SYMPOSIUM

HOW WRONG ARE EMPLOYEES ABOUT THEIR RIGHTS, AND WHY DOES IT MATTER?

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Most employees are terminable at will, yet apparently most believe they only can be fired for cause. That belief persists in the face of a standard at-will disclaimer. In this Essay, Cynthia Estlund explores some causes, consequences, and possible legal responses to that gap between employees' beliefs and reality. She suggests first that employers, by acting as if they must justify discharges, may foster employees' erroneous beliefs by contradicting the words of a disclaimer. Whatever its source, the gap is problematic because it allows employers to enjoy both the benefits of employee perceptions of job security and the benefits of employment at will. In principle, switching the default to "for cause" should help bridge the gap. A weak default, however, would be defeated by an at-will disclaimer, and would accomplish little. Employers already act as if the default is "for cause" and disclaim it; employees do not credit that disclaimer. A stronger default, such as a waivable right to for-cause protection, holds greater promise. If the standard for waiver is high enough to ensure that employees understand their rights, employers would have to choose between the benefits of employees' expectations of job security and the benefits of employment at will. This Essay concludes by sketching a case for bringing the law into line with employees' optimistic beliefs.

INTRODUCTION

The law often relies on assumptions about human behavior and cognition that correspond to the economists' "rational actor" model. The venerable "reasonable man" himself embodies some of these assumptions. The relatively new field of behavioral economics, which posits and documents regular, systematic deviations from the standard "rational actor" model, thus has much the same subversive potential in law that it has in economics. Should the "reasonable person" be presumed to think one way if we know that actual people process information in predictably different ways? The questions raised and the evidence adduced by behavioral economists are especially important in employment law, which regulates the interactions of average folks who act without the benefit of legal or other expert advice on matters that are crucial to their well-being.

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The law governing job security—in particular the changing status of the employment-at-will rule—provides an especially fruitful terrain in which to explore how the law might respond sensibly to a systematic gap between the law and peoples' beliefs about the law. There is evidence that most employees significantly overestimate their legal protection against unjustified discharge: They believe they enjoy something like "just cause" protection when they are mostly terminable "at will."[1] There is also evidence that employers significantly overestimate their exposure to wrongful discharge litigation.[2] Employees appear to be overly optimistic, while employers appear to be overly pessimistic.

One question is how these misconceptions arise. Behavioral economics provides some clues to the source of both employee and employer misperceptions. I will suggest here that some of what employers do based on their own exaggerated perception of the costs of wrongful discharge litigation may foster erroneous employee beliefs about their legal rights. To the extent that employers act as if they must justify discharges even while they explicitly disclaim any promise of job security, those acts may speak more loudly than the words of a disclaimer.

Whatever its source, the gap between employer and employee beliefs and legal reality needs to be reckoned with. That gap is problematic because it allows employers to have it both ways—to enjoy the benefits of employee expectations of legally enforceable job security without legal accountability. The law of implied contract and employee handbooks aspires, as it should, to force employers to choose between the benefits of employee expectations of for-cause protection and the benefits of employment at will. But the evidence suggests that employees do not process employers' words and conduct as the law presumes they do, and that employers still manage to have it both ways.

In principle, switching the default rule from "at will" to "for cause" should help to bridge the gap.[3] But the evidence suggests the need, at a minimum, to distinguish between weak and strong defaults.[4] A weak "for-cause" default would simply fill a gap in contracting and would be defeated by an "at-will" disclaimer. A weak "for-cause" default would make little difference in actual contracting practices, because most employers already act as if the default is "for cause," and

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1 See infra notes 11-17 and accompanying text.

2 See infra notes 24-29 and accompanying text.

3 So argues Cass R. Sunstein, Switching the Default Rule, 77 N.Y.U. L. Rev. 106 (2002).

4 See infra Part IV.

disclaim it; and it would not close the gap between employee beliefs and legal reality because most employees do not give credence to a standard at-will disclaimer.[5]

A stronger default, in the form of a waivable legal right to for-cause protection with relatively stringent requirements for knowing waiver, holds greater promise.[6] Employees who are asked to waive their for-cause rights "knowingly" still might have no real choice in the matter. But if the standard for waiver is high enough to ensure that employees actually know what they are and are not getting, it would force the *employer* to make a choice between the benefits of employees' belief that they enjoy legal job security and the benefits of employment at will.

