A DEFENSE OF JUST CAUSE DISMISSAL RULES

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I. Introduction

Discussion of business practices often proceeds as if market principles are the only criteria needed in order to assess whether a practice is wise and reasonable. However, purely market-based analyses fail to acknowledge an indisputable fact: all markets operate in a social space that is defined by the moral values of the culture in which they are embedded. An example that illustrates this fact is the difference between U.S. and European practices governing the dismissal of individual employees. If we understand the legal differences between the U.S. and Europe, as well as management’s response to those differences, we can see how differences in particular accepted moral norms give a different shape to the marketplace.

In dismissal policy, U.S. law follows a modified Employment at Will (EAW) approach. Corporations have wide discretion in both the procedures and reasons governing an individual employee’s termination. For example, except for a handful of reasons identified as illegitimate by statute or past judicial precedent, employers may terminate for any or even for no reason. (Legally prohibited reasons include firings based on race or those in violation of clear public policy.) Employees who successfully press a wrongful discharge case through the courts may stand to recover very sizable awards (in the millions of dollars). However, winning a suit requires that the employee bear the initial burden of establishing that the discharge was for one of the identified illegitimate reasons.

Most European corporations operate in a much different legal environment. There, the legal systems usually mandate a Just Cause approach to dismissal. Under this approach, corporations must notify non-probationary employees of intent to dismiss. They are also significantly limited in the reasons the law will accept as adequate grounds for dismissal. Corporations must supply the employee with the reason for intended dismissal and the employee has the right to challenge the reason, usually in a pre-termination hearing and always before an external, easily accessible, and independent arbiter. Further, the initial burden of proof is on the employer. If, say, an employer wishes to dismiss an employee for poor productivity, the employer must have both clear, previously announced performance standards and evidence that the particular employee has failed to meet those standards. If successful, aggrieved employees can receive remedies such as some small multiple of wages or re-instatement (though the latter happens in a very small minority of cases). This Just Cause approach places substantially greater limits on the power of European employers to dismiss a worker.
Typically, the arguments against Just Cause divide into two broad categories: those based on predicted dire social consequences and those based on individual right claims. For instance, the more laissez-faire U.S. approach is often defended as both a) more productive, and b) required by the rights to freedom of contract. I want to argue, however, that: 1) the empirical prediction of productivity losses with Just Cause is not supported by the evidence; 2) the economic arguments are fraught with difficulties; and 3) the appeals to contract rights are insufficient to trump the claimed right of employees to freedom from arbitrary dismissal. Accordingly, I will propose that a Just Cause legal regime is preferable to the current U.S. model.

II. Consequences

Consequentialist objections to Just Cause themselves fall into two broad categories. One is associated with practical management and organizational behavior worries; the other comes from the market analyses of law and economics theorists. Both types of argument are substantially speculative and I believe both have serious shortcomings.

A. Practical Management Concerns

Management in the U.S. has often been concerned that the increased job security for employees given by Just Cause policies would be inversely related to worker productivity. One need not be a devotee of Taylorism and its authoritarian "scientific management" to have this worry. Concern about the impact of job security is instead often supported by anecdotal evidence on the productivity of those few classes of U.S. workers who have strong job security: government employees, union workers, and tenured university faculty. It is part of American lore that these workers are stereotyped as unproductive and, as some would say, lazy.

The anecdotes, of course, have implicit theoretical assumptions about human motivation. Thus, opponents of Just Cause explain the anecdotal evidence of these cases of purported low productivity by suggesting that workers under Just Cause will perform only just up to the minimum required by performance standards (since work at that level of output will not carry the threat of dismissal but will still assure the expected compensation). Workers without Just Cause protections, they contend, have more incentive to produce since they are always at some risk of being replaced by others willing to work harder. This fear of dismissal, it is often suggested, is most necessary in repetitive jobs with little status and little opportunity for advancement. Since many employees, especially those in the latter type of jobs, see work as at best a necessary evil, motivating worker output requires the persistent threat of job loss.

Opponents of Just Cause also point to the costs in management time and morale associated with shifting the burden of proof in dismissal cases onto the corporation. Documenting a worker’s poor performance over time and requiring pre-termination hearings are, opponents say, an inefficient use of valuable management resources. Moreover, they say that the difficulties of the process can provide management a disincentive for pressing ahead with dismissal charges. This would be especially true for management that has tried to dismiss an unproductive employee and was frustrated by procedural obstacles.

