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Just Notice: Re-Reforming Employment At-Will

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JUST NOTICE: RE-REFORMING EMPLOYMENT AT WILL

Rachel Arnow-Richman^{*}

This Article proposes a fundamental shift in the movement to reform employment termination law. For forty years, there has been a near consensus among employee advocates and worklaw scholars that the current doctrine of employment at will should be abandoned in favor of a rule requiring just cause for termination. This Article contends that such calls are misguided, not—as defenders of the current regime have argued—because a just cause rule grants workers too much protection vis-à-vis management, but because it grants them too little.

A just cause rule provides only a weak cause of action to a narrow subset of workers: those able to prove they were fired for purely arbitrary reasons. It fails to account for the justifiable, but still devastating, termination of workers for economic reasons, by far the most common reason for job loss today. In this way, a just cause rule is not only inadequate, but also anachronistic. Just cause protection is consistent with a mid-twentieth-century view of the social contract of employment, one that anticipates a long-term, symbiotic relationship between employer and employee in an economy dependent on internal labor markets. Under such a system, a just cause rule gives legal force to parties' mutual and implicit understanding of their obligations to one another.

In contrast, today's employers operate principally in an external labor market in which implicit promises of long-term employment have been replaced by implicit promises of long-term employability. Companies and workers alike anticipate significant job turnover both in times of economic turbulence, such as the recent downturn, in which employers were forced to shed numerous workers due to financial hardship, as well as during economic bubbles, in which companies lay off workers and reorganize for strategic reasons. Given these practices and expectations, the goal of termination law should not be protecting individual jobs but assisting workers in the inevitable situation of job loss.

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To that end, this Article proposes the adoption of a universal “pay-or-play” system of employment termination. Absent serious misconduct, employers would be required to provide advance notice of termination or offer wages and benefits for the duration of the notice period. In contrast to just cause proposals, “pay-or-play” recognizes the necessity and inevitability of employment termination. Rather than encourage parties to maintain status quo relationships, “pay-or-play” facilitates transition. It affirms managerial discretion to hire and fire by eliminating fact-intensive inquiries into the reason for termination. At the same time, it makes real employers’ implicit promise of employability by granting workers a window of income security during which they can comfortably search for the next opportunity.

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“A distinction must be drawn between a right to a job and a right to the job.”¹

INTRODUCTION

On November 17, 2008, CitiGroup made history by announcing the imminent layoff of 52,000 employees, the second largest on record after IBM’s separation of 60,000 workers in 1993.² Occurring in the midst of what has been called the most significant economic collapse since the Great Depression,³ the CitiGroup layoff was just one of many reductions in force (RIFs), mergers, bankruptcies, and fire sales that occurred in the wake of the mortgage industry implosion and ensuing financial turmoil of 2008 through 2010.⁴ Such events displaced countless workers and will continue to do so until the global economy achieves equilibrium.

Large-scale layoffs within the financial industry are notable not only for their size but also for where and why they occur. The problem of “plant closings” has long been viewed as the inevitable and necessary conclusion to America’s

1. HUGH COLLINS, *JUSTICE IN DISMISSAL: THE LAW OF TERMINATION OF EMPLOYMENT* 146 (1992) (emphasis omitted).

2. Eric Dash, *Citigroup Plans to Sell Assets and Cut More Jobs*, N.Y. TIMES, Nov. 17, 2008, at B1; Francesco Guerrera, *Citi to Cut 52,000 More Jobs*, FIN. TIMES, Nov. 18, 2008, at 1; Gogoi Pallavi, *52,000 Jobs to Be Cut at Citigroup; Reduction Is Nation’s Biggest Since IBM in 1993*, USA TODAY, Nov. 18, 2008, at 1B.

3. See MARK JICKLING, CONG. RESEARCH SERV., *CAUSES OF THE FINANCIAL CRISIS I* (2009); RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* vii (2009); Robert J. Barro, *What Are the Odds of a Depression?*, WALL ST. J., Mar. 4, 2009, at A15 (exploring the scope of the current economic downturn in the United States and concluding that “there is ample reason to worry about slipping into a depression”); Laura D’Andrea Tyson, *In Defense of Obamanomics*, WALL ST. J., Mar. 9, 2009, at A19 (stating that President Obama “inherited an economic crisis worse than any the nation has experienced since the Great Depression”).

4. See, e.g., Conor Dougherty, *U.S. News: Unemployment Rises in Every State*, WALL ST. J., Jan. 28, 2009, at A3 (noting the impact of financial industry layoffs on unemployment rates); Catherine Rampell et al., *Layoffs Spread to More Sectors of the Economy*, N.Y. TIMES, Jan. 27, 2009, at A1 (discussing layoff announcements in the first month of 2009 by Home Depot, Sprint Nextel, Caterpillar, and Texas Instruments).

dying manufacturing industry—a phenomenon associated with Rust Belt factories and the offshoring or mechanization of blue collar jobs.⁵ But CitiGroup and other financial industry layoffs tell a different story. These closings and RIFs are taking place in sophisticated, vibrant, and globalized industries. They represent not the necessary demise of anachronistic enterprises, but the inherent risks of industry restructuring and experimentation.⁶ In this version of the plant closing story, a business adopts a new technology, employs a novel financial instrument, or pursues some other innovation. Some of these endeavors, like Intel's silicon chip, will herald incredible economic success, even change life as we know it; others, like AIG's credit default swap, will fail miserably and plunge businesses (and workers) into insolvency.

Either way, the likelihood of economic-based termination is part and parcel of a modern, fast-paced, interconnected economy that is constantly reinventing itself.⁷ Given this reality, one might think that the rights of workers terminated for economic reasons—whether individually or collectively—would top employee advocates' agenda for legal reform. But this is not the case.⁸ To be sure, for the last fifty years, employment law scholars have evinced a near consensus that employment at will—the American default rule that permits termination by either party for any reason or no reason⁹—ought to be

5. See Regan E. Keebaugh, *Intellectual Property and the Protection of Industrial Design*, 13 J. INTEL. PROP. L. 255, 256 (2005) (observing that an “overwhelming majority” of workers affected by outsourcing jobs to foreign countries are in the manufacturing sector); Janice Kay McClendon, *The Death Knell of Traditional Defined Benefit Plans*, 80 TEMP. L. REV. 809, 822 (2007) (linking mass layoffs of over 239,000 private sector workers in 2004 to outsourcing); Clyde W. Summers, *Worker Dislocation: Who Bears the Burden?*, 70 NOTRE DAME L. REV. 1033, 1033 (1995) (“A pervasive phenomenon in modern industrial societies is the instability of employment. Production methods are replaced by new processes requiring different skills; robots replace human hands; computers replace human competency.”).

6. See Sanford M. Jacoby, *Melting Into Air? Downsizing, Job Stability, and the Future of Work*, 76 CHI.-KENT L. REV. 1195, 1202 (2000) (noting that, in contrast to the cyclical shedding of blue collar jobs in decades past, since the late 1980s layoffs have disproportionately affected educated professional and managerial employees and occurred during relatively tight labor market conditions).

7. See Summers, *supra* note 5 (“Dislocation of workers is inescapable in anything other than a closed and regimented society which prefers stagnation to increased living standards.”).

8. For a rare exception, see Anne Marie Lofaso, *Talking Is Worthwhile: The Role of Employee Voice in Protecting, Enhancing, and Encouraging Individual Rights to Job Security in a Collective System*, 14 EMP. RTS. & EMP. POL'Y J. 101, 137 (2010) (proposing that employers be obligated to bargain with workers prior to a mass layoff or plant closing).

9. The employment-at-will default rule is generally attributed to an 1877 treatise by Horace Wood. See Paul Berks, *Social Change and Judicial Response: The Handbook Exception to Employment-at-Will*, 4 EMP. RTS. & EMP. POL'Y J. 231, 235–36 (2000) (noting that “American courts were quick to adopt ‘Wood’s rule’ and by the end of the nineteenth century, employment-at-will . . . was the dominant doctrine governing the employment relationship”). Scholars have questioned the extent to which Wood’s assertion of the rule was adequately supported by the precedents of his time. See, e.g., Deborah A. Ballam, *Exploding the Original Myth Regarding Employment-at-Will: The True Origins of the Doctrine*, 17 BERKELEY J. EMP. & LAB. L. 91, 92–94 (1996) (explaining that “[t]he common assertion is that Wood simply made the rule up” because “he cited only four American cases as authority . . . none of which

abolished.¹⁰ However, they have almost universally advocated for a just cause alternative, one that would proscribe only arbitrary or socially condemnable terminations.¹¹ Under such a system, courts would continue to defer to

supported him”); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 126–27 (1976). *But see* Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of “Wood’s Rule” Revisited*, 22 ARIZ. ST. L.J. 551, 554 (1990) (countering that “Wood relied on four American cases for his black letter rule, and notwithstanding the persistent assertions to the contrary, these cases do indeed support the principle for which Wood cited them”). Whatever its provenance, however, employment at will is the established law in every state except Montana, which has modified the default rule by statute. *See* Montana Wrongful Discharge From Employment Act, MONT. CODE ANN. § 39-2-904(1)(b) (2009) (making discharge wrongful if “the discharge was not for good cause”). *See generally* Lisa J. Bernt, *Finding the Right Jobs for the Reasonable Person in Employment Law*, 77 UMKC L. REV. 1, 7 (2008) (“[E]mployment-at-will is still the default rule in almost every jurisdiction in the United States. . . .”); Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1097 (1989) [hereinafter Freed & Polsby, *Just Cause*] (explaining that employment at will is the general presumption, and “in the private sector and in the absence of unions, employment is almost always at will”).

10. Articles condemning the American at-will rule are legion. *See, e.g.*, Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404–05 (1967) (urging that employment at will threatens the individual freedom of employees); Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 9–10 (2002) (surveying evidence that employees believe they have more legal protection than actually provided by employment at will, which allows employers to benefit from employees’ erroneous expectations without paying a wage premium for the ability to fire indiscriminately); Cornelius J. Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 4 (1979) (asserting that “the overwhelming importance of the employment relation to the individual employee, coupled with the arbitrariness and capriciousness of a rule that permits the termination of that relation without cause, necessitates that the courts . . . reexamine the suitability of [employment at will]”); Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 65–66 (1988) (offering the view that elimination of employment at will “is a matter of simple justice” and that there is “little or nothing to be said in favor of an employer’s right to treat its employees arbitrarily or unfairly”); Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 77–78 (2000) (critiquing courts’ narrow application of at-will exceptions as reflecting “the deeply rooted conception [in American labor law] of the employment relationship as a dominant-servient relation rather than one of mutual rights and obligations”); Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 121 (2002) (reasoning that employees overestimate their legal rights because they do not understand the employment-at-will default rule and arguing that employees would have a better understanding of the law if the default rule shifted in their favor).

11. *See, e.g.*, Blades, *supra* note 10, at 1410 (describing how labor unions have utilized the just cause rule to protect employees from discharges for no reason, discharges for ulterior reasons, and discharges for “reasons erroneously believed by the employer to be justified”); Estlund, *supra* note 10, at 30 (promoting waivable or mandatory just cause protection, particularly if the costs of enforcing such a rule could be minimized); St. Antoine, *supra* note 10, at 70–71 (advocating new legislation using just cause language to protect employees from unjust discharge); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 484 (1976) (urging abandonment of employment at will in favor of extending to all employees the just cause protections afforded by collective bargaining agreements); Sunstein, *supra* note 10 (proposing that a just cause default rule would enhance employees’ knowledge of their rights). In addition, a number of recent articles, while not specifically condemning at-will or championing just cause, recommend the adoption of a statute that limits an employer’s ability to terminate without justification. *See, e.g.*, Jeffrey M. Hirsch, *The Law of Termination: Doing More*

employers with respect to their business needs and performance assessments, and the consequences of being terminated for “legitimate” reasons would be borne primarily by the individual. Employers’ obligations to such workers would be limited to their attenuated contributions to the unemployment insurance system (UI),¹² and, for large employers, to the modest notice requirement imposed under the federal Worker Adjustment Retraining & Notification Act (WARN) in the event of a plant closing or mass layoff.¹³

This Article challenges the existing orthodoxy of at-will reform scholarship, arguing that the dominant approach to termination reform—the call for a universal just cause standard for termination—is misguided. Such an

With Less, 68 MD. L. REV. 89, 110–11 (2008); Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 84 (2008); cf. Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1509 (1996) (calling for replacing employment at will and its exceptions with a consistent national wrongful discharge policy that prohibits arbitrary termination as a means of bolstering the effect of civil rights laws).

In contrast, only a handful of articles have focused on reforms that require notice and/or severance pay or that specifically address workers terminated for economic reasons. The only sustained contribution in this vein is Daniel J. Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111 (2006). Libenson’s article calls for a system similar to the one proposed here but for different reasons. Whereas I draw on social contract theory, Libenson analogizes to bailment law, arguing that employers are bailees of workers’ human capital and are consequently obliged to protect the value of the property with which employees have trusted them. *Id.* at 143–46.

12. Government-sponsored unemployment insurance (UI) provides workers with twenty-six weeks of partial income replacement in the event they become unemployed for reasons other than their own misconduct and are not able to find new work. See generally Roger A. Rossi, *Unemployment Insurance in the United States*, 1 COMP. LAB. L. 173 (1976) (describing the scope and purpose of the UI system); *infra* Part IV.B.1. Employers contribute to the system partially in proportion to the amount of unemployment they cause. See Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 344 (2001) (explaining the “experience-rated component of the [unemployment] tax,” under which “an individual employer’s tax rate must vary depending on its history of layoffs”).

13. The WARN Act, 29 U.S.C. §§ 2101–09 (2006), requires large employers to provide sixty days’ advance notice to workers who will be affected by a plant closing affecting fifty or more workers or a mass layoff, defined as at least five hundred employees or fifty employees comprising one-third of the workforce. See *id.* §§ 2101(a)(2), 2101(a)(3), 2102. The Act is generally perceived as being too narrow and permitting too many exceptions to meaningfully help workers. See, e.g., Parisi G. Filippatos & Sean Farhang, *The Rights of Employees Subjected to Reductions in Force: A Critical Evaluation*, 6 EMP. RTS. & EMP. POL’Y J. 263, 325–26 (2002) (criticizing the WARN Act as narrow and “toothless” and suggesting amendments that would increase the Act’s scope and incentivize more private litigation); Jane Friesen, *Mandatory Notice and the Jobless Durations of Displaced Workers*, 50 INDUS. & LAB. REL. REV. 652, 653 (1997) (providing evidence that the number of workers who reported having received notice of layoff did not increase after the passage of WARN in 1988); Evan Hudson-Plush, *WARN’s Place in the FLSA/Employment Discrimination Dichotomy: Why a Warning Cannot Be Waived*, 27 CARDOZO L. REV. 2929, 2932 (2006) (asserting that most employers subject to the WARN Act circumvent the notice requirement by getting employee waivers upon discharge); Richard W. McHugh, *Fair Warning or Foul? An Analysis of the Worker Adjustment and Retraining Notification (WARN) Act in Practice*, 14 BERKELEY J. EMP. & LAB. L. 1, 64–70 (1993) (proposing changes to WARN, including a longer notice period, expanded coverage, administrative enforcement, and enhanced remedies).

approach, while more favorable to workers than the current system, provides a weak cause of action to a relatively narrow subset of terminated workers. It protects only those workers who can prove in court that they were fired for purely arbitrary reasons. It fails to account for the tremendous practical challenges that arbitrarily terminated workers will face in establishing the absence of cause, and it does nothing to address the justifiable, but still devastating, termination of workers for economic reasons. This Article argues against just cause protection not, as defenders of at-will argue, because it grants workers too much protection vis-à-vis managerial discretion, but because it grants them too little.

Instead, this Article calls for the adoption of a “pay-or-play” system under which an employer would be required to provide meaningful advance notice of termination, or, at the employer’s election, offer wages and benefits for the duration of the notice period.¹⁴ Such an approach would extend to all terminated workers the protection currently afforded only to those affected by a plant closing or mass layoff under the federal WARN Act. In contrast to WARN, however, employers would be obliged to provide severance pay in lieu of notice in the event that they are unable to foresee, or choose not to announce, the need for termination. In this way, pay-or-play would serve primarily as a source of income replacement that terminated workers would be obligated to exhaust before becoming eligible for unemployment benefits. Importantly, the rights of terminated workers would not be dependent on the employer’s reason for terminating. Absent serious misconduct, employers would be obligated to provide notice or severance irrespective of the reason for termination. Thus, a pay-or-play system would eliminate the subjective and fact-intensive question of whether termination was justified—the key inquiry under just cause.

The remainder of this Article proceeds as follows: Part I provides an overview of the scholarly consensus in favor of just cause reform. It argues that the just cause approach was imported reflexively from the collective bargaining context without serious consideration of how such a change in

14. “Pay-or-play” refers to contract clauses, common in the entertainment industry, under which the party purchasing the artist’s work or services reserves the right to pay the artist and refrain from using or producing his or her work. See Nancy Morrison O’Connor, “Promises and Pye-Crusts”: *State Statutes Threaten Broadcast Noncompetes*, 21 COMM. LAW. 3, 5 (2003) (explaining that under a pay-or-play clause, in the broadcasting industry, “the employee recognizes that the employer has fulfilled any contractual obligation as long as the employer pays the employee and has no obligation to play the employee”). More recently, the phrase has been used in the healthcare debate to refer to a system in which employers must provide insurance to their workforce or pay a penalty. See Jesse McKinley, *Judges Say San Francisco Can Charge Employers for Its Health Plan*, N.Y. TIMES, Oct. 1, 2008, at A27 (describing San Francisco’s city-wide plan adopted in 2006 as a “pay-or-play” program).

the law would serve workers' interests. Part II demonstrates the limits of the just cause approach. Under such a system, only those workers able to prove wrongful termination are protected, while the vast majority of terminated workers, those fired pursuant to legitimate exercises of employer discretion, receive nothing.

Parts III and IV argue that just notice, more so than just cause, captures an important component of the emerging social contract of employment. The notion of just cause protection as an alternative to at-will evolved to give legal force to a particular set of expectations about employment, one in which parties anticipated a long-term, symbiotic relationship between employer and employee in an economy dominated by internal labor markets. In contrast, modern employers have eschewed implicit promises of long-term employment, and workers increasingly anticipate moving between jobs and companies over the course of their careers. In this environment, the law best gives force to the parties' mutual understanding by enabling transition rather than preserving status quo relationships. Existing employment law achieves this to some extent only in the limited context of plant closings and mass layoffs. Absent such an event, workers are cast immediately onto the public benefits system. To rectify this gap in the law and grant legal status to parties' shared understandings, employment termination law should obligate employers to partially finance workers' reemployment process in the inevitable situation of job loss.

Part V turns to the question of crafting an alternative pay-or-play approach to worker protection, drawing on foreign laws that require the employer to give notice of termination or continue the worker's salary for the notice period. It considers how the amount and form of pay-or-play benefits should be determined and how a pay-or-play system will affect employer policies and practices and, consequently, the experience of workers. This Article concludes that a pay-or-play approach will complement employer and employee interests in a transient labor market, allowing employers discretion to terminate and granting workers a window of income security in which to search for their next opportunity.

I. AT-WILL REFORM AND THE CALL FOR CAUSE

It is perhaps surprising that employment at will remains the default regime. There is a wide body of employment law scholarship, dating at least to the 1960s, calling for reform¹⁵ against a mere handful of voices defending

15. The seminal article is Blades, *supra* note 10. See also Estlund, *supra* note 10; Peck, *supra* note 10; St. Antoine, *supra* note 10; Summers, *supra* note 10; Summers, *supra* note 11; Sunstein, *supra* note 10.

the status quo.¹⁶ While they cite legitimate problems in the current regime, however, these critiques implicitly assume without serious examination both the value and inevitability of a just cause alternative. The literature thus creates a dichotomy between at-will and just cause systems without considering whether just cause, while more employee-friendly than employment at will, is the best way to protect worker interests.

This Part offers a survey of the at-will reform literature. It identifies three themes in the scholarship supporting a just cause alternative: worker exploitation, economic efficiency, and pragmatic concerns. As I discuss, early at-will critics drew primarily on the union model of the mid-twentieth century in offering just cause as a model for reform. That approach has since framed the debate over employment at will, with its supporters offering little evaluation of the efficacy of a just cause system.

A. The Exploitation Critique: Just Cause as the Universal Standard of Decency

Early just cause literature emphasized the inherent unfairness of an at-will system and the potential for employer abuse. Scholars cited workers' financial dependence, minimal mobility, and emotional investment in their work as explanations for employee vulnerability to abusive terms and the threat of discharge.¹⁷ In this respect, the call for reform was set within an explicit and legitimate critique of existing power structures.¹⁸

In addition, much of contemporary employment law scholarship, while addressing other issues, presupposes the flawed nature of the basic at-will principle.

16. See, e.g., Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901 (1996); J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837.

17. See Blades, *supra* note 10, at 1405 (arguing that due to the employee's "comparative immobility, the individual worker has long been highly vulnerable" to the employer) (quoting JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER* 114 (2d ed. 1956)); St. Antoine, *supra* note 10, at 67 (describing the "piercing hurt to individuals" in reference to studies documenting increases in mental and physical illnesses in the aftermath of layoffs and plant closings); Summers, *supra* note 10, at 68 ("The doctrine . . . expresses and implements the subordination of workers to those who control the enterprise.").

18. Summers suggests that employers' "divine right" to insist on total obedience and to discard the worker at any time flows from the deeply rooted concept of employment as a master-servant relationship rather than one of mutual rights and protections. See Summers, *supra* note 10, at 78; see also Blades, *supra* note 10, at 1415 (arguing that the employer's power over the employee comes from the employer's "power to terminate the relationship" at will); Estlund, *supra* note 10, at 28 (declaring that "the power to fire for no good reason enhances the employer's power to demand compliance" with both legitimate and illegitimate demands); Jay M. Feinman, *The Development of the Employment at Will Rule*,

Consistent with their exploitation critique, these advocates presented at-will employment as enabling arbitrary, malicious, and even socially harmful employer behavior.¹⁹ At-will termination was thus conflated with the condemnation of morally reprehensible employer motives. For this reason, a just cause approach requiring an objective justification for discharge offered a responsive solution.

Conveniently, European law and, more importantly, the American collective bargaining regime offered ready models for legal change. Noting the widespread adoption of protections against arbitrary discharge abroad, early exploitation critics heralded the just cause standard as an “accept[ed and] essential element of a tolerable and humane employment relationship.”²⁰ They also drew heavily on the terms of unionized relationships, in which collective action had leveled the inherent power imbalance in employment relationships.²¹ In negotiating collective terms of employment, unions almost always seek and achieve just cause protection for their workers, a fact widely observed in the just cause literature.²² If eliminating structural impediments to negotiation resulted in just cause relationships, such critics assumed, then just cause must certainly be protective of workers’ interests.²³ In this way, the early exploitation literature explicitly sought to bring the established protections of the union setting to the general workforce. It endeavored to eliminate what it termed a “cleavage in [American] industrial jurisprudence.”²⁴

Since that time, however, the employment law landscape has changed in several respects. First, union density has declined dramatically.²⁵ The first

20 AM. J. LEGAL HIST. 118, 132–33 (1976) (“Employment at will is the ultimate guarantee of the capitalist’s authority over the worker.”).

