientific Management. Later that year, he was invited to testify before the special House Committee chaired by Representative William Wilson.

Taylor's justification of scientific management from a social, economic and philosophical perspective is identical in import to the policy grounds articulated by the Court to sustain its result in the Adair case. An analysis of Taylor's testimony demonstrates how Taylor attempted to advance, through the ideology of "freedom" and "consent," a strategy which would dampen opposition to scientific management and preserve to capitalism a substantial tactical advantage in the wage-labor bargain.

In the session on Tuesday, January 30, 1912, Chairman Wilson commenced a line of inquiry addressing substantive allocations of power within the workplace. He asked of Taylor who would determine "what constitutes soldiering and what constitutes a proper amount of physical energy to be expended [in completing a particular task]." Taylor replied that it was a "matter of accurate, careful scientific investigation." Taylor went on to suggest that accepted standards of productivity would eventually be established in every trade, and the matter of labor output would therefore be resolved by consensus.

Wilson then pursued the notion of surplus production and its division among management and labor. He proposed to Taylor that excess labor value should be distributed through collective bargaining. Taylor, in response, offered the premise that the interests of labor and capital were not inimical to one another and that the neutral, objective system of scientific management would obviate any conflict between them and, thus, any need for bargaining. Taylor said:

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TALISM AND FREEDOM 115-16 (1962).

79. Person, Foreword, SCIENTIFIC MANAGEMENT, supra note 5, at xii.
80. Supra note 5.
81. Testimony, supra note 29, at 141 (transcription of proceedings begins).
82. Id. at 143.
83. Such standards, Taylor asserted, would eventually be regarded "both by the workmen and the management as correct." Id.
Now, the moment this attitude of hostility or semihostility between the two sides is abandoned, and the moment it becomes the object of both sides jointly to arrive at what is an equitable and just series of standards by which they will both be governed; the moment they realize that under this new type of cooperation—by joining together and pushing in the same direction instead of pulling apart—they can so enormously increase this surplus that there will be ample for both sides to divide; then collective bargaining instead of becoming a necessity becomes a trifling importance. In all establishments working under scientific management it is always understood that any single workman or any four or five or six workmen can at any time call to the attention of the management the fact that any element in the management is wrong and should be corrected, and this protest will receive immediate and proper attention. And what I want to emphasize is that the kind of attention which any protest from the men receives under scientific management is not that which is subject to the personal prejudice or to the personal judgment of the employer, but it is the type of attention which immediately starts a careful scientific investigation as to all of the facts in the case, and this investigation is pursued until results have been obtained which satisfy both sides of the justice of the conclusion. Under these circumstances, then, collective bargaining becomes a matter of trifling importance.84

Taylor assumed that scientific management would function as a system characterized by objectivity, generality and autonomy, and one which would remain free from the domination of any party acting from its own self-interest. Scientific management, as Taylor conceived it, replicated the structural features of the rule of law in modern society; it was concerned more with procedural regularity and formality than substantive equity, and its claim to legitimacy depended upon a purportedly neutral and value-free content.85

With regard to formal equality under scientific management, for example, Taylor discussed the ostensible mutuality of rights in the workplace using language nearly identical with that used by the Supreme Court in Adair only a few years earlier. When Chairman Wilson asserted to Taylor that power within any enterprise utilizing scientific management would be centered in the head of the establishment and that workers would have no avenue of appeal beyond that level, Taylor disagreed with that conclusion by pointing out that a worker, first of all, could engage in soldiering. Should that tactic

84. Id. at 150-51.
85. See R. UNGER, LAW IN MODERN SOCIETY (1976).
fail, Taylor added, "he always has the recourse of leaving." Wilson objected that that alternative would disadvantage the worker much more than the employer but Taylor insisted that employers "are always looking for good men." And, in answer to whether workers would be permitted to leave the establishment, Taylor said:

They do not want to leave. Permit them? Of course they are permitted. This is a free country. But they are so well off, and so well treated, that they do not want to leave. It is not a question of permitting; it is altogether a voluntary matter. 

Like Coppage, then, workers under scientific management were deemed to have an "equality of right" and "liberty of contract" on an equivalent footing with the employer. The ideology supporting Taylor's theory is the same as that supporting employment at will, and the points of common reinforcement between the legal system and the industrial system can thus be adumbrated. That symbiotic relationship, moreover, can be further elaborated by examining their simultaneous decline. The next portion of this article traces the judicial evisceration of the common law doctrine of at will employment and the erosion of scientific management as an industrial project.

