# FREEDOM OF EXPRESSION IN THE CORPORATE WORKPLACE: A PHILOSOPHICAL INQUIRY*

Robert F. Ladenson, Ph.D.
Faculty Associate, CSEP
and Associate Professor
of Philosophy, Department
of Humanities

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Center for the Study of Ethics in the Professions
Illinois Institute of Technology
Chicago, Illinois 60616

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# Freedom of Expression in the Corporate Workplace: A Philosophical Inquiry

Robert F. Ladenson
Department of Humanities
Illinois Insitute of Technology
Chicago, IL 60616

In a novel entitled Scientists and Engineers: The Professionals Who Are Not the author, Lewis V. McIntire, presents a highly negative picture of life as an employee in a large private business corporation.[1] Characters in the novel inveigh against management favoritism, cheating inventors out of bonuses, and taking unfair advantage of employees in employment contracts. The fictional employer bears a striking resemblance to DuPont, the company for which McIntire worked as a chemical engineer from 1956 through 1971, the year the book was published. In 1972 McIntire was fired.[2]

Should employees of large private business corporations be free to speak out on any subject without fear of dismissal or other sanctions even when they level harsh criticism at their corporate employers? In this paper I will argue that they should for reasons that closely parallel one of the fundamental bases for the principle of freedom of expression pertaining to the relation between individuals and the state. An important and controversial consequence of this view is that corporate employees should be free to speak without fear of sanctions even when they make false allegations that lead to a decline in either productivity or profits.

Before proceeding, however, the above thesis must be distinguished from another with which it can be easily conflated--that new rights to free expression for corporate employees should be acknowledged as a matter of law. The argument for this claim requires that one do more than make out a case for the desirability of freedom of expression in the corporate workplace. It also must involve presenting either a new interpretation of the First Amendment, according to which it applies to corporate employees, or a plausible case for the feasibility of protecting employee rights to free expression in the private corporate sector through a statute, or new Constitutional amendment, or through extending traditional common law causes of action to facilitate lawsuits by dismissed employees. In this paper I will not discuss any of these important matters.[3] It seems to me, however, that before turning one's attention to them a convincing account must be put forward of why freedom of expression for corporate employees is important. Without such an account the other matters are not worth pursuing.

To place the issue in its proper perspective a few words must be said about the current situation of corporate employees in regard to free expression. For the most part, the common law doctrine of "employment at will" governs employer-employee relations in the private sector.[4] This doctrine looks upon employee and employer as equal partners to an employment contract. Just as employees may resign whenever it pleases them, so also employers may dismiss their employees whenever they desire.

This latter aspect of the doctrine has been stated forcefully time and time again in various court decisions. For example, in

Payne v. Western and A.R.R. (81 Tenn. 507,519-20 (1884)) the court declared that employers "may dismiss their employees at will...for good cause, for no cause, or even for cause morally wrong, without thereby being guilty of legal wrong." Similarly, in Union Labor Hospital Association v. Vance Redwood Lumber Co. (158 Cal. 551, 555 (1910)) the court said that the "arbitrary right of the employer to employ or discharge labor is settled beyond peradventure." The traditional doctrine of employment at will was recently invoked by the Supreme Court of Pennsylvania to dispose of Geary v. United States Steel Corporation (456 Pa. 171, 319 A.2nd 174 (1974)). In this case Geary, an employee, charged that he was unjustly dismissed by United States Steel after he went outside normal organizational channels to warn a vice president of the corporation (it turned out correctly) about defects in steel tubing that was about to be marketed.

The absence of legal rights to free expression for corporate employees would not really matter if business corporations generally tended to be places in which employees feel free to express their beliefs and attitudes. The almost unanimous testimony of people with substantial work experience in the corporate world, however, is to the contrary. When CBS televised a program on Phillips Petroleum Corporation, William V. Keeler, its chief executive said of the employee who deviates from unwritten company rules about dress, manners, or other behavior, "The rest of the pack turns against him".[5] In his review of the program in the New York Times John J. O'Connor noted that at Phillips there was a "direct ratio between the extent of an individual's ambitions and the pressure for conformity".[6] Phillips may be an extreme

case, but if so it is an extreme case of a situation common to most large business corporations--namely, the absence of an open atmosphere conducive to free expression by employees.