This Essay concludes by suggesting that erroneous but widely shared beliefs about the law may sometimes justify changing the law. In the context of a contract between a more- and a less-sophisticated party, in which the former directly benefits from the misconceptions of the latter, a case can be made for bringing the law into line with the optimistic beliefs of the less-sophisticated party. Such an approach has arguably prevailed in the analogous context of landlord-tenant law.[7]

I
THE GAP BETWEEN EMPLOYEE BELIEFS AND LEGAL REALITY, WHY IT MATTERS, AND HOW IT COMES ABOUT

Under the long-standing American rule of employment at will, employees hired for an indefinite term presumptively can be fired for good reason, bad reason, or no reason at all.[8] Numerous exceptions to this rule—in particular, prohibitions of certain "bad reason" discharges—have developed in recent decades.[9] But absent a contractual provision for job security or a prohibited discriminatory or retaliatory motive, it remains true in every American jurisdiction, except Montana, that employees are subject to discharge without justification.[10]

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5 See infra Part IV.A.

6 See infra Part IV.B.

7 See infra notes 83-94 and accompanying text.

8 See Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 518 (1884) (holding that employers have right to discharge "employees at will for cause or for no cause, or even for bad cause"), overruled on other grounds, Hutton v. Walters, 132 Tenn. 527 (1915).

9 For a brief survey of the "bad reasons" exceptions, see Cynthia L. Estlund, Wrongful Discharge Protections in an At-Will World, 74 Tex. L. Rev. 1655, 1657-62 (1996).

10 See Steven L. Willborn et al., Employment Law 217-18 (2d ed. 1998). The Montana statute is Mont. Code Ann. §§ 39-2-903, 39-2-904 (2001).

Employees do not appear to understand this rule.[11] Professor Pauline Kim's studies provide convincing evidence that most employees believe that they enjoy something like "just cause" protection even in the absence of any express contractual protection.[12] The extent to which they misperceive the law is striking. For example, she found that approximately ninety percent of employees surveyed believed that it was "unlawful" to fire an employee based on personal dislike.[13] Over eighty percent believed that it was illegal for an employer to fire an employee in order to hire another willing to do the same job for a lower wage.[14]

These beliefs largely persisted in the face of an express, written disclaimer of job security: Up to seventy percent of employees believed that it was illegal to fire an employee in order to hire another at a lower wage even where the personnel manual stated that the "Company reserves the right to discharge employees at any time, for any reason, with or without cause."[15] Fully three-quarters of the employees who believed that such a discharge was illegal without the at-will disclaimer persisted in that belief in the face of the disclaimer.[16] This finding may actually *overstate* the impact of disclaimers in deflating employee expectations. In the study, respondents were shown the disclaimer language and immediately asked about its effect on the legality of a discharge; in real life, employees may overlook, ignore, or forget about disclaimer language that is featured in an employee handbook or job application.[17]

Professor Kim's findings are highly significant and subversive. As she and others have pointed out, employees' widespread and system-

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[11] In addition to the Kim studies discussed here, see Richard B. Freeman & Joel Rogers, What Workers Want 118-22 (1999). Freeman and Rogers' nationwide study found that eighty-three percent of respondents believed it was unlawful to fire an employee "for no reason." Id. at 119.

[12] See 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 (1997) [hereinafter Kim, Bargaining]; Pauline T. Kim, Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge, 1999 U. Ill. L. Rev. 447 [hereinafter Kim, Norms]. Respondents were to assume the absence of any "formal written or oral agreement . . . stating the terms of the employment." Kim, Norms, supra, at 508.

[13] Kim, Norms, supra note 12, at 456-67, 462. More precisely, 91.7% of Missouri respondents, 88.1% of California respondents, and 90.6% of New York respondents expressed this belief. Id. at 462.

[14] Id. That is, 82.2% of Missouri respondents, 81.3% of California respondents, and 86.1% of New York respondents. Id.

[15] Id. at 459, 464. That is, 63.4% of Missouri respondents, 67.9% of California respondents, and 69.6% of New York respondents. Id.

[16] Id. at 465. This finding was limited to a single kind of discharge, cost-saving discharge, which may cast doubt on its robustness and generality. Id.

[17] See id. at 496-97.

atic misunderstanding of the law seriously undermines most defenses of the employment-at-will default rule, which assume that employees know the background at-will rule and that those who value greater job security can seek it, whether through bargaining, unionizing, or shopping around.[18] If employees think they already enjoy just-cause protection without any express promise, they have no reason to seek it. Nor do they have any reason to demand a wage premium for foregoing such protection. So we cannot assume that the prevalence of employment at will reflects what employees want or what they are willing to pay for.

The problem with erroneous employee beliefs about the law is that *they allow employers to have it both ways*: Employers enjoy the considerable benefits of employee beliefs that they are legally protected against unjustified discharge while escaping the costs of that legal protection. I will argue that the law should, and to some extent does, aim to prevent employers from having it both ways; and that to do so, it must take evidence of actual employee beliefs into account.