V. Dogma in Decay

A. The Assault on Employment at Will

The decline of the at will principle as a viable legal concept can be traced with relative clarity. The first judicial decision of significance was rendered in 1959 in Petermann v. International Brotherhood of Teamsters, Local 396, wherein the California Court of Appeals held that an employer's "generally unlimited right to discharge an employee whose employment is for an unspecified duration" was subject to legal restriction when the discharge contravened some important public policy. Thus, the court ruled, the plaintiff stated a cause of action when he alleged that he had been terminated for his refusal to commit perjury. Petermann was the leading decision articulating the "public policy" exception to the employment at will rule.

86. Testimony, supra note 29, at 214.
87. Id. at 215.
88. Id.
90. See also Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (discharge based on the filing of a workers' compensation claim contravenes public policy).
Next, in a seminal article published in 1967, Professor Lawrence Blades argued for broad judicial protection of an employee's interests in the employment relationship. Blades asserted that despite the concentration of economic power in the hands of fewer employers, "the law has done little, outside the limited and shrinking realm of labor unions, to protect the economically dependent employee from employer power." The result, he contended, was that employers attained an unwarranted measure of control over an employee's activities which were not directly related to the job. Blades therefore concluded that a remedy in damages ought to be made available to an employee who was "abusively discharged," a theory which rested on proof of the employer's ulterior purpose in terminating the employee.

Within fifteen years from the publication of Blades' article, a substantial modification of the common law rule had indeed taken place. One commentator, after a detailed review of precedent through 1980, claimed that the reported death of the at will rule was "greatly exaggerated," but conceded that it was an area of the law undergoing "dynamic development." A more recent survey concludes that twenty-nine states have recognized some exceptions to the at will rule, and five additional states have indicated a willingness to do so. If not dead, at will employment is exceedingly moribund, and commentators continue to advocate legislative reform.

Generally, three major categories of exceptions to the at will principle have emerged. They are the public policy exception, the malice or bad faith exception, and the contract exception. The case of Novosel v. Nationwide Insurance Co. illustrates the current judicial predilection for applying and expanding the exceptions

91. Blades, supra note 8.
92. Id. at 1405.
93. Id. at 1407-08.
94. Id. at 1423-24.
96. Id. at 265.
102. 721 F.2d 894 (3rd Cir. 1983).
to the at will employment.

Novosel was employed by the defendant corporation from December 1966 to November 1981. He was regularly awarded promotions and never received any disciplinary action. At the time of his discharge, he was under consideration for the position of division claims manager.

In October 1981, the company circulated a memorandum requesting all employees to engage in lobbying activities in support of legislation then pending before the Pennsylvania House of Representatives. Following his discharge, Novosel filed an action alleging that he had been terminated for his refusal to participate in the employer's political campaign, and for his personal opposition to the legislation. The district court granted the employer's motion to dismiss.

The Third Circuit determined that under Pennsylvania law the plaintiff had stated a cause of action grounded in both tort and contract theories. The claim in tort was based on the employer's putative interference with a public policy of the state, while the contract issue involved Novosel's allegation that the employer had by custom and practice created a just cause standard for discharge.

Relative to the public policy question, the court ruled that "the protection of an employee's freedom of political expression would appear to involve no less compelling a societal interest than the fulfillment of jury service or the filing of a workers' compensation claim." The court noted that no state action was present in the case as Novosel was not a public employee; nevertheless, the opinion draws an explicit analogy to constitutional protections arising under the First Amendment. The court stated:

The protection of important political freedoms . . . goes well beyond the question whether the threat comes from state or private bodies. The inquiry before us is whether the concern for the rights of political expression and association which animated the public employee cases is sufficient to state a public policy under Pennsylvania law. While there are no Pennsylvania cases squarely on this point, we believe that the clear direction of the opinions promulgated by the state's courts suggests that this question be answered in the affirmative. 105

103. The legislation pertained to "no-fault" insurance. The defendant employer supported the proposed statute, which was entitled the "No-Fault Reform Act." Id. at 896.

104. Id. at 899.

105. Id. at 900.
The appellate court consequently directed the trial court to apply to Novosel’s tort claim a balancing standard derived from First Amendment decisions of the Supreme Court.\(^{106}\)

With regard to Novosel’s contract theory, the court declined to adopt a specific just cause standard applicable to the employment relationship. It observed, however, that courts in Michigan\(^{107}\) and California\(^{108}\) enforced against employers the employers’ representations of job security made orally, and in employee policy manuals.\(^{109}\) The appellate court concluded that under Pennsylvania law, the contract claim was a factual issue upon which Novosel should be permitted discovery and submission of evidence.

