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FIRM-SPECIFIC HUMAN CAPITAL INVESTMENTS AND HEGELIAN ETHICS: A COMMENT ON CORNELL AND POSNER

Jonathan R. Macey*

INTRODUCTION

In a deeply interesting and provocative Article in these pages, Professor Drucilla Cornell attempts to bring together two strands of her own experience, one as a former labor organizer, the other as Hegelian scholar. But reconciliation does not prove easy. Initially, Professor Cornell makes an important observation about the nature of the employment relationship that deserves more attention from the legal community. Based on an elaborately reconstructed rendition of Hegelian thought, Professor Cornell moves from the observation that one's job is immensely important to one's sense of well-being and identity, to the rather strange policy implication that statutes should be passed that forbid employers to fire employees without "just cause." The statutory regime she advocates is extremely modest. It would not really change the common law rule of employment at will except to the extent that employers would be required to explain to workers their reasons for firing them.2

Cornell defends her proposal on the grounds that it would save a fired worker's sense of personhood, and prevent his "systematic exploitation." While Cornell is undoubtedly correct that there are workers who will feel depersonalized and alienated if they are not told the reasons why they are being fired, others will be indifferent as to the reasons for being fired. And as Judge Posner points out in his interesting comment on Professor Cornell, still others will find Professor Cornell's proposal worse than the status quo, under which workers can be fired for no reason. After all, under the current system,

* Professor of Law, Cornell University.
1 Cornell, Dialogic Reciprocity and the Critique of Employment at Will, 10 Cardozo L. Rev. 1625 (1989).
2 Professor Cornell's article is based on the extremely dubious premise that employers do not voluntarily explain to workers why they are being dismissed. She also seems to presume that employers would not divulge their reasons for firing a worker even if the employee requested that they do so. The reality is that employers generally do provide workers with the reasons they are being fired. If a problem exists, it is not that employers do not provide workers with reasons for firing them, but that they are likely to stress reasons that are less humiliating and dehumanizing to workers than the truth. But Professor Cornell should approve of this practice.
“when a worker is fired with no reasons given, at least he is not stigmatized by a determination that he is a bad worker.”

Thus, there is a wide gulf between Professor Cornell’s goal of insuring that employers do not destroy the sense of well-being and identity enjoyed by workers, and her policy goal of requiring that a worker be given reasons for being fired. But Judge Posner goes too far in the other direction when he claims that Cornell’s proposal “would make discharges more painful and humiliating than they need be” because some employees would prefer to be told the reasons they are being fired, just as Professor Cornell suggests.

Two other aspects of Judge Posner’s response to Professor Cornell deserve special mention at the outset. The first is that Judge Posner wholly agrees with Professor Cornell’s assertion that individualism is socially constructed and not presocial. Thus both Posner and Cornell share the Hegelian perspective that individuals lack natural rights to anything, including the right to contract. Like Professor Cornell, in place of a natural rights orientation, Judge Posner would substitute the view that these rights are socially constructed.

Second, and there is a bit of irony in this, both Judge Posner and Professor Cornell seem to agree that individual well-being is a social product, although they disagree strongly about the role of the contracting process in defending people’s sense of well-being. Judge Posner does not seem to believe that the contracting process has much of a role to play in this regard. Professor Cornell, on the other hand believes that contract has much to do with it, but that workers are unable to protect themselves from employer malice, so the state should step in to protect the worker.

The purpose of this Comment is to challenge both Professor Cornell and Judge Posner on both of these counts. In the first section I will argue that pragmatic justifications and natural rights justifications are not mutually exclusive, and that Judge Posner’s observations about the state’s ability to determine the extent of a person’s well-being does not undermine the natural rights position in the way that he suggests.

Second, and more importantly, I will argue that there are important economic implications to the proposition that people identify with their work. Professor Cornell is correct to emphasize that workers who feel alienated by a corporate bureaucracy from which they

4 Id.
5 Id. at 1626-27.
feel isolated and removed are likely to feel less fulfilled in their work than they otherwise might. But in making this important point, Professor Cornell fails to understand that employers as well as employees would prefer to have workers who are engaged and who feel a sense of identification with their jobs. This is because these sorts of workers are likely to be more productive than disaffected workers. Furthermore, the contracting process can be used to encourage workers to identify with their work and to develop feelings of loyalty.

Identification with one's work and loyalty to one's employer involve an allocation of firm-specific human capital. Workers and employers can, to a large extent, use the contracting process to determine the extent to which workers' personalities will be tied up in their work. The employment contracts given to workers provide important incentives and other signals that inform workers about how worthwhile it will be for them to allow themselves to identify strongly with their jobs. In other words, the contracting process plays a major role in determining the extent to which workers will identify with their work. An important illustration of this phenomenon is the Japanese workplace, where a pervasive system of lifetime job tenure has given workers an incentive to develop a variety of inchoate firm-specific skills, which come in the form of a strong sense of loyalty to their employer and a keen sense of identification with their jobs.