19. See Blades, *supra* note 10, at 1409 (describing how an employer might use the threat of termination to extort releases of liability from employees as well as to engage in other harmful behavior); Summers, *supra* note 10, at 70–71 (giving examples of retaliatory terminations and those violating public policy, such as termination for refusing to commit perjury, for filing workplace injury claims, and for refusing to take part in illegal activities).

20. Summers, *supra* note 11, at 520.

21. See *id.* at 482–83.

22. See Blades, *supra* note 10, at 1410 (using the example of union contracts to illustrate the benefits of just cause protection); Summers, *supra* note 10, at 78 (citing the “near universal acceptance of just cause protection in collective agreements” in advocating for a switch from at-will to just cause); see also BUREAU OF NAT’L AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 7 (14th ed. 1995) (reporting that 92 percent of collective bargaining agreements in a cross sectional sample of four hundred contracts listed “cause” or “just cause” as a basis for termination).

23. See Blades, *supra* note 10, at 1411–12 (implying that employees would prefer just cause protection over employment at will but lack the necessary bargaining power to negotiate it).

24. Summers, *supra* note 11, at 483.

25. In 2009, unions represented 12.3 percent of the workforce, down from 20 percent in 1983 when the Bureau of Labor Statistics began collecting such data. See Economic News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Union Members Summary 2009 (Jan. 22, 2010), <http://www.bls.gov/news.release/union2.pdf>.

articles calling for a just cause standard in individual employment relationships appeared in the 1960s, on the heels of the collective bargaining movement's strongest decade.²⁶ By the time calls for "universal" just cause were penned, union influence was already cycling downward. Few expected this trend to reverse, even before the collapse of heavily unionized industries in the late 2000s.²⁷ In addition, over the course of the 1960s, '70s, and '80s, courts developed and Congress enacted a wide range of common law and statutory protections for workers, which partially address the problem of unchecked managerial discretion that inspired the initial call for just cause reform.²⁸ Today, discriminatory terminations and terminations for such reasons as filing workplace injury claims, refusing to take part in illegal activities, or performing civic duties are unlawful notwithstanding the absence of a universal just cause standard.²⁹ Finally, the 1980s witnessed significant economic stagnation in Europe, which was frequently attributed to labor market rigidities resulting in part from employment regulation.³⁰ Such developments raised

bls.gov/news.release/pdf/union2.pdf. Union density in the private sector peaked at about 35 percent in 1953. See Harry G. Hutchison, *What Workers Want or What Labor Experts Want Them to Want?*, 26 QLR 799, 802 (2008) (reviewing RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* (2006)); Keith N. Hylton, *Law and the Future of Organized Labor in America*, 49 WAYNE L. REV. 685, 686 (2003). Numerous scholars have noted this downward trend and its implications for labor law reform. See generally Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1529 (2002); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 614–15 (2001); *infra* Part III.B.2.

26. See Hutchison, *supra* note 25, at 802–04 (discussing the rise in union membership in the mid-1900s and the subsequent decline).

27. See *id.* at 803 (stating that "private sector [union] decline appears . . . irreversible"); Hylton, *supra* note 25, at 686 (noting that "there is no obvious reason to believe that this decline [in union density] will not continue in the foreseeable future"). The prognosis worsened with the inevitable decline of the United Auto Workers in the wake of the 2009 General Motors and Chrysler bankruptcies. See, e.g., Steven Greenhouse, *Unions Look for New Life in the World of Obama*, N.Y. TIMES, Dec. 29, 2008, at B6 (discussing the fallout from the 2008 auto bailout).

28. See Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1657–62 (1996) (describing the development of "bad motive" exceptions to employment at will through anti-retaliation statutes and public policy jurisprudence); McGinley, *supra* note 11, at 1491–93.

29. See Estlund, *supra* note 28, at 1660–61; Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1125–26 (examining the expansive anti-retaliation protection provided to employees under Sarbanes-Oxley).

30. See, e.g., Samuel Bentolila & Giuseppe Bertola, *Firing Costs and Labor Demand: How Bad Is Eurosclerosis?*, 57 REV. ECON. STUD. 381 (1990) (describing this history and modeling its effects). See generally John O. McGinnis, *The Decline of the Western Nation-State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903, 921 (1996) (asserting that the economic situation in Europe "is now so notorious that a new word—'Eurosclerosis'—has been coined to describe the high unemployment and slow growth engendered by excessive regulation").

questions about the viability of using European labor laws as models for domestic reform.³¹

None of this history suggests that at-will reform should be abandoned. Indeed, much of it makes at-will reform more pressing than ever. For instance, the demise of the labor movement means that the default rules and statutory law that govern individual employment relationships play an increasingly important role in protecting workers. While the advent of new causes of action for workers has helped, existing law still does not address the myriad ways in which employees are terminated unfairly.³² Nor do concerns about the effects of economic protection legislation foreclose the possibility of thoughtful, incremental regulatory reform.

The point, rather, is that such developments challenge the idea that just cause is the ideal—indeed, the inevitable—alternative to the current system. The demise of collective bargaining suggests that policymakers should act cautiously in attempting to transport the standard terms of union employment to the wider labor market. The growing litany of unlawful reasons for termination raises questions about the utility of a system that replicates this inquiry into the reasons for an employer's decision.³³ The European experience counsels that lawmakers and legal theorists carefully consider how best to assist workers while reducing the costs of protective legislation in advocating specific reform measures. At a minimum, contemporary at-will reform scholars should reexamine the fit between just cause and the goal of enhanced legal protection for workers. As detailed in the next Subparts, this evaluation has not happened.

31. See, e.g., David R. Henderson, *Eurosclerosis Spreads to Our Shores*, WALL ST. J., Oct. 14, 1993, at A16 (criticizing U.S. politicians for “increasingly imitating the failed policies of Europe”).

32. See STEPHEN F. BEFORT & JOHN W. BUDD, *INVISIBLE HANDS, INVISIBLE OBJECTIVES: BRINGING WORKPLACE LAW & PUBLIC POLICY INTO FOCUS* 89 (2009) (urging that a decline in union presence and an increase in precarious employment relationships make the need to reform employment at will more pressing). Additionally, Professor Cynthia Estlund makes a compelling argument that the continued vitality of employment at will undermines existing prohibitions against wrongful termination by making it difficult and costly for employees to show actionable termination, and thus deters employees from engaging in socially desirable conduct that wrongful discharge laws are designed to protect. See Estlund, *supra* note 28, at 1669–78.

33. That said, some scholars believe the growing number of unlawful reasons for termination makes universal just cause a sensible means of standardizing the legal inquiry into the permissibility of any particular termination. See Hirsch, *supra* note 11, at 100; Porter, *supra* note 11, at 84–85. I discuss such proposals in Part I.C, *infra*.

B. The Law and Economics Critique: Making the Case for a Just Cause Default

Recent scholarship criticizing the at-will system has justified the need for reform on different grounds, albeit still in support of a just cause alternative. Richard Epstein's widely cited 1984 essay defending employment at will largely recast the debate in law and economics terms.³⁴ According to Epstein, the relative scarcity of explicit just cause contracts evidences a mutual desire to maintain employment at will. If workers wanted just cause protection, they would be willing to "pay" for it through lower wages; but almost invariably, they accept the at-will default.³⁵ In response to this argument, scholars have leveraged Epstein's own tools to argue in favor of a just cause default on grounds of economic efficiency. This body of literature questions whether employees are sufficiently knowledgeable of the background law to "choose" employment at will, whether or not they would have the bargaining power to effect a contrary preference.³⁶

These arguments rely on empirical research demonstrating that most workers assume the law protects them against arbitrary discharge and believe that employers must have legal cause to terminate them.³⁷ Such workers even overstate the protection that an actual just cause regime would afford, assuming, for instance, that a termination to hire a replacement at a lower wage would be unlawful.³⁸ If workers believe they are subject to just cause protection as a matter of law, then the prevalence of relationships retaining the default

34. Epstein, *supra* note 16.

35. *Id.* at 954–55.

36. See Guy Davidov, *In Defence of (Efficiently Administered) "Just Cause" Dismissal Laws*, 23 INT'L J. OF COMP. LAB. L. & INDUS. REL. 117, 122 (2007) (pointing out that "employees tend to believe that the law provides more job security for them than it actually does"); Estlund, *supra* note 10, at 9 (citing studies showing that "most employees believe that they enjoy something like 'just cause' protection even in the absence of any contractual protection"); Pauline T. Kim, *Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1997) [hereinafter Kim, *Bargaining*] (demonstrating through survey data that workers believe "that they have far greater rights against unjust or arbitrary discharges than they in fact have under an at-will contract"); Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 479–80 [hereinafter Kim, *Norms, Learning, and Law*] (hypothesizing that employees overestimate their rights because they "confuse law and norms" and thereby wrongly think "that the law prohibits what fairness forbids," particularly with regard to discharge); Sunstein, *supra* note 10, at 119–20 (contending that workers "have a false and exaggerated understanding of their legal rights").

37. Kim, *Bargaining*, *supra* note 36, at 133–35; Kim, *Norms, Learning, and Law*, *supra* note 36, at 456–57.

38. Kim, *Bargaining*, *supra* note 36, at 133. Another example of employee misinformation is the common belief that it is unlawful to fire an employee for reporting another employee's wrongdoing. *Id.* Employees also commonly, but incorrectly, believe that it is unlawful to fire an employee because of personal dislike. *Id.*

rule does not reflect a preference for employment at will.³⁹ In light of these misconceptions, the economics-based critics of at-will suggest that the law align itself with worker expectations.⁴⁰ Establishing just cause as the background rule would serve as a “penalty default,” requiring employers to disclose their desire for at-will and purchase that right through higher wages.⁴¹

Such arguments, however, merely challenge the descriptive premises of the law and economics defense of employment at will. They do not engage economists’ assertions that fully informed workers ought rationally to prefer an at-will system. Neither do scholars supporting a “switch in the default” offer any independent assessment of the value of just cause protection vis-à-vis at-will or any alternative regime.⁴²

C. The Pragmatic Critique: Time for a (Compromise) Statute⁴³

Yet a third set of reform proposals takes a pragmatic view. Building on the existing array of exceptions to at-will termination, these just cause proponents call for a single, universal just cause statute that will streamline current law to benefit both workers and management.⁴⁴ Currently, employers making

39. See, e.g., Estlund, *supra* note 10, at 9–10 (“[E]mployees’ widespread and systematic misunderstanding of the law seriously undermines most defenses of the employment-at-law default rule.”); Kim, *Bargaining*, *supra* note 36, at 106 (using empirical evidence to contradict the assumptions held by employment at will defenders that employees bargain with perfect information).

40. Davidov, *supra* note 36 (arguing that a just cause default rule would mitigate “information asymmetries” by aligning the background rules with workers’ expectations); Kim, *Bargaining*, *supra* note 36, at 154 (advocating for a just cause default rule because workers do not understand that their legal rights are based on an at-will system).

41. See Kim, *Bargaining*, *supra* note 36, at 152 (referring to the imposition of a just cause rule as a “penalty default” that would cause employers to share with employees their “superior information about the relevant legal rules”). For an explanation of penalty default rules, see Ian Ayres, *Ya-Huh: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589, 605 (2006) (defining a penalty default in the area of contract law as “a judicial construction of a contract that is unfavorable to the drafter in order to create an incentive for the drafter, and other similarly situated drafters, to make more clear the legal relationship that the contract actually creates”); Eric Maskin, *On the Rationale for Penalty Default Rules*, 33 FLA. ST. U. L. REV. 557, 557 (2006) (explaining that a “penalty default” is a rule that causes “one contracting party to reveal socially valuable information that, with transaction costs, she would supposedly keep to herself under a ‘nonpenalty’ default rule”).

42. See Sunstein, *supra* note 10.

43. See Summers, *supra* note 11.

44. See Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 429 (2002) (presenting a reform proposal that “would have the benefit of eliminating the burden of multiple claims and multiple forums by transferring all employment termination challenges into a single just cause claim subject to resolution in an expeditious arbitration proceeding”); Hirsch, *supra* note 11, at 91–92 (proposing to “supplant all rules regulating terminations with a single, non-waivable, universal law” that would be more effective than current law); Porter, *supra* note 11, at 65–66 (proposing a comprehensive codification of at-will exceptions that would clarify accepted theories of liability and reduce litigation); St. Antoine, *supra* note 10, at

termination decisions must navigate a patchwork of statutory and common law exceptions to employment at will, and they often anticipate the possibility that they will be called to account for their decisions in a legal forum.⁴⁵ At the same time, in the absence of a general just cause standard, terminated employees, particularly those fired under objectionable but not unlawful circumstances, are either left with no recourse or struggle to shoehorn their facts into ill-fitting legal theories.⁴⁶ As a result, some scholars have argued that terminated workers turn to antidiscrimination law to seek redress for unfair, but not discriminatory, terminations. Such overreliance on antidiscrimination law results in low plaintiff success rates and potentially trivializes or dilutes the importance of these laws.⁴⁷

For these reasons, some reformers have sought a uniform rule mandating just cause protection that simultaneously imposes some type of procedural or substantive limitation on worker claims.⁴⁸ The archetype of this compromise approach is the 1993 Model Employment Termination Act (META), which proposes a uniform just cause rule in exchange for limited remedies.⁴⁹

68–69 (suggesting that “the prevention of arbitrary treatment of employees may be not only humane but good business” and stating that evidence suggests that expenses associated with altering the current rule would not be exorbitant); see also McGinley, *supra* note 11, at 1509 (proposing an “omnibus federal ‘just cause’ employment statute” that would address “the decline of civil rights in employment while also accommodating workers not protected by the civil rights statutes”).

45. See Hirsch, *supra* note 11, at 95 (describing current termination laws as “numerous, complex, and unnecessarily confusing”); Scott A. Moss, *Where There’s At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. PITT. L. REV. 295, 299–302 (2005) (describing vast differences between states in adoption and application of employment at will exceptions); Porter, *supra* note 11, at 70 (describing the current state of employment at will and its exceptions as “mass confusion”).

46. See Hirsch, *supra* note 11, at 89–90 (noting that very few employees have the resources to navigate the complexities of the current termination laws); Porter, *supra* note 11, at 71–75 (citing examples of “egregious terminations cases” in which the plaintiff did not have a remedy under existing at-will exceptions); St. Antoine, *supra* note 10, at 58–64 (discussing the various judicial theories of unjust discharge and their limitations).

47. See Hirsch, *supra* note 11, at 142 (asserting that workers’ “search for an explanation [for their termination] results in unmeritorious [discrimination] claims that give employees false hope, impose unnecessary litigation costs on employers, waste judicial resources, and often overshadow valid discrimination claims by making judges suspicious of all such cases”); Porter, *supra* note 11, at 75–76 (suggesting that, because the at-will rule precludes other claims, employees bring discrimination claims regardless of whether there is evidence of discrimination, resulting in a low success rate for discrimination plaintiffs). This overuse is particularly troublesome in light of social science research suggesting that the invocation of antidiscrimination law may create or exacerbate bias against minority workers. See, e.g., Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 N.M. L. REV. 333, 339–48 (2008) (describing the problem of “litigation-induced group bias”).

48. See, e.g., Montana Wrongful Discharge From Employment Act, MONT. CODE ANN. § 39-2-911 (2009); MODEL EMPLOYMENT TERMINATION ACT § 5 (1991); Befort, *supra* note 44, at 424; Hirsch, *supra* note 11, at 107–08; McGinley, *supra* note 11, at 1507; Porter, *supra* note 11, at 84.

49. MODEL EMPLOYMENT TERMINATION ACT § 3 (providing that “an employer may not terminate the employment of an employee without good cause”); *id.* § 7(d) (prohibiting damages “for pain and

In the same vein is the Montana Wrongful Discharge From Employment Act (WDEA), the only just cause proposal to have been enacted as law.⁵⁰ The WDEA not only limits recovery but also preempts most common law wrongful termination claims.⁵¹ Scholarly proposals go further, offering a uniform just cause law or a set of codified at-will exceptions that would supplant not only common law exceptions to employment at will but also portions of federal antidiscrimination law.⁵²

In contrast to the economic critiques that seek to reverse the common law at-will default, the pragmatic proposals are statutory, offering the advantages of transparency, uniformity, and increased manageability. To the extent that they are compromise proposals, however, it is unclear how much they will offer workers beyond the limited rights they currently enjoy.⁵³ Recent proposals, in particular, emphasize that such legislative initiatives will help employers by reducing legal uncertainty and its consequent costs.⁵⁴ In short, the pragmatist critique, while supportive of workers, has as its primary goal the reform of a broken system, not the independent goal of establishing a just cause regime.

II. JUST CAUSE PROTECTION VERSUS WORKER PROTECTION

Each of the above critiques makes a strong case for adopting an approach that moves away from the at-will model. They contribute to a stronger understanding of the problems of the current system in terms of both the limited protection it affords workers and the administrative costs it imposes on employers.

However, these critiques do not explain why a just cause system is the logical alternative to employment at will or, more importantly, why such a

suffering, emotional distress, defamation, fraud, or other injury under common law; punitive damages; compensatory damages; or any other monetary award”).

50. MONT. CODE ANN. §§ 39-2-901–915.

51. See *id.* § 39-2-905(3) (barring damages “for pain and suffering, emotional distress, compensatory damages, punitive damages); *id.* § 39-2-913 (preempting common law discharge claims arising from tort or contract).

52. See Hirsch, *supra* note 11, at 107–08; McGinley, *supra* note 11, at 1511–12; *cf.* Porter, *supra* note 11, at 107 (requiring plaintiffs to choose between current statutory discrimination claims or claims under the statutory proposal put forth).

53. See Libenson, *supra* note 11, at 114–15 (criticizing compromise approaches as “inherently uninspiring” and unlikely to secure adoption and urging reform “based on principle rather than compromise”).

54. See Hirsch, *supra* note 11, at 96 (noting that “[i]t is often difficult for employers to predict *ex ante* the consequences of any given termination decision” under the current system of at-will exceptions); Porter, *supra* note 11, at 71 (noting that the unpredictability of the current system leads to more litigation and makes it difficult for employers to create a uniform plan across state lines); St. Antoine, *supra* note 10, at 69 (discussing the “crushing financial liability incurred by companies that have felt the wrath of aroused juries under our existing, capricious common-law regime”).

system is the best alternative for workers.⁵⁵ Using the collective bargaining model as a comparison, Part II considers two serious impediments to adequate protection for terminated workers via a just cause rule: workers' limited ability to challenge arbitrary terminations under current legal standards (the proof and deference problem), and the large number of workers who are terminated for cause but who nonetheless deserve some compensation upon termination (the scope problem). However helpful it may be for some workers, just cause protection will grant most terminated employees a cause of action in name only.

A. The Elusive Victory: Problems of Proof and Deference

As employment at will defenders have argued, the effectiveness of a just cause rule depends on the likelihood that employees will pursue and prevail on legal claims of employer violation.⁵⁶ In contrast to just cause in collective bargaining relationships, just cause in individual employment relationships generally requires that the aggrieved worker prove the absence of any cause for his or her termination and do so under a definition of cause highly deferential to management interests. This one-two punch of procedural and substantive hurdles significantly diminishes the value of a just cause rule to its intended beneficiaries.

1. Just Cause in Individual Versus Unionized Relationships

In the union context, the notion that employers may not discipline or discharge employees without just cause has been described as "the most important principle of labor relations."⁵⁷ More than 90 percent of collective bargaining agreements contain such a provision.⁵⁸ Just-cause-only termination is so well recognized that labor arbitrators have sometimes found an implicit promise of job security in collective bargaining agreements that contain no express limitation on employer discretion.⁵⁹

55. See Freed & Polsby, *Just Cause*, *supra* note 9, at 1104 (criticizing just cause advocates for failing to address whether "[u]njust dismissal rules . . . [are] in the best interest of employees . . . [or at least] more beneficial to employees who are benefitted than harmful to employees who are harmed").

56. Verkerke, *supra* note 16, at 900 ("The value of just cause protection depends on the ability to enforce that protection in the event of an unjust discharge.").

57. Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 594.

58. See BUREAU OF NAT'L AFFAIRS, *supra* note 22.

59. Abrams & Nolan, *supra* note 57, at 594-95.

The success and universality of just cause as a benchmark for protecting workers in the unionized environment owes to a variety of procedural and substantive characteristics unique to the labor arbitration system. Proceedings occur in a specialized venue carefully calibrated to level the playing field between workers and management. While workers may be represented by counsel, they generally enjoy free and experienced representation by a union advocate.⁶⁰ The arbitrators who hear cases are specialists in the field, selected for their neutrality and expertise.⁶¹ Finally and most critically, the employer, and not the worker, bears the burden of proving cause.⁶²

In addition to these important procedural advantages, unionized workers benefit from a highly contextualized standard of cause. Arbitrators are charged with considering the “law of the shop” in rendering judgment.⁶³ Their expertise justifies close scrutiny of employer decisionmaking.⁶⁴ This includes determining not only whether actual cause existed, but whether the employer’s response was appropriate in light of the particular situation.⁶⁵ Arbitrators consider such factors as whether the employer acted proportionately, whether the employee was adequately warned, and whether, if a rule was violated, the rule itself is fair and consistently enforced.⁶⁶

Application of just cause in the union context stands in sharp contrast to its application in the context of individual employment relationships. The usual common law definition of just cause contemplates that the employer must terminate on the basis of a “fair and honest cause or reason, regulated by

60. See FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 229–33 (Alan Miles Ruben ed., 6th ed. 2003) (discussing the role of union representatives).

61. See *id.* at 176–91; Summers, *supra* note 11, at 521 (describing labor arbitrators as “a trained judiciary” that is “experienced in hearing discipline cases and applying the ‘just cause’ standard”).

62. See RAY J. SCHOONHOVER, *FAIRWEATHER’S PRACTICE AND PROCEDURE IN LABOR ARBITRATION* 273–74 (4th ed. 1999).

63. See *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581–82 (1960) (“The labor arbitrator’s source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.”).

64. See *id.* at 582 (“The labor arbitrator is usually chosen because of the parties’ confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.”).

65. See *id.* (“The parties expect that [the arbitrator’s] judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished.”).

66. See *Whirlpool Corp.*, 58 Lab. Arb. Rep. (BNA) 421 *passim* (1972) (describing “seven questions” to be asked by labor arbitrators in determining presence of cause); *Enterprise Wire Co.*, 46 Lab. Arb. Rep. (BNA) 359, 360–62 (1966) (Daugherty, Arb.); *Abrams & Nolan*, *supra* note 57, at 611–12 (setting out the theory of just cause in union discipline cases that affords workers the right to “industrial due process,” “industrial equal protection,” and “individualized treatment”).

good faith.”⁶⁷ Generally the plaintiff has the burden to show that that standard was breached.⁶⁸ In practice, courts defer significantly to employers’ exercise of business judgment.⁶⁹ In many jurisdictions, the common law just cause standard does not even require the employer to be *right* in its factual determination of the basis for discharge.⁷⁰

In calling for a universal just cause rule, at-will critics have partially sought to replicate the worker-friendly features of the collective bargaining regime. Scholars have long recognized the value of the streamlined extra-judicial forum.⁷¹ Contemporary statutory initiatives, such as the Montana Wrongful Discharge in Employment Act (WDEA) and the Model Termination of Employment Act (META) create incentives for parties to choose private arbitration.⁷² Those

67. See, e.g., *Pugh v. See’s Candies, Inc. (Pugh I)*, 171 Cal. Rptr. 917, 928 (Ct. App. 1981) (using this definition to describe “just cause” as well as “good cause”).