The *Novosel* opinion illustrates the degree of erosion in the common law rule of employment. The plaintiff’s mere allegation of an employment contract is sufficient to withstand a motion to dismiss, in contrast to the earlier common law presumption that employment was at will.\(^{110}\) Further, the decision imports concepts of constitutional law into private sector employment. That aspect of the case is itself a significant departure from previous judicial treatments\(^{111}\) and a significant measure of the current scope of judicial incursion into the area. At will employment, as *Novosel* suggests, is now more the exception than the common law rule.

**B. Modern Work and Scientific Management**

There is substantial debate concerning the degree to which scientific management, as an explicit program, has penetrated the American industrial setting.\(^{112}\) However, the two indispensable features of scientific management—quantification of work and detailed control over the work process—offer an analytical perspective from

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106. The court relied primarily on factors set forth by the U.S. Supreme Court in Pickering v. Board of Educ., 391 U.S. 563 (1968), which weigh the respective interests of the employer and the public employee.


110. See Note, supra note 49.

111. Judge Becker, dissenting from the court’s denial of the petition for rehearing, asserts that the majority has in effect “constitutionalized” the private sector workplace. 721 F.2d at 903-04. See also Klare, *The Public/Private Distinction in Labor Law*, 130 U. Pa. L. Rev. 1358 (1982).

which to evaluate the decline of scientific management as a model of industrial organization, and as an ideological project. Insofar as the quantification and direct control of work have declined in importance as managerial strategies, the impact of scientific management has diminished.

C. Measuring Labor

Scientific management was best suited to a method of production dependent upon high volume and standardization, with the automobile assembly line representing the paradigmatic application of the technique.\(^\text{113}\) That method resulted in the United States' becoming the dominant industrial power in the world until the last decade.\(^\text{114}\) Developments in the global economy since 1970, however, have necessitated structural modification of the processes of industrial production.

According to one influential analyst, Robert Reich, our industrial future depends on "flexible-system production."\(^\text{115}\) That is, in order to compete on a global scale, the United States must generate products which are unique rather than mass-produced. Such categories of products, for example, would include precision products, custom products, and technology-driven products.\(^\text{116}\) In each instance, the product would require skilled labor and cooperative effort within the enterprise. The implications for the quantification of labor within such a system are described by Reich as follows:

workers' performance cannot be monitored and evaluated through simple accounting systems. In flexible-system production the quality of work is often more important than quantity. As machines and low-wage labor overseas take over these tasks that demand only speed and accuracy, workers' skill, judgment, and initiative

\(^{113}\) Braverman describes the implementation of scientific management techniques at the Ford Model T plant in Highland Park, Michigan. The process was so efficient that it reduced the amount of time necessary for final assembly to one-tenth of that previously required. Workers were so antagonistic toward the system that in 1913, when Ford wanted to add 100 workers to the work force, it was obliged to hire a total of 963. H. BRAVERMAN, supra note 6, at 146-50.


\(^{115}\) See R. REICH, supra note 7, at 117-39. See also PIORE & SABEL, supra note 114, at 281-308.

\(^{116}\) R. REICH, supra note 7, at 128-30.
become the determinants of the flexible-system enterprise's competitive success. Moreover, tasks are often so interrelated that it becomes impossible to measure them separately; since each worker needs the help and cooperation of many others, success can be measured only in reference to the final collective result.\textsuperscript{117}

Reich further notes that one aspect of flexible-system labor is that the "radical distinction heretofore drawn between those who plan work and those who execute it is inappropriate . . . ."\textsuperscript{118} Under such circumstances, the quantification of work is exceedingly difficult.