But why should there be such an atmosphere in corporations? The principle of freedom of expression, as it has been traditionally defended by political philosophers, applies solely to the relation between citizens and the state.[7] That is to say, the proposition that people ought to be free to express themselves has been taken exclusively as a proscription of governmental interference with their doing so. By contrast, interferences with expression that stem from other sources have not been regarded as falling under the purview of the principle. For example, suppose one private individual interferes with attempts at expression by another. Although such interference might warrant condemnation for a variety of reasons depending upon the circumstances--e.g. rudeness, unfairness, etc--the situation does not count as one in which the principle of freedom of expression, as traditionally conceived of, has been violated. Some writers stress the respects in which large private business corporations resemble governments.[8] The crucial question, however, is whether they resemble them in precisely those respects that matter from the standpoint of well entrenched philosophical defenses of the principle of freedom of expression. One cannot then move directly from such defenses to the claim that employees in private business corporations should have extensive freedom to express themselves. More in the way of analysis is needed.[9]

One can begin such an analysis by contrasting two basically different ways of making out the case for freedom of expression in

corporations, which I will refer to respectively as the volunteer public guardian and the fundamental liberty approaches. The first mode of argument, the volunteer public guardian approach, sees the case for free expression of corporate employees as having to do primarily with associated potential benefits to society from increased exposure of corporate corruption, waste, and negligence. The following quotation from Where The Law Ends by Christopher Stone exemplifies this approach.

> "...anyone concerned with improving the exchange of information between the corporation and the outside world must pay serious regard to the so called whistle-blower. The corporate work force in America, in the aggregate, will always know more than the best planned government inspection system we are likely to finance. Traditionally workers have kept their mouths shut about "sensitive" matters that come to their attention. There are any number of reasons for this, ranging from peer group expectations, to the employee's more solid fears of being fired...
>
> This means that if ethical whistleblowing is to be encouraged some special protections and perhaps even incentives will have to be afforded the whistle-blower."10

The second mode of argument for freedom of expression of corporate employees, the fundamental liberty approach, does not focus upon the immediate social benefits to be gained as a result of a more open atmosphere in corporations. Instead, it suggests that we should look upon freedom of expression in the corporate workplace as an inherent right grounded in basic principles of social morality. Such an outlook is reflected in the quotation below from David Ewing's book Freedom Inside The Organization.

> "A classic formulation of the philosophy of the First Amendment was given decades ago by Supreme Court Justice Louis D. Brandeis. Although he was commenting upon free speech in the political area, his observations would seem to be equally valid for the

> governance of corporations...Brandeis wrote: "Those who won our independence knew that...it is hazardous to discourage thought, hope, and imagination... They eschewed silence coerced by law--the argument of force in its worst form..."
>
> ...many executives in business and government find (the above view)... "unrealistic" when it comes to employee speech. In the name of discipline, they feel that free thinking about an organization's policies should be suppressed. In this respect, if no other, they are in league with radical left philosopher Herbert Marcuse who argues that free speech cannot be justified when it becomes too distracting."[11]

We have then two kinds of arguments in support of freedom of expression in corporations. The volunteer public guardian approach stresses immediate benefits to society that will flow presumably from making the climate in corporations more conducive to free speech. The fundamental liberty approach, on the other hand, looks to basic principles of social morality akin to those that underlie the First Amendment in its most familiar applications. These two kinds of arguments differ in an important way brought out sharply by considering the question 'What should happen to whistleblowers who turn out to be wrong?'

Following the volunteer public guardian approach one would treat this question by performing a comparative analysis of the social benefits and costs associated with corporate whistleblowing. As mentioned above, on the benefit side one can cite the increased exposure of corporate waste corruption, and negligence. On the cost side, however, one must include the possibility of a general decline in productivity stemming from decreased efficiency as a result of disruptions in the corporate decision making and administrative routines. In addition, where whistleblowers are mistaken

in their allegations about the safety or quality of a product the affected corporations may unfairly suffer a decline in profits.

