UC Berkeley
Journal of Law and Political Economy

Title
Preface to Special Issue: Not So Free to Contract: How Unequal Workplace Power Undercuts the “Freedom of Contract” Framework

Permalink
https://escholarship.org/uc/item/8z09s50f

Journal
Journal of Law and Political Economy, 3(1)

Author
Anderson, Elizabeth

Publication Date
2022

DOI
10.5070/LP63159029

Copyright Information
Copyright 2022 by the author(s).This work is made available under the terms of a Creative Commons Attribution-NonCommercial-ShareAlike License, available at https://creativecommons.org/licenses/by-nc-sa/4.0/

eScholarship.org Powered by the California Digital Library
University of California

Elizabeth Anderson, University of Michigan, Ann Arbor[*]

Preface to Special Issue: *Not So Free to Contract: How Unequal Workplace Power Undercuts the "Freedom of Contract" Framework*

Employers exercise power over workers. This power has two aspects. First, even before the work contract is accepted, they have bargaining power over workers that vastly exceeds the bargaining power that most workers have over them. And their bargaining power over their employees generally increases once the contract is accepted, due to additional costs employees suffer for quitting—for example, additional commuting and moving costs to taking a job further away, and a blemish on their employment record if they quit too often. Second, once the work contract is accepted, the vast majority of employers enjoy virtually dictatorial powers over their workers.

The second aspect of employers' power over workers is the subject of my book, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It)* (Anderson 2017). Employers are endowed by law with a managerial prerogative to control almost everything undertaken by and within the firm, including matters concerning their employees in the workplace. They have legal authority to minutely control their employees' motions, speech, comportment, dress, and physical appearance. They are entitled to subject their employees to arbitrary searches, drug tests, and other invasions of their privacy. They may require their workers to submit to tedious drudgery, an unbearable pace of work, and dangerous and unhealthy conditions. They can even make it nearly impossible for their workers to urinate at work.

Employers' power to control their workers interferes with workers' freedoms even while off duty. Employers may impose constantly changing, irregular work hours that prevent employees from making plans for the use of their free time. They may pressure their employees to support favored candidates and political causes, and fire their employees for engaging in legal off-duty speech or political activities. In fact, under the doctrine of employment-at-will, employers have the right to fire their employees for nearly any reason (except for a few kinds of discrimination). This entails that employers can fire their employees for virtually anything they do off-duty, even if it has no bearing on their work performance. In *Private Government*, I argued that the legal powers conferred on employers makes them dictators over their domain. The constitution of the workplace thus amounts to a kind of "private government," which I define as arbitrary government that is unaccountable to the governed, who are in this case the workers themselves.

The two types of employer power interact and reinforce each other. The less bargaining power workers have with respect to their employers, the greater are employers' effective prerogatives to control workers' lives without suffering significant cost. So it is no surprise that defenders of the

[*] Max Shaye Professor of Public Philosophy. Please direct correspondence to eandersn@umich.edu.

employer's monopoly on managerial prerogatives claim that workers and employers have roughly equal bargaining power. The defenders observe that, in the default case of employment at will, the employer's right to fire employees for any or no reason is matched by the employee's right to quit for any or no reason. If workers have equal freedom to exit, they can bargain for more favorable working conditions, less oppressive employer constraints, or greater compensation for employer impositions. On the defenders' view, the workers' freedom of contract either negates, mitigates the objectionable features of, or compensates workers for employers' dictatorial powers.