68. See, e.g., *Pugh v. See’s Candies, Inc. (Pugh II)*, 250 Cal. Rptr. 195, 213 (Ct. App. 1988) (instructing that, after the existence of the contract has been established, “[t]he employee has the burden of proving that the employer’s action was in bad faith”).

69. See *Pugh I*, 171 Cal. Rptr. at 928 (“Care must be taken . . . not to interfere with the legitimate exercise of managerial discretion. ‘Good cause’ in this context is quite different from the standard applicable in determining the propriety of an employee’s termination under a contract for a specified term. And where . . . the employee occupies a sensitive managerial or confidential position, the employer must of necessity be allowed substantial scope for the exercise of subjective judgment.”); Moss, *supra* note 45, at 343 (describing Montana’s broad interpretation of “legitimate business reasons” for termination under its statutory wrongful discharge law, which includes “even modest economic imperatives like ‘reduction in warehouse inventory’”) (citing *Braulick v. Hathaway Meats, Inc.*, 980 P.2d 1, 3 (Mont. 1999)).

70. See, e.g., *Cotran v. Rollins Hudig Hall Int’l, Inc.*, 948 P.2d 412, 414 (Cal. 1998) (holding that the better standard is whether the employer acted “fairly, honestly, and in good faith” rather than “whether the alleged misconduct occurred as a matter of fact”) (emphasis omitted). There is some limited empirical support for the supposition that an individual just cause rule will not provide workers the benefits they enjoy under collective bargaining agreements. Researchers presented a hypothetical dismissal case to a group of arbitrators. In one version, the case was presented as a labor discipline grievance under a collective bargaining agreement. In the other version, the identical set of facts was presented as a wrongful termination claim brought by an individual nonunion worker under META. Controlling for type of arbitrator, decisionmakers were statistically more likely to reinstate the worker in the collective bargaining context than in the wrongful dismissal suit. See Lisa B. Bingham & Debra J. Mesch, *Decision Making in Employment and Labor Arbitration*, 39 INDUS. REL. 671, 683 (2000); cf. Moss, *supra* note 45, at 343 (asserting that even “Montana’s [just cause statute], which represents the far extreme of states’ willingness to restrict employment at will, is not so radical and is not nearly as strong a guarantee of job security as the meatier ‘just cause’ provisions common in collective bargaining agreements”).

71. See, e.g., Blades, *supra* note 10, at 1431 (speculating that employer dissatisfaction with judicial outcomes may lead to “the creation of private means of settlement that might be the most effective and expeditious way of handling such cases”); Summers, *supra* note 11, at 521–24 (proposing that “legal protection against unjust dismissal can best be built upon the standards and procedures of our existing [labor] arbitration system”).

72. See Montana Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-914, 915 (2009) (providing that a prevailing party who makes an offer to arbitrate that is not accepted by the other party is entitled to attorneys’ fees); MODEL EMPLOYMENT TERMINATION ACT § 6 (1991) (making arbitration the default for resolution of wrongful termination cases unless the parties agree to some other form of adjudication).

proposals that allow or favor judicial access generally include mechanisms for workers to recover costs and attorneys' fees.⁷³

Calls for universal just cause almost always presume, however, that the common law standard of cause and the burden of proof structure applied in individual contract cases would become the relevant standard for assessing employer liability for termination.⁷⁴ This concession may well be strategic. It may be unrealistic to expect a plaintiff-friendly allocation of proof in addition to the fundamental shift in baseline rights that a universal just cause rule would entail.⁷⁵

Yet, it is critical to take stock of the practical realities of such a system if adopted. A just cause rule, as currently understood, places the burden on the worker to prove a fact-intensive question on an issue on which the employer holds all of the relevant information.⁷⁶ Generous discovery rules and information-forcing adjustments to the burden of proof might ease the situation somewhat.⁷⁷ However, the employee would remain in the difficult position

73. See MODEL EMPLOYMENT TERMINATION ACT § 7; Hirsch, *supra* note 11, at 128; Porter, *supra* note 11, at 113.

74. See, e.g., MONT. CODE ANN. § 39-2-903(5) (defining good cause as "reasonable job-related" grounds based on a legitimate business reason); Hirsch, *supra* note 11, at 111 (advocating a substantive standard that would make unlawful "any termination that was not actually motivated by a reasonable business justification"); Porter, *supra* note 11, at 86–87 (limiting prohibited reasons for termination to discrete law exceptions). It should be noted that META purports to apply the same standard as applied in collective bargaining relationships, but the text of the model act recites the common law definition of cause, with the factors commonly used by arbitrators to determine good cause mentioned only in the drafters' commentary. See MODEL EMPLOYMENT TERMINATION ACT § 1 cmt.; see also Bingham & Mesch, *supra* note 70, at 679 (suggesting that META's good cause standard is less deferential to workers than labor law just cause). Ann McGinley's proposal is one exception to the many that would adopt the common law standard. McGinley proposes placing the burden on the employer to prove it has a legitimate business interest in terminating and that it gave the employee notice of its policy as well as a warning to cease the offending behavior. See McGinley, *supra* note 11, at 1513–14.

75. See, e.g., Hirsch, *supra* note 11, at 114 (acknowledging that for a reform proposal to be politically possible, "significant employer discretion is needed to gain employer support or at least dampen employer resistance"); Porter, *supra* note 11, at 84 (asserting that adoption of a just cause rule is politically infeasible, if not impossible).

76. See McGinley, *supra* note 11, at 1507 (critiquing META for "plac[ing] the procedural disadvantage on the party with fewer resources and less access to the information he needs to meet the burden"); cf. Estlund, *supra* note 28, at 1673–74 (describing the "hurdles of delay, cost of litigation, and difficulties of proof" in considering the obstacles to plaintiff success under anti-retaliation statutes and public policy doctrines); Richard W. Power, *A Defense of the Employment at Will Rule*, 27 ST. LOUIS U. L.J. 881, 885–86 (1983) (describing proof challenges as a reason not to adopt just cause). Such problems are compounded by the fact that well-informed employers, counseled by attorneys and human resources professionals, are careful to keep (or create) records that justify termination. See Estlund, *supra* note 28, at 1670 ("The cautious, liability-conscious employer has means, motive, and opportunity to create a plausible record in support of what may in fact be an illegally motivated discharge.")

77. For instance, *Pugh I* applied the shifting burden of production associated with federal discrimination claims under which the employer bears the burden of producing a reason for termination,

of proving a negative—the *absence* of cause—under a standard that strongly favors management.

2. A Pyrrhic Victory? A Case Study in the Application of Just Cause

The California Appellate Court’s landmark decision in *Pugh v. See’s Candies (Pugh I)*⁷⁸ provides a telling illustration of the degree to which plaintiffs can expect to succeed under an individual just cause rule. Hailed as a significant inroad into at-will, *Pugh* threw out the much criticized “additional consideration” requirement under which employees had to prove they had provided the employer with something more than their mere agreement to serve in order to support a contractual claim to job security.⁷⁹ Instead, the California court set forth an employee-friendly, multi-factored test that examines the totality of circumstances reflecting employer intent to provide job security.⁸⁰

This rule was articulated against a compelling factual backdrop. Wayne Pugh had served the defendant employer for thirty-two years, beginning his employment as a dishwasher and working his way up the corporate ladder to vice president and member of the board of directors.⁸¹ His career ended abruptly when he was unceremoniously fired, without severance and without explanation, upon the conclusion of a family trip with his boss.⁸² That termination

albeit not a burden of proof on the ultimate issue of discrimination. See *Pugh I*, 171 Cal. Rptr. 917, 927 (Ct. App. 1981) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–07 (1973)).

78. 171 Cal. Rptr. 917.

79. See, e.g., *Hanson v. Central Show Printing Co.*, 130 N.W.2d 654, 657 (Iowa 1964) (explaining that “in the absence of a consideration in addition to the services to be rendered, contracts for permanent employment are indefinite hirings, terminable at the will of either party” and “[t]he giving up of the opportunity to take other employment cannot be held to be an additional consideration” (citing *Lewis v. Minn. Mut. Life Ins. Co.*, 37 N.W.2d 316, 322–23 (Iowa 1949))); *Skagerberg v. Blandin Paper Co.*, 266 N.W. 872, 874 (Minn. 1936) (holding that “good consideration additional to the services contracted to be rendered” is necessary to establish a contract for job security). The additional consideration rule has been derided as antithetical to contract doctrine. See Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 *FORDHAM L. REV.* 1082, 1099 (1984) (countering that “[a]s any first semester law student knows . . . one performance can be consideration to support two or even twenty promises. The work performed could be consideration for both the wages paid and the promise of future employment”). Yet many modern courts continue to employ this analysis. See *Turner v. Newsom*, 3 So. 3d 913, 922 (Ala. Civ. App. 2008) (finding that a written promise of job security was an indefinite contract, and the fact that the employee accepted additional responsibilities and work hours, put educational opportunities on hold, and did not reveal the employer’s “immoral conduct” were not additional consideration of the type necessary to support an “extraordinary” contract for lifetime employment).

80. *Pugh I*, 171 Cal. Rptr. at 925–27 (including as factors to be considered the duration of plaintiff’s employment and performance history, assurances of supervisors, company practices and policies, and industry standards).

81. *Id.* at 918.

82. *Id.* at 919.

occurred despite years of praise, assurances, and positive performance evaluations, including the fabled gold watch for his “years of loyal service.”⁸³

On these facts, Pugh was able to convince a jury that he had a contractual right to continued employment absent just cause. He was not, however, able to persuade the jury that his contract had been breached.⁸⁴ At trial, Pugh’s boss testified that Pugh was “rude, argumentative, belligerent, and uncooperative” on their trip to Europe, and other See’s employees testified that Pugh was “disrespectful to his superiors and subordinates, disloyal to the company, and uncooperative with other administrative staff.”⁸⁵ The jury ultimately concluded that Pugh was terminated with cause.⁸⁶ Notably absent from the analysis on appeal is any consideration of the employer’s failure to warn or discipline Pugh, any evaluation of See’s workplace rules, or assessment of whether termination was consistent and proportional to Pugh’s offense, all of which would be explicit components of a labor arbitrator’s ruling.

This analysis of *Pugh* is not meant to suggest that an implied contract theory of job security is not valuable, or that a universal just cause standard would not improve workers’ plight. Certainly, implied contract jurisprudence has enabled some plaintiff successes, whether in the form of court victories or pretrial settlements. Many more employees have likely benefited from more conscientious termination policies adopted by risk-averse employers in response to such decisions.⁸⁷ But these benefits do not suggest that a just cause system offers workers their best alternative to employment at will. The economic defense of at-will asserts that rational and informed employees are better off selecting at-will employment than paying for costly just cause rights that they have little chance of enforcing.⁸⁸ Just cause advocates have challenged the notion that employees are informed. They have given little consideration, however, to the implicit second question: whether an informed employee would

83. *Id.*

84. *See Pugh II*, 250 Cal. Rptr. 195, 197–98 (Ct. App. 1988) (affirming verdict for defendant).

85. *Id.* at 203.

86. *Id.* at 197–98.

87. For instance, the development of implied contract jurisprudence likely contributed to employers offering severance pay in exchange for a release of claims upon termination, a practice that has some of the same effects as the pay-or-pay proposal advanced here. *See infra* Part IV and Part V.

88. *See, e.g., Verkerke, supra* note 16, at 898–900 (suggesting that workers overestimate the value of a just cause rule because they underestimate enforcement costs).

be better off choosing just cause.⁸⁹ The procedural and substantive obstacles to succeeding on an individual just cause claim offer good reason to doubt it.⁹⁰

B. Who Benefits? Problems of Scope

The previous Subpart questioned the value to workers of a just cause system given the challenges they will face sustaining a claim for wrongful termination. It does not follow from this critique, however, that just cause should be abandoned. Rather, just cause might itself be reformed to better protect the interests of workers. Pragmatic critics of employment at will, for instance, have proposed just cause systems that channel disputes into alternative fora and offer attorneys' fees to prevailing plaintiffs, features that would enhance workers' ability to pursue claims.⁹¹ To make a just cause regime even more plaintiff-friendly, one might adopt a more exacting legal standard for assessing cause to terminate, lessen the burden of proof imposed on employees, or incorporate other features of the collective bargaining system that have produced positive outcomes.⁹²

Setting aside the fact that such features would likely doom these reform proposals politically, a more fundamental limitation of a just cause system remains: It protects only workers fired without cause. No matter how strictly the law defines cause, under a universal just cause system, as in the union context, employers would be free to terminate for legitimate economic reasons unrelated to performance. Employers could continue to lay off workers as a result

89. *But see* Estlund, *supra* note 10, at 15–16 (speculating that employees do not choose just cause contracts because they do not trust employers to comply and do not trust courts to bring employers to justice).

90. It is an empirical question whether the result in *Pugh II* is typical of outcomes in common law just cause cases. One early study of California jury verdicts in wrongful discharge cases, including tort-based claims, determined that workers prevailed in 68 percent of cases. JAMES N. DERTOUZOS ET AL., RAND INST. FOR CIVIL JUSTICE, THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION vii (1988), available at <http://www.rand.org/pubs/reports/2007/R3602.pdf>. A more recent study, focusing on the results of implied contract claims in reported decisions, found employees to be vastly less successful, with no more than 15 percent succeeding on the merits even in those states most hospitable to such claims. See Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47, 58 (1992). This latter study, which weeded out public policy cases and considered all litigated cases resulting in decisions (as opposed to those reaching a jury), would appear to be the more useful source for evaluating this question.

91. See *supra* Part II.A.1.

92. Several of the most recent contributions to the at-will reform literature incorporate such features in their proposals. See, e.g., Hirsch, *supra* note 11, at 109–10 (an employer must supply workers with a written explanation of the reason for termination); Porter, *supra* note 11, at 110 (proposing that the employee need prove only that the employer's proffered reason for termination is pretextual and need not prove that the real reason for termination was unlawful).

of a cessation of operations, partial closings, takeovers or mergers, strategic changes in direction, or any number of business reasons.

Thus, an evaluation of just cause alternatives to employment at will must consider who is included within that system of protection and who is left out. On this issue, two related and important questions present: First, what percentage of employee terminations are, in fact, arbitrary as a proportion of overall terminations; and, second, to what extent should termination policy be concerned about the well-being of workers fired for rational business reasons?

1. The Scarcity of Arbitrary Terminations

The economic defense of employment at will has emphasized the first point. Scholars have argued against a just cause system based, in part, on the notion that most employers operate under implicit contracts—self-enforcing, non-legal understandings that workers will be retained absent just cause.⁹³ Under this theory, employers have every reason to retain effective, productive employees who will help them improve their bottom line.⁹⁴ They also have relatively strong incentives to retain marginal workers to avoid the costs of training a replacement.⁹⁵

It is clear, however, that employers do at times terminate wrongfully or arbitrarily. For instance, employers sometimes fire for discriminatory or retaliatory reasons, a reality that justifies existing statutory inroads into employment at will that are widely supported, including by most at-will defenders.⁹⁶ Employers also terminate workers opportunistically. Law and economics scholars recognize that, at various points in the employment relationship, employees may make uncompensated investments in the company—such as acquiring firm-specific skills and accepting pay below their opportunity wage—in

93. See Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1917, 1921 (1996) (noting how corporate norms, such as limiting discharge to for-cause situations and retaining older workers despite declining performance, coexist with the inconsistent doctrinal rule of employment at will).

94. See *id.* at 1930; see also Abrams & Nolan, *supra* note 57, at 602–03 (“The profit motive alone discourages arbitrary discipline. . . . The employer’s common law authority to suspend or discharge workers at will is thus no indication of his actual willingness to use that authority in a capricious manner.”); Freed & Polsby, *Just Cause*, *supra* note 9, at 1106 (“If a firing is arbitrary and without just cause only when the firing cannot reasonably be found to benefit the employer, then arbitrary firings probably rarely take place. Employers do not need additional reasons for avoiding self-inflicted wounds.”).

95. See Rock & Wachter, *supra* note 93, at 1922–23; see also Abrams & Nolan, *supra* note 57, at 602–03.

96. See Estlund, *supra* note 28, at 1655 (noting that the legitimacy of “‘bad reasons’ doctrines” that prohibit termination for wrongful or immoral reasons has largely been conceded).

anticipation of deferred compensation.⁹⁷ An employer might seek to terminate such an individual without justification merely to avoid paying the amounts owed, which at that point may exceed the worker's marginal product.⁹⁸

Furthermore, companies encounter agency problems in achieving the best results for the corporate bottom line. A worker may be productive but disliked. Although retention would be in the employer's best interest, a supervisor may terminate that worker for her own idiosyncratic reasons.⁹⁹ In other situations, a supervisor may simply make an error of judgment.¹⁰⁰ In these scenarios, a just cause standard can actually prevent inefficient results that are counter to employers' interests but that might otherwise go uncorrected.

The question is not whether workers are ever terminated without cause, but whether such terminations are so pervasive that they should be prioritized above others. It is probably impossible to know from labor statistics the number of documented terminations that would be actionable under a universal just cause standard. A widely cited estimate among exploitation-based critics of employment at will is that 150,000 to 200,000 terminations per year are without any discernable cause.¹⁰¹ Rarely cited by such commentators is the fact that this estimate, based on early 1980s data, is based on a pool of two million total terminations.¹⁰² In other words, 1.8 to 1.85 million workers in the sample relied

97. This "career wage" model and its underlying economic theories have been described in greater detail by a number of legal scholars. See, e.g., Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1, 6 (2001); Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 14 (1993); Stone, *supra* note 25, at 535–39.

98. This most likely occurs at the tail end of a long-term relationship. See Schwab, *supra* note 97, at 19. Some scholarship has questioned the degree to which such "career" models apply in the contemporary economy. See, e.g., PETER CAPPELLI, *THE NEW DEAL AT WORK: MANAGING THE MARKET DRIVEN WORKFORCE* 5 (1999) (suggesting that competition and reduced lead time make long-term investments in employees impractical for companies who prefer to hire skilled workers and replace them when the company's needs change); Stone, *supra* note 25, at 539–49 (surveying evidence of decline in job tenure and rise in contingent employment relationships). I return to this issue in Part III.B, *infra*.

99. See Moss, *supra* note 45, at 352 (suggesting that terminations perpetrated by "self-interested managers" that are "not only unfair but inefficient may be just one of the minor inefficiencies that companies suffer with regularity").

100. See St. Antoine, *supra* note 10, at 67 (asserting that scholarship defending the efficiency of employment at will "admits of no living, breathing human beings, who develop irrational antagonisms or exercise poor judgment").

101. See, e.g., Charles B. Craver, *Why Labor Unions Must [And Can] Survive*, 1 U. PA. J. LAB. & EMP. L. 15, 32 (1998); Hirsch, *supra* note 11, at 93; Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 850–51 (1994); St. Antoine, *supra* note 10, at 66. The source of this estimate is a 1985 article by Professor Jack Stieber. See Jack Stieber, *Recent Developments in Employment-at-Will*, 36 LAB. L.J. 557, 558 (1985). An earlier estimate by Professor Cornelius Peck, based on 1976 data, put the number at 8,000 arbitrary dismissals per year. See Peck, *supra* note 10.

102. Stieber, *supra* note 101.

upon would receive no benefit whatsoever under a just cause approach.¹⁰³ The relative paucity of arbitrary terminations is even more striking considering that these data draw in part on the incidence of successful results in union grievances, where stricter standards for cause apply.¹⁰⁴

2. The Prevalence of Economic Terminations

The large number of nonarbitrary at-will terminations presents a second reason for reevaluating just cause. No doubt there are theoretical justifications for prioritizing legal regulation of arbitrary terminations over the regulation of economic ones. From a law and economics perspective, arbitrary terminations are likely to create inefficiencies of the type described above, whereas economic terminations, if the employer's assessment of its business circumstances is legitimate, will correct such inefficiencies. Arbitrary terminations may also be viewed as morally wrong or may be easily ascribed to employer fault, as exploitation critics argue. In such instances, unlike in cases of economic termination, it is uncontroversial and normatively appropriate to hold the company responsible.

That said, the consequences for the individual—unemployment and its attendant costs—are the same regardless of whether the termination was arbitrary. Indeed, in making the case for just cause protection, the exploitation-based critics draw explicitly from literature on the psychological effects of financially motivated plant closings.¹⁰⁵ These extend not only to individual workers but to whole communities. As a matter of social policy then, the broader consequences of economic terminations should garner higher priority than arbitrary ones within the worker protection movement. It is puzzling that the just cause system, championed as the key to civilized and humane workplace relationships, would neglect the vast number of economically terminated

103. Using Professor Peck's earlier data, Professors Mayer Freed and Daniel Polsby calculate that the probability of a worker being terminated for a reason that would be overturned under a union just cause standard would be 0.0154 percent. See Freed & Polsby, *Just Cause*, *supra* note 9, at 1106. For a detailed analysis updating the 1976 and 1983 statistics relied on by Professor Peck and Professor Stieber, respectively, see Morriss, *supra* note 16, at 1909.

104. See Freed & Polsby, *Just Cause*, *supra* note 9, at 1106 (noting that the use of union sector arbitration rates "beg[s] the question whether an arbitrator's view should be determinative of what constitutes an unjust dismissal"); Morriss, *supra* note 16, at 1910–13 (arguing that differences in standards applied, the pool of jobs, and the nature of union work, among others, make it "impossible to apply information accurately" from the union sector to the nonunion sector); *supra* Part II.A.1.

105. See, e.g., St. Antoine, *supra* note 10, at 67. In his discussion of the effects of plant closings, St. Antoine notes that "numerous studies document the increases in cardiovascular deaths, suicides, mental breakdowns, alcoholism, ulcers, diabetes, spouse and child abuse, impaired social relationships, and various other diseases and abnormal conditions that develop even in the wake of impersonal permanent layoffs resulting from plant closures," and suggests that "such effects are at least as severe when a worker is singled out to be discharged for some alleged deficiency or misconduct." *Id.*

workers, who suffer equivalent harms and whose terminations create wider social problems.

Workers terminated for economic reasons are in many ways worse off than arbitrarily terminated workers under the at-will regime. Both types of workers are equally eligible for public benefits in the form of unemployment insurance. However, the rights they enjoy vis-à-vis the terminating employer are vastly different. Workers terminated for economic reasons have a cause of action against their employer only in the special case of a plant closing or mass layoff. Under the federal Worker Adjustment Retraining and Notification (WARN) Act, employers must give sixty days' notice of a layoff that will result in a plant closing or an employment loss of one-third of the workforce or five hundred or more employees.¹⁰⁶ If the employer violates the notice provision, an employee is entitled to payment for the number of days' notice that the employer failed to provide.¹⁰⁷ In contrast to this meager protection, state and federal employment law is riddled with exceptions to employment at will, all of which limit the possible motives for which employers may terminate. For example, discriminatory terminations on the basis of a protected status or characteristic have been broadly proscribed at the state and federal level, as have other morally condemnable terminations, such as those seeking to coerce unlawful behavior, chill whistleblowing, or otherwise adversely affect the public interest.¹⁰⁸ This is not to suggest, as some have argued, that current law comprises a de facto just cause regime, but rather to show that there is a meaningful backstop against arbitrary termination that is unavailable in the case of small-scale or individual layoffs where an economic justification is patent.