Thus, unlike Professor Cornell, I do not believe that it is inevitable that a worker's personality will be tied up in his work. Rather, I believe that the degree to which a worker identifies with his job can be influenced by the nature of a worker's employment contract. And, unlike Judge Posner, I do not believe that providing workers with the reasons they are fired inevitably will make discharges more painful and humiliating.

I believe that employers' can create work environments in which workers will develop firm-specific skills. On the other hand, of course, sometimes employers will refrain from creating such environments, in which case workers are unlikely to identify strongly with their jobs. In such cases, however, workers will not be subject to the sort of malicious firing with which Professor Cornell is concerned.

I. NATURAL RIGHTS AND SOCIAL INTERACTIONS

Judge Posner is quick to point out that he sides with Hegel and with Cornell in his rejection of the concept of natural rights. Posner writes that:

Like Hegel, I do not believe that individuals have "natural" rights, whether to make contracts or to do anything else. The natural
state of human beings is not one of equality but of dependence on more powerful human beings. Economic freedom in the classical liberal sense is one of the luxuries enabled by social organization. The long life, wide liberties, and extensive property of the average modern American are the creation not of that American alone but of society . . . and of luck.6

In my view, Judge Posner's analysis is flawed in two ways. First is his assumption that an individual's rights can be natural if they are a product of social interaction rather than of his skills and efforts alone.7 The fact that the skills and efforts of a social group combine to enhance the value of a particular individual's own natural endowment does not diminish the fact that that initial endowment belongs to the individual who owns them in the most fundamental sense. Clearly, the value of Michael Jordan's basketball talents would be significantly altered if there were no professional basketball league. But this does not mean that Mr. Jordan's talents are not naturally his.8

Similarly, but even more fundamentally, Judge Posner and Professor Cornell confuse the concept of "right" with the concept of "power." For example, Judge Posner asserts that "the state has a right to take away the difference between my income and that of the average resident of Bangladesh."9 From this he concludes that our rights are social rather than natural. But, in my view, the state does not have the right to take away the difference between Judge Posner's income and that of the average citizen of Bangladesh. It merely has the power to do so.

If a state exercises its power to deprive its citizens of their natural rights, it does not eliminate the existence of those rights, it merely deprives the owners of their use. The term natural rights refers to those rights which every person possesses by virtue of his status as a human being. To the extent that the contours of these rights can be articulated, the state bears a heavy burden of persuasion when it argues that they should be taken away.

In one sense the distinction I am drawing between the Posner/Cornell position and my own is significant and in another sense it is trivial. The distinction is trivial in the sense that once the state has deprived an individual of her right to something (say, to enter into mutually consensual contractual arrangements), the issue of whether she has been deprived of a natural right, or whether the right never

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6 Id. at 1626.
7 Id.
8 See also R. Nozick, Anarchy, State and Utopia 161-64 (giving other reasons for allowing basketball players to earn economic rents).
9 Posner, supra note 3, at 1627.
existed is wholly academic. I would argue that, in such an instance, the state has used its power to deprive the individual of her ability to do something, but that she retains her inchoate natural right to do the thing. Thus, I do not equate the phrase natural right with inalienable right. By contrast, Posner and Cornell would say that she has lost her rights when the state passed the law forbidding the act, since she lacks any natural rights. From a consequentialist perspective, of course, this distinction is meaningless because the tangible effects on a person affected by the law are the same in either case: she will be forced to comply with the dictates of the state.

From another, more abstract perspective, the distinction between Posner/Cornell and myself is an important one. They would argue that because natural law does not exist, it can have no influence on the contours of civil law. But because I side with Locke and Montesquieu and against Hegel, Posner, and Cornell, I would argue that natural law should influence the shape of the civil laws, and that a system of civil laws is not going to be useful to a society unless it conforms to the dictates of natural law.\(^\text{10}\) Judge Posner is of course correct in his observation that the social power of the state is of enormous practical consequence. The state does have the power (though I would argue not the right) to deprive one of its citizens of the difference between his income and that of the average citizen of Bangladesh. But I would argue that a natural rights orientation would be of value because it would tend to place the burden of persuasion on the state whenever it wanted to deprive its citizens of some right or other. By contrast, the Posner/Cornell approach starts with the assumption that people have no rights that are intrinsic to themselves. To Posner and Cornell, rights are allocated on a purely "pragmatic" basis. If somebody can come up with a good pragmatic argument for why he should get Michael Jordan's salary instead of Michael Jordan, then he has the right to that salary. The problem I have with this approach is that it makes the wealth transfer process too easy. In a world in which politics is driven by self-interest, individuals who wish to retain their rights against the pervasive inroads of the state need all the help they can get.\(^\text{11}\)