In addition to the developments taking place in the manufacturing sector described by Reich, it is also generally recognized that the American economy is shifting from the production of goods to service-oriented activities. According to data compiled by the Bureau of Labor Statistics, "[s]ervice-producing industries—broadly defined as transportation, communications, public utilities, trade, finance, insurance, real estate, other services, and government—are projected to account for almost 75 percent of all new jobs between 1982 and 1995."\textsuperscript{119} The nature of employment available to American workers in the next decade, therefore, will differ significantly from that available in the past.\textsuperscript{120}

It is evident that the measurement of work is no longer necessarily an important managerial objective. Most new jobs are service-oriented rather than goods-producing, and labor output for such work is not readily susceptible to accurate quantification. Moreover, even within a manufacturing enterprise, the process of production in the future will depend less on the objectification of work, and increasingly upon cooperative effort and quality of production.\textsuperscript{121} The

\textsuperscript{117} Id. at 135.
\textsuperscript{118} Id.
\textsuperscript{120} Id. at 26 (tables of occupations most in demand). See also Greenwald, A Remarkable Job Machine, TIME, June 25, 1984, at 52-54. ("Overall, the U.S. is undergoing shifts in employment similar to those that have regularly taken place since the industrial revolution."). Braverman argues that work is becoming increasingly deskilled and concentrated in lower-paying sectors of the economy, thus creating an "immense reservoir" of unemployed and underemployed workers. H. BraverMAN, supra note 6, at 377-401. See also The AFL-CIO American Federationist, Apr. 21, 1984, at 7, col. 1 (shift in employment to service sector, where wages are considerably lower).
\textsuperscript{121} Piore and Sabel envision the possibility of "industrial districts" dominated by skilled craft workers as one response to the current economic dilemma. Workers in their model would control all aspects of production. M. PIore & C. SABEL, supra note 114, at 303-6.

It should also be noted, however, that technological advances may enable employers to objectively determine the productivity of workers in service industries. One example is the use of scanners in the retail food industry. With scanners, "management is able to set work stan-
first criterion of Taylor's system—the measurement of labor output—has become irrelevant to the modern industrial world. The second element, control over the worker, is no longer manifested through disciplinary action. Instead, as explored in the next section, control has become implicit rather than explicit in the organization of the enterprise.

D. Controlling the Worker

From an historical approach, the relationship between workers and capitalists in America can be fairly characterized as a struggle for control within the workplace. Recent scholarship has convincingly demonstrated the increased consolidation of control by employers in the work environment.\textsuperscript{122} This consolidation has been effectuated in part by technological change, and in part by the growth of the economic power of the employers.\textsuperscript{123} Presently, the organizational techniques of control are so pervasive as to be institutionalized.

In his study of corporate control of workers, Richard Edwards concludes that regulation in the workplace is primarily attained through “bureaucratic” mechanisms.\textsuperscript{124} At the Polaroid Corporation, for example, there is a highly articulated personnel system based on detailed job classifications and divisions. Employees are controlled through a network of rules which direct how work is to be done and evaluated and which inculcate desirable traits in workers. As Edwards summarizes:

\begin{quote}
[B]ureaucratic control is imbedded in the social and organizational structure of the firm and is built into job categories, work rules, promotion procedures, discipline, wage scales, definitions of responsibilities, and the like. Bureaucratic control establishes the impersonal force of “company rules” or “company policy” as the basis for control.\textsuperscript{125}
\end{quote}

Control, in other words, is so engrained within the structure of the enterprise at all levels as to constitute a “dictatorship.”\textsuperscript{126}

\begin{footnotes}
\footnotetext[122]{See, e.g., D. Clawson, supra note 15, at 36-70.}
\footnotetext[123]{Id.}
\footnotetext[124]{R. Edwards, supra note 112, at 130-32.}
\footnotetext[125]{Id. at 131.}
\footnotetext[126]{D. Clawson, supra note 15, at 246-47.}
\end{footnotes}
Given such a systematic and formalized means of eliciting appropriate worker behavior, discipline becomes necessary only in egregious cases. Discharge, particularly, can be reserved for instances of extreme misconduct.\textsuperscript{127} The economic power manifested by employers in implementing scientific management in its early stages has been transmuted into the fundamental design of the modern corporation, and operates at a much deeper level than the relatively crude device of overt discipline.\textsuperscript{128}

In summary, it is no longer essential to quantify with precision the labor output of any individual employee. Nor is it necessary to control the worker by oppressive discipline and repeated threats of discharge. The original connection between capitalist power, scientific management and employment at will has seemingly become attenuated. Yet, there remain important linkages between the concerns of capitalism and current common law developments.

\textbf{VI. THE EMERGING INDUSTRIAL ORDER AND THE LEGAL ENVIRONMENT}

Employment at will has been explained in terms of its utility to employers as an economic class. The decline of the at will rule can be similarly explained. A perception on the part of American workers that they are legally entitled to some degree of protection in their jobs will facilitate capitalist interests in several significant respects. First, it will enhance the loyalty of workers to their particular employer and motivate them to greater achievement on the employer's behalf. Second, it will frustrate effort at collective action by removing one important end of such action. Third, it will blunt reform on the political level by meliorating the perceived need for statutory reform. Finally, and of the most importance, it will reinforce the belief on the part of workers that the American judicial system is responsive to their needs.