Although scholars have called for expansions of the WARN Act, they are far fewer in number than the vast chorus seeking universal just cause protection.¹⁰⁹ This neglect is particularly unusual given the frequent analogy to collective bargaining relationships and the emphasis on European labor laws in just cause scholarship. Union contracts not only require termination to be justified, they also recognize the need to cushion necessary economic terminations. Most collective bargaining agreements create a process for selecting workers for layoff ("last in, first out") and provide affected workers with recall and transfer rights.¹¹⁰ They thus offer workers a modest degree of predictability

106. 29 U.S.C. § 2102 (2006).

107. *Id.* § 2104(a).

108. See *supra* Part I.A.

109. For some useful arguments supporting the expansion of the WARN Act, see, for example, McHugh, *supra* note 13; Summers, *supra* note 5.

110. See BUREAU OF NAT'L AFFAIRS, *supra* note 22, at 67–69 (reporting that 88 percent of sampled collective bargaining agreements used seniority as a factor or determinative factor in selecting workers for

about job loss. More importantly, many collective bargaining agreements require that workers receive notice of an impending layoff¹¹¹ and some amount of severance pay and benefits continuation upon termination.¹¹² These amounts are generally modest—one week per year of service is common¹¹³—but they offer some cushion for workers as they search for new employment. Similarly, most European nations, in addition to requiring just cause for discharge, require employers to provide notice of termination or severance pay (or both) upon termination, even in situations when termination is economically compelled.¹¹⁴ Thus, both collective bargaining agreements and foreign law reflect a shared understanding that the employer bears some responsibility for the consequences of job loss even when termination is justified.

The vast majority of collective bargaining agreements and the laws of many other Western nations capture and account for the possibility of both arbitrary and economic-based terminations and provide protections accordingly. Just cause advocates, while drawing explicitly on the rights afforded to workers in unionized relationships and employed outside the United States, have neglected the critical component of those systems that protects workers facing economic dislocation.

III. RETHINKING WRONGFUL TERMINATION FOR A “ME, INC.” ECONOMY¹¹⁵

The preceding critique of the just cause model of employment termination raises an inevitable question: Why, given its limitations, did just cause become the primary focus of the at-will reform movement? Part III answers this question, and, in so doing, lays the groundwork for a new approach to worker protection. Just cause reform gave voice to a particular social contract of employment that pertained in nonunionized industries during the mid-twentieth century. At that time, employers operated principally in an internal labor

layoff, 63 percent provided “bumping” rights to employees scheduled for layoff, and 85 percent provided for recall after layoff).

111. See *id.* at 68 (reporting that 49 percent of sampled collective bargaining agreements provided for notice of layoff to the affected workers, their union, or both).

112. See *id.* at 42 (reporting that 39 percent of sampled collective bargaining agreements provided for severance pay, 47 percent of those in the case of a permanent shutdown in operations).

113. See *id.*

114. See, e.g., Employment Rights Act, 1996, c. 18, § 86 (Eng.); Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, Bundesgesetzblatt [BGBl.] I, as amended, § 622 (Ger.). See generally Summers, *supra* note 5, at 1039–57 (comparing worker dislocation laws of England, Germany, Sweden, and Japan); *infra* Part V.A.

115. Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a “Me, Inc.” World*, 12 TEX. J. WOMEN & L. 345 (2003).

market and frequently made implicit promises that employees would enjoy long-term work in exchange for loyal service. In contrast, today's companies and employees operate in what I have described as a "Me, Inc." economy—one in which workers are encouraged to take responsibility for their own careers, benchmarking success against an external labor market.¹¹⁶ In this environment, giving legal effect to the social contract of employment requires rules that support market transition rather than privilege job attachment.

A. The "Life Cycle" Story: Just Cause and Implicit Contracts¹¹⁷

The just cause approach to termination reflects a particular view of employment relationships that held sway for a relatively brief period of time in American labor history. During the 1940s and 1950s, companies adopted a unique social contract of employment that reflected the dominance of internal labor markets.¹¹⁸ In that context, the requirement of just cause for termination served as a legal imprimatur on parties' mutual understanding of their relationship.

1. The Rise of Long-Term Employment

The mid-twentieth century social contract grew out of the industrial management practices of previous generations. Throughout the nineteenth century, as American industry and infrastructure expanded, labor was relatively mobile and, in the case of skilled workers, highly autonomous.¹¹⁹ The at-will rule, penned in 1877, reflected the reality that work relationships were contingent, unstable affairs and that a long-term commitment was the exception rather than the norm.¹²⁰

The situation changed, however, with the advent of mechanization and the birth of industrial management. Beginning in the early twentieth century,

116. *Id.* at 374 ("[T]oday's work relationships are defined by a "Me, Inc." work culture—an employment environment in which workers are increasingly independent, short-term employment relationships predominate, collective action is all but absent, and employer reliance on contingent labor has dramatically expanded. [It is] an economy where employees' futures depend not on their current employer but on the value of their human capital within the external labor market."); *see also* Estlund, *supra* note 10, at 27 (describing a "brave new workplace of fluidity and free agency").

117. Schwab, *supra* note 97.

118. *See generally* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 51–63 (2004). I draw heavily on this monograph and Professor Stone's research in the Subparts below.

119. *See* Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 737–40.

120. *See id.*

many companies implemented a system founded on Frederick Taylor's theory of scientific management.¹²¹ The Taylorist approach dissected the production process into sharply differentiated jobs, each involving minimal skill and repetitive work.¹²² This structure gave management a strong degree of control over workers and their work product. But it also engendered serious problems with employee morale and reliability given the deskilled and monotonous nature of the work.¹²³

The solution was a system of elaborate rewards and benefits tied to longevity rather than performance and innovation. Companies instituted fixed promotion ladders and relied on a tradition of hiring from within for all but the lowest ports of entry. This system created an intricate internal labor market heavily dependent on firm-specific training.¹²⁴ With this structure came implicit promises of advancement and security.¹²⁵ Workers could look forward to consistent promotions and rising pay by providing reliable performance and investing in firm-specific skills. At the same time, employers could depend on a competent and consistent workforce with reduced risk of shirking, turnover, and sabotage.

2. A Legal Imprimatur

This social contract was merely an understanding drawn against the backdrop of employment at will. Indeed, it was only because of the at-will default rule that employers' implicit promise of long-term job security resonated as an employment benefit.¹²⁶ During the mid-twentieth century, however, this tension between law and norms changed in two respects. First, unions, then at the height of their power, adopted the symbiotic vision of the dominant social contract in negotiating collective bargaining agreements for their members. Unions routinely bargained for clauses requiring just cause for dismissal, as well as an array of protections aimed at preserving status quo relationships and restricting managerial discretion.¹²⁷ The typical features of collective bargaining agreements—set job classifications and promotion ladders, structured pay scales and seniority systems, work preservation clauses, and elaborate grievance

121. See STONE, *supra* note 118, at 28–38.

122. See *id.* at 32; Finkin, *supra* note 119, at 740–41.

123. See STONE, *supra* note 118, at 27–28 (describing management's "labor problem" at the turn of the twentieth century as the dual issue of dealing with low worker morale combined with worker inclination to organize); Finkin, *supra* note 119, at 740 ("Turnover came to be seen as an evil to be dealt with.").

124. See STONE, *supra* note 118, at 38–44.

125. See *id.*

126. See *id.* at 49 (describing the at-will rule as a "precondition for the effective operation of internal labor markets").

127. See *id.* at 61–63.

and arbitration procedures—dovetailed with what management had already put in place.¹²⁸ These collective agreements made explicit otherwise implicit agreements between labor and management.¹²⁹

Second, courts attempted to give legal force to similar understandings between employers and unrepresented workers through implied contract jurisprudence. By the 1970s, companies found themselves unable to sustain the implicit promises of the previous generation, and by the early 1980s appellate courts were facing termination claims by workers on the losing side of such understandings. A series of cases, primarily from employee-friendly jurisdictions in which union density was relatively strong, sought to remedy these “breaches” by recognizing the viability of an implied contract to job security as an exception to employment at will.¹³⁰ Many of the cases, most notably *Pugh v. See’s Candies (Pugh I)*,¹³¹ involved long-term employees with strong records of promotion, whose stories reflected the dominant social contract.¹³² Drawing explicitly on company culture and practices, courts gave legal force to the shared understanding, inculcated by management, that workers could expect continued employment absent just cause for termination.¹³³

Thus emerged a strong social expectation, as well as a legal norm, that employers should insulate workers against job loss and that employment relationships should withstand the vicissitudes of an employee’s life. Dismissal absent just cause violated this notion, and an employer’s reasons for terminating consequently became a legitimate source of judicial (or arbitral) scrutiny. In contrast to an earlier era in which rugged individualism reigned, a system of long-term, stable employment bound the worker to a single employer, ostensibly in the interest of both parties.

128. See *id.*

129. See Stone, *supra* note 25, at 615 (noting that one of the main functions of unions has been to enforce “psychological contracts”).

130. See, e.g., *Pugh v. See’s Candies, Inc. (Pugh I)*, 171 Cal. Rptr. 917 (Ct. App. 1981); *Shebar v. Sanyo Bus. Sys. Corp.*, 544 A.2d 377 (N.J. 1988); *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257 (N.J. 1985). See generally Finkin, *supra* note 119, at 750–51 (suggesting that courts enforcing the job security promises in personnel manuals were engaged in the legitimate use of contract doctrine to enforce the internal labor market practices adopted by firms in the post-war era); Schwab, *supra* note 97, at 38–47 (suggesting that the contract exceptions to employment at will can be understood as a form of judicial policing of opportunistic employer behavior, particularly vis-à-vis long-term employees).

131. 171 Cal. Rptr. 917.

132. See *id.* at 918–19 (describing how, over thirty-two years of employment, the plaintiff “worked his way up the corporate ladder from dishwasher to vice-president in charge of production and member of the board of directors”).

133. See *id.* at 925–26 (holding that the presence of an implied contract for employment absent cause to terminate depends on such factors as the assurances of supervisors, company practices and policies, industry standards, and worker longevity).

B. The Marketability Story: Flexible Employment and External Labor Market Theory

Since the development of implied contract jurisprudence in the 1980s, the American labor market has moved away from the lifecycle model of employment on which such court decisions were grounded. A new ethic of worker-firm relations has taken hold, one that prizes industry flexibility and worker mobility.

1. The Social Contract of “Employability”¹³⁴

Much has been written about the economic and infrastructural changes that have led to new workplace practices.¹³⁵ Many of the service and technology jobs that currently dominate the economy are less susceptible to Taylorist management structures than the manufacturing jobs that gave rise to them.¹³⁶ At the same time, American employers are operating in a globalized economy, requiring them to quickly develop new products and services to meet fluctuating demands and compete against a broader pool of international competitors.¹³⁷ In this environment, employers require innovative, self-motivated workers with access to the newest and most marketable skills—skills that are likely to change frequently over time.

This reality has necessitated the adoption of different, if not entirely new, personnel practices. In a rapidly fluctuating market, employers prefer short-term labor that allows them to fill immediate personnel needs while

134. ROSABETH MOSS KANTER, *ON THE FRONTIERS OF MANAGEMENT* 192 (1997).

135. For a more detailed discussion of the causes of the trends described *infra* and their effect on the work relationship, see generally CAPPELLI, *supra* note 98, at 4–5; Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1198–1202 (2001); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 99–104 (2003); Stone, *supra* note 25, at 553–72.

136. See RICHARD SENNETT, *THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM* 51 (1998) (describing the modern approach of “flexible specialization,” which seeks to deliver more varied products more quickly to the market, as “the antithesis of the system of production embodied in Fordism”); Anthony P. Carnevale & Donna Desrochers, *Training in the Dilbert Economy*, TRAINING & DEV., Dec. 1999, at 32–33 (noting that unlike manufacturing, in which success was measured by the achievement of high volume at low cost, success in the new economy demands more complex skills, and, consequently, more complex performance standards).

137. See CAPPELLI, *supra* note 98, at 4–5 (attributing recent changes in work practices to, among other things, increasingly competitive product markets and pressures to create market niches); SENNETT, *supra* note 136, at 52 (positing that “[t]he most strongly flavored ingredient in th[e] new productive process is the willingness to let the shifting demands of the outside world determine the inside structure of institutions”); Stone, *supra* note 25, at 549 (noting the significance of increased global competition and pressures to achieve short-term cost reduction in explaining contemporary labor management trends).

maintaining future flexibility.¹³⁸ Consequently, recent decades have witnessed an increase in explicitly contingent employment relationships as well as decreased expectations of long-term attachment between companies and their “permanent” workforce.¹³⁹ Through statements of managerial strategy, human resources policy, and company hiring and firing practices, employers have conveyed to their workers that employment relationships are always contingent on financial success and the needs of the business. For this reason, workers’ financial security ultimately depends not on their current employer but rather on their external marketability.

This movement away from internal labor markets likewise has required a shift away from the social contract of employment that accompanied it. In many employment relationships, the implicit understanding between employee and employer is no longer premised on long-term employment but on the prospect of long-term marketability. Companies do not expect worker loyalty in the traditional sense of a lifetime relationship; rather, they seek a zealous commitment to the work itself.¹⁴⁰ In exchange, employers will provide valuable experience and the opportunity to cultivate marketable skills.¹⁴¹ While continued employment with any particular company in any particular capacity is not assured, workers reasonably expect that they will be well positioned to take advantage of new opportunities in the event that their current relationship ends.

2. New Rules, New Strategies

To be sure, this description of contemporary workplace expectations is far from universal. Long-term relationships remain the norm in some industries, and even the most flexible employers require a modicum of workforce stability

138. See CAPPELLI, *supra* note 98, at 5 (noting that such competition reduces market lead time, making long-term investments impractical for companies); Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?*, 76 IND. L.J. 29, 31 (2001) (predicting that firms will be increasingly reluctant to hire specialized workers under implicit long-term contracts due to the risk that their skills will become superfluous in a changing global market).

139. Professor Stone uses the term “precarious employment” to refer to any individual employed with no express or implicit promise of job security. See Stone, *supra* note 25, at 542.

140. See *id.* at 556–60 (describing employer desire for good corporate citizen behavior).

141. See CAPPELLI, *supra* note 98, at 29 (noting that “[t]he most crucial part of the [new] deal—and the one apparent element of reciprocity—is the promise on the employer’s side to help support the development of employee skills” that will yield some security in the external labor market); Stone, *supra* note 25, at 525 (“One of the most important terms of the new psychological contract is the promise of employers to give employees general skills and training. This is known as the promise of employability security, and it is treated as a substitute for the former promise of employment security.”).

to maintain continuity of operations and retain institutional knowledge.¹⁴² Moreover, workers in all industries continue to believe that terminations, inevitable though they may be, will be for cause; in the sense of a nonarbitrary reason.¹⁴³ The difference in the contemporary workplace is the significant degree of anticipated movement in the labor market. This expectation must be accounted for in developing new legal rules and devising future strategies for worker protection.¹⁴⁴

Indeed, the oral and implied contract jurisprudence associated with internal labor markets is undergoing a shift. Whereas two decades ago, innovative courts drew on contract law to enforce workers' expectations of long-term security, today they appear increasingly reluctant to recognize such claims.¹⁴⁵ This resistance generally takes the form of heightened judicial deference to language disclaiming contractual commitments in personnel manuals and other employer-drafted documents. Courts then treat such language as a bar to employee claims based not only on implicit norms, but also on explicit promises on which employees actually relied.¹⁴⁶

Two recent California cases raising oral and implied contract claims illustrate this trend. In *Dore v. Arnold Worldwide*,¹⁴⁷ for example, the court rejected a breach of contract claim brought by a worker who was terminated after he had relocated from Colorado to California with assurances that his new job would be long-term.¹⁴⁸ The California Supreme Court refused to allow the case to go to a jury, deferring to language in the employer's offer letter, stating that termination was at-will.¹⁴⁹ In so holding, the court failed to consider that the employee received the offer letter *after* he had already accepted the position

142. See Jacoby, *supra* note 6, at 1219–20 (asserting that despite modest declines in job tenure in the 1990s, employers continue to offer career-type work that offers benefits, training, and the prospect of continuity).

143. See *supra* notes 37–38 and accompanying text.

144. Indeed, the perception of uncertainty likely influences work culture whether or not “precarious” relationships actually outnumber traditional ones and regardless of the extent to which job tenure has measurably declined.

145. See BEFORT & BUDD, *supra* note 32, at 87–88 (describing how courts have narrowly construed employment at will exceptions).

146. I have described these trends in more detail in previous articles. See Rachel S. Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447, 468–70 (2009); Rachel Arnow-Richman, *Response to Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Putting the Restatement in Its Place*, 13 EMP. RTS. & EMP. POL'Y. J. 143, 146–50 (2009) [hereinafter Arnow-Richman, *Response*]; see also Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 377 (2008) (concluding that “as long as employers are careful when drafting documents, there is now little chance that they will be liable for an implied contract claim”).

147. 139 P.3d 56 (Cal. 2006).

148. *Id.* at 57.

149. See *id.* at 62.

based in part on the employer's oral assurances.¹⁵⁰ In another case, *Levitan v. Apple*, the employer promised the worker that he could continue to reside out-of-state and that it would pay his commuting costs.¹⁵¹ When the employer subsequently terminated the worker for refusing to relocate, a California appellate court dismissed a claim for breach of contract.¹⁵² The court found that the at-will language in the company's offer letter unambiguously allowed the employer to end the relationship for any reason and that the worker had failed to raise an issue of fact on the existence of a contractual breach.¹⁵³ Such decisions, particularly from an historically pro-plaintiff jurisdiction like California, may reflect a degree of judicial discomfort with recognizing an implied contract to long-term security as the appropriate legal translation of contemporary workplace understandings.¹⁵⁴

Change is also afoot in the collective bargaining arena. The standard terms and bargaining strategies on which unions have long relied, and which formed the basis for the initial call for a universal just cause system, are increasingly challenged by contemporary workplace dynamics. Labor relations scholars have noted the incongruity between traditional union demands for hierarchical, seniority-based promotion and wage progression and the flexible, external labor market practices of today's employers.¹⁵⁵ Some have called for legislation to change basic features of labor regulation to reflect these changes in the structure of work.¹⁵⁶ Unions themselves are responding, increasing efforts to organize

150. *Id.* at 57–58.

151. *Levitan v. Apple Computer, Inc.*, No. H024191, 2003 Cal. App. Unpub. LEXIS 3972, at *5 (Cal. Ct. App. Apr. 18, 2003).

152. *See id.* at *22.

153. *See id.* at *12, *16, *19–20.

154. *See* Arnov-Richman, *Response*, *supra* note 146, at 152 (arguing that *Levitan v. Apple* illustrates the perils of “litigat[ing] through the lens of job security. The employer's oral agreement to allow Levitan to commute . . . was spun as a limitation on the employer's right to terminate when it should have been recognized by the court as . . . a term of employment in its own right”).

155. *See* STONE, *supra* note 118, at 198–206; Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 362–63 (2002) (explaining employers' resistance to unions because of the need to compete in the global economy and the ability to utilize the lower wage structures of developing countries); Marion Crain, *The Transformation of the Professional Workforce*, 79 CHI.-KENT L. REV. 543, 599–600 (2004) (describing how employers' flexibility in organizing the structure of work does not mesh with traditional union demands); Alan Hyde, *Employee Organization in Silicon Valley: Networks, Ethnic Organization, and New Unions*, 4 U. PA. J. LAB. & EMP. L. 493, 498 (2002) (“Almost all the work practices identified with Silicon Valley . . . are said to be obstacles to union organizing, particularly short job tenures, heavy use of temporary labor, and heavy use of immigrant labor.”).

156. *See, e.g.*, STONE, *supra* note 118, at 206–16. Many articles have focused on the need to reform sections 2(5) and 8(a)(2) of the National Labor Relations Act to enable creative and interactive management systems consistent with flattened organizational structures and the emphasis on employee innovation in contemporary companies. *See, e.g.*, Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What's Next for the NLRA?*, 34 FLA. ST. U. L. REV. 1133, 1152–62 (2007)

contingent and immigrant workers, often relying on non-traditional paths to recognition.¹⁵⁷

This is not to say that just cause protection is inconsistent with current market dynamics. An employer could adopt an external labor market strategy and still abide by a promise of just-cause-only termination. Economic downturns, the need for newer skills, and changes in market direction have always been and would continue to be just cause for termination. However, the implicit rules of workplace relationships that gave rise to the implied model of worker protection have eroded, and the legal infrastructure that evolved to enforce those understandings has been increasingly strained. Given these developments, along with the practical limitations of a just cause system as a tool of worker protection,¹⁵⁸ workplace reform efforts should not remain focused solely on arbitrary termination. Scholars and advocates must consider alternative means to protect workers that account for current workplace practices and economic realities. Part IV attempts to do this.

IV. FROM JUSTIFYING TERMINATION TO ENABLING JOB TRANSITION

As previously described, the distinguishing feature of the new social contract of employment is the increased expectation of possible job loss. If employers no longer implicitly offer workers long-term job security, and employees no longer expect to remain in the same job for their lifetime, the guiding theory of worker protection should focus on enabling continued labor market participation rather than on preserving particular jobs.

(suggesting reform of the NLRA “company union” prohibition to allow nonunion workers to participate in employer-sponsored work groups to enhance worker voice and employer-employee cooperation); Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 187–90 (1993) (proposing an “employee free choice defense” to a complaint arising out of Section 8(a)(2) of the NLRA to allow employees to freely choose as their representative body spontaneous employee organizations, which garner employer support); Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(a)(2) of the NLRA*, 72 S. CAL. L. REV. 1651, 1664–65 (1999) (describing employee participation as essential to employers’ goal of retaining a quality workforce in a competitive environment and the mechanisms of participation as a natural extension of modern technology).

157. See Alexander Colvin, *Rethinking Bargaining Unit Determination: Labor Law and the Structure of Collective Representation in a Changing Workplace*, 15 HOFSTRA LAB. & EMP. L.J. 419, 430–31 (1998) (highlighting the Service Employees International Union “Janitors for Justice” campaign, which organized service sector workers through publicity and economic pressure); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1606–07 (2002) (describing the successful organization of Riva Jewelry through a national protest and a press campaign after a failed representation election).

158. See *supra* Part II.

Enabling continued work attachment could take the form of a legislative “pay-or-play” obligation upon termination. Under such a system, employers would be obligated to provide workers advance notice of termination or, at the employer’s election, continued pay and benefits for the duration of the notice period. This system would allow employees a degree of income continuity, enabling them to search for new employment or, in the event the employer elects severance pay, to invest in training.

This Part explores the normative significance and legal foundations of such an approach. It begins with a case study in the role of notice and income continuity in the context of a contemporary plant closing, then turns to an exploration of how such a system would draw upon and intersect with existing law.