A social cost-benefit analysis of corporate dissent not only requires attaching weights to the above factors, but also necessitates an assessment of both the prevalence of anti-social corporate behavior and the nature of its consequences. A person who regards such behavior not only as commonplace but also as gravely harmful would advocate extensive protection for corporate dissenters, holding that the costs associated with mistaken allegations they might make count for relatively little in the balance. On the other hand, if serious corporate misbehavior is looked upon as the exception rather than the rule then a different view of the matter becomes appropriate. Indeed, depending upon how exceptional one regards it, and upon how heavily one weighs the costs associated with corporate dissent, it might be reasonable to suggest that such dissent should be thought of on analogy with the common law rules in regard to citizen's arrests. Specifically, a person making a citizen's arrest avoids tort liability for unlawful detention only if the person he or she arrested <u>actually</u> committed a felony. Reasonable belief is not a defense.[12] By analogy, someone who regards corporate misconduct as exceptional might say that freedom of expression in corporations should only extend to dissenters who turn out to be right.

The prevalence of serious corporate misbehavior, and the nature of its social consequences, are empirical issues lying beyond the scope of this paper.[13] The point to be noted here, however, is that when one makes the case for freedom of expression in corporations

by way of the volunteer public guardian approach, the question of how much freedom corporate employees should have involves a weighing of costs and benefits which essentially depends upon one's beliefs about these empirical matters.

By contrast, the fundamental liberty approach eschews appeal to any such considerations. If freedom of expression, conceived of as a fundamental liberty, extends to the employee-employer relationship in a corporation then questions about its nature and scope cannot be settled through balancing immediate social benefits and costs. As Ronald Dworkin has pointed out, regarding a liberty as fundamental involves believing that it "trumps" all other considerations, even those which otherwise would be considered decisive.[14] Moreover, if a coherent philosophical account of the principle of freedom of expression pertaining to citizens and the state can be extended reasonably to cover the relationship between employers and employees then we have a short answer to our question about the whistleblower who turns out to be wrong. Such an individual can no more justifiably be made subject to sanctions by his or her employer than a citizen can justifiably be punished at the hands of the government simply for expressing incorrect views.

A crucial question for the fundamental liberty approach then is whether such an extension can be made. This question, in turn, requires a brief review of some important points about freedom of expression. To begin, the primary task for a philosophical defense of it can be stated in the following way. Acts of expression can, at times, lead to very undesirable consequences, consequences which when caused in any other way would be regarded as so grave that behavior causing them ought to be legally prevented. Nonetheless,

for those who regard the right to freedom of expression as fundamental, even when its exercise leads to certain of these undesirable consequences, limitations upon freedom of expression are still considered unjustifiable. How one can defend such an outlook must be explained.

The search for such an explanation inevitably leads to the arguments advanced respectively in chapters two and three of John Stuart Mill's classic essay On Liberty. Boiled down to essentials, Mill contends in chapter two that countenancing routine governmental interference with the expression of beliefs and attitudes by citizens would only make sense if we believed it possible to identify infallible, perfectly benevolent human beings and to put them into positions of political power. Since, of course, this cannot be done it follows that if governmental authorities routinely prevent the expression of beliefs and attitudes on the basis of their content the result will be inevitably a widespread acceptance of seriously erroneous viewpoints. What is worse, this benighted condition of society will persist in all likelihood over many generations because the most obvious means of overcoming it, free discussion, will not be available. The right to freedom of expression, conceived of as ruling out governmental restrictions upon the content of beliefs and attitudes that may be expressed, can thus be treated as fundamental in view of the extraordinary social interest its acknowledgement serves--namely, the avoidance of social action predicated upon mistaken beliefs over the long run.

The foregoing argument constitutes a formidable case for freedom of citizens from governmental interference to express their beliefs and attitudes. It does not, however, apply in an obvious

way to the relations between corporate employees and their employers. The argument calls attention to the grave long run social harm that stems from giving a single individual or group power to regulate expression and hence to control thought. Now while corporate employers can, and undoubtedly often do, exercise substantial coercive force to discourage their employees from freely expressing themselves it would seem that no one corporation could exercise the kind of centralized power to control thought of which a strong government would be capable. Accordingly, Mill's argument in chapter two of On Liberty does not go to establish that freedom of expression should exist in private business corporations.