\(^{11}\) See Macey, Transactions Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory, 74 Va. L. Rev. 471 (1988) (arguing that constitutions should erect structural barriers to the legislative process to protect natural rights and make wealth transfers more difficult).
II. THE INTERSECTION BETWEEN CORNELL AND POSNER: THE UNWAIVABLE RATIONAL CAUSE STATUTE

Judge Posner argues that the common law doctrine of employment at will is likely to be more efficient than the legal regime Cornell advocates. His claim is based on two observations. First, Judge Posner observes that employment arrangements that call for employment at will are voluntary relationships freely entered into by employers and employees.\(^\text{1}\) Second, Posner notes that this voluntary arrangement, like other volitional contracts, will probably make workers better off because “the employee at will is likely to have a higher wage than he would if he had an employment contract or other job tenure (including Professor Cornell’s proposed ‘rational grounds’ protection).”\(^\text{13}\) But suppose it is the case, as Judge Posner himself suggests, that employers would be willing to give employees job protection if and only if the employees similarly agreed to refrain from quitting their jobs.\(^\text{14}\) Further suppose that there are limitations on the contracting process in this country that make it doubtful that such contracts would be enforceable. If this were the case, then the voluntary employment-at-will agreement that Judge Posner defends may only be efficient in a world of the second best. For reasons discussed below, it is at least arguable that the first best state of affairs might be similar to the one that exists in the Netherlands and in Japan, i.e., one in which neither employees nor employers may terminate the employment relationship at will.\(^\text{15}\) In other words, Judge Posner’s arguments about the desirability of employment at will are cast into doubt by: 1) the fact that other social orders have abandoned the presumption of employment at will and appear to be flourishing both in terms of productivity and in terms of workers’ job satisfaction; and 2) the fact that the enforceability of a labor contract prohibiting an employee from ever quitting is doubtful.

I will argue that the simple fact that we observe voluntary employment-at-will arrangements in this country does not conclusively prove that it is more efficient than an alternative regime. I will argue that a Japanese-style employment regime in which workers have job tenure and employers have \textit{de facto} assurances from workers that they will not leave for other jobs in fact may be more efficient. But in this country workers and their employees are not able to make

\(^{12}\) Posner, supra note 3, at 1629.

\(^{13}\) Id.

\(^{14}\) Id. at 1631 (a rule “entitling a person to demand a reason for being fired ... logically entails a right (of the employer) to demand a reason for quitting”).

\(^{15}\) See infra notes 40-44 and accompanying text.
employment contracts containing these provisions because they would not be enforceable in U.S. courts. Consequently, the dominant American regime of employment at will may be the market’s second-best solution in the face of this legal impediment to the contracting process.

In my argument I will embrace many of Professor Cornell’s observations about the way that workers view their jobs. I wish to emphasize at the outset, however, that in doing so, I do not share her view about the pernicious nature of the employment relationship. In addition, I reject her proposal for rational cause statutes, which in my view, would impede rather than promote the objectives Cornell is seeking to achieve.

At the heart of Professor Cornell’s analysis is the: Hegelian insight, later developed by Marx, that work is crucial to the development of personality because it allows us to externalize our creative capacities in the world. When our ability to externalize our capacities is challenged, so is our personhood. Of course, to merely give reasons for the firing cannot completely take away that harm. What it does is recognize just how important work is to personality. It demands that a firing be seen as the serious assault on personality that it is. To impose this harm without reasons is to belittle the damage done.16

So, for Cornell, work is important to one’s personality. From this insight, Cornell moves to the rather odd conclusion that “[w]e all have the capacity to recognize the need for rational-cause statutes because we would not want to live in a society where human beings can lose something as important to their sense of identity and well-being as a job without some reason.”17

While I agree with Professor Cornell that one’s sense of identity and well-being are important, her assertion that giving employees the right to receive notification of the reasons for being discharged is a necessary precondition for a tolerable society seems outlandish. Is our society really one in which we would not want to live? Apparently not. Is she implying that her policy prescription actually will restore a discharged worker’s sense of identity and well-being? This too seems unlikely. And finally, is her policy formulation really consistent with Hegel’s idea of reciprocal symmetry. For the reasons I outline below, this too seems problematic.