\textsuperscript{127} "Companies dislike having to terminate a worker they have recruited and trained. It is a mark of failure, particularly for the personnel director." R. COULSON, \textit{The Termination Handbook} 120 (1981).

\textsuperscript{128} Thompson, for example observes that scientific management is no longer, in and of itself, sufficient as "the main source of legitimization of capitalist social relations in the workplace." Contemporary scholarship has identified an effort on the part of management to instill in workers "responsible autonomy," which encourages workers to accept the competitive goals of the enterprise and to further them at their own initiative. Thus, it has been argued that "responsible autonomy constitutes the major alternative form of management [rather than direct authority] in exercising overall control of the labour process." P. THOMPSON, \textit{supra} note 11, at 132-33.
A. Loyalty, Motivation and Control

A shibboleth of modern management is that the cultivation of human resources can result in "productivity through people." According to a popular work on management, the successful firm is characterized by a commitment to its workers and by the creation of a "corporate culture" reflecting values to be identified with and internalized by employees. Those values are linked with the financial strength of the enterprise and in turn to the general well-being of the employees. Viability of the business thus depends on the motivation of workers through internalized incentives.

Bureaucratic control generates an environment which is highly conducive to modifying behavior over the long term. Edwards notes that "In contrast to other systems of control, where the methods of gaining compliance succeed as well with new employees as with old ones, bureaucratic control requires time—time for workers to learn rules, procedures and expectations; time for workers to respond to the attractions of positive incentives; and time for employers to weed out troublesome, rebellious, or, to use Polaroid's term, 'mediocre' workers." For that reason, seniority is rewarded by pay increases and other benefits, and job security within the organization is emphasized. The exemplary enterprise will typically have grievance procedures by which an employee can challenge disciplinary action, and terminations and layoffs are rare. Such techniques, in addition, are often cited as a major reason for the relatively high productivity of Japanese firms.

The existence of a loyal, dedicated and stable workforce is a corollary of bureaucratic control. To afford the employee some assurance of job security in exchange for his or her commitment is a relatively minor concession. The control attained through traditional discipline has become counter-productive, and the at will employment rule no longer has a practical function in the operation of the shop.

130. "On the whole, we stand in awe of the cultures that the excellent companies have built." Id. at 79-80.
131. R. Edwards, supra note 112, at 151.
132. See R. Coulson, supra note 127, at 119-26 (survey of termination practices in selected corporations).
B. Defeating Collective Action

It is generally assumed by commentators that organized labor is, and will continue to be, opposed to any relaxation of the employment at will principle. The assumption underlying the premise is that unions traditionally have negotiated labor agreements which limit an employer's right to discharge by providing that termination must be for cause. Therefore, it can be argued, that a common law rule affording job security would detract from labor's ability to organize workers and further erode the strength and effectiveness of American unions.

One study of large, non-union American firms indicates that job security is an important common feature within those firms. The personnel policies of such companies as IBM, Honeywell and others emphasize that discharge is utilized only as a last resort in discipline, and that employees have a reasonable expectation of continued employment with the company. Policy directives attempt to minimize the occurrence of arbitrary discipline, and the disciplinary actions of supervisors are typically reviewed by the personnel department.

In a book describing methods by which a business can remain "union free," one leading management consultant advises employers to implement a grievance procedure to insure employee "due process." The procedure, he points out, will provide fairness in disciplinary matters and assure employees that they will not be discharged without reason. According to the consultant, job security is a major issue in union organizing drives.

Empirical research also substantiates the relationship between job security and an employee's predisposition to vote in favor of union representation. The influential work, Union Representation Elections: Law and Reality, establishes a positive correlation between the worker's perceived need for protections against discharge

135. "Over ninety percent of collective bargaining agreements in the United States limit the employer's power to discharge. . . ." Id. at 1832.
137. "In spite of their greater liberty, some of the nonunion companies appear to err in the direction of not firing people. Some seem to lean so far over backwards to retain employees that it may hurt the organization." Id. at 341.
138. See Id. at 299-322 (review of grievance procedures).
140. Id. at 32-35; see also Catler, supra note 12, at 494-95.
and voting behavior. Consequently, there is empirical support for the proposition that an employer's voluntary abandonment of the at will rule as a means of controlling workers has a tendency to minimize workers' desires for union representation.