But first: What accounts for employees' inflated understanding of their legal protection against discharge? Professor Kim argues persuasively that employees confuse norms and law.[19] They observe a norm of discharge only for cause—both a regular practice by employers of discharging for cause and a strong and widely shared belief that only for-cause discharge is fair.[20] A "fairness heuristic"—the belief "that the law prohibits what fairness forbids"[21]—interacts with other recognized cognitive biases to defeat the learning processes by which false beliefs might be corrected.[22] Thus, Kim contends, "once formed, beliefs are likely to persist because individuals tend to notice evidence that confirms their beliefs, while overlooking contradictory information."[23] This phenomenon helps explain the surprisingly limited impact of at-will disclaimers on employee beliefs, as well as the failure of labor market experience to correct erroneous beliefs.

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18 For leading examples of such defenses, see generally Richard A. Epstein, In Defense of the Contract At Will, 51 U. Chi. L. Rev. 947 (1984) (advocating maintenance of at-will rule based on fairness and efficiency); Mayer G. Freed & Daniel D. Polsby, Just Cause for Termination Rules and Economic Efficiency, 38 Emory L.J. 1097 (1989) (offering market failure for reason for greater efficiency of at-will rule); J. Hoult Verkerke, An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate, 1995 Wis. L. Rev. 837 (arguing that empirical data supports conclusion that at-will default rule is socially optimal choice).

19 Kim, Norms, supra note 12, at 477-94.

20 Id. at 480.

21 Id.

22 Id. at 495-96.

23 Id. at 496.

I would suggest two additional clues to this puzzle. The first is simple and is based not on cognitive biases or misunderstandings but on a correct apprehension of the law: The typically absolute language of at-will disclaimers, which claim the right to fire "at any time, for any reason," claims far more discretion than the law actually affords. The illegality of discrimination, at least, is common knowledge. It is possible that employees ignore as meaningless bluster a clause that, on its face, claims the right to discriminate.

A further clue to how employees come to confuse norms of fair treatment with legal rights may lie in another interesting empirical observation. It appears that employers also have skewed perceptions about the law's protections against discharge: They significantly overestimate their exposure for wrongful discharge. This is suggested by both the RAND study by Dertouzos and Karoly[24] and the work of Lauren Edelman and her colleagues.[25] The RAND study concluded that the direct costs of wrongful discharge doctrines—attorneys fees plus the cost of judgments and settlements—were only about ten dollars per employee or one hundred dollars per termination.[26] But the study also concluded, quite astoundingly, that employers size their workforces as if the cost of wrongful discharge exposure were one hundred times as great, or the equivalent of a ten percent increase in wage costs.[27] The study may significantly overstate the labor market impact of wrongful discharge litigation.[28] But even if it is off by a factor of ten, it suggests that employers significantly overestimate the

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[24] James N. Dertouzos & Lynn A. Karoly, Labor-Market Responses to Employer Liability (1992).

[25] Lauren B. Edelman, Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace, 95 Am. J. of Soc. 1401 (1990) (tracking and explaining growth of internal grievance procedures); Lauren B. Edelman et al., Professional Construction of Law: The Inflated Threat of Wrongful Discharge, 26 Law & Soc'y Rev. 47 (1992) [hereinafter Edelman et al., Wrongful Discharge] (showing how human relations professionals exaggerate threat of wrongful-discharge liability); Lauren B. Edelman et al., The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth, 105 Am. J. of Soc. 406 (1999) [hereinafter Edelman et al., Grievance Procedures] (examining growth of grievance procedures and arguments used by human relations professionals to promote them).

[26] Dertouzos & Karoly, supra note 24, at xi.

[27] Id. at xiii.

[28] Preliminary results from a careful reanalysis by John Donahue, Stewart Schwab, and David Autor indicate some significant problems with the RAND study and suggest much more modest, though still significant, negative effects of wrongful-discharge law—especially the implied contract doctrines—on employment levels. See generally David H. Autor et al., The Costs of Wrongful Discharge Laws (unpublished manuscript, on file with the *New York University Law Review*).

cost of wrongful discharge litigation and significantly overinvest in litigation avoidance.[29]

It is not that employers believe that their employees legally can be fired only for cause. Most employers share their employees' belief that it is generally wrong to fire employees without cause.[30] But they do not confuse these norms with the law; most employers explicitly embrace their *legal* right to discharge employees at will.[31] Employers' inflated expectations of wrongful discharge liability may reflect in part a belief that the courts—more precisely, juries—often get it wrong and find promises of job security where none were meant to be conveyed.[32] But employers' fear of liability is also fueled by antidiscrimination law and other noncontractual exceptions to employment at will, many of which carry the threat of tort damages. Employers correctly understand that no amount of clarity and care in maintaining the at-will status of their employees will shield them from claims of discrimination on the basis of race, sex, religion, national origin, pregnancy, age, or disability, or from claims based on public policy or other tort doctrines. What they apparently misapprehend is the incidence and probable cost of employment litigation.