More specifically there are at least three things wrong with Professor Cornell’s proposed policy prescription. First, her formulation

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17 Cornell, supra note 1, at 1580.
does not come remotely close to guaranteeing to workers their sense of identity and well-being. It does not take a particularly astute judge of human nature to recognize that being told the reasons for one's discharge may not enable a worker to retain his sense of identity and well-being. Indeed, Cornell's claim that a party can have a legal obligation to protect another person from loss of identity and well-being seems highly suspect. Even more dubious is her assertion that we would not want to live in a society in which a person's sense of well-being could be stripped away without reason. The truth is that this happens all the time. The person whose firm goes bankrupt, the person struck with the undeserved carcinoma or disfigured in an automobile accident, may quickly lose his sense of identity and well-being without reason. In the scheme of things, the traditional employment-at-will relation that Cornell is attacking appears to be among the most sane and rational aspects of human existence.

Second, Cornell substitutes legal obligation for reciprocal symmetry in two ways. She begins by eliminating the possibility that workers will achieve mutually consensual, voluntary agreements by interjecting state coercion into the contracting process. Next, she abandons Hegel's idea of reciprocal symmetry by giving a right exclusively to one party, without providing the other party with any corresponding right.

Thus, Cornell's analysis seems at odds with the Hegelian conception of the contracting process as a mechanism for expressing one's personhood. This criticism seems particularly damaging to Professor Cornell's claim to have found support in Hegel, since it seems to replace Hegel's symmetry in contractual obligations with feudalism's asymmetry. For Hegel, the ability to contract freely, like the ability to own property, conveys value because it permits the property owner or the contracting party "to be recognized as a formal equal, a legal subject, capable of embodying her will in external things." In other words, when the state enforces a contract between two people, it is enforcing an "obligation imposed on both parties by right as part of the legal recognition of their personhood." Nowhere is this more clear than in Hegel's master-slave dialectic in the Phenomenology of Mind, where Hegel reasons that people can only obtain recognition of themselves as individuals from other people. And, as Professor Cornell herself recognizes, a horizontal mutuality of recognition is necessary for the achievement of the concrete relations of mutual

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18 Id. at 1590.
19 Id. at 1593.
symmetry.\textsuperscript{21} Cornell's proposed solution, however, would undermine the contracting parties' purported status as equals because it would deprive the employee of any real opportunity for recognition in the Hegelian sense since recognition would be mandated by the state, rather than proffered voluntarily. This would undermine the very consequences Hegel ascribes to the contracting process.

Professor Cornell's response to the claim that the legal regime of rational cause statutes she proposes is inconsistent with Hegel's conception of reciprocal symmetry requires that we "move beyond Hegel's own understanding of the sphere of private right."\textsuperscript{22} She is candidly arguing that we have to abandon ("recast" is the term she uses) the Hegelian conception of reciprocal symmetry in order to "remain true to the aspiration of achieving the 'good' of relations of reciprocal symmetry."\textsuperscript{23}

Professor Cornell suggests that an "abstract"\textsuperscript{24} sort of reciprocal symmetry of the kind that I describe does not really reflect conditions of equality, because the employment-at-will doctrine is a vestige of the asymmetrical legal relationships of feudalism,\textsuperscript{25} and that so long as this sort of inequality exists, the state must intervene to protect conditions of horizontality.\textsuperscript{26}

For me, it is difficult to reconcile this aspect of Professor Cornell's depiction of Hegel with her earlier succinct observation that "[i]n Hegel, the historical development of modern contract principles and of the legal person who can freely enter into contractual negotiations expresses the realized relations of reciprocal symmetry that displaced the asymmetrical obligations associated with feudalism."\textsuperscript{27} If, as Hegel claims, legal personhood is a social achievement, then Cornell's argument that state intervention is necessary to achieve contractual symmetry is really an admission that our society has not progressed much, if any, beyond feudalism because it has not developed to a stage at which employees can contract on equal terms with their employers. Put another way, the ability of a person to enter into a freely negotiated contract is a \textit{manifestation} of a position of equality with his trading partner. It is, to use Hegel's terms, a manifestation of reciprocal symmetry. If as Professor Cornell suggests, state intervention at the micro-level is needed to achieve horizontality because we

\begin{footnotes}
\item[21] Cornell, supra note 1, at 1603.
\item[22] Id. at 1581.
\item[23] Id.
\item[24] Id.
\item[25] Id. at 1582.
\item[26] Id. at 1581.
\item[27] Id. at 1578.
\end{footnotes}
have not yet moved beyond feudalism to modernity, then society's social problems are in need of a far more effective palliative than a rational cause statute is likely to bring.