A. Notice as the New Cause: A Case Study in Economic Termination

The events and publicity surrounding the December 2008 shuttering of Republic Windows & Doors is illustrative of the practical and humanizing role that notice and income continuity play in the context of job loss and transition. On December 2, the Chicago-based employer announced that it would be closing its facility due to a sudden credit freeze by one of its large lenders.¹⁵⁹ Workers were informed that their jobs would end just three days later, on Friday, December 5.¹⁶⁰ At the close of business on Friday, however, the workers did not leave. Instead, they began a peaceful occupation of the employer’s facility.¹⁶¹ The workers’ chief complaint was the absence of any meaningful warning of the imminent closure; their goal was to obtain severance and accrued vacation pay.¹⁶²

More than two hundred of Republic Windows’s two hundred and fifty workers continued to occupy the premises through the weekend, and their quest became a minor cause célèbre. National media described the workers as the face of the economic downturn.¹⁶³ Civil rights advocates compared the workers to Rosa Parks,¹⁶⁴ and union organizers and left-leaning news sources

159. See Monica Davey, *In Factory Sit-In, an Anger Spread Wide*, N.Y. TIMES, Dec. 8, 2008, at A16; Michael Luo & Karen Ann Cullotta, *Even Workers Surprised by Success of Factory Sit-In*, N.Y. TIMES, Dec. 13, 2008, at A9.

160. Davey, *supra* note 159.

161. *Id.*; see also *Union Says Sit-In at Factory Not Over*, DAILY HERALD, Dec. 10, 2008, at 19.

162. Davey, *supra* note 159.

163. See Luo & Cullotta, *supra* note 159.

164. *Id.*

linked them to the history of class struggle and worker solidarity.¹⁶⁵ A multi-party negotiation ensued between creditors, union leaders, and government officials. In the end, creditors agreed to lend the company \$1.75 million for purposes of paying the employees.¹⁶⁶ Each worker received eight weeks of severance plus their accrued vacation.¹⁶⁷

The Republic Windows debacle offers a snapshot of societal expectations of employer fairness in the context of economic volatility. The employees' demands were modest. They did not question the company's decision to fold or its rationale in terminating its workforce.¹⁶⁸ The workers' objections (and the public outrage that ensued) were not about *why* they had been terminated, but *how* they had been terminated.

The Republic Windows workers' legal rights to their perceived entitlement were far from certain, albeit better than those of most terminated workers. The Republic Windows workers had the advantage, as it were, of being terminated in a plant closure covered by the federal WARN Act.¹⁶⁹ Had the workers successfully proved a violation, they would have received backpay for the notice period—effectively, a grant of retroactive severance pay. However, the WARN Act contains a broad exception for unforeseeable circumstances, a provision that Republic Windows no doubt would have invoked, citing the actions of its creditors.¹⁷⁰ In contrast, entitlement to vacation

165. See Charles Rachlis, *Republic Window and Door Workers Show the Way!*, OPEN SALON, Dec. 8, 2008, http://open.salon.com/blog/charles_rachlis/2008/12/08/republic_window_and_door_workers_show_the_way (“A one sided class war with the capitalist class firing all the shots has got to end. The working class has been silent too long. The workers of the Republic Window and Door Company [sic] show the way!”); see also Rupa Shenoy, *Laid Off Workers Refuse to Leave Chicago Factory*, HUFFINGTON POST, Dec. 6, 2008, http://www.huffingtonpost.com/2008/12/06/laid-off-workers-refuse-t_n_148972.html (quoting a union organizer comparing the Republic Windows and Doors situation to the 1936–1937 sit-in by General Motors factory workers in Flint, Michigan).

166. Lisa Donovan & Maudlyne Ihejirika, *Standoff Ends—Each Factory Worker Gets About \$6,000 in Pay, Benefits After Banks OK Loans*, CHI. SUN-TIMES, Dec. 11, 2008, at 43.

167. *Id.*

168. Interestingly, information surfaced challenging the claim that the closure was compelled by the actions of outside creditors. According to some sources, the company had been relocating equipment to a new, presumably nonunionized, location. Davey, *supra* note 159. However, it appears that such information was merely used to debunk the company's claim that precipitous events prevented them from making any payments to workers, not to cast doubt on the legitimacy of the company's motives.

169. Republic Windows far exceeded the requisite threshold of employing at least one hundred employees, see 29 U.S.C. § 2101(a)(1) (2006) (defining “employer”), and the closure clearly constituted a “permanent . . . shutdown of a single site of employment” affecting fifty or more employees, see *id.* § 2101(a)(2) (defining “plant closing”).

170. See *id.* § 2102(b)(2)(A) (“An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.”) This exception is discussed further in Part IV.B.2, *infra*.

benefits is determined by private contract.¹⁷¹ Here again, the Republic Windows workers may have had stronger legal rights than most. Because they were unionized, they had the advantage of a collective bargaining agreement that likely articulated when and to what extent accrued vacation was payable upon termination.¹⁷²

Outside of these circumstances, the existing legal regime barely addresses, let alone protects, workers' expectations of income continuity in the face of job transition. Absent a plant closure or major reduction in force, employers have no obligation either to notify workers or to provide income continuity. Workers are cast immediately into the public benefits system, which in most cases grants them no more than half their salary and no benefits.

Just cause reform, with its focus on the reason for termination and its goal of job preservation, would do nothing to change that. In contrast, pay-or-play reform would advance an entirely different set of goals and expectations. As illustrated in Table 1, where just cause would foster job retention, pay-or-play would ease employment transitions, recognizing and giving legal force to employers' implicit promise of long-term *employability* in the external labor market. Whereas just cause protection would oblige employers to justify termination, in effect to defend their deviation from the norm of continued employment, a pay-or-play system would translate the implicit promise of marketability into a legal obligation to directly underwrite the costs of reemployment.

171. See, e.g., *Prettyman v. Commonwealth Edison Co.*, 653 N.E.2d 65, 69–70 (Ill. App. Ct. 1995).

172. Almost all collective bargaining agreements grant vacation benefits and a large majority address the consequences of separation on workers' entitlement. See BUREAU OF NAT'L AFFAIRS, *supra* note 22, at 101, 110 (finding that 92 percent of surveyed CBAs provided vacation with 79 percent explicitly addressing the impact of separation). Of these, most grant workers a right to earned vacation depending on the reason for separation. *Id.* at 110.

TABLE 1. Comparison Between Just Cause and Pay-or-Play Reform

	Just Cause	Pay-or-Play
Systemic Goal	Job Retention	Job Transition
Employer's Implied Promise	Long-Term Employment	Long-Term Employability
Obligation Imposed	Employer Justification for Termination	Employer Support for Reemployment

The epilogue to the Republic Windows story takes the point further. Following closure, the remains of Republic Windows were sold to Serious Materials, a California company specializing in energy-efficient windows and construction products.¹⁷³ In February 2009, the entity announced plans both to reopen the facility and to hire all of the laid-off Republic Windows workers.¹⁷⁴ This development appears to have coincided with the final weeks of severance pay that the Republic Windows workers had negotiated under the 2008 settlement.¹⁷⁵ In this way, Republic Windows is a poster child for the way that companies ought to operate (and cease to operate) in a competitive twenty-first century economy. Unsuccessful businesses and dying industries fold; other entities reap the benefits of these losses. The pressing question is what will happen to workers in the process. Realistically, most transitions will not be as seamless as the purchase of Republic Windows, but given the implicit promises of the new economy, the system ought to aspire to that end.

B. Existing Foundations: Unemployment Insurance and Plant Closing Laws

A pay-or-play system of termination would have two principle features: First, a statutory mandate requiring employers to provide notice of termination in all instances absent employee misconduct, and second, an option for employers to “buy out” of that obligation with severance pay. The employer effectively would be given the choice to “play” the worker, allowing the

173. Karen Ann Cullotta, *New Owners Will Reopen Plant in Sit-In*, N.Y. TIMES, Feb. 27, 2009, at A15; see also Serious Materials, About Our Manufacturing Facilities, <http://www.seriousmaterials.com/html/facilities.html> (last visited Aug. 8, 2010).

174. Cullotta, *supra* note 173.

175. The eight-week settlement was reached on December 10, 2008, and the reopening of the plant under new ownership was announced on February 26, 2009, eleven weeks later.

individual to continue working during the obligatory notice period, or terminate the worker immediately, but “pay” salary and benefits for the applicable period.

A pay-or-play approach would augment two extant statutory systems: the jointly administered state-federal unemployment insurance system, which grants modest income replacement to terminated workers unable to find reemployment;¹⁷⁶ and the federal WARN Act, which requires notice of termination in the case of a mass layoff or plant closing.¹⁷⁷ The scope and limitations of each of these systems is considered in turn, as are the ways in which pay-or-play would augment current law.

1. Government Benefits Versus Mandatory Severance: The “Pay” Option

Currently, the costs of job transition are funded largely by the social security system. Government-sponsored unemployment insurance (UI) provides eligible workers with twenty-six weeks of partial income replacement in the event that they become unemployed for reasons other than their own misconduct and are not able to find new work.¹⁷⁸ Congress may authorize extensions in times of economic hardship.¹⁷⁹

The UI system serves many of the same goals as the pay-or-play approach advanced in this Article. Like pay-or-play, UI alleviates the hardship of wage interruption. It facilitates transition to new, appropriate work by enabling the worker to fund a selective job search.¹⁸⁰ Although UI is a government benefit, it is not need-based; entitlement stems from the individual’s prior labor

176. Unemployment insurance was created by the Social Security Act of 1935. See 42 U.S.C. §§ 501–504 (2006). The Federal Unemployment Tax Act, which imposes an annual payroll tax on employers, permits employers to credit against their federal tax obligation any contributions to approved state unemployment funds. See 26 U.S.C. § 3301 (2006 & Supp. II 2008); *id.* § 3302 (2006). For more detailed explanations of the structure of the UI system, see generally Lisa Lawler Graditor, *Back to Basics: A Call to Re-Evaluate the Unemployment Insurance Disqualification for Misconduct*, 37 J. MARSHALL L. REV. 27, 27–28 (2003); Lester, *supra* note 12; Deborah Maranville, *Unemployment Insurance Meets Globalization and the Modern Workforce*, 44 SANTA CLARA L. REV. 1129, 1133 (2004); Rossi, *supra* note 12.

177. See 29 U.S.C. §§ 2101–2102.

178. Lester, *supra* note 12, at 340, 350 (summarizing the scope of benefits and coverage limitations based on worker behavior); Rossi, *supra* note 12, at 178–81 (same).

179. Rossi, *supra* note 12, at 178–79 (explaining the Federal-State Extended Unemployment Compensation Program, under which benefits may be extended for up to thirteen weeks during periods of high unemployment). Congress authorized numerous benefit extensions following the economic crisis of 2008, and debate continues over the wisdom of these additional extensions. See, e.g., Sara Murray, *Long Recession Ignites Debate on Jobless Benefits*, WALL ST. J., July 7, 2010, at A1.

180. Lester, *supra* note 12, at 343 (explaining that UI was intended to give the terminated worker “an opportunity to engage in a more rigorous job search. Rather than having to take the first job that came along just in order to make ends meet, the worker could hold out for a job better matched to his skills and training”).

market attachment.¹⁸¹ Thus, like pay-or-play, UI offers a source of (partial) income replacement to previously employed workers, recognizing both the inevitability of job separation and the need for an economic cushion when it occurs.

That said, the compensation under UI is relatively modest. Workers receive approximately half of their weekly earnings, subject to a state-imposed cap. This may be as low as \$230 per week in some states and as high as \$628 per week in others.¹⁸² The compensation cap reflects the goal of the UI system, which is not wage replacement per se but the advancement of certain social and economic ends. Unemployment insurance reduces the risk of significant downturns in consumer spending by putting cash in workers' hands;¹⁸³ it modestly disincentivizes layoffs by taxing employers through its experience rating mechanism;¹⁸⁴ and it offers a safety net to laid-off workers who might otherwise become impoverished.¹⁸⁵ In this last respect, UI serves as an alternative to welfare.¹⁸⁶

Unemployment insurance does not address the normative question of the employer's obligation, contractual or otherwise, to its terminated workers.¹⁸⁷

181. *Id.* at 346 (noting that “UI, in contrast with welfare, is targeted at workers with a stable attachment to the workforce. This is motivated by the desire to provide benefits only to those workers who have ‘earned’ them through some minimum level of past workforce participation”); Rossi, *supra* note 12, at 176 (“Payments are made . . . as a matter of right which is earned through a demonstrated substantial attachment to the . . . labor force.”). See generally Deborah Maranville, *Changing Economy, Changing Lives: Unemployment Insurance and the Contingent Workforce*, 4 B.U. PUB. INT. L.J. 291, 333–34 (1995) (“The distinction between benefits obtained through attachment to the labor force (‘earned benefits’) and benefits obtained on the basis of need (‘welfare’) is central to the public perception of the American social welfare system.”). For an explanation of the various methods by which states calculate labor force participation for eligibility purposes, see Rossi, *supra* note 12, at 177.

182. Mississippi has the lowest cap at \$230 per week, and Massachusetts has the highest at \$628 per week. See MSN Money Staff and Wire Reports, *How Much Jobless Pay Would You Get?*, MSN MONEY, Feb. 23, 2009, <http://articles.moneycentral.msn.com/SavingandDebt/LearnToBudget/how-much-jobless-pay-would-you-get.aspx> (compiling maximum weekly unemployment benefits by state).

183. This has been referred to as the “consumption smoothing” effect of UI. See, e.g., Jonathan Gruber, *The Wealth of the Unemployed*, 55 INDUS. & LAB. REL. REV. 79, 80–81 (2001); Walter Nicholson, *The Evolution of Unemployment Insurance in the United States*, 30 COMP. LAB. L. & POL’Y J. 123, 124–25 (2007).

184. Lester, *supra* note 12, at 344–45 (explaining that the “common goal” of states’ various mechanisms for calculating employer contributions “is to tax each employer in a manner proportionate to the costs it imposes on the insurance pool”). The effect is modest because current experience rating practices are imperfect. See generally Schwab, *supra* note 138, at 39–40 (explaining the imperfections in experience rating and the incentives they create).

185. Lester, *supra* note 12, at 341 (describing UI as a “way to reduce the hardship of wage interruption”).

186. Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage, Labor Organization and Legal Ideology*, 35 B.C. L. REV. 259, 263 (1994) (describing how the UI system has been “recharacteriz[ed] . . . as a public welfare insurance program to combat destitution”).

187. Professor Kenneth Casebeer makes a compelling argument that unemployment insurance in its original incarnation was part of a larger agenda to achieve a fair living wage and greater employer accountability, but that the system has been severed from its roots in labor politics and reinterpreted

Benefits are not tied to termination itself but are triggered by the inability to find replacement work. Workers must endure a waiting period after termination, during which they are expected to finance their own job search. This period is often short—as little as one week in some states—but its existence reflects a fundamental distinction between unemployment insurance and mandatory severance. Unemployment insurance is a government-sponsored system of pooling funds to hedge against the risk that new work might not be available. It is triggered by labor conditions that are not attributable either to the worker or the employer. The system is silent on the employer’s responsibility in exercising the right to terminate, recognizing that some gap between jobs is inevitable regardless of the conditions.

In contrast to UI, pay-or-play is a direct mandate to employers, aimed at enforcing the implicit promise of marketability. To the extent that employers have eschewed promises of long-term work and have encouraged workers to rely on the market as their ultimate source of security, they should be obligated to provide some income continuity when workers are forced to do just that. This obligation would sit comfortably beside the UI system. Currently, in situations where employers voluntarily provide severance pay, workers do not qualify for UI during the severance period.¹⁸⁸ Other countries that have mandatory severance laws in addition to unemployment insurance orchestrate the two systems similarly. Thus, under pay-or-play, workers would receive full pay from their employers for a designated period of weeks, after which they would collect unemployment benefits if they have not found other employment.

One potential concern with such an approach is the employer’s double obligation—the cost of the worker’s salary for the requisite severance period in addition to its continued tax contribution to the UI system. There are several ways to ease this burden. Adopting pay-or-play ought to reduce UI claims and

as a tool of fiscal stabilization. Casebeer, *supra* note 186, at 335 (“Initially, unemployment benefits were earned entitlements of the wage worker During and after World War II, the program became one of public welfare in which the recipients were ‘beneficiaries’ of public recognition of their status of deprivation Unemployed workers were considered especially deserving, and temporarily deserving, poor. . . . Finally, in the 1970s, unemployment insurance became increasingly a matter of fiscal stabilization”).

188. See *Gardner v. D.C. Dep’t of Emp. Serv.*, 736 A.2d 1012, 1015 (D.C. 1999) (“[I]n order to be ‘unemployed’ and be eligible for compensation under the [District of Columbia Unemployment Compensation] Act, an individual must not have performed any services or received any earnings during the period.” (quoting *Dyer v. D.C. Unemployment Comp. Bd.*, 392 A.2d 1, 3 (D.C. 1978)) (modification in original)); *Garcia v. Alstom Signaling Inc.*, 729 N.W.2d 30, 32 (Minn. Ct. App. 2007) (“[A]n applicant is not eligible for unemployment benefits for any week in which . . . the applicant received or filed for severance pay”). The same is true with respect to any retirement benefit received post-termination. See 26 U.S.C. § 3304(a)(15) (2006) (“[T]he amount of compensation payable to an individual for any week . . . shall be reduced . . . by an amount equal to the amount of such pension, retirement . . . , annuity, or other payment, which is reasonably attributable to such week. . . .”).

their consequent costs. Indeed, the very purpose of such a system is to avoid unemployment by enabling workers to find new jobs before losing their stream of income. If terminated workers find new work, employers' tax rates would drop under the current experience rating system. If savings to UI overall are significant enough, Congress could restructure the tax credit system to further reduce employer contributions. Congress could also create additional tax benefits for employers as part of the pay-or-play system. For instance, mandatory severance pay and wages paid during the notice period could be tax deductible like employer contributions to group health plans and other employee benefits.¹⁸⁹ Congress could also choose to contribute directly some portion of the overall cost to employers through general tax funds, much as it chose to do under the American Recovery and Reinvestment Act of 2009 in helping unemployed workers pay the cost of continued health insurance coverage under COBRA.¹⁹⁰

Finally, it is important to remember that amounts paid to the worker under pay-or-play are far from a pure loss to the employer. The employer can choose to provide notice to the worker rather than severance. Where notice is viable, the employer reaps the benefit of the worker's continued labor, while still enjoying the consequent reduction in unemployment contributions.¹⁹¹

2. From WARN to Universal Notice: The "Play" Option

The closest American analog to the notice requirement of the proposed pay-or-play system is the federal Worker Adjustment Retraining and Notification (WARN) Act.¹⁹² Under WARN, companies that employ more than one hundred employees must provide sixty days' notice to any worker

189. For an historical account of why employer contributions to such programs receive favorable tax treatment, see BETH STEVENS, *COMPLEMENTING THE WELFARE STATE: THE DEVELOPMENT OF PRIVATE PENSION, HEALTH INSURANCE AND OTHER EMPLOYEE BENEFITS IN THE UNITED STATES* (1986). I offer a brief account in Arnow-Richman, *supra* note 115, at 376-77.

190. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §§ 3000-01, 123 Stat. 115, 455-66 (2009); Statement of Secretary of Labor Hilda L. Solis on COBRA Subsidy Under American Recovery and Reinvestment Act of 2009 (March 19, 2009), <http://www.dol.gov/ebsa/newsroom/2009/09-301-NAT.html> (explaining 65 percent subsidy); David M. Herszenhorn, *A Smaller, Faster Stimulus Plan, but Still With a Lot of Money*, N.Y. TIMES, Feb. 14, 2009, at A14 (explaining components of the stimulus bill including COBRA assistance).

191. The degree to which advance notice of termination leads to employee shirking while still on the job was contested during the passage of the WARN Act, with a key briefing paper concluding that advance notice could in fact increase worker productivity. See Larry Mishel, *Advance Notice of Plant Closing: Benefits Outweigh Costs* 9-10 (Econ. Policy Inst., Briefing Paper No. 7, 1988), available at http://epi.3cdn.net/88dc67beb9cc26334e_r7m6bxti7.pdf. In any particular situation, the pay-or-play system allows the employer to weigh the risk of shirking against the prospect of paying severance without receiving any return service.

192. 29 U.S.C. §§ 2101-09 (2006).

affected by a plant closing or mass layoff.¹⁹³ A handful of states have adopted mini-WARN Acts that more expansively regulate closures and reductions in force by local companies.¹⁹⁴

More so than UI, these statutes directly advance the goal of facilitating worker transition. Prior to adopting the WARN Act, Congress studied plant closings and the role of advance notice in mitigating their harsh effects. Lawmakers cited research suggesting that notice would reduce the duration of unemployment and help prepare workers and affected communities for the consequences of widespread job loss.¹⁹⁵ In this way, the statute, true to its name, is a preventative measure, aimed at avoiding income interruptions rather than simply cushioning their effect.

The statute's application, however, is limited to only a fraction of termination decisions. WARN was styled as a response to the unique situation of a large-scale closure: Notice is required only if the termination event is a plant closing affecting at least fifty workers or a mass layoff of at least five hundred workers or one-third of the workforce.¹⁹⁶ Bureau of Labor Statistics data suggest that such events likely account for less than a third of all terminations. For instance, in the first quarter of 2009, at the height of the economic downturn, mass layoffs resulted in over 500,000 job losses.¹⁹⁷ That amount was dwarfed by the number of new unemployment claims for the same period, which neared or exceeded 600,000 for *each month* of the quarter.¹⁹⁸ Moreover, the half million mass layoff-related terminations captured by government data likely

193. See *id.* § 2102.

194. For instance, New York's mini-WARN Act requires ninety days' notice, applies to relocations as well as closings and mass layoffs, and covers employers of fifty or more workers as opposed to one hundred or more workers. See N.Y. LABOR LAW §§ 860-a.3–a.4, -a.6, 860-b.1 (McKinney 2009); see also N.H. REV. STAT. ANN. § 275-F:2 (2009) (defining “employer” to include companies with seventy-five or more workers).

195. See U.S. GOV'T PRINTING OFFICE, 100TH CONG., LEGISLATIVE HISTORY OF S.2527 WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT, PUB. L. 100-379 156, 162–68, 427 (Comm. Print 1990) (citing, *inter alia*, Mishel, *supra* note 191). For an excellent summary of more recent data on the effect of advance notice on unemployment and reemployment, see Libenson, *supra* note 11, at 152–55.

196. See 29 U.S.C. §§ 2101(a)(3), 2102; *supra* note 13.

197. See News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Extended Mass Layoffs in the First Quarter of 2009 (May 12, 2009) http://www.bls.gov/news.release/archives/mslo_05122009.pdf (“Employers initiated 3,489 mass layoff events in the first quarter of 2009 that resulted in the separation of 558,909 workers from their jobs for at least 31 days.”).