Finally, opponents note that since Just Cause requires announced performance standards, it is not permissible under its rules to replace an adequately performing worker with one who predicts to be a stellar performer. Thus, opponents charge that a clear opportunity for enhanced productivity is lost when firms are forced to operate under Just Cause.

These real concerns of practicing managers cannot be dismissed. However, their sufficiency as a reason for rejecting Just Cause policies is open to serious question. The first problem, of course, is that Just Cause policies do allow dismissal of workers performing at levels below the announced standards.

Second, questions can be raised about the assumption that job security is inversely related to employee productivity. Even if we grant that the stereotypes of low performance government workers are true, the anecdotal evidence does
not establish that job security is the culprit. Contrary anecdotal evidence exists from the high productivity of international workers who have Just Cause protections, from particular U.S. firms that promise (and deliver) job security, and from studies comparing the productivity of union and non-union workers in the U.S. (Freeman and Medoff, 1984). These facts establish that job security does not, by itself, lead to low employee output. At most, then, the anecdotal evidence against Just Cause suggests that job security, when conjoined with other unspecified job attributes, might cause output to fall.

If those other attributes are such things as repetitive, unchallenging work, the absence of opportunity for advancement, or the lack of status and respect at work, it should not be surprising that workers who fear for their livelihoods will “grin and bear it” more than those whose positions are secure. However, from a moral and public policy perspective, perhaps what ought to be challenged are those debilitating conditions and not the desirability of extending Just Cause to employees.

Examining the relationship between job security and productivity also forces us to consider what constitute effective motivational mechanisms. Clearly, fear has something to contribute as a motivational tool for workers who are already alienated. However, much contemporary management theory is clear on the faults of motivating through fear. (Consider the points made by Pfeffer, 1998, and Ichniowski, 1992, about the effects of threatened job loss on productivity. Consider also the implications of the new classic ideas of Douglas McGregor, 1960, and Frederick Herzberg, 1987. Herzberg’s analysis of the motivational impacts of ‘KITA [Kick in the Ass]’ is particularly relevant here!) Threatened workers may produce but they are also likely to be further alienated, to be risk averse, and to identify at only the most superficial levels with corporate goals. They are not likely to be committed employees nor are they likely to take initiative. That is, they are precisely not the sort of employee that many now say are needed for firms to be competitive in the international marketplace.

Alternatively, workers who believe that management will not abuse its power are conceivably more loyal and more prone to identify with a corporation’s goals and future welfare. Some interesting studies of participatory workplaces find that employee involvement programs provide real productivity gains only when conjoined with a firm commitment to job security for workers. Levine and Tyson (1990), for example, report that data collected from over 40 empirical studies give support to the idea that workplace participation enhances productivity, but only when participatory schemes are conjoined with profit sharing, measures to enhance group cohesiveness, guaranteed individual rights, and job security. Pfeffer (1998) and Ichniowski (1992) have found similar results in case analyses of individual firms. Thus, while employee productivity is a real worry for management, it may be a misplaced worry if it is used as a reason for opposing Just Cause policies. Perhaps, instead, the worry ought to generate a more careful look at other job characteristics and employment practices.

Similarly, a proponent of Just Cause can suggest that while management’s attention to documenting employee performance might have some opportunity costs, an ongoing and systematic evaluation of performance can be used as a device for the early correction of a worker’s productivity problems. Just Cause policies might institutionalize a system that would force management to pay more attention to individual performance appraisal and hence allow an opportunity for enhancing output. In addition, though the time spent at pre-termination hearings (hopefully infrequent if early intervention is successful) might seem wasted, that cost in time might pay dividends in employee loyalty and commitment if workers generally believe that discharge only occurs for real cause.

This last point about systemic effects of labor practices also provides one line of response to the worry about not being able to hire potentially better performers. It does seem true that Just Cause has this harmful effect if we limit our attention to a simple exchange of one worker who is performing at a merely adequate level for another who predicts to be a superior performer. However, in allowing such a replacement, we are not merely engaged in a single substitution of one employee for another. Rather, allowing this replacement constitutes the adoption of an HR/IR policy that may have systemic impact. The issue, if we restrict our attention to productivity alone, is whether the systemic effect of that HR policy is net positive or net negative.