In other words, for Hegel, individuality is a social construct. One of the social inventions that permits individuals to achieve individuality is the ability to contract. Professor Cornell argues that in the realm of employment relationships, individuality can only be achieved through a form of state intervention that deprives employers and employees of the ability to contract freely. It is hard to fathom how such an arrangement contributes to, rather than detracts from the individuals whom it constrains. In other words, state intervention into the employment relationship may benefit workers in a way that Professor Cornell deems desirable, but it will not achieve the conditions of horizontality and mutual recognition that Hegel thought were necessary conditions for the discovery of individual freedom.

After all, if my contracting partner is forced by the anonymous arm of the state to recognize my right to something, it is hardly accurate to say that I am bargaining as an equal. Similarly, if I am able to retain my job solely because of political coercion, then I am unlikely to obtain the same sense of inner satisfaction and fulfillment as I would in a job in which I am working because my employer assigns a high value to the fruits of my labor.

I should also point out that Professor Cornell offers no explanation for why employers do not voluntarily provide workers with reasons for firing them. Professor Cornell’s article is premised on the assumption that employers' decisions to discharge workers are often motivated by reasons other than lack of productivity such as personality or life-style differences. But the world of employers cannot be so easily stereotyped, and the motivations behind employment dismissals are diverse and complicated.

Judge Posner points out that providing employees with the reasons for firing them might only add to their humiliation at being dismissed. This is clearly true for at least some employees. And if we assume that employers somehow can be made to tell the truth when they are giving their reasons for discharging an undesired employee:

[a]nother objection to the just-cause or rational-cause principle is that it would make discharges more painful and humiliating than they need be. When a worker is fired with no reasons given, at least he is not stigmatized by a determination that he is a bad worker. Under Cornell’s proposal, fewer workers would be fired . . . but those that are fired would be branded as bad workers . . . .

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28 Posner, supra note 3, at 1635.
But I would go a bit further than Judge Posner. Speaking for myself, if I were to be fired from a job, I would prefer that the reason for my discharge not be related to my productivity. I would prefer to be fired for being too ugly or too fat than to be fired for being unproductive.  

This is, I suppose, because I have a great deal of my personal identity tied up in my work, as well as because I don’t much care whether people think I’m ugly or fat. By contrast, one might argue that a sexist society has caused women to be more concerned about their appearance than men, and that women might therefore have different preferences than men regarding the basis for being fired. Specifically, I am told that some women might prefer to be told that they are being fired for being unproductive rather than for being fat or ugly. My point here is that individuals differ tremendously in their personalities and self-identities. One person might take pride in something that humiliating another. An unwaivable just-cause statute of the sort she proposes certainly will make some workers worse off than the status quo. Such a statute will even diminish the sense of identity and well-being of some workers. In any event, it seems clear that if employers behave in the mean-spirited way Professor Cornell suggests, her modest policy prescription is hardly going to achieve the grandiose objectives she envisions. Thus, it would seem that Professor Cornell has launched something of an inadvertent empirical attack on the legitimacy of Hegel’s observations that contracting parties can have equal status. Her vision of the modern employer-employee relationship is one in which employers are not only exploitive, but needlessly cruel to workers. If she is correct, then there is very little possibility that employees will obtain a sense of personhood through their jobs, regardless of the degree to which the state intervenes.

Finally, Cornell’s goals (increased sense of self and personal fulfillment) are far too vague and open-ended to provide support for as narrow and specific a legal rule as Cornell is advocating: it is hardly the “objective standard of fairness to which the judge can appeal in assessing the validity of contractual transactions.” After all, a judge could invalidate any contract on the grounds that enforcement would deprive one party or other of the “sense of well being and identity.” Similarly, of course, there is absolutely no basis for permitting employers to satisfy their obligations to society simply by providing workers with just cause. Rather, even the most incompetent or cor-

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29 Indeed, I would vastly prefer to be fired for being too skinny than for being unproductive.
30 I am indebted to Ms. Robin Flicker of Cardozo Law Review for this point.
31 Cornell, supra note 1, at 1579.
rupt worker should be allowed to keep her job under Cornell's test if losing it would involve the loss of the worker's sense of identity and well-being.  

The point here is not that Professor Cornell is wrong about the interests of workers in their employment relationship. Rather, the point is that she is stretching things to claim that her policy prescription is grounded in Hegel. As I will argue, she would do better to have grounded her arguments in economics. Like Professor Cornell, I agree that one's sense of self and one's personhood can be intimately tied up in one's work. But unlike Professor Cornell, I recognize the fact that rational employers are likely to value those employees who identify most strongly with their work, since such employees are likely to be more productive, as well as more loyal, than other workers. There is a close connection between a worker's loyalty to the firm for which he works and his sense of identification with that firm. The greater a worker's sense of loyalty and identification, the more valuable he is likely to be as an employee.