198. Nonfarm payroll dropped 598,000 jobs in January 2009, 651,000 jobs in February 2009, and 663,000 jobs in March 2009. See News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, The Employment Situation: January 2009 (Feb. 6, 2009), http://www.bls.gov/news.release/archives/empisit_02062009.pdf; News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, The Employment Situation: February 2009 (Mar. 6, 2009), http://www.bls.gov/news.release/archives/empisit_03062009.pdf; News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, The Employment Situation: March 2009 (Apr. 3, 2009), http://www.bls.gov/news.release/archives/empisit_04032009.pdf.

exceed the number of terminations that actually triggered WARN obligations given the statute's coverage limitations. The Act applies only to companies employing at least one hundred employees,¹⁹⁹ by far the largest threshold for coverage among federal labor standards and antidiscrimination laws.²⁰⁰

Even if WARN applies in a given circumstance, an employer may avoid all or some of its notice obligations if one of several exceptions applies. Most notably, the Act permits an employer to lay off workers before the end of the sixty-day notice period in the event of unforeseeable business circumstances.²⁰¹ Courts have interpreted this exception broadly, granting companies significant discretion in responding to market fluctuations and economic trends.²⁰² In particular, courts appear receptive to arguments that unexpected third party action accelerated the closure or mass layoff event, even when the general circumstances leading to the business's decline were well known. For example, courts have held that a buyer's decision not to renew its contract or to significantly reduce orders excused a seller's WARN obligations despite the seller's awareness that the relationship was deteriorating.²⁰³ In one high-profile, analogous example, the accounting firm Arthur Andersen successfully invoked the defense when it failed to notify employees of its closure following the 2001 collapse of Enron, its infamous client.²⁰⁴ The Seventh Circuit accepted Arthur Andersen's argument that a Justice Department indictment was the unforeseeable, precipitating cause of the firm's unraveling.²⁰⁵ The court reached this conclusion despite the fact that the DOJ's investigation had been in progress

199. The Bureau of Labor Statistics defines a "mass layoff" as one yielding at least fifty unemployment claims in a consecutive five-week period, apparently without regard to the size of the employer. Bureau of Labor Statistics, U.S. Dep't of Labor, Mass Layoff Statistics, Frequently Asked Questions, <http://www.bls.gov/mls/mlsfaq.htm> (last visited Oct. 2, 2010) [hereinafter Bureau of Labor Statistics, Mass Layoff Statistics].

200. The Family Medical Leave Act has the next highest threshold, applying to employers of at least fifty workers. By contrast, federal discrimination laws apply to all employers with fifteen or more employees. Several congressional bills propose expanding WARN's coverage by both subjecting smaller employers to the act as well as bringing layoffs across multiple sites of a single entity within the definition of mass layoff. See Forewarn Act, S. 1374, 111th Cong. (2009); Forewarn Act, H.R. 3042, 111th Cong. (2009); Alert Laid Off Employees in Reasonable Time Act, H.R. 2077, 111th Cong. (2009). As of the printing of this Article, these bills were all in committee or subcommittee.

201. 29 U.S.C. § 2102(b)(2)(A) (2006).

202. 20 C.F.R. § 639.9(b)(1) (2009) (identifying an unforeseeable event as one "caused by some sudden, dramatic, and unexpected action or condition outside the employer's control," such as "unexpected termination of a major contract" or a "major economic downturn").

203. See, e.g., *Gross v. Hale-Halsell Co.*, 554 F.3d 870, 878 (10th Cir. 2009); *Watson v. Mich. Indus. Holdings, Inc.*, 311 F.3d 760, 766 (6th Cir. 2002).

204. *Roquet v. Arthur Andersen LLP*, 398 F.3d 585 (7th Cir. 2005).

205. See *id.* at 589–91.

for more than five months before the indictment was handed down, and Enron itself had imploded months before that.²⁰⁶

The breadth of the unforeseeability exception is understandable given the nature of an employer's obligation under WARN. Companies face legitimate difficulties predicting whether their immediate economic and business challenges will ultimately resolve or require drastic action. Without a deferential standard of reasonable business judgment, employers might announce lay offs prematurely to avoid the risk of liability.²⁰⁷ However, this justification supposes that the essence of the obligation is the warning itself rather than the income continuation that accompanies it. Instead of excusing noncompliance, a pay-or-play system would require companies unable to foresee termination or closure to pay severance to those affected in the amount equivalent to what they would have earned had advance notice been feasible. In this way, pay-or-play not only makes WARN obligations universal—applicable to individual as well as mass terminations—it also reinterprets the nature of the worker's right under such laws. Given the contemporary social contract, workers should be entitled to a period of financial security during which to plan for reemployment—whether or not notice of job loss is possible.

Of course, the choice to provide notice or severance pay does not alleviate the burden some firms will face in complying with a pay-or-play mandate. One argument against such a system is that it will place additional costs on struggling companies that may hasten closures, ultimately doing workers more harm than good. Termination in the new economy, however, is not necessarily a reflection of dire financial circumstances. Even mass layoffs and full-scale closures may be strategic undertakings from which corporate entities emerge leaner and more profitable.²⁰⁸ In such cases, pay-or-play simply mandates that the workers' interests be part of that calculus. In those cases where pay-or-play obligations constitute the proverbial straw on the camel's back, workers will at least have legal entitlements that must be recognized upon sale of the company or in bankruptcy, if funds allow.²⁰⁹

206. See *id.* at 587.

207. See *Watson*, 311 F.3d at 765 (“WARN was not intended to force financially fragile, yet economically viable, employers to . . . close [their] doors when there is a possibility that the business may fail at some undetermined time in the future. Such a reading of the Act would . . . harm[] precisely those individuals WARN attempts to protect.”).

208. See Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. REV. 1189, 1191 (1991).

209. See *id.* at 1194 (advancing an interpretation of state stakeholder statutes that would extend the board's fiduciary duties to workers dislocated in financial rather than strategic closures by elevating employees to the status of recognized stakeholders in the business).

The Republic Windows scenario described in Part IV is indicative. The coup de grace precipitating the plant shutdown was a credit freeze by the company's lenders.²¹⁰ Had a WARN suit been brought, Republic Windows could have invoked, and may well have been successful in arguing, unforeseen circumstances. However, it is likely that the company's creditors made their decision in the context of ongoing discussions with the company about its financial stability and its future prospects. The risk of a shutdown, while perhaps not probable, was likely within the company's contemplation. If so, the company could have considered the fate of the workers in making the ultimate decision to close. Indeed, the aftermath of the worker sit-in demonstrates what this might have looked like. The company took the workers' claims under advisement, negotiated with creditors, and emerged with a plan to give workers a piece of what was being unwound.²¹¹ Pay-or-play makes that process mandatory in all terminations, ensuring that whatever the financial state of the employer, workers have some modest entitlement that must be accounted for at the end of the relationship.

V. PAY-OR-PLAY IN PRACTICE

Part IV argued that requiring employers to pay-or-play—either to provide notice or pay severance upon termination—is a more appropriate means of protecting workers than requiring just cause for termination and that such an approach will fill critical gaps in existing law. This Part turns from theorizing the basis for such a policy shift to posing some preliminary questions about what a pay-or-play system might look like. It considers the laws of several foreign jurisdictions whose termination rules offer possible models for formulating an American pay-or-play system. It then turns to the practical implications of such a system, identifying possible risks of adoption and suggesting areas for future study.

A. Modeling a Pay-or-Play Alternative

Mandatory notice and severance rules are an established feature of the worklaw regime of most foreign jurisdictions. This Subpart surveys some of the most prominent examples, in particular the Canadian reasonable notice rule, focusing on how such systems determine the appropriate length of notice or

210. See Donovan & Ihejirika, *supra* note 166; *supra* Part IV.

211. See Donovan & Ihejirika, *supra* note 166; *supra* Part IV.

severance. In so doing, it lays the initial groundwork for future federal legislation or model laws.

1. Canada's Common Law Rule of Reasonable Notice

The foreign law most analogous to the pay-or-play system envisioned in this Article is the Canadian rule of reasonable notice. Under provincial common law, as part of the implied contractual duty of good faith, Canadian employers are required to give workers reasonable notice of termination (or its equivalent in pay) absent serious worker misconduct.²¹² The reasonable notice period is based on the totality of circumstances and geared toward enabling the worker to plan for imminent transition.

Canada is a particularly appropriate source for importing law to the United States given the parallels between the two countries' employment regimes. Although employment at will is considered uniquely American, this is true only insofar as U.S. employers are permitted to terminate both without cause *and without notice*. Unlike European countries, which affirmatively require just cause for termination, Canada permits employers to terminate without cause provided that they afford the worker adequate notice or pay.²¹³ In this way, Canadian law, like U.S. law, defers to an employer's judgment in terminating. Unlike American employers, however, Canadian employers pay for the right to exercise that discretion.

The Canadian notice obligation is partially statutory and partially common law. Every Canadian jurisdiction has enacted notice of dismissal statutes that an employer can satisfy by providing either working notice, in which case the employee continues to work until the notice period ends, or pay in lieu of notice.²¹⁴ These statutes generally require modest periods of notice tied to the length of the employee's service.²¹⁵ However, Canada also recognizes a common law duty of reasonable notice that requires the employer to provide notice (or pay in lieu thereof) based on individual circumstances. The common law duty is generally construed to require notice periods well beyond the

212. See generally GEOFFREY ENGLAND, *ESSENTIALS OF CANADIAN LAW: INDIVIDUAL EMPLOYMENT LAW* 289–324 (2d ed. 2008); Robert C. Bird & Darren Charters, *Good Faith and Wrongful Termination in Canada and the United States: A Comparative and Relational Inquiry*, 41 *AM. BUS. L.J.* 205, 207–10 (2004).

213. See ENGLAND, *supra* note 212, at 289–90.

214. The amount of notice varies by province but is generally tied to length of service. Thus, in Ontario, an employee receives roughly one week of notice per year of service up to a maximum of eight weeks. See Ontario Employment Standards Act, 2000 S.O., c. 41, s. 57 (Can.). Ontario also requires lump severance payments to a subset of terminated workers, which is similarly calculated based on years of service. See *id.* s. 64.

215. See *id.* s. 57. Canadian statutory notice schedules are discussed further in Part V.A.3, *infra*.

statutory minimums. Reasonable notice periods have sometimes stretched as long as twenty-four months in reported decisions.²¹⁶

The most important consideration in determining reasonable notice periods or severance pay is the employee's likelihood of finding replacement work.²¹⁷ Courts consider such factors as the employee's age, duration of employment, and the transferability of skills.²¹⁸ Courts generally increase the required notice periods as the employee's length of service increases and a worker's skills presumably become more firm-specific. Notice periods are usually longer for older employees and in situations where the employer's manner of termination reduces the worker's chances of reemployment.²¹⁹

Importantly, the employer's reason for terminating has almost no bearing on the court's analysis. The exception is a summary dismissal for cause, which requires a serious, performance-related reason akin to a breach of contract.²²⁰ Absent this type of cause, the employer's obligation to provide notice or pay applies, even if its decision to terminate was economically justified.²²¹

Canada's reasonable notice rule offers what is perhaps the most accurate legal translation of the promises implicit in the modern social contract of employment. The rule incorporates the premise that workers are freely terminable, thus validating management's prerogative to make decisions about its need for labor. At the same time, the employer is obligated to facilitate the reemployment of terminated workers. Consequently, the notice or severance period is designed not to compensate the worker for job loss but rather to pay

216. See generally DOUGLAS G. GILBERT ET AL., CANADIAN LABOUR AND EMPLOYMENT LAW FOR THE U.S. PRACTITIONER 709–14 (2d ed. 2006) (providing a rubric from recent cases).

217. See ENGLAND, *supra* note 212; Bird & Charters, *supra* note 212, at 208 (“The basic premise underlying common law reasonable notice [in Canada] is that the period should approximate the period of time that the employee would need to find a new position.”).

218. See *Bardal v. The Globe & Mail Ltd.*, [1960] 24 D.L.R.2d 140, 145 (Can.) (enumerating factors to be considered in determining reasonableness).

219. For a time, an award could include punitive amounts based purely on an employer's bad faith conduct. See *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, 745–46 (Can.); Bird & Charters, *supra* note 212, at 213–19 (surveying judicial application of *Wallace*). But the Canadian Supreme Court recently clarified that such additional sums are allowable only when the employee suffers actual harm or distress as a result of the bad faith treatment and when such an injury was in the contemplation of the parties. See *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362, 391–92 (Can.).

220. See ENGLAND, *supra* note 212, at 324–43. Thus, the standard is more akin to what a U.S. employer must show to preclude unemployment insurance or to satisfy the just cause standard applicable to unionized employees, than to the common law definition of just cause for termination. See *id.* at 325 (asserting that through the reasonable notice rule “the [Canadian] courts have afforded the non-unionized employee roughly equal protections under the common law doctrine of just cause as are available to unionized workers under . . . most collective agreements”).

221. Courts will at times, however, consider economic circumstances in reducing the amount of notice/pay that would otherwise be owed. See G. England, *Determining Reasonable Notice of Termination at Common Law: The Implications of Cronk v. Canadian General Insurance Co.*, 4 CAN. LAB. & EMP. L.J. 115 (1996).

the costs of transition. By applying a flexible standard, the Canadian rule ensures that the period of notice or severance is appropriate to the particular employee's needs without over- or under-compensating.

Interestingly, to the extent that employers in Canada opt to pay rather than notify workers, the effect of the reasonable notice rule is similar to the de facto result in a subset of American terminations under employment at will. Only a minority of American employers maintain severance plans under which workers receive pay upon termination as a matter of course.²²² However, anecdotal experience suggests that many more, no doubt operating on advice of counsel, offer separation pay to employees on an ad hoc basis in exchange for a release of claims. This practice is perhaps most common in planned reductions in force, but likely occurs as well on an individual basis when employers perceive the threat of litigation.²²³ Thus, American employers may already be acting to some extent consistent with a reasonable severance rule. Adopting a Canadian-style approach would ensure that the benefits of the practice extend equally to all employees and would reframe determination of the amount of severance around the challenges of reemployment rather than the risk of litigation.²²⁴

In addition, the Canadian reasonable notice rule has a doctrinal foundation in American law. Under commercial contract law, relationships of indefinite duration are construed as terminable at will, subject to the obligation to provide reasonable notice of termination consistent with the implied duty of good faith.²²⁵ Thus, in the case of long-term supply contracts, the law requires the terminating buyer or seller to provide notice sufficient "to afford the party losing the contract an opportunity to make appropriate [alternative]

222. See Donald O. Parsons, Benefit Generosity in Voluntary Severance Plans: The U.S. Experience 12 (Dec. 2005) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=877903.

223. See, e.g., Kenneth D. Schwartz, *A Lawyer's Perspective on Planning a Reduction in Force*, 29 *ECON. PERSP.* 94, 100 (2005) (describing severance and release agreements as a "key strategy" for employers seeking to avoid litigation); Lee Hecht Harrison, *Severance & Separation Practices: Benchmark Study 2008–09*, at 1 (2008), available at http://www.lhhitalia.com/it/Documents/LHH_SevStudy08.pdf (finding in study of severance practices that "avoiding future litigation" was the reason most commonly cited by companies for providing severance pay to terminated workers).

224. Social science research suggests that many employers have an inflated sense of the risks and costs of wrongful discharge litigation. See Lauren B. Edelman, Steven E. Abraham & Howard S. Erlanger, *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 *LAW & SOC'Y REV.* 47 (1992). This may mean that American employers are acting suboptimally in seeking and pricing severance and release agreements. Indeed, one case study of the human resources practices of a transnational company operating in both Canada and the United States concluded that the company's U.S. office spent more on terminations than the Canadian office, albeit in payment to lawyers rather than to workers. See Laura Beth Nielsen, *Paying Workers or Paying Lawyers: Employee Termination Practices in the United States and Canada*, 21 *LAW & POL'Y* 247, 274 (1999).

225. See U.C.C. § 2-309(3) (2003) ("Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party . . .").

arrangements.”²²⁶ Appropriate arrangements include finding a replacement supplier or buyer, dispersing or altering inventory, and making necessary workforce adjustments.²²⁷ As with the Canadian employment rule, the amount of required notice is specific to the circumstances. It is designed to provide the nonterminating party time to “get [its] house in order’ to proceed in absence of the former relationship.”²²⁸ In both its terminology and rationale, the American law of indefinite commercial relationships appears equally applicable to indefinite employment contracts and could serve as a bridge between the Canadian and American approaches to at-will employment.

2. The Viability of a Contextual Standard

Despite its close alignment with the contemporary social contract of employment in the United States, Canada’s approach to employment termination also has numerous limitations. To begin, its concept of reasonable notice may go too far in placing the full costs of a worker’s transition on the back of the prior employer. Among the factors Canadian courts consider in determining reasonableness is the overall strength of the labor market at the time of termination.²²⁹ This arguably goes beyond enforcing the parties’ implicit contract of employment to penalize the employer for conditions outside of its control. If implied employment contracts include the promise that the employee will obtain marketable experience in the course of the relationship, it makes sense to consider the transferability of the employee’s skill set in determining reasonable notice. On the other hand, inability to find replacement work owing to broader economic circumstances is a risk properly accounted for through the unemployment insurance system.²³⁰ While Canadian courts have discretion to reduce an award to an aggrieved plaintiff in light of the economic circumstances of the employer,²³¹ this exception is only infrequently applied.²³²

226. *Pharo Distrib. Co. v. Stahl*, 782 S.W.2d 635, 638 (Ky. Ct. App. 1989).

227. *See id.*

228. *Id.*

229. *See Bardal v. The Globe & Mail Ltd.*, [1960] 24 D.L.R.2d 140, 145 (Can.) (listing among factors to be considered in determining reasonable notice the “availability of similar employment”); *Bird & Charters*, *supra* note 212, at 208; *England*, *supra* note 221, at 117.

230. *See generally COLLINS*, *supra* note 1, at 141–84; *England*, *supra* note 221, at 131–32.

231. *See ENGLAND*, *supra* note 212, at 311–12; *Bird & Charters*, *supra* note 212, at 208 (noting that courts examine factors outside of the considerations enumerated in *Bardal* when determining length of notice, including “the general economic climate”).

232. *See ENGLAND*, *supra* note 212, at 313–14 (noting that most courts choose to increase notice in order to cushion the blow to employees in tough economic times and that claims of employer financial hardship are closely scrutinized).

Beyond the issue of economic circumstances, Canada's approach poses difficult administrative challenges. Its open-ended standard would no doubt introduce additional legal uncertainty (and consequent costs) to U.S. employment law.²³³ Firms would be forced to make individualized assessments of reasonableness with respect to each employee selected for termination. This would require guesswork by employers and their counsel, with the potential for any individual grant to be challenged in court. Interestingly, this has not been a significant problem in Canada where the reasonable notice rule is longstanding. Canadian case law and established practices have yielded adequate guidance to employers and their attorneys about the appropriate duration of notice in particular cases.²³⁴ The anecdotal experience of Canadian practitioners suggests that most terminations are handled by voluntary settlement, and litigation over reasonableness is the exception, not the rule.²³⁵ However, the United States is a more populous and more litigious country.²³⁶ This legal culture, combined with the absence of any domestic custom for determining notice, would likely make adoption of such a flexible standard unworkable.²³⁷

In addition, an open-ended standard would create a risk of arbitrary, even discriminatory, variations in the amount of notice American workers receive. To the extent that reasonable duration is negotiated upon notice of termination, the results will depend on the status and bargaining power of the particular

233. See Libenson, *supra* note 11, at 165–66 (rejecting Canada's individual assessment of reasonableness in proposing an American notice rule).

234. See ENGLAND, *supra* note 212, at 300 (characterizing the common law on reasonableness of notice as "enormously detailed").

235. See Bird & Charters, *supra* note 212, at 209 ("Typically, [a Canadian] employer can determine an acceptable continuum of notice prior to termination and provide the employee with notice or payment in lieu of notice that is within the acceptable range."); England, *supra* note 221, at 122 (noting that the majority of wrongful dismissal suits are settled in negotiations before trial); Telephone Interview With Douglas G. Gilbert, Senior Partner, Heenan Blaikie (Oct. 5, 2008) (notes on file with author).

236. See Nielsen, *supra* note 224, at 251 (finding that 7 percent of forced separations in a transnational firm's Canadian office resulted in litigation compared with 23 percent of the separations in its American office). Terminated American workers were also more likely to dispute a termination short of bringing a legal claim. See *id.* It is difficult to know, however, the extent to which these realities are exogenous to the law. The adversarial nature of employment termination in the United States and employers' perceived need to manage uncertainty and legal risk may reflect the current system of employment at will and its many exceptions. If so, it is difficult to predict the effect of importing a doctrine, like Canada's reasonable notice rule, that would establish a clear universal entitlement but with a benefit to be determined case by case.

237. Given this account of the difficulties of a flexible notice rule, it is perhaps surprising that U.S. commercial law retains an open-ended reasonable notice standard in assessing parties' obligations upon terminating relationships of indefinite duration. See U.C.C. § 2-309(3) (2003); *supra* Part V.A.1. Judging from reported case law, this obligation has not engendered significant litigation. This may be a result of well-established customs about notice in particular industries, much as there are in Canadian employment law. It may also reflect the infrequency with which commercial parties enter into at-will relationships. Such speculations raise interesting empirical questions that are beyond the scope of this Article.

worker. Poor or financially vulnerable workers may not be in a position to threaten litigation in objecting to the notice or pay tendered by their employer.²³⁸ This criticism has been levied in Canada, where the common law explicitly sanctions the award of longer notice periods to upper-level workers.²³⁹

Such concerns about the effects of preexisting power imbalances are intensified with respect to minority and women workers. Contemporary employment discrimination scholarship has demonstrated how cognitive biases are likely to influence subjective determinations by company decisionmakers.²⁴⁰ Managers charged with applying a reasonable notice rule will exercise just this type of discretion. Consequently, American adoption of a flexible notice standard may foster unconscious discrimination, or worse, mask explicit consideration of impermissible factors. Thus, while the Canadian reasonable notice rule provides an example of how policymakers might reform domestic termination law, its open-ended standard makes it an unlikely candidate for full adoption in the United States.

3. The Graded Vesting Alternative

If an open-ended notice rule is not practical or desirable, U.S. legislators might adopt a set of specific rules designating the appropriate length of notice. One possibility is a statutory schedule that ties the amount of notice or pay to longevity, with the statutory period growing as the worker's job tenure increases. This is how most voluntary and collectively bargained employer severance plans are structured, with one week's pay per year of service being a typical formulation.²⁴¹ As part of a legislated pay-or-play system, the approach would be similar to the graded vesting schedules used by private employee benefit plans. Under graded vesting, the vested percentage of the employee's retirement funds increases with each year of service up to seven years in

238. England, *supra* note 221, at 122 (“[T]he exigencies of bargaining power, rather than legal principles, generally determine the amount of notice that the employee receives In practice, lack of financial liquidity, combined with the relatively low returns of a successful action will effectively deter many employees—especially those in low-status occupations—from pursuing their claim to trial, so that they will frequently receive considerably less than their common law entitlement”).

239. See, e.g., *id.* at 128–29.

240. See generally Green, *supra* note 135, at 95–99; Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 745–49 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187 (1995).