The threat of unionism, then, is a significant incentive for employers to disregard the at will employment rule. Employees who are subject to being capriciously discharged may seek protection in a labor contract. Granting job security tends to obviate a need to unionize.

C. Defeating Political Action

Respected and influential scholars have repeatedly urged statutory modification of the at will rule, and legislation has in fact been introduced both at the federal and state level. Typically, such legislation provides for a “just cause” standard for discharge and an administrative process by which employees can enforce their statutory rights.

From an employer's perspective, common law modification of the at will rule is arguably preferable to statutory reform. First, there are numerous common law defenses, both procedural and substantive, which can be raised against an employee's claim of wrongful discharge. The delay and expense of litigation may well discourage potential claimants from pursuing their rights. Certainly, the necessity of a common law action would serve as a substantial deterrent to litigation to wrongfully discharged workers, particularly when compared to an administrative remedy.

Second, enactment of legislative reform would prompt public debate concerning the nature of the employment relationship. That debate might well extend to other issues of our capitalist economy, such as plant closures and relocations, or the use of pension

142. Id. at 54-57.
144. For a report on federal legislation introduced in 1980, see LAB. REL. REP. (BNA), News and Background Information Part II, The Employment-At-Will Issue (Special Report) 9 (1982).
145. E.g., Pennsylvania House Bill No. 1742 (July 1, 1981), reprinted in Id. at 70-71.
146. Id.
147. See Olsen, supra note 95, at 285-298.
148. “Even now, an individual employee who goes to court [claiming wrongful discharge] may regret it. Being involved in a lawsuit is time consuming, expensive and frustrating. Lawsuits between employees and their former employers can be tough.” R. COULSON, supra note 127, at 115.
funds. Legislative restriction of an employer's discretion in one area conceivably could lead to reform in related areas. In any event, judicial revision of the at will rule does not directly implicate the political system and thereby minimizes the perceived connection between legal doctrine and political action.

Third, any rights granted employees at common law can be judicially retrenched at a future date. Because those rights have no particular permanence, they can be denied at the discretion of a given judicial body. A statute, in contrast, could only be repealed through legislative action, and any attempt to do so might provoke a political reaction.

For the reasons above, it is evident that capitalist interests are better served by judicial modification of the at will rule than by legislative action. Continued judicial activism will debilitate any broad political movement based on reform of at will employment and preclude the need for public debate concerning employment.

D. The Process of Legitimation

Taken together, the points discussed indicate that there are ascertainable and significant benefits accruing to capitalism as a result of judicial modification of the common law at will rule. This conclusion is further corroborated by evaluating the recent judicial developments in the context of the political system.

One crucial function of law in modern society is its legitimation of differences in power and wealth. In a pluralistic political environment lacking any meaningful degree of communal assent to legal norms, "it becomes important to devise a system of law whose content somehow accommodates antagonistic interests and whose procedures are such that most everyone might find it in his own interest to subscribe to them regardless of the ends he happens to seek." The allegiance of individuals depends on such characteristics of the system as universality and autonomy; it must appear, that is, to be free
from the specific domination of any particular group. The system thereby establishes its legitimacy and minimizes the possibility of radical revision.

Judicial modification of the employment at will concept enhances social perceptions of the common law as a legitimate institution. Recent trends in the law appear to serve the interests of American workers by offering employment security. But from a different point of view, judicial decisions may in fact merely confirm contemporary economic realities. Employers no longer require the power to discharge workers at will because control over the work force is more effectively manifested in forms other than discipline. Concession of the now relatively insubstantial right of termination at will offers the capitalist in exchange certain advantages both economically and politically. Foremost among those benefits is the renewed belief of the American worker that the legal and economic order will as a matter of course inure to his or her betterment, for that belief effectively sustains a system which necessarily demands substantive inequality.

VII. Conclusion

Scientific management profoundly altered the American industrial environment. The employment at will rule was a powerful and indispensable tool in implementing that change. The two systems share historical and ideological roots, and their simultaneous rise and decline demonstrates the important connection between them. When their facilitation of capitalist objectives is also considered, it is obvious that in this particular instance the common law was closely allied with the needs of the dominant economic class. The phenomenon can hardly be explained as coincidental.

154. Id. at 68-70. See also F. Thompson, Whigs and Hunters: The Origin of the Black Act (1975).

If the law is evidently partial and unjust, then it will mask nothing, legitimaze nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just.

Id. at 263.