It also stands to reason that the more job security a worker has, the more likely he is to identify with and develop loyalty to the firm for which he works. Thus, when a worker ties his personality up in his work, he is making a firm-specific investment of human capital. Whether one describes an employee's relationship with his firm as one of trust and confidence, or, as Cornell does, of "horizontality," the analysis is the same. Like other firm-specific human capital investments, all of these attributes must be developed over time. And, like other firm-specific human capital investments, they increase the worker's value to her firm, but are of no particular value to other firms. This is because a sense of loyalty and identification with one's work are specific to a single firm, and will not be transferred to a new job if the employee quits or is fired. Like other firm-specific human capital investments, developing close personal ties with one's work is likely to increase a worker's value to his own firm, but is going to be of no value to the employee in another job.

And, like other firm-specific human capital investments, developing a sense of personal attachment to one's work leaves the employee who makes this investment subject to exploitation. The employer can reduce the employee's wages by the amount that the worker obtains in psychic job satisfaction without fearing that the employee will quit

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32 Professor Cornell does not explain why she draws the line at just-cause statutes and does not go for the whole loaf—lifetime tenure for all employees.

33 See supra notes 16-27 and accompanying text (describing the tension between Cornell's arguments and the Hegelian ideals of reciprocal symmetry and individualism).
and seek work elsewhere. But workers, recognizing this potential for exploitation, will refrain from developing close ties of identification and personal loyalty if they can be exploited so easily. Employers that abuse their workers are not likely to have a work force that identifies particularly strongly with their jobs, or one that is particularly loyal. Thus, employers who want to engender a strong feeling of loyalty and identification among their workers are likely to give workers a sense of job security and invest in developing a reputation for treating workers well.

But loyalty and identification with one's work are attributes that are not entirely firm-specific. A worker who has displayed loyalty and a sense of identification for one firm has shown that he has the capacity to develop it for another. Thus, while these attributes are themselves entirely firm-specific, the ability to develop them is generic. A worker who is loyal to one firm is likely to be able to develop a sense of loyalty for another. For this reason, firms may be unwilling to grant workers a lengthy employment contract, which will induce workers to develop a sense of loyalty and identification, unless they have some assurances that the workers will not exploit the firm by quitting if a better job offer comes along. Thus, employers and employees have an incentive to enter into long-term employment arrangements in which it not only is difficult for employers to discharge employees, but also difficult for employees to quit. Making it difficult to discharge employees will improve productivity by giving workers the incentive to develop strong personal ties with their firms. Making it difficult for employees to quit provides employers with the assurance that employees will not be lured away after they have demonstrated a proclivity for productivity and loyalty. The dilemma facing both workers and employers in the fast food industry illustrates this point nicely. Employers generally complain that the work force is unstable, and workers in the industry complain because the pay is so low. It seems clear that employers would offer higher wages if doing so would produce a more stable work force. Unfortunately, there is no way that workers can offer a credible (bonded) promise that they will not quit in order to obtain higher wages because the promise not to quit would be unenforceable.

I also wish to emphasize how closely attributes such as loyalty, personal identification to the firm for which one works, and relations of trust and confidence with co-workers and superiors, are connected to the Hegelian notion that our personal identities are "profoundly tied up in our employment." The individual who personally identi-

34 Cornell, supra note 1, at 1620.
fies with and is very loyal to her firm personifies the Hegelian vision of the employment relation as depicted by Professor Cornell. But Professor Cornell assumes that these relationships blossom automatically whenever someone is hired. This is not the case. Some workers are highly disaffected, while others identify quite strongly with the firms for which they work. Some workers find their jobs demeaning and degrading, while others find it possible to define themselves completely through their work. These events are not random. Different jobs come with different expectations of self-fulfillment.

For example, higher wages are likely to give workers a greater sense of fulfillment and self-worth than low wages. And job tenure of a stronger variety than the kind Professor Cornell advocates will accomplish the same thing. In addition, it seems clear that greater job security will provide workers with a stronger feeling of loyalty and with an added incentive to identify with the firm for which they work.

I would like to point out that the analysis presented here casts doubts on Professor Cornell's assertions that only higher level employees are not fungible and that technically unskilled workers are especially subject to exploitation. Professor Cornell seems to be of the opinion that employers only value employees that they train. In fact, employers value even untrained employees who identify closely with their work and exhibit a strong sense of loyalty to their jobs. These workers are not fungible. Indeed, they may be even less fungible than the highly skilled and semi-skilled workers that Cornell presumes have such strong bargaining positions. This is because in the modern workplace, most skills are easily transferable from one employer to another. But the attributes of loyalty and identification with an employer are not. Consequently, a highly committed unskilled worker may be far more difficult to replace than a superbly skilled, albeit fickle, professional worker.