There are reasons for suspecting that it might be negative. The empirical evidence cited above (Ichniowski; Levine and Tyson; Pfeffer) suggests that there are productivity benefits to be gained from a system that gives workers job security. That empirical evidence can be explained by the impact of a message to workers that they can be replaced at any time. The insecurity and fear, not to mention the hostility, caused by a general policy allowing for the replacement of those performing adequately might predictably produce a less than optimal employee response. After all, such a replacement policy shares something with the historical “call system,” a system with clear productivity disadvantages that go beyond its inability to develop firm specific skill sets.

So, while there is much opinion in the U.S. that finds job security to be damaging to productivity, that opinion needs to be re-evaluated. Little evidence, whether anecdotal or theoretical, suggests unequivocally that job security, by itself, causes a net loss in productivity.

B. Market Arguments

The other broad category of consequentialist objection to Just Cause is perhaps more theoretically sophisticated in its argument. It is, nonetheless, equally speculative and equally problematic. There are a number of separate argument styles that we can identify in these market analyses.
The arguments are attempts either to itemize the costs of Just Cause and/or to establish that Just Cause protections are unnecessary given the market’s natural protection against unfair dismissal.

Job Security as Costly and Unnecessary.

Some identify significant costs associated with job security; others claim that legal protections are not needed because the market already assures against unfair dismissal. An admittedly inexhaustive catalog of these arguments leads us to the conclusion: At the very least, we must say that the inefficiency of Just Cause has not been proven by a preponderance of evidence.

That job security through mandated Just Cause policies is unnecessary is argued on two grounds (Epstein, Posner). First, employer abuse and arbitrary discharge is not rational behavior because firms that engage in such practices will suffer “reputational losses” that will prevent them from attracting talented workers in the future. Second, EAW arrangements, with their tenuous security, actually serve to deter employer abuse since abusive behavior can be met with an employee quitting and the firm losing what it invested in developing the employee’s skills.

That job security creates significant costs is also defended on two grounds. First, it is commonly argued that workers with job security provisions are worse off than those employed at will since job security provisions add little protection but cost the worker in reduced wages. Second, there is the argument that the probability of employer abuse is, again given the preceding, low while the probability of jury error in unjust dismissal cases is greater. Added to this is the claim that the costs to an employee of an (improbable) unjust dismissal are low since termination under EAW implies no wrong doing and since the unfairly dismissed but competent employee will more easily find work in a market that rewards merit. However, the potential harm of an error by the jury is great since jury awards can run into the multi-million dollar range (Epstein).

In response to these points we need to reiterate the analysis is driven by an assumption that is contrary to fact: that real labor market agents act as rational economic maximizers. As will be seen below, clearly they do not.

The more specific problems of these arguments are instructive as well. That the market already adequately deters abusive behavior will be news to the nearly
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200,000 workers whose contested firings labor arbitrators annually find without just cause (ACLU, 1988). In addition, there is reason to question whether potential employees know in most cases about the past practices of individual firms (and if they know, whether they have the luxury of acting on that information).

The claims that job security provisions are costly to workers themselves can also be challenged. In order to determine whether workers are better off with job security, we need to identify, in the words of a classic jazz tune, “Compared to What?” Even if, for the sake of argument, we accept that there is a wage premium for workers without job security under EAW rules (contrary to some suggestions above), we need to ask whether workers with job security under a legal EAW regime are economically worse off, not only than workers without job security in that EAW system, but also than workers under a Just Cause regime that grants job security as the initial entitlement (Hager). Under the latter approach, of course, it is management that must buy the right to terminate at will from employees. Once again, the judgment will likely be influenced by what the starting assumptions one makes about the distribution of entitlements.

The experimental evidence in Milon (1998) about the outcomes of parallel bargaining circumstances where entitlements were reversed is relevant here as well. The evidence cited concerning waivable employment default rules (rules that establish initial legal rules that the parties are free to negotiate around) showed that those persons favored by a default rule do better in negotiations than if the default rule were the opposite. Milon argues that this evidence indicates that workers both with and without job security under a job security default rule will be better off than workers employed at will under an EAW default rule.