The situation is quite different, however, with regard to Mill's line of reasoning in chapter three entitled "Of Individuality As One Of The Elements Of Well Being". To grasp the essentials of this argument one must first concentrate upon the passage below.

> "...to conform to custom merely as custom does not educate or develop in (a person) any of the qualities which are the distinctive endowment of a human being. The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference are exercised only in making a choice. He who does anything because it is the custom makes no choice. He gains no practice in discerning or in desiring what is best.....
>
> He who lets the world, or his own portion of it choose his plan of life for him has no need of any faculty other than the ape-like one of imitation. He who chooses his plan for himself employs all his faculties. He must use observation to see, reasoning and judgment to foresee, activity to gather materials for decision, and when he has decided, firmness and self-control to hold to his deliberate decision. And these qualities he requires and exercises exactly in proportion as the part of his conduct which he determines according to his own judgment and feelings is a large one."[15]

In chapter three of On Liberty Mill can thus be thought of as arguing in the following way. Certain abilities and capacities,

such as observation, judgment, discrimination, firmness of will, and so forth are the distinctive endowment of a human being. These abilities and capacities, which Mill takes to be the elements of what he terms "individuality", make it possible to discern and desire what is best. Thus, in the proportion to which people have them they become both more valuable to themselves and potentially more valuable to others.[16] According to any reasonable conception of the good for society it should be a primary function of social arrangements to facilitate everyone's cultivating his or her individuality, as understood above, to the greatest possible degree. Individuality, so understood, however, consists in the possession of a variety of different abilities and capacities all of which can only be developed by exercising them. Without freedom of expression, however, the likelihood for such development on a large scale is extremely low. Accordingly, even if freedom of expression sometimes leads to serious harm, this must be borne as a cost of making it possible for a society to develop in which large numbers of people cultivate their individuality.[17]

Unlike the line of reasoning in chapter two of On Liberty, the foregoing argument directly applies to the situation of employees in a large private business corporation. Mill contends here that without freedom of expression a person's individuality remains uncultivated; and from both an individual and a social perspective the development of this trait should be accorded primary importance. Now while the above observations suggest the undesirability of governmental interference with the expression of beliefs and attitudes they also constitute a strong argument

against anything else that undermines the development of individuality. Mill's argument in chapter two of On Liberty turns specifically upon the evil that results from according a single person or group the power to regulate expression. By contrast, the undesirable condition associated with a denial of free expression to which Mill calls our attention in chapter three--that is, the stifling of individuality--can obtain when coercive interference with the expression of beliefs and attitudes stems from a multitude of independent sources. Accordingly, that restrictions upon expression in the corporate workplace tend to have precisely the above effect would appear to be a compelling ground for holding they should not exist.[18]

It is important to note that Mill's arguments in On Liberty do not purport to establish the unjustifiability of any kind of governmental restriction upon expression. Instead, as has been acutely noted by Thomas Scanlon, they are best thought of as directed primarily against paternalistic interferences with the expression of thought.[19] Mill's conclusion should be understood as the claim that it is never justifiable for authorities to interfere with the expression of a given thought simply on the ground that such interference is necessary to prevent either (a) harm to certain individuals which consists in their coming to have false beliefs as a result of the expression of that thought, or (b) harm that is the consequence of certain acts which people perform because the thought in question caused them to believe those acts are worth performing. Looked at in the above way Mill's arguments pertain solely to governmental interference with the expression of beliefs and attitudes based upon their content.

Holding that freedom of expression should exist in the corporate workplace thus commits one to the view that content based restrictions upon employee speech are never justifiable. Even if what an employee says disrupts the normal corporate decisions making and administrative routines this price should be paid in order to foster the development of individuality. By the same token, even though an employee's words can harm the reputation of a product unfairly, this no more justifies prior restraints upon employee speech than the possibility that what someone says may result in unfair rejection by the public of a particular governmental policy justifies imposing prior restraints upon individual citizens or the press. To be sure, declines in productivity and unfair losses of profits are serious matters. But what makes the principle of freedom of expression significant is precisely that it requires important considerations such as these to be subordinated to the interest in maintaining an open atmosphere for the expression of beliefs and attitudes.