Put another way, Cornell has it backwards when she asserts that firms only value workers in whom they have made large investments in training. Firms are only going to make large investments in training workers whom they think will be loyal enough to remain with the firm for a sufficient period of time to allow the firm to recoup its investment. After all, as long as the skills being provided to the workers are easily transferable, after the investment in training has been made, it is the worker, and not the firm, who has the opportunity to engage in exploitation.37

35 Id. at 1616.
36 Id.
37 The existence of schools, including law schools, illustrates this point. Students receive
A worker, recognizing the dilemma facing the employer, might be willing to promise to remain on the job for a certain length of time in order to induce the employer to provide him with training he desires. Thus, it might well be in the interests of both employees and employers for employees to be able to agree to work for a particular firm for a specified time. In other words, it seems that Professor Cornell was too quick to abandon the idea of strict symmetry in employment contracting. Just as the parties might want to have the right to be able to obtain a justification before dismissal, so too might the parties want to be able to bind themselves to remain at work for an agreed upon period.

Judge Posner ridicules the prospect that such an arrangement could benefit the parties, theorizing that a worker who signed a contract making it difficult for him to quit "might be forced to spend his whole life in a job he hated." But the fact is that Japan has for years had an employment system very similar to the one Posner is describing. Roughly one-third of Japanese workers in non-agricultural sectors has lifetime tenure. Workers are virtually guaranteed lifetime employment by their employers, but employers also have had an implicit agreement among themselves not to hire laterally from other firms. Japanese workers do not seem to be miserable, as Judge Posner suggests they will be. Rather, Japanese workers are known for their high productivity and close sense of identification with the firms for which they work. Indeed, Japanese workers often describe their firms as extensions of their families, and even Japanese industrial organizations are structured to resemble somewhat family and village life.

As Professor Ike of Stanford has observed:

> the nature of employment practices utilized by management . . . promotes group goals. Friendship, camaraderie, a sense of belonging, and the approval of one's peers are powerful inducements for individuals to put out maximum effort (on behalf of the firm for which one works). By the same token, the threat of withholding these can act as a powerful sanction. By contrast if one were simply a member of a large organization, he would have much less incentive to work hard for the common good, because no matter how hard he worked the contribution he made would seem insignificant.

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38 Posner, supra note 3, at 1631.
40 Id. at 40-41.
significant in relation to the total output.\footnote{Id.}

The experience of Japanese workers is consistent with the theory of firm-specific capital investments presented in this Article. If employees and employers believe they have entered into a stable employment arrangement, workers will have strong incentives to develop close personal ties with their firms. But employers’ incentives to provide such a stable employment arrangement are not without costs,\footnote{In particular, it has been noted that Japanese firms do not choose workers on the basis of ability alone, but are likely to select those workers likely to identify most closely with the firm and to feel a sense of obligation towards it. Id. at 35.} and employers will be unlikely to provide increased job tenure unless they have some assurance that workers will not leave at the first better opportunity that comes along.

The above discussion suggests that at least some American workers and their employers might be better off if they had employment arrangements that more closely resembled those of their Japanese counterparts. The Japanese system does seem to engender the attributes of loyalty and identification that Cornell describes.

Judge Posner’s rejoinder to this analysis is that the employment-at-will doctrine comes with a strong presumption that it is efficient because it has survived the competitive pressures of the U.S. labor markets.\footnote{Posner, supra note 3, at 1633 ("[A] free-market institution as persistent and widespread as employment at will is presumptively more efficient than an alternative imposed by government.")} The problem with this analysis is that it is highly doubtful that the parties would be able to forge an enforceable contract that made it difficult for workers to quit—even in return for a promise that made it difficult for employers to fire them. Restrictions of this kind are frowned upon under United States law and construed extremely narrowly. Thus, the dominance of the current regime of employment at will may simply be a second-best solution in light of the fact that the alternative is impossible to achieve under current law.

While Cornell errs because she fails to recognize the value to employees and employers of being able to stipulate that the employee will remain at work for a particular length of time, Posner errs because he fails to recognize the extent to which employers can exploit firm-specific human capital investments in loyalty made by workers. Judge Posner observes that an employee develops skills that are specialized to a particular job he is doing for a particular employer.\footnote{Id. at 1632.} These skills are firm-specific in the sense that they are of value to the
firm for which the employee is working but are not of value to other firms, even other firms within the same industry.

As Judge Posner points out, once the employer recognizes that an employee has these skills, the employer can act opportunistically by threatening him “with discharge if he demands a wage equal to his marginal product for this employer.” Judge Posner goes on to say that the employee can threaten the employer with quitting if the employer does not pay him his full marginal product. This too is true. From these observations Judge Posner concludes that an “employee’s specialized skills protect him from overreaching by the employer at the same time that they create a temptation for overreaching.” Where an employer incurs all of the costs of providing an employee with firm-specific skills, that employer can be exploited by the worker who has developed the skills. Where an employee incurs the costs of developing these skills, the employee can be exploited.