Finally, Epstein’s argument about the probability of error and the attendant possible harms has fatal flaws. His claim that employer abuse is improbable is discredited by problems noted above. The claim that unfairly dismissed but competent employees are unlikely to suffer serious harm may be an inaccurate description of potential employers’ criteria of evaluation. There are reasons for suspecting that an employee who was dismissed, even unfairly, is permanently seen as suspect goods. Additionally, the ease with which even competent employees can find replacement work is overstated. Finally, his appeal to the potential damage to the corporation of large jury verdicts is a red herring, at least as an argument against Just Cause. For, recall that Just Cause policies typically give increased job security for employees in exchange for decreased corporate exposure to the “litigation lottery.” For example, in the U.K. there was a limit of £11,000 on unfair dismissal awards (Donkin, 1994). Under Montana’s Unfair Dismissal From Employment Act, the maximal award is four times earnings less what one would reasonably have been expected to earn since the termination (Bierman et al., 1993). The potential for large jury awards is irrelevant when assessing the costs of Just Cause.

And so, these speculative concerns about the potential harmful consequences cannot lead to a rejection of Just Cause.

This final paragraph on the consequential arguments against Just Cause may be an appropriate place to note a tension between the two broad categories of consequential argument we have identified. The motivation argument claimed that workers needed to be motivated by fear of job loss. Such motivation can only be effective if job loss is perceived as both a real possibility and a serious harm. However, some market-based arguments claim that job security provisions are unnecessary and that unfairly dismissed employees are not seriously damaged. But these claims cannot both be true. For if the market already deters abuse, provides for job security, and minimizes the harm of unfair discharge, then the motivational argument loses all force since job loss is unlikely and not harmful. Alternatively, if, as I suspect is more likely, the motivational argument is correct in holding that workers see job loss as a serious harm, then that would disclose the absolute unreality of some of the law and economics objections to Just Cause.

We need now to move to a consideration of the rights based objections to Just Cause policies.

III. Rights

A. Rights Objections

Typically, rights arguments against Just Cause appeal to members of the generally recognized pantheon of rights—freedom of contract (Werhane, 1985; Werhane and Radin, 1999).

The rights argument against Just Cause sees it as a violation of the right of free individuals to engage in voluntary exchanges with others. By prohibiting contracts with terms that specify employment at will, Just Cause policies interfere
with persons’ abilities to negotiate for themselves whatever contract provisions they find most desirable. For instance, under some Just Cause regimes, workers may be prohibited from choosing at will employment in exchange for greater income. As such, this argument claims that Just Cause policies are unjust limits on market agents’ freedoms of contract and association (Maitland; Narveson; Nozick). (This claim may not be true, of course. It is possible that Just Cause merely functions as the default interpretation when contracts are silent about dismissal terms, or it could make the job security entitlement one that is waivable by the right holder but only in exchange for at least a statutorily guaranteed minimum consideration.)

B. Method

These arguments are not easily dismissed. The rights they appeal to have powerful rhetorical force, especially in the U.S. But before we accept them as cogent objections, we need to clarify the circumstances of the debate. The debate over Just Cause is a case of conflicting right claims. Management and owners claim rights to property and freedom of contract. Workers claim conflicting rights to freedom from arbitrary and unfair discharge. It is true that the first two rights have existing recognition while, in the U.S. at least, the third is at best what Joel Feinberg calls a manifesto right, one claimed to be supported by good reasons but not yet socially sanctioned. However, its manifesto status is not a reason for allowing property and freedom of contract rights immediately to “trump” job security. For it may be that, on analysis, we decide that our current understanding of rights fails in not recognizing a right to job security.

A more reasonable method for resolving conflicts between rights claims must directly assess the merits of the competing claims.

We can satisfy these requirements for a reasonable assessment of rights conflicts if we ask two questions of each of the competing claims: 1) What are the justifying or foundational reasons for this right (why is it a right)? 2) What harm would be done to those underlying values if we recognized a conflicting right claim and thus marginally constrained the scope of a particular right? Here, for instance, we need to ask what are the foundations of freedom of contract and job security rights, and what harm would be done to those respective values if we denied a right to job security and gave owners the right to terminate at will or, alternatively, if we denied owners that right and instituted a Just Cause policy.

D. Response to the Freedom of Contract Argument

In order to assess the conflict between freedom of contract rights and rights to job security, we need to ask about the foundations of freedom of contract just as we have asked about the foundations of property and job security rights. Freedom of contract has been defended on grounds of utility in that each person, as best judge of his/her own interests, is also in the best position to optimize the satisfaction of those interests. Allowing each person in the competitive marketplace to determine which goods he/she desires and how much he/she is willing to pay for them will, it is claimed, maximize the net satisfaction of interests.