241. See BUREAU OF NAT'L AFFAIRS, *supra* note 22, at 42; Parsons, *supra* note 222.

accordance with federal law.²⁴² Length of employment would serve as a rough proxy for reemployment prospects under the assumption that finding new work becomes increasingly difficult as workers age and acquire firm-specific human capital.²⁴³

Graded vesting is a standard component of the statutory termination laws of many foreign jurisdictions. Mandatory notice periods in several European countries, including Germany and the United Kingdom, are tied to longevity.²⁴⁴ The same is true of Canada's provincial notice statutes, which exist alongside the country's common law reasonable notice rule.²⁴⁵ Table 2 compares a subset of these laws and the benefits they provide. Germany's approach is particularly generous, granting a minimum of four weeks' notice and increasing up to seven months' notice for workers with twenty or more years of attachment.²⁴⁶ More modest amounts are provided under U.K. law, which requires between one and twelve weeks' notice, and in the Canadian provinces, which require between one and eight weeks' notice.²⁴⁷

Puerto Rican law offers a slightly different approach to the graded vesting concept. Rather than requiring advance notice of termination, Puerto Rico's Act 80 requires employers to pay an increasingly costly "indemnity" to workers terminated without cause.²⁴⁸ The statutory formula is more nuanced than in most jurisdictions, employing a graduated base amount plus a progressive supplement tied to years of service.²⁴⁹ It is also extremely generous to long-term employees. A worker in Puerto Rico with twenty years of service, for instance, can look forward to nearly eighteen months of continued salary upon

242. See *id.* § 1053(a)(2)(A). Under the Employee Retirement Income Security Act (ERISA), employers may choose between this type of graded vesting schedule and cliff vesting, under which benefits vest in a lump sum after three years of service. See 29 U.S.C. § 1053(a)(2) (2006).

243. See ENGLAND, *supra* note 212, at 311 (describing factors examined under the Canadian reasonable notice rule, including "age and the degree to which skills and experience are firm specific" as indicative of "whether or not the employee can reasonably be expected to find replacement work"); Schwab, *supra* note 97, at 13 (describing the "basic human capital model" under which workers invest in learning the ways of the firm, becoming more productive as their employment tenure increases).

244. See Employment Rights Act, 1996, c. 18, § 86 (Eng.); Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, Bundesgesetzblatt [BGBl.] I, as amended, § 622.

245. See ENGLAND, *supra* note 212, at 290–96.

246. Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, Bundesgesetzblatt [BGBl.] I, as amended, § 622(1)–(2).

247. See Employment Rights Act 1996, c. 18, § 86 (Eng.); GILBERT, *supra* note 216, at 709–14 (summarizing provisions of provincial laws). Additional sums are required in some jurisdictions where the termination is part of a large layoff. *Id.*

248. P.R. LAWS ANN. tit. 29 § 185a (2005).

249. The formula ranges from two months plus one week per year of service to six months plus three weeks per year of service. See *id.* §§ 185a(a)–(b).

termination.²⁵⁰ Importantly though, the indemnity is required only if the termination is unjustified.²⁵¹ Like U.S. common law, Act 80 broadly defines cause to include a wide range of economic circumstances and places the burden of proof on the employee to demonstrate wrongful dismissal.²⁵²

Similar to Act 80 is the opt-out provision of the proposed Model Employment Termination Act (META). While META's principal aim is to impose a just cause requirement, a lesser-known provision of the model law allows employers to avoid that obligation through an ex ante promise of severance pay.²⁵³ Section 4 provides that an employee may, by written agreement, waive the protections of the model law and reinstate employment at will, provided the employer agrees to pay at least one month's severance per year of service up to thirty months.²⁵⁴ This formula, while more simplistic than Puerto Rico's, offers comparable amounts of pay.²⁵⁵

250. See *id.* (providing six months of salary under § 185a(a) plus sixty weeks (twenty years times three weeks per year) under § 185a(b)).

251. See *id.* § 185a (providing that the statute applies only to an employee "who is discharged from his/her employment without just cause").

252. See *id.* § 185b; *Fonnegra-Tamayo v. Banco Santander P.R.*, 552 F. Supp. 2d 172, 179–80 (D.P.R. 2007) (holding that under the Puerto Rico Wrongful Dismissal Act, the "employee bears the initial burden of alleging unjustified dismissal and must prove by a preponderance of the evidence that he was actually or constructively discharged"); *Seda Soto v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 73 F. Supp. 2d 116, 131 (D.P.R. 1999) (holding that business reorganization and other economic reasons are sufficient to support good cause for termination).

253. See MODEL EMPLOYMENT TERMINATION ACT § 4 (1991).

254. See *id.*

255. For instance, an employee with fifteen years of service would receive a minimum of fifteen months' severance pay under the META and slightly more than seventeen months' indemnity under P.R. Act 80.

TABLE 2. Comparison Between Existing Notice/Severance Provisions

Jurisdiction	Formula ²⁵⁶	Minimum	Maximum	Defenses
Ontario, CA ²⁵⁷	One week notice per year of service	One week (for workers employed three months to one year)	Eight weeks (for workers employed eight years or more)	Termination for serious misconduct
U.K.	One week notice per year of service	One week (for workers employed one month to three years)	Twelve weeks (for workers employed twelve years or more)	Termination for serious misconduct
Germany	Scaled number of months notice according to number years of service	Four weeks (may be reduced by agreement to two weeks for probationary employees)	Seven months (for workers employed twenty years or more)	Termination for a “compelling reason” ²⁵⁸
Puerto Rico	“Indemnity” payment comprised of fixed number of months pay plus “progressive compensation” comprised of fixed number of weeks pay, both portions tied to years of service ²⁵⁹	Two months plus one week for each year of service (for workers employed up to five years)	Six months plus three weeks for each year of employment (for workers employed more than fifteen years)	Termination was for “just cause,” including nonperformance related business reasons ²⁶⁰
META Section 4(c) ²⁶¹	One month pay per year of service	One month	Thirty months	Termination for “willful misconduct”

256. This column contains a condensed summary of the mechanism for calculating notice under the provision in question. It does not purport to convey all of the details of each statutory scheme.

257. These amounts refer to the provincial statute only; additional notice may be required under common law. See *supra* Part V.A.1.

258. Bürgerliches Gesetzbuch [BGB] [Civil Code] Jan. 2, 2002, Bundesgesetzblatt [BGBl.] I, as amended, § 626.

259. P.R. LAWS ANN. tit. 29 § 185a(a) and (b) (2005).

260. *Id.* § 185(b).

261. This provision is applicable only if the employer opts out of the default obligation to terminate only for just cause.

4. Determining the Duration of Pay-or-Play Obligations

The previous survey of foreign law demonstrates that, while there are numerous models on which to base an American pay-or-play system, there is no consensus on the appropriate amount of notice or severance pay. In endeavoring to determine the proper duration for employers' obligations, it is perhaps useful to think of the amount of notice or pay as part of a larger calculus that accounts for the various benefits and tradeoffs that the adoption of pay-or-play would entail. At a minimum, the duration of the notice or pay period ought to reflect the scope of protection, the availability of exceptions, and the legislation's relationship to other employment laws. It should also be grounded in empirical data about the effects of notice and severance on reemployment.

With respect to scope and exceptions, the critical feature of the pay-or-play system proposed here is the obligation to notify or pay terminated workers irrespective of an employer's business justification for termination. The only exception envisioned under this system is one for serious worker misconduct. Given that many, if not most, terminations covered by such a system are legitimate, pay-or-play ought to "charge" employers significantly less than what a just cause system would impose on employers as a penalty for terminating arbitrarily.

Indeed, the distinction between arbitrary terminations and terminations for cause explains the wide variation in benefits provided under the laws described above. The most generous payment provisions, such as Puerto Rico's Act 80 and META's section 4, are direct alternatives to just cause termination. In Puerto Rico, employees receive the "indemnity" only upon proof that the employer acted without cause, broadly construed to include ordinary performance issues as well as economic circumstances.²⁶² Under META, the employer affirmatively elects severance at the start of the relationship to buy out of the default just-cause-only termination rule imposed by the model law.²⁶³ In the exceptional case of an employer who is unable or unwilling to show even an economic basis for termination, it is more likely that the actual reason deserves condemnation. In contrast, from both a normative and practical perspective, a rule requiring payment in all instances of termination absent worker misconduct should exact smaller, though more frequent, employer payouts.

In the same vein, the duration of the statutory period ought to take account of the background rights of the parties. These rights include protective legislation already in place, as well as the degree to which the reformed termination system insulates employers from other liabilities. As previously described,

262. See *supra* Part V.A.3.

263. See MODEL EMPLOYMENT TERMINATION ACT § 4 (1991).

in Puerto Rico and under META, the requisite payout serves as a replacement for what would otherwise be a claim for arbitrary termination.²⁶⁴ In contrast, Canadian workers retain their common law notice rights,²⁶⁵ and in the United Kingdom and Germany, workers' have extensive statutory protection against unfair dismissal in the European tradition.²⁶⁶

Thus, the proper amount of notice or severance under pay-or-play must be determined in tandem with decisions about whether and to what extent the system will preempt other forms of employment liability. Currently, American common law offers workers some weak but viable routes to overcoming the at-will presumption, mostly through implied contract theory.²⁶⁷ Insofar as pay-or-play offers an alternative to just cause protection, it would be appropriate for the law to preempt those termination claims alleging breach of implied promise. On the other hand, terminations that violate existing public law or otherwise offend public policy would appear outside the bounds of the system. Such terminations are actionable on the theory that they harm not just the worker but society as a whole.²⁶⁸ Absent the risk of tort liability, employers are not likely to be deterred from terminating for such reasons.²⁶⁹

It is also critical that the benefit period reflect available data about the effects of notice or pay on worker reemployment. Most studies, while not fully in agreement, confirm that notice reduces the likelihood of terminated workers

264. See *id.* § 2(c) (“[T]his [Act] displaces and extinguishes all common-law rights and claims of a terminated employee . . . which are based on the termination”); *Hopgood v. Merrill Lynch, Pierce, Fenner & Smith*, 839 F. Supp. 98, 110 (D.P.R. 1993) (concluding that there is no recognized right for at-will employees to sue for wrongful discharge in Puerto Rico outside the remedies given under § 185(a) for discharge without cause).

265. See *infra* Part V.A.1.

266. Employment Rights Act, 1996, c. 18, § 98 (Eng.) (making “unfair” dismissals unlawful and placing the burden on the employer to prove the “fairness” of the dismissal); *Neufassung des Kündigungsschutzgesetzes [Act on Protection Against Dismissal] [KSchG]*, v. 25.8.1969 BGBl. I 83 S.1317 (prohibiting terminations “not based on the reasons connected with the . . . conduct of the employee or on urgent operating requirements precluding his continued employment”).

267. See generally *Pugh v. See’s Candies, Inc. (Pugh I)*, 171 Cal. Rptr. 917, 927 (Ct. App. 1981) (recognizing a cause of action for breach of an implied indefinite just cause contract based on a totality of the circumstances); *Woolley v. Hoffmann-La Roche*, 491 A.2d 1257, 1258 (N.J. 1985) (recognizing a cause of action for breach of implied indefinite just cause contract based on statements in a personnel manual); *supra* Part III.A.2.

268. Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1952–53 (1996) (explaining the rationale and the necessity of the wrongful discharge tort, which “gives the employee some backbone to look at the overall social interest”).

269. However, pay-or-play could have an impact on the amount of recoverable damages awarded to compensate for future employment in surviving tort claims. If, for instance, the worker is able to find new employment during the pay period, damages for lost employment under the tort award would be unnecessary and duplicative. The role of the tort cause of action in such instances would be to obtain additional compensatory damages beyond lost wages (for example, for emotional distress or damage to reputation) and punitive damages if appropriate.

experiencing unemployment and reduces the duration of unemployment for those unable to avoid it.²⁷⁰ However, these studies tell us little about the optimal amount of notice needed to achieve these effects. It is possible that similar results could be achieved with less notice, or that better results could be achieved with more. It is also possible that under some circumstances, severance pay will act as a disincentive to seeking new employment. Thus, legislative expertise is needed to examine these matters, and further study should be commissioned.

Ultimately, the extent of an employer's obligation under pay-or-play must depend on a combination of empirical data, economic realities, and, of course, political compromise. Given these considerations, it is beyond the scope of this Article to propose an appropriate duration or schedule of employer obligations. That said, it is fair to suggest that the amount ought to be less than the extensive payments required under META's opt-out provision and Puerto Rico's Act 80, but more than the minimal requirements imposed by British and Canadian statutes, which exist alongside other statutory and common law protections. Germany's provision, requiring a minimum of four weeks' and up to seven months' notice or pay for long-term employees, may offer a useful halfway point.

B. Risk Management Under Pay-or-Play

Whatever form it ultimately takes, the success of a pay-or-play system will depend, in part, on the ways that employers implement the law and respond to their obligations. This response may take any number of forms—firms might comply with the new mandate, but reduce wages or employment levels; they might resist their legal obligations by vigorously invoking exceptions; they might seek to contract around their obligations to the extent permissible under the new law; or they might do a combination of these things. This Subpart considers some of the risk management strategies companies might adopt in seeking to achieve (or to avoid) compliance.

270. See, e.g., John T. Addison & McKinley L. Blackburn, *A Puzzling Aspect of the Effect of Advance Notice on Unemployment*, 50 INDUS. & LAB. REL. REV. 268, 279 (1997); Ronald G. Ehrenberg & George H. Jakubson, *Advance Notification of Plant Closing: Does It Matter?* 28 INDUS. REL. 60 (1989); Friesen, *supra* note 13; Allison Zippay, *The Effects of Advance Notice on Displaced Manufacturing Workers: A Case Study*, 1993 LAB. STUD. J. 43. But see Christopher J. Ruhm, *Advance Notice and Postdisplacement Joblessness*, 10 J. LAB. ECON. 1, 18–19 (1992) (suggesting that existing research overstates the degree to which notice reduces unemployment).

1. Passing on Costs to Workers

Employers may respond to the adoption of a pay-or-play system by seeking to pass on the cost of compliance to their workers through lower wages. This risk has been raised in objection to other types of employment protection laws, including just cause legislation.²⁷¹ Because employers control wages, mandating benefits may simply lead employers to reduce pay, resulting in a zero sum game.²⁷² In the case of pay-or-play, the value of any notice or severance pay would be offset by a front-end loss of income that workers might have used for personal savings. Some empirical data support the existence of such an effect under Canadian notice laws, at least with respect to starting salaries.²⁷³

Employers' ability to fully pass on costs to their workers, however, is circumscribed by wage and hour law. The Fair Labor Standards Act and comparable state statutes prevent employers from reducing wages below the minimum wage.²⁷⁴ While minimum wage workers represent a small percentage of the workforce,²⁷⁵ these workers are likely among the least equipped to tolerate a gap in income. Thus, the most poorly paid workers should reap the full advantage of the new system, gaining the right to statutory notice or pay while maintaining their current income levels.

Outside this segment of the workforce, the system's cost to workers will depend on the ripple effect of minimum wage laws and the elasticity of

271. See, e.g., David H. Autor et al., *The Costs of Wrongful-Discharge Laws*, 88 REV. ECON. & STAT. 211, 214 (2006) (“[T]he Coase theorem predicts that imposition of employer-side firing costs will be fully undone by efficient worker-firm bargains; for example, workers would post a bond equal to the firing cost.”); Robert C. Bird, *An Employment Contract “Instinct With an Obligation”: Good Faith Costs and Contexts*, 28 PACE L. REV. 409, 423 (2008) (speculating that “wages may decrease as bureaucratic and legal costs imposed upon an employer by discharge protections are passed on to employees”); see Jane Friesen, *The Response of Wages to Protective Labor Legislation: Evidence From Canada*, 49 INDUS. & LAB. REL. REV. 243, 244 (1996) (describing a theoretical model under which “mandatory provision of non-wage benefits in general will lead to an offsetting reduction in the wage rate”); Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 237–38 (2001) (“When mandatory for-cause provisions are imposed, someone must pay for them. . . . Workers might lose in salary or other benefits most of, or as much as, they gain via the nonwaivable term . . .”).

272. See Epstein, *supra* note 16, at 978 (contending that employment regulation results in a “shrinking overall pie”); Edward P. Lazear, *Job Security Provisions and Employment*, 1990 Q.J. ECON. 699, 699 (describing how in a perfect market “any government-ordered transfer from A to B can be offset by a ‘voluntary’ transfer of the same size from B to A”).

273. See Friesen, *supra* note 263, at 250.

274. See 29 U.S.C. § 206(a)(1) (2006).

275. Workers at or below the minimum wage constituted 3 percent of hourly wage workers in 2008 and 4.9 percent of hourly wage workers in 2009. See BUREAU OF LABOR STATISTICS, DEP’T OF LABOR, CHARACTERISTICS OF MINIMUM WAGE WORKERS: 2008 (2009), available at <http://www.bls.gov/cps/minwage2008.pdf>; BUREAU OF LABOR STATISTICS, DEP’T OF LABOR, CHARACTERISTICS OF MINIMUM WAGE WORKERS: 2009 (2010), available at <http://www.bls.gov/cps/minwage2009.pdf>.

supply.²⁷⁶ Minimum wage increases generally translate into raises up the ranks as employers proportionately reward other workers to preserve their internal pay structure.²⁷⁷ Thus, the population of workers insulated from income offsets should be larger than those at the minimum wage threshold. In addition, wage reductions to entering employees may be partially offset by increases to incumbent workers who, in light of the increased costs of termination, are able to demand higher wages.²⁷⁸ Beyond those extremes, the effect on salary will depend on the degree to which employees can exercise bargaining power to maintain or enhance their income level over the course of their career. At least some portion of higher-level workers will be in a position to refuse salaries significantly below the currently prevailing wages in their field when moving to new employment.

It is also possible that the cost to employers will be less significant than lawmakers (and companies) might initially anticipate, leaving less to pass on to workers. If wages already reflect the costs of employment termination, then workers are currently “paying” the price of the legal uncertainty that pervades the current system of at-will exceptions. Ultimately, it is an empirical question whether the costs of pay-or-play would exceed or reduce the costs of current wrongful discharge law. One might predict, however, that the statutorily fixed payments imposed by a pay-or-play system will offer employers increased predictability in managing terminations over the fact-dependent patchwork of claims that currently persists. Depending on the parameters of the system, pay-or-play will preempt some portion of existing wrongful discharge law that companies now navigate.²⁷⁹ It is also likely that companies will experience a decrease in other forms of employment litigation, such as employment discrimination claims. With the benefit of advance notice or income continuity,

276. See Daryl Marc Shapiro, *Will an Increased Minimum Wage Help the Homeless?*, 45 U. MIAMI L. REV. 651, 690 n.263 (1991) (explaining that “[r]ipple effect’ refers to the wage increase that occurs when workers senior and more experienced than minimum wage workers command higher wages to maintain the prior wage differentials intended to recognize their greater value to the employer”).

277. See generally AMY CHASANOV, NO LONGER GETTING BY—AN INCREASE IN THE MINIMUM WAGE IS LONG OVERDUE (2004), available at http://www.epi.org/publications/entry/briefingpapers_bp151/ (describing and forecasting the spillover effect of the federal minimum wage increase).

278. See Autor et al., *supra* note 271, at 227 (explaining the incumbent bargaining power theory); Friesen, *supra* note 271, at 253 (documenting this effect). See generally Olivier Blanchard & Pedro Portugal, *What Hides Behind an Unemployment Rate: Comparing Portuguese and U.S. Labor Markets*, 91 AM. ECON. REV. 187, 196 (2001) (observing that greater employment protection “increases the costs of firms while . . . strengthening the bargaining power of workers”). Such an effect would, however, result in a likely reduction in employment levels, a subject I take up in Part V.B.4, *infra*.

279. See *infra* Part V.A.4.

employees may feel less need to resort to such theories to address the legitimate hardship and perceived unfairness of termination.²⁸⁰

In addition, some workers may already be “paying” the costs of anticipated notice or severance benefits. Under the prevailing social contract of employment, employees assume they will obtain marketable skills that will prepare them to secure a new position in the event of termination.²⁸¹ It is possible that workers enter employment relationships anticipating that they will receive some degree of transition support from their employers, and companies may implicitly or explicitly encourage this understanding. Some firms offer severance to departing workers as a voluntary practice, although such programs may not be as generous as the pay-or-play proposal anticipates.²⁸² Similarly, the standard practice of requiring “two weeks’ notice” prior to termination has likely influenced employees’ understanding of termination obligations.²⁸³ Such practices and policies, however, may not be contractually enforceable, either because they are promised in vague terms or because the employer formally disclaims enforceability in its written documentation.²⁸⁴ In other words, employers

280. At the same time, some legitimate discrimination claims might also be lost as victims decide to forego the stigma and difficulty of bringing these suits. It is likely, however, that many discrimination victims already make that choice absent the benefit of any notice or income continuity. See Fink, *supra* note 47, at 334 (describing the “daunting and emotionally destructive” nature of discrimination litigation); cf. Nantiya Ruan, *Bringing Sense to Incentives: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions*, 10 EMP. RTS. & EMP. POL’Y J. 395, 400–04 (2006). Whether pay-or-play would increase the number of legitimate claimants who forego suit is an empirical question beyond the scope of this Article.

281. See *supra* Part III.B.

282. Surveys by the Bureau of Labor Statistics show that about 25 percent of private employers provide severance plans for workers, but the BLS does not collect data on the design of such plans. See Parsons, *supra* note 222, at 1. Private studies indicate that almost all voluntary severance plans calculate severance pay based on years of service, and the median severance for all workers other than executives is one week of severance pay per year of service. See *id.*

283. Cf. Kim, *Norms, Learning, and Law*, *supra* note 36, at 479–86 (theorizing that employees’ mistaken understanding of their job security rights results from the belief that employment law and the norms established by company practice are coextensive).

284. See *Reedstrom v. Nova Chemicals, Inc.*, 96 Fed. Appx. 331, 337 (6th Cir. 2004) (finding that the employee was not entitled to severance pay when the employer retained discretion over which workers were entitled to severance by requiring that they be “targeted for reductions” and stay with the company until a certain date); *Kirkland v. St. Elizabeth Hosp. Med. Ctr.*, 34 Fed. Appx. 174, 179 (6th Cir. 2002) (holding that summary judgment for the employer was appropriate where the employee did not receive severance after refusing to sign an amended severance agreement). On the other hand, where a formal policy is in place, workers are likely to fare better than they would in asserting breach of a job security policy because courts generally look at compensation-based promises as vested benefits not subject to unilateral retroactive modification. See, e.g., *Bolling v. Clevepak Corp.*, 484 N.E.2d 1367, 1375 (Ohio Ct. App. 1984) (explaining that severance “is an earned benefit” and “[o]nce earned, that right (and the amount of pay theretofore accrued) cannot thereafter be retroactively modified, diminished or eliminated by the employer, except through a valid contractual arrangement to which the employees are a consenting party”); *Helle v. Landmark Inc.*, 472 N.E.2d 765, 776 (Ohio Ct. App. 1984) (finding that employees “accepted Landmark’s offer of severance pay by rendering their performance

may be reaping the benefit of workers' expectations of advance notice and severance in the form of reduced wages and increased loyalty, while at the same time opportunistically "breaching" this shared understanding. If so, the pay-or-play system would not introduce a new cost so much as create an enforcement system through which workers can insist on receiving the advance notice and severance pay they have already purchased.

It is beyond the scope of this Article to fully consider the effect of pay-or-play on wage levels; nor is it possible to anticipate the degree to which employers will seek to pass on the cost of compliance.²⁸⁵ The point is that several theories support the view that workers will not suffer a quid pro quo wage reduction under pay-or-play.