To argue against content restrictions upon expression by corporate employees, however, does not rule out regarding other kinds of restrictions as justified. Indeed, it seems to me that most of the situations in which governmental interferences with expression are generally considered justifiable, and hence not violations of the principle of freedom of expression, have analogues in the corporate employer-employee situation. For example, consider the case of an employee who voices his dissent continuously during working hours, harranguing other employees so as to make it impossible for them to carry on their work. Sanctions of some kind or other seem reasonable here. This case, however, appears

to fall under a rubric similar to the well entrenched principle of First Amendment case law, that governmental restrictions which go to time, place, and manner, rather than content, will be upheld so long as they are reasonable.[20] That is, employees should be able to say anything they want, but not necessarily at any time or place or in any manner they choose. Just as in the realm of First Amendment adjudication, however, restrictions in these regards must not be so arbitrary or vague as to be nothing more than thinly veiled subterfuges for regulating the content of employee speech.[21]

To consider another case, what about the disclosure of trade secrets? The issues here appear to be similar to those that arise in connection with officially classified information. The extensive and complicated governmental system for classifying information that has emerged since World War Two has increasingly come to be viewed as incompatible with the basic principles of a free society.[22] Insofar as the rationale for such a system is simply to "prevent sensitive information from falling into the wrong hands", one can justify classifying virtually anything. The classification of information by governmental bodies may not be completely unjustified from the standpoint of the principle of freedom of expression. Nonetheless, it would seem that a legitimate standard for designating material as classified, at the very least, must impose strict limitations as to scope and duration.[23] An analogous proposition appears to hold in the corporate realm. Perhaps some restrictions upon employees from disclosing corporate secrets are consistent with the principle of freedom of expression. The only credible examples I can conceive of, however, would pertain to such

matters as the particular figure to be bid on a government contract, the precise formula for a chemical product about to be submitted for a patent, and so forth. In these cases it seems possible to frame relatively narrow restrictions upon expression that would protect the interests of corporate employers without by implication according these employers an unlimited authority to control the content of employee speech subject to no scope or duration restrictions.

Some restrictions upon employee speech thus can be justified. The important point to emphasize, however, is that if the foregoing analysis has merit then employees should not be prevented or deterred from expressing themselves for reasons having to do with the content of their beliefs and attitudes. The cultivation of individuality fostered by freedom of expression counts for more than almost anything else over the long run. It thus counts for more than the interests that may be compromised by opening up the atmosphere in corporations.

## FOOTNOTES

1. Louis V. McIntire and Marion B. McIntire, Scientists and Engineers: The Professionals Who Are Not. Lafayette, La.: Arcola Pub. Co. (1971).

2. Nicholas Wade, "Protection Sought for Satirists and Whistleblowers" Science, Vol. 182 (Dec. 7, 1973) pp. 1002-3.

3. A voluminous literature has emerged over the past decade or so with respect to these issues. Among the noteworthy contributions are David Ewing, Freedom Inside The Organization, New York: Dutton, 1977; Christopher Stone, Where The Law Ends, New York: Harper and Row, 1975; Lawrence E. Blades, "Employment at Will vs. Individual Liberty: On Limiting the Abusive Exercise Of Employment Power" Columbia Law Review, Vol. 67 (1967) pp. 1404-35; Phillip I. Blumberg, "Corporate Responsibility and the Employee's Duty of Loyalty: A Preliminary Inquiry" Oklahoma Law Review Vol. 24 (1971) pp. 279-91; Clyde W. Summers, "Individual Protection Against Unjust Dismissal: Time For A Statute" Virginia Law Review, Vol. 62 (1976) pp. 481-532.