A second defense of freedom of contract is on grounds of individual autonomy in that freedom of contract will obviously allow persons more direct control over their lives than if the ability to negotiate one’s own terms were restricted. For instance, some will argue that employees should have the freedom to choose the job rules they prefer rather than be forced by legal mandates to accept “benefits” they do not wish to have. (Compare Narveson’s (1992) argument on mandated worker participation.)

Of course, our commitment to autonomy does not result in absolute freedom of contract, as those in favor of Just Cause will be quick to note. In employment law in particular, we already accept a myriad of limits on the power of parties to set the terms of contracts. Laws governing discrimination, workplace safety, minimum wage, and sexual harassment are just a few instances where we constrain both employers and employees in negotiating contract terms. Since freedom of contract is not equivalent to absolute freedom of contract, the argument against Just Cause is incomplete unless it can show that Just Cause limits are inappropriate while other limits are acceptable. (I do not mean to suggest that all current legal limits on contracts, or even all those just mentioned, must be accepted. Rather,
the point is that if one accepts any limits on contracts then one needs to distinguish those from the limits one does not accept. I also take it that a position which rejects all limits is prima facie an unreasonable one.)

Some might respond that acceptable limits are ones that are needed to correct for clear market failures. But, the argument continues, there are no clear failures with respect to job security. We have already discussed in Section II the reasons for suspecting that market failures of knowledge, power, and mobility might explain the relative absence of job security provisions in U.S. contracts. To the degree that those points are telling, then this attempt fails to distinguish job security from other market correcting limits on contracts.

However, even if there are no market failures with respect to job security, the response is problematic for other reasons. Not every justifiable limit on freedom of contract exists merely to remedy market failure. It would be odd indeed to claim that Civil Rights protections against discrimination and sexual harassment are responses to classic market failures. Rather, it is more natural to see such laws as expressing the belief that jeopardizing a person’s employment for these morally arbitrary reasons is degrading and simply wrong.

So, some limits on contract freedoms can be defended on grounds other than correction of market failures. This is true of job security protections as well. If we accept the preceding fairness arguments, we might use Just Cause limits on employment contracts to underscore social opposition to the serious, avoidable, and arbitrary harms caused by at will dismissals. Or, if we modeled an autonomy argument on traditional utility analysis, we might construct a “net autonomy” case for Just Cause as follows. Workers dismissed without cause suffer at least temporary loss of income, the stress that comes with that and, in all probability, loss of seniority and firm specific investment. These harms are proportionally greater the more that the dismissal would impact one’s future employment applications. All of these economic losses will have serious impacts on the real life choices available to the dismissed worker. There is significant impact, then, on autonomy. The limits caused by job security requirements on the autonomy of other workers who might wish to trade security for increased income are not nearly so great. They merely lose the (speculative) marginal wage increase that might be available under at will contracts. Moreover, this loss is not a necessary consequence of Just Cause rules. It occurs only when those rules are mandated as un-waivable; they need not be. Constraining freedom of contract, then, might produce more net autonomy for workers than would a discharge at will rule.

So, job security protections may be a rational choice for society either because workers who want them are unable to negotiate for them successfully (the market failure explanation) or because we simply want, as part of a commitment to fairness, institutionally to express an opposition to dismissals without just cause, or because we believe such protections maximize net autonomy.

Finally, we should note the following with respect to utility claims. Some provision prohibiting firing without cause is one of the first demands of union contracts. It would be surprising if unorganized workers somehow desired job security less. More reasonable is the assumption that they desire it but have been unable to secure individually for themselves what organized workers have secured. If this is true and workers generally want security, then perhaps net satisfaction would be also increased by legally proscribed protections against unfair dismissal.

IV. Conclusion

A review of the objections to Just Cause, both on grounds of consequences and rights, reveals them to be seriously deficient. Most seriously, the very foundational values of the rights commonly used in the U.S. to oppose Just Cause suggest, instead, that job security should be pursued. Concerns for fairness and autonomy arguably ought to drive the U.S. toward Just Cause requirements rather than away from them. The American resistance to Just Cause seems unwarranted on its own grounds once one recognizes that the American system of private property and freedom of contract depend on fairness and autonomy.
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Note

I would like to thank George Brenkert for some helpful comments that made this paper more cogent and more clear. I would also like to hold him responsible for any serious argumentative gaffes — but I doubt I can get away with that.

BIBLIOGRAPHY


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