The following example illustrates the worker exploitation problem. Suppose that an employee has certain generic skills that are worth $15.00 per hour on the labor market. Suppose further that the worker invests a considerable sum in acquiring firm-specific human capital skills on the basis of an express or implied promise that he would be compensated for his investment in the form of a raise to $25.00 per hour. After making the investment, the employer has an incentive to refuse to raise the worker's pay above $15.01 per hour because $15.00 is the most the worker could obtain if he quit and tried to find employment elsewhere. Posner concludes that workers and employers can solve this problem by sharing the costs of the development of firm-specific human capital.

This conclusion seems to ignore the subtle nature of many, perhaps most, firm-specific human capital investments. For example, Judge Posner seems to ignore the fact that, in order to avoid the possibility of exploitation, workers and employers must not only contemplate sharing the costs of a firm-specific human capital investment, they must be able to coordinate the timing of their respective expenditures perfectly. Reference to the above example illustrates the point. The worker and the firm both contemplated sharing the costs of the worker's investment in firm-specific human capital. The worker invested in new information, and the employer paid for it in the form of higher wages. But the timing of payments left the worker susceptible to exploitation. Only if the worker could obtain payment at the pre-

\[45\] Id.
\[46\] Id.
\[47\] Id.
cise moment at which he made his firm-specific human capital investment could he avoid exploitation by his employer. Once the investment is made, he is subject to ex-post contractual opportunism by his employer. Several factors, including the pattern of repeat dealings between the worker and the employer, as well as the desire of the employer to maintain its reputational capital, will induce employers to compensate employees for their investments in firm-specific human capital even after those investments have been made. The fact remains, however, that the potential for exploitation exists.

I wish to stress that the existence of this potential for exploitation is a burden for both employers and employees. Employers will find it difficult to induce employees to make firm-specific capital investments because the employees recognize that they may not be compensated for them. Employees will be deprived of the compensation that such investments would bring if it were possible to construct a stable contracting regime.

This point becomes more clear when we recognize the subtle nature of many firm-specific capital investments. Among the more significant sorts of firm-specific capital investments are loyalty to the firm for which one works, personal identification by an individual with her firm, relationships of trust and confidence with co-workers and with one’s superiors in the corporate hierarchy. Like other firm-specific human capital investments, all of these attributes must be developed over time. And, like other firm-specific human capital investments, they increase the worker’s value to her firm but are of no particular benefit to other firms.

CONCLUSION

This Comment suggests that the following dynamic may exist in employment relations of all types. First, employees and employers can, at least to some extent, control the degree to which their own sense of personhood is linked to their work. Employees can withdraw emotionally and psychologically from their jobs if they feel disengaged, or they can identify closely with their work if they become attached to it. Similarly, by creating an inclusive, nurturing work environment, employers can encourage workers to identify with their work.

Second, vague attributes such as “identification with one’s work” and a worker’s “sense of loyalty” are firm-specific human capital skills in the sense that they enhance a worker’s value to the firm for which he works and are specific to the firm to which they apply. As workers’ sense of job security and feelings of belonging increase, so
too will their sense of loyalty to their firm. With increased loyalty comes increased productivity. Although these specific attributes such as loyalty and a sense of identification with one’s work are firm-specific, it stands to reason that workers who have demonstrated these attributes towards one firm are more likely to develop these skills if working for another firm. In other words, while the attributes themselves are firm-specific, the capacity to develop them is not. Thus, firms have less of an incentive to provide job security than they would have if they could be assured that their workers could not easily move to another firm. This poses a problem for both workers and employers because both would like to see employees be able to bind themselves to a particular firm for an extended length of time.

Thus, I believe Professor Cornell is wrong to abandon the Hege-lian idea of reciprocal symmetry so quickly. It seems to me that symmetry does exist, in the sense that the contracting problems of workers and employers are identical. Each is subject to exploitation by the other if one makes a nontransferable investment before being compensated for it. Judge Posner assumes away this problem by concluding that it will be solved if workers and employers share the costs of developing human capital skills. But this solution ignores the fact that the timing of the expenditures is extremely important. In addition, Judge Posner’s analysis doesn’t seem to recognize the inchoate nature of the firm-specific skills that one develops during the course of one’s employment. In particular, loyalty and a sense of identification with one’s work are a form of firm-specific human capital investment. Both employers and employees have an incentive to bond themselves into service for the firms for which they work in order to make it more likely that such investments will be made.