Yet formal legal symmetries between employers and workers do not entail that the two sides have equal bargaining power. That is an empirical question that depends on the costs to each side of exiting (or refusing to enter) the employment relationship. The state's conferral on employers of a monopoly on managerial prerogatives makes a substantial difference to those costs. For employers frequently deploy their prerogatives to increase their employees' costs, and minimize the costs they themselves must bear of exiting the employment relationship. Employers can increase their employees' exit costs by imposing a noncompete agreement. Such agreements force employees who quit to leave much of their human capital behind, or to move far away. Employers can minimize their own costs of exit by manipulating the division of labor—the assignment of productive tasks to jobs. By dividing tasks finely among jobs, they can create deskilled jobs whose occupants can be cheaply replaced. This debasement of jobs creates a large pool of interchangeable, precarious workers that in turn enables employers to intensify the pace, danger, and tedium of work to levels unsustainable from the individual workers' point of view. High turnover is sustainable from the employer's point of view because training costs for deskilled workers are minimal and precarity forces workers into these jobs as quickly as others leave.

Many other factors affect the relative bargaining power of workers and employers. Adam Smith argued that workers' bargaining power is nearly always much less than that of employers. For employers have two great advantages over workers. They can afford to hold out longer for better terms. And employers "are always and everywhere in a sort of tacit . . . combination, not to raise the wages of labor." Hence, "It is not . . . difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute, and force the other into a compliance with their terms" (Smith [1776] 1981, Bk. 1, ch. 8, par. 12, 13). The essays in this special issue support Smith's analysis and consider additional factors, such as high rates of unemployment, that further undermine workers' bargaining power.

These essays also call into question employers' monopoly on managerial powers. Many economists, legal academics, and judges assume that important goods, such as economic growth, low unemployment, and high productivity—require employer dictatorship. Judges sometimes even refuse to enforce employment contracts under which employers have voluntarily given up some of their prerogatives. Several essays in this issue discuss mounting evidence that reducing labor to a commodity—that is, making the fate of workers depend on perfectly competitive labor markets—has substantial costs to the economy overall as well as on workers. State-imposed limits on employers' powers to dictate terms—for example, minimum wage laws—yield net gains to workers without impairing employment levels. Other countries' experience with codetermination, under which employees participate in firm governance, can yield benefits for workers, especially in conjunction with collective bargaining, without imposing significant costs on firms' performance.

We are far past the point where it could be reasonable to assume that employers use their managerial powers only to advance general economic well-being. Much of their activity consists in little more than techniques to suppress wages. Defenders of wage suppression frequently claim that it stimulates trade and benefits consumers. Adam Smith had heard this rationale before:

> Our merchants and master-manufacturers complain much of the bad effects of high wages in raising the price, and thereby lessening the sale of their goods both at home and abroad. They say nothing concerning the bad effects of high profits. (Bk. 1, Ch. 9, par. 21.)

In reality, employers suppress wages mainly to take a greater share for their shareholders and top executives. One study finds that 44% of the growth in US equity wealth from 1989–2017 was due to a pure redistribution of rewards from workers to shareholders. Executives with business degrees appear to know little more than a set of techniques for perfecting this redistribution. Firms that hire CEOs with business degrees do increase their profits. But these CEOs don't manage this by increasing investment or sales, or by taking advantage of opportunities for export. They merely shift income shares from ordinary workers to shareholders and executives.

It is high time that we redesign the employment contract and the government of firms so that ordinary workers can enjoy better wages, more freedom, and a voice in management. The essays in this special issue provide key arguments for these changes.

REFERENCES

Acemoglu, Daron, Alex He, and Daniel le Maire. 2022. "Eclipse of Rent-Sharing: The Effects of Managers' Business Education on Wages and the Labor Share in the US and Denmark." National Bureau of Economic Research, Working Paper 29874. http://www.nber.org/papers/w29874.

Anderson, Elizabeth. 2017. *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It.* Princeton University Press.

Smith, Adam. (1776) 1981. *An Inquiry Into the Nature and Causes of the Wealth of Nations*, vol. 1. Liberty Fund.

Greenwald, Daniel, Martin Lettau, and Sydney Ludvigson. 2021. "How the Wealth Was Won: Factors Shares as Market Fundamentals." National Bureau of Economic Research, Working Paper 25769. https://www.nber.org/system/files/working_papers/w25769/w25769.pdf.