4. Most public sector employees either fall under civil service or are protected by the decision of the United States Supreme Court in Pickering v. Board of Education 391 U.S. 563 (1968) which affirmed very substantial rights to free expression of public employees. As a practical matter, however, the plight of employees in the public sector often does not differ greatly from that of employees in private industry. See, United States. Congress. Senate Committee on Governmental Affairs. The Whistleblowers Committee Print. Ninety fifth Congress, second session. U.S. Govt. Print. Off. 1978.

5. Ewing, cited at footnote 3, p. 95.

6. John J. O'Connor, New York Times, Dec. 6, 1973.

7. For example, the great defenses of freedom of thought one finds in the writings of Milton, Spinoza, Thomas Paine, Voltaire, and John Stuart Mill all take it to be only infringeable by the state. One finds such a presupposition also in the writings of major twentieth century defenders of freedom of expression such as Oliver Wendell Holmes and Alexander Meiklejohn.

8. See Ewing at pp.3-29 and Ralph Nader, Mark Green, and Joel Seligman, Taming the Giant Corporation New York: W.W. Norton and Co. (1976) pp.15-32.

9. One might object that the entire subject of freedom of expression for corporate employees can be disposed of in short order if one simply notes that such employees voluntarily alienate their liberty by accepting jobs with corporations. This view of the matter, however, will not do. One's decision to put up with coercive circumstances in the workplace can only be thought of as fully voluntary to the extent that real options exist for doing otherwise. But in an increasingly bureaucratized society this is not the case for most people. The view that a corporate employee voluntarily alienates his or her liberty by going to work thus fails for much the same reason as does the thesis, shared by Locke and Plato among others, that one tacitly consents to obey the laws in one's society by not leaving.

10. Stone, cited at footnote 3, p. 213.

11. Ewing. pp. 97-8.

12. For a general discussion of citizen's arrests see William F. Prosser Law of Torts, St. Paul: West Pub. Co. (1971) pp.42-9.

13. In this regard the following study is interesting--James Olson, "Engineer Attitudes Toward Professionalism, Employment, and Social Responsibility" Professional Engineer Vol. 42 (August, 1972) pp.30-2.

14. See Ronald Dworkin, "Taking Rights Seriously" in Taking Rights Seriously. Cambridge, Mass.: Harvard University Press (1977) p. 184.

15. On Liberty (Currin v. Shields, ed.) Library of Liberal Arts Edition, pp. 71-72.

16. On Liberty, pp.76-77.

17. The foregoing interpretation of Mill's argument in chapter three of On Liberty departs admittedly from the received view. I have defended this interpretation in my article entitled "Mill's Conception of Individuality" Social Theory and Practice Vol. 4 (1977) pp.167-82. I also suggested in an article entitled "A Theory of Personal Autonomy" Ethics, Vol. 86 (1975) pp. 30-48 that Dewey defends the principle of freedom of expression in a manner similar to Mill's approach in chapter three.

18. William H. Whyte's classic portrait of corporate employees in The Organization Man (New York: Simon and Shuster, 1956) provides a compelling illustration of the diverse ways in which corporate life dampens the individual spirit.

19. See "A Theory of Freedom of Expression" 1 Philosophy and Public Affairs (1972) pp. 204-26.

20. A good review of the pertinent cases in this regard can be found in Gerald Gunther, Individual Rights in Constitutional Law, Mineola, N.Y.: The Foundation Press (1976) pp.740-804.

21. In this regard see Lovell v. Griffin 303 U.S. 444 (1938), Schneider v. State 308 U.S. 147 (1938), Hague v. C.I.O. 307 U.S. 496 (1939), Cox v. New Hampshire 312 U.S. 569 (1941), Saia v. New York 334 U.S. 558 (1948), Kunz v. New York 340 U.S. 290 (1951), and Cohen v. California 403 U.S. 15 (1971).

22. See Benedict Karl Zobrist II, "Reform in the Classification and Declassification of National Security Information: Nixon Executive Privilege Order 11652" Vol. 59 No. 1 Iowa Law Review (1973) pp. 110-43.

23. See Executive Order 11652: Classification of National Security Information and Material (Federal Register, Vol. 37 No. 4 March 10, 1972).