2. Litigating Serious Cause to Terminate

Employers may also seek to avoid the obligations imposed by a pay-or-play system by contending, wherever possible, that they had serious cause to terminate. Because the obligation to provide notice or severance under the pay-or-play system would apply to all terminations absent serious misconduct, employers may respond by aggressively defending against claims of noncompliance.

This type of response could undermine the anticipated advantages of a pay-or-play system over the current regime of at-will exceptions. Employees

(*i.e.*, by retaining their employment with Landmark), and sufficient consideration was furnished to support Landmark's offer when [employees] continued working after they learned of the offered severance pay"); *Horton v. Prepared Media Lab., Inc.*, 997 P.2d 864, 867 (Or. Ct. App. 2000) (holding that the employee was entitled to severance pay accrued between the date the employee accepted the employer's offered severance package by continuing to work and the date on which the employer revoked benefits).

285. Indeed, the empirical literature on the effects of wrongful discharge laws presents different conclusions on the relationship between protective laws and employee wage levels. Compare Autor et al., *supra* note 271, at 212 (finding "no evidence" that common law exceptions to employment at will "had any significant impact on workers' wages"), and Blanchard & Portugal, *supra* note 278, at 196 (implying that workers can negotiate higher wages when employment protection is greater because workers' bargaining power is increased), with Price V. Fishback & Shawn Everett Kantor, *Did Workers Pay for the Passage of Workers' Compensation Laws?*, 110 Q.J. ECON. 713, 736 (1995) (concluding that "workers experienced substantial wage offsets" after workers' compensation laws were enacted), and Jonathan Gruber, *The Incidence of Mandated Maternity Benefits*, 84 AM. ECON. REV. 622, 639-40 (1994) (finding that mandated maternity benefits resulted in a wage decrease for members of the targeted group—women of childbearing age—because the cost of employing members of this group increased). Cf. Thomas J. Miles, *Common Law Exceptions to Employment at Will and U.S. Labor Markets*, 16 J.L. ECON. & ORG. 74, 94 (2000) (finding a positive correlation between the adoption of an exception to employment at will and an increase in temporary employment). See generally Robert C. Bird & John D. Knopf, *Do Wrongful-Discharge Laws Impair Firm Performance?*, 52 J.L. & ECON. 197, 201 (asserting that on the basis of existing research "[i]t is inconclusive . . . whether dismissal protections exert a net negative or positive overall pressure on wages").

would lose the benefit of income continuity and suffer the expense and uncertainties of the litigation process in attempting to secure what they are statutorily owed. At the extreme, the situation could give rise to the type of costly, fact-intensive disputes produced by the current at-will system.²⁸⁶

Of course, litigation is the inevitable risk of any system that allows exceptions. The problem could be eliminated by making employers strictly liable regardless of the circumstances of termination. However, it would be poor policy to deny employers some leeway in the face of egregious personnel problems. Without a misconduct defense, the system would create moral hazard problems, granting workers license to shirk without fear of an immediate, unqualified termination.²⁸⁷ In addition, such a system would be inequitable, requiring potentially large payouts to troublesome employees.

The solution is not to eliminate the exception but to carefully circumscribe it, as is done under the current unemployment insurance system. Under UI, benefits are provided to eligible workers absent statutory disqualification for misconduct relating to employment.²⁸⁸ Coverage is assumed, and misconduct is narrowly construed to require a demonstration of willful or wanton misbehavior above and beyond mere poor performance.²⁸⁹ Pay-or-play could

286. See Estlund, *supra* note 28, at 1674 (describing how, under the current at-will system, “unless and until the employee can overcome all the hurdles of delay, cost of litigation, and difficulties of proof in establishing a wrongful discharge, she remains out of a job and without relief”).

287. See Libenson, *supra* note 11, at 160–62 (advocating a misconduct defense to a proposed “at-will-with-notice-rule” for these reasons).

288. See, e.g., 820 ILL. COMP. STAT. 405/602 (2009) (“An individual shall be ineligible for benefits for the week in which he has been discharged for misconduct connected with his work and, thereafter, until he has become reemployed . . .”); N.Y. LABOR LAW § 593(3) (McKinney 2009) (“No days of total unemployment shall be deemed to occur after a claimant lost employment through misconduct in connection with his or her employment . . .”).

289. See, e.g., MASS. GEN. LAWS ANN. ch. 151A, § 25(e) (2004) (providing for disqualification where termination is “attributable to deliberate misconduct in willful disregard of the employing unit’s interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee’s incompetence”); *Larry v. Nat’l Rehab. Hosp.*, 973 A.2d 180, 183 (D.C. 2009) (explaining that for purposes of disqualification “‘gross misconduct’ must include the fact that the conduct was done ‘deliberately or willfully’ or in ‘disregard’ of the employee’s obligations and expected standards of behavior”); *Davidson v. AAA Cooper Transp.*, 852 So. 2d 398, 401 (Fla. Dist. Ct. App. 2003) (finding a truck driver’s refusal to make daytime deliveries after completion of his regular graveyard shift did not rise to the level of misconduct warranting a disqualification of unemployment benefits, even if the deliveries were in the scope of employment); *Messer & Stilp, Ltd. v. Dep’t of Employment Sec.*, 910 N.E.2d 1223, 1235 (Ill. App. Ct. 2009) (“[T]he business decision to terminate employment based on unacceptable performance does not equate to the standard of misconduct required to deny unemployment benefits. The employer must prove by a preponderance of the competent evidence that the claimant was deliberately and willfully failing to perform her job in a satisfactory manner.”); *Hanson v. Crestliner, Inc.*, 772 N.W.2d 539, 544 (Minn. Ct. App. 2009) (finding that while an employee’s absence without notice, due to the unexpected hospitalization of his mother, was in violation of employer policy, it was conduct the average reasonable employee would have engaged in under the circumstances and, therefore, was not employment misconduct).

adopt a similar substantive standard and proof structure. Like UI (and in contrast to the current system of at-will exceptions), pay-or-play creates a background right to a specific termination benefit, and it is appropriate to place the burden on the employer for what is effectively an affirmative defense.

Of course, the dangers of hard-line employer tactics in refusing to pay-or-play inhere even if the employer is ultimately unsuccessful in court. In the UI context, the employee obtains benefits up to and until the employer successfully challenges eligibility. In the case of pay-or-play, benefits come directly from the employer, and the company's ability to assert ineligibility and withhold funds places workers in a difficult position. That said, there is no reason to assume that employers will opt for strategic noncompliance. Regulatory theory in the employment law context suggests that many, if not most, firms are compliance-minded, desiring to abide by the law where possible.²⁹⁰ Indeed, compliance with pay-or-play has particular advantages for employers, namely greater predictability and reduced risk of litigation. No doubt there will be a subset of employers who frivolously or strategically invoke the misconduct defense. The risk of employer noncompliance is probably best addressed by granting employees a right to attorneys' fees, and perhaps even liquidated damages in the case of a successful challenge.²⁹¹

3. Requiring Pre-Employment Waivers

Another way employers might respond is by seeking waivers of pay-or-play rights in advance of hiring. Employer solicitation of pre-employment waivers is an increasingly common practice, particularly with respect to workers' rights to sue in court. Employers routinely seek worker consent to binding arbitration of future disputes, such as discrimination claims, which could otherwise be litigated before a jury. While this particular practice has received significant scholarly attention,²⁹² the problem is part of a larger effort to eliminate worker rights through the use of standard forms, including noncompetition agreements

290. See, e.g., Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 378–83 (2005); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 371–404 (2004).

291. See Libenson, *supra* note 11, at 171–72 (advocating attorneys' fee awards as a means of deterring noncompliance with proposed notice rule). Many of the statutory just cause reform initiatives also include such a provision. See *supra* Part II.A.1.

292. See, e.g., David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 36 (“[P]re-dispute arbitration clauses . . . have increasingly found their way into standard form contracts of adhesion.”); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1037 (1996) (“[M]andatory arbitration provisions are often imposed on workers without even the illusion of bargaining or consent.”).

and other restrictive covenants, independent contractor agreements, and recitals of at-will status.²⁹³

These realities suggest that employer-solicited waivers may be the greatest threat to a pay-or-play regime. If granted free reign to contract out of pay-or-play obligations, employers could effectively reimpose employment at will.²⁹⁴ Given the stakes, it is tempting to conclude that pay-or-play obligations should be nonwaivable. Some opponents of individual employment arbitration have identified this approach, suggesting that Congress could amend the Federal Arbitration Act and Title VII to ensure the right to a jury trial.²⁹⁵

There are, however, several problems with such a categorical response. First, prohibiting all waivers ignores employers' genuine need for flexibility in particular cases. For instance, an employer may need temporary workers for a short-term project. At least in cases where the parties enter into a written agreement for a fixed term of employment, companies should be permitted to waive any severance or additional notice obligations.²⁹⁶ In such cases, the parties' contract serves much the same purpose as pay-or-play, enabling the temporary worker to predict the need for alternate work at a specified time and search while still employed.

Second, a categorical prohibition on waivers presumes that workers lack any autonomy in choosing their terms of employment. As previously noted,

293. I have described this trend in several earlier articles, as have others. See generally Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637 (2007) [hereinafter Arnow-Richman, *Delayed Term*]; Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963 [hereinafter Arnow-Richman, *Employee Bargaining Power*]; Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379 (2006).

294. See Libenson, *supra* note 11, at 174 (expressing skepticism about a waivable notice right, observing that “[t]he reality . . . is that employees will agree to just about anything an employer wants. Whether this is due to employee desperation, inequality of bargaining power, signaling concerns, or lack of information, permitting employers and employees to bargain around the mandatory notice requirement would likely make it worthless”); cf. Estlund, *supra* note 10, at 21–23 (explaining why adoption of a “weak” just cause default rule would not significantly augment workers’ legal entitlement to job security beyond what they currently enjoy under employment at will).

295. See generally Dennis R. Nolan, *Employment Arbitration After Circuit City*, 41 BRANDEIS L.J. 853, 881 (2003) (noting that “Congress could at any time amend the FAA or the anti-discrimination laws to limit or prohibit pre-dispute arbitration agreements covering statutory issues. A single sentence would do the job”).

296. These types of waivers are permitted under the Montana Wrongful Discharge From Employment Act and most scholarly proposals for just cause reform that consider the issue. See Montana Wrongful Discharge From Employment Act, MONTANA CODE ANN. § 39-2-912(2) (2009) (exempting from coverage employees covered by “a written contract of employment for a specific term”); MODEL EMPLOYMENT TERMINATION ACT § 4(d) (1991). Another way to achieve the same flexibility is to create a statutory probationary period during which no pay-or-play obligation would attach. I take this up in Part V.B.4, *infra*.

under a pay-or-play regime employers may lower wages to pass some of the costs of compliance onto workers. If so, it is likely that a subset of workers will prefer to tolerate the uncertainty of employment at will rather than suffer a loss in pay. Respect for individual autonomy suggests that workers should be free to exercise a preference for higher wages and to self-insure against the risk of an unforeseen (and uncompensated) termination.²⁹⁷

Given the inherent conflict between protecting rights and preserving autonomy, some scholars take an intermediate stance on issues of waiver, arguing that some rights can be waived subject to certain conditions.²⁹⁸ As previously noted, the law currently allows workers to accept arbitration agreements that waive the right to a jury trial in the event of an employment dispute. The law similarly allows employees to waive the right to compete with their employer upon termination pursuant to a restrictive covenant.²⁹⁹ In both cases, however, the enforceability of the worker's waiver is subject to important substantive constraints: An arbitration agreement must set forth a legitimate and fair alternative dispute resolution process that adequately protects the worker's rights; and a noncompete contract must impose only reasonable restraints necessary to protect a legitimate interest of the employer.³⁰⁰

It is beyond the scope of this Article to fully articulate how conditional waivability would apply in the pay-or-play context.³⁰¹ At a minimum, the system ought to place meaningful constraints both on the waiver process and the terms under which waivers are secured. Employers should be required to provide a detailed disclosure of the rights being waived, including the schedule of notice or pay that the worker would otherwise receive upon termination.³⁰²

297. See Estlund, *supra* note 293, at 389 (“Making employee rights waivable converts them into bargaining chips that, at least in principle, allow employees to make mutually beneficial bargains with their employers.”); Sunstein, *supra* note 271, at 244 (“On [a waiver] approach, the relevant right would be ‘commodified’ in the sense that it could be traded on the market . . .”).

298. See, e.g., Estlund, *supra* note 293, at 390; Sunstein, *supra* note 271, at 243–45.

299. See generally Arnow-Richman, *Delayed Term*, *supra* note 293, at 638–39 (describing both non-competes and arbitration agreements as vehicles through which employers “extract waivers of rights [from employees] thus realigning statutory and default rules to better reflect employers’ interests”); Estlund, *supra* note 293 at 391–406 (describing the commonality between noncompetition and arbitration agreements and the law governing them).

300. See generally Arnow-Richman, *Delayed Term*, *supra* note 293, at 657–60 (summarizing the law); Estlund, *supra* note 293, at 391–400 (same).

301. For examples of how conditional waivability might apply (or be improved) in other substantive contexts, see Estlund, *supra* note 293, at 439–44 (discussing noncompetes and arbitration agreements); Estlund, *supra* note 10, at 23–27 (discussing the just cause default rule); Sunstein, *supra* note 271, at 247–59 (discussing age discrimination, workplace safety, leave and benefits, and unionization).

302. A possible model for this requirement is the Older Workers’ Benefits Protection Act, which requires that all employee waivers of claims be “knowing and voluntary” and obliges employers to provide workers with detailed information relevant to possible legal claims they might possess. See 29 U.S.C.

Enforceability should also be subject to the employee receiving the disclosure and providing the waiver before accepting employment. It is only with such advance notice that an employee is able to make a meaningful and informed decision as to whether to accept work on the terms being offered.³⁰³ However, disclosure requirements should be merely a first step. Given the various reasons why employees might be unwilling or unable to bargain, legislators should devise additional requirements to ensure that any waiver of pay-or-play rights reflects an actual choice presented on fair terms. Among other things, enforcement could be conditioned on the employer providing the employee the option to reject the waiver and accept a lower salary or benefit level. It could also be conditioned on the employer promising certain terms of employment in exchange for the waiver of rights. For instance, legislators could devise a menu of possible employment terms—including perhaps a commitment to for-cause-only termination—which, if offered by the employer, would be treated as *prima facie* evidence of a fair and enforceable waiver.

Once employment begins, the problem of policing the fairness of waivers is significantly reduced, if not eliminated. An employer operating under pay-or-play would be prevented from insisting on unilateral changes in employment terms. An employer would have to provide sufficient consideration (other than continued employment) to secure the employee's uncoerced consent or else abide by the pay-or-play obligation. In this way, pay-or-play has the potential not only to provide meaningful protection to workers upon termination, but to bolster employees' bargaining power in existing employment relationships. Indeed, it may reduce or even eliminate the coercive imposition of other unfavorable employment terms on incumbent employees.

4. Avoiding Employment

Finally, employers may seek to reduce the costs of pay-or-play by avoiding employment altogether. If pay-or-play coverage were limited to statutory employees, like other employment protection legislation, employers might hire

§ 626(f)(1), 626(f)(1)(H) (2006); Sunstein, *supra* note at 271, at 244–45 (drawing on ADEA requirements in proposing a procedural approach to “constrained waiver[s]”).

303. I have developed this argument more fully in connection with “cubewrap” noncompete and arbitration agreements. See generally Arnow-Richman, *Delayed Term*, *supra* note 293, at 641 (using the term “cubewrap” contracts to refer to waivers of rights solicited from employees post-hire); Arnow-Richman, *Employee Bargaining Power*, *supra* note 293, at 966 (same). Employers currently have free rein to impose such terms thanks to the background rule of employment at will, which enables the employer to freely terminate a worker who refuses a proffered change in employment terms. See generally Arnow-Richman, *Delayed Term*, *supra* note 293, at 649; Arnow-Richman, *Employee Bargaining Power*, *supra* note 293, at 980.

more independent contractors or seek other alternative work arrangements.³⁰⁴ If, on the other hand, pay-or-play covered all work relationships, employers might reduce the size of their overall workforce. Indeed, there is at least some empirical research, based on European data, that suggests that mandatory notice rules negatively affect employment levels.³⁰⁵

Both risks are largely obviated by the recommendation to permit, at least as an exploratory matter, the conditional waivability of pay-or-play rights.³⁰⁶ Where existing legislation limits coverage to employees, independent contractor agreements operate as a de facto waiver of rights.³⁰⁷ It is for this reason that the legitimacy of such designations is hotly contested in cases alleging violations of nonwaivable rights, such as those granted under antidiscrimination and wage and hour laws.³⁰⁸ If waiver were permitted under pay-or-play, employers would have limited incentive to seek out independent contractor arrangements to avoid their legal obligations. In fact, if the statutory obligations for obtaining a conditional waiver of pay-or-play rights are clear, employers might actually prefer waivers to independent contractor status. The common law test for employment status is notoriously malleable, and employers may legitimately fear that their characterization of work relationships will be challenged in court.³⁰⁹

304. Cf. Miles, *supra* note 285, at 98 (finding empirical evidence that the presence of an employment at will exception, such as the implied-contract exception, encourages employers to substitute temporary workers for permanent ones).

305. Lazear, *supra* note 272, at 724–25.

306. See *supra* Part V.B.3.

307. See, e.g., Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 166 (2003) (noting that a worker is exempt from employment regulation when the worker is classified as an independent contractor).

308. See, e.g., Lewis L. Maltby & David C. Yamada, *Beyond “Economic Realities”: The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 240–42 (1997) (proposing that employment discrimination laws should be amended to include independent contractors as well as employees, so that employers are unable to avoid the requirements of these laws).

309. In determining whether a worker is an employee or an independent contractor, courts use a haphazard combination of agency law and, particularly in the context of minimum labor standards disputes, the judicially created “economic realities test.” See, e.g., *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1534–35 (7th Cir. 1987) (setting out the “economic realities” test as encompassing the following factors: the degree of the employer’s control, the worker’s opportunity for profit or loss, the worker’s investment, the amount of skill required, the permanency of the relationship, and the extent to which the service is an integral part of the employer’s business); *McCary v. Wade*, 861 So. 2d 358, 361 (Miss. Ct. App. 2003) (drawing from agency law to articulate the test as a variety of control factors, including the power to terminate at will, control the time and manner of payment, and control the tools and premises). See generally Richard R. Carlson, *Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. TEX. L. REV. 661, 671 (1996) (“The common law test of employee status is notoriously unpredictable because of the multiplicity of factors it includes and the infinite variability of service contracts. Moreover, many federal statutes prescribe some special ‘employee’ tests different from the common law.”); David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 240 (2002) (explaining that “[t]he common law test for determining employee

In a system that applies to all work relationships regardless of status, the availability of conditional waiver should similarly mitigate concerns that pay-or-play will lead companies to reduce employment levels overall. Basic economic principles predict that in the face of laws constraining termination or mandating benefits, companies will lower their consumption of labor in proportion to the increased costs of employment.³¹⁰ Interestingly, research on the degree to which protective employment legislation impacts employment levels has not always supported this view.³¹¹ Yet, to the extent that additional burdens of legislative compliance affect employer demand, conditional waiver offers employers another tool to strategically manage those costs rather than limit hiring.

Finally, pay-or-play legislation could require that workers be employed with a particular employer for a threshold period of time before becoming eligible for benefits. The Montana Wrongful Discharge in Employment Act takes this approach in imposing a default just cause rule, as do several other contemporary at-will reform proposals.³¹² These tenure requirements create a type of probationary period during which employers may terminate freely without the additional costs imposed by protective legislation. Adopting this approach in enacting pay-or-play would soften the risk employers face in making new

status has been heavily criticized for yielding ‘inconsistent results’ and for providing ‘a means and incentive to circumvent the employment policies of the nation’”).

310. For a more detailed explanation of these principles, see generally Bird & Knopf, *supra* note 285, at 200 (explaining the predicted relationship between discharge protection and wage and employment levels). See also JAMES N. DERTOUZOS & LYNN A. KAROLY, RAND INST. FOR CIVIL JUSTICE, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY 51 (1992), available at <http://www.rand.org/pubs/reports/2007/R3989.pdf> (predicting, from a state-level empirical study of employment levels, a drop in aggregate employment of between 1.4 and 2.9 percent following judicial recognition of tort or contract exceptions to employment at will); Autor et al., *supra* note 271, at 227 (concluding from empirical research that employment levels drop with increased employment protection); cf. Miles, *supra* note 285, at 98 (finding that the at-will rule increases employment of temporary workers at the expense of permanent employees).

311. As described previously, empirical work on the effects of wrongful discharge laws on employment levels also produces inconsistent results. Compare Autor et al., *supra* note 271, at 227 (finding that imposition of the implied-contract exception caused decreased employment rates), and DERTOUZOS & KAROLY, *supra* note 310, at 62 (concluding from empirical research that state-level aggregate employment decreased following the adoption of greater employment protection), with Blanchard & Portugal, *supra* note 278, at 196 (comparing the unemployment rates in the United States with those in Portugal, a country with a high degree of employment protection, and determining that while the rates are similar, the higher protection in Portugal leads to fewer terminations but longer and more painful unemployment durations). See generally Bird & Knopf, *supra* note 285, at 211 (finding “no significant evidence of an impact on employment levels”).

312. See Montana Wrongful Discharge From Employment Act, MONTANA CODE ANN. § 39-2-904(2) (2009) (allowing the employer to set a probationary period and making a discharge wrongful if “the discharge was not for good cause and the employee had completed the employer’s probationary period of employment”); MODEL EMPLOYMENT TERMINATION ACT § 3(b) (1991) (providing for a one-year probationary period prior to the “good cause” requirement taking effect); Hirsch, *supra* note 11, at 121 (suggesting a probationary period of ninety days during which the employer may freely terminate employees).

hires and would consequently reduce employers' tendency to lower employment levels in response to the legislation.

CONCLUSION

This Article has argued for a fundamental shift in the goals and focus of employment termination law. Recent and profound changes in the labor market—the demand for increased employer flexibility, the rise in short-term and contingent labor, and a precipitous decline in union density—challenge the premise that continued employment with a particular employer is itself an important end. Instead, contemporary employers increasingly encourage workers to look to the external market and their own skill set as the ultimate guarantors of long-term security.

Given this volatile environment, a just cause rule would be of limited use to most workers, and in some cases, would be inconsistent with party expectations. Such a rule requires the worker to prove that termination was arbitrary, a relatively rare occurrence, while leaving workers vulnerable to frequent economic-based termination. Rather than constrain employer discretion to terminate, a better approach to at-will reform would assist workers in the inevitable situation of job loss.

Under the pay-or-play system proposed here, employers would remain free to terminate at will, but they would be obligated to pay for that right through either notice or severance absent employee misconduct. Such a system would reduce the uncertainty of employment at will, help workers avoid gaps in income, and preserve managerial flexibility. More importantly, it would elevate the contemporary social contract of employment to an enforceable legal rule. To the extent that contemporary employers are promising workers marketable skills and experience in lieu of long-term employment, it makes sense that employers be obligated to underwrite some portion of their workers' costs in the event of termination. Pay-or-play would grant workers an immediate and universal benefit that recognizes both the challenges and the inevitability of job transition. Rather than compensating a subset of individuals for the arbitrary loss of particular jobs, a pay-or-play system would provide all workers a window of income security during which to search for the next opportunity.