Lauren Edelman and her colleagues proffer both an important cause and an important effect of that exaggerated fear of litigation. An important cause is the evolution of a profession of human relations consultants and managers whose usefulness depends heavily on their ability to minimize employment litigation and liability.[33] These professionals have an interest in inflating employers' fear of liability so as to inflate their own importance to the firm's well-being.[34]

The inflated fear of litigation has also had important consequences within the workplace. The newly influential human relations professionals successfully have promoted two seemingly contradictory

[29] Of course it is possible (and the human relations professionals surely would like employers to believe) that employers' perceptions of the threat are realistic and that their litigation avoidance expenditures, though very substantial, successfully are avoiding vastly greater litigation and liability costs.

[30] See, e.g., Denise M. Rousseau & Ronald J. Anton, Fairness and Implied Contract Obligations in Job Terminations: The Role of Contributions, Promises, and Performance, 12 J. Org. Behav. 287, 295 (1991).

[31] See Verkerke, supra note 18, at 874-75.

[32] The Kim data may give credence to that belief: Given what most of the jury pool believes about the law in this area, see supra notes 12-17 and accompanying text, employers may have reason to fear that juries will not closely follow jury instructions that are out of step with their beliefs, or at least that juries will be quick to find a promise of the fair treatment to which they already believe employees are entitled.

[33] See Edelman et al., Wrongful Discharge, supra note 25, at 74-78.

[34] Id. The enormous salience of the rare large plaintiffs' verdicts against other employers may give credence to these efforts, while the actual rarity of costly litigation for any one firm simply may be seen as evidence of the success of costly liability-avoidance strategies.

employer responses to the inflated liability threat: first, the adoption of express "disclaimers" reaffirming the power to terminate employment at will; and second, the expansion of internal dispute resolution mechanisms, or "internal due process," through which employees can challenge employer actions they regard as unfair.[35]

The at-will disclaimers respond specifically to the much-exaggerated threat of implied contract litigation, for they offer no shield against public-policy, discrimination, or retaliation claims. Disclaimers may be featured in employee handbooks or even in the employment application. Assuming they are prominent enough and properly timed, disclaimers afford fairly reliable protection against contract-based wrongful discharge claims.[36]

The institution of internal due process (IDP) predates the upsurge in wrongful discharge litigation, but its growth is partly a result of that upsurge.[37] Internal due process responds to—though it does not insure against—the whole range of potential employment claims. Internal due process machinery typically provides for some kind of hearing at which the employee can contest the grounds for adverse action before a somewhat disinterested company official. What it typically does not provide is any explicit substantive limitations on the grounds for discharge—any assurance that discharge will be only for cause—because such representations would open the door to contract claims. The typical IDP system affords process without substance.

These systems, like job security itself, have many benefits. Employees like them and feel more fairly treated; these good feelings are thought to enhance employee morale and performance and to divert interest in unionization.[38] Moreover, IDP systems allow management to rationalize discipline, monitor supervisors, and avoid mistakes.[39] All that being said, it appears that an exaggerated fear of litigation,

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35 See id. at 79-80.

36 See, e.g., Reid v. Sears, Roebuck & Co., 790 F.2d 453, 455, 462 (6th Cir. 1986) (upholding at-will disclaimer contained in job application); Woolley v. Hoffman-LaRoche, Inc., 491 A.2d 1257, 1258 (N.J. 1985) (noting that binding effect of employment manual can be disavowed by prominent statement to that effect). Some courts are rather stringent about the requirement of conspicuousness or prominence. See, e.g., Jones v. Cent. Peninsula Gen. Hosp., 779 P.2d 783, 788 (Alaska 1989) (finding one-sentence disclaimer in eighty-five page manual to be insufficiently conspicuous and therefore ineffective); McDonald v. Mobil Coal Producing, Inc., 820 P.2d 986, 989 (Wyo. 1991) (holding that handbook disclaimer was ineffective because it was in same size and type of print as rest of handbook). Other courts are not. See Anderson v. Douglas & Lomason Co., 540 N.W.2d 277, 288 (Iowa 1995) (upholding two-sentence disclaimer contained in fifty-three page manual without inquiry into "prominence").

37 See Edelman, supra note 25, at 1404-05, 1412.

38 See id. at 1411-12.

39 See id. at 1411.

especially over discharge and harassment claims under the antidiscrimination laws, has helped to spur the dramatic and rapid growth of IDP systems in medium- and large-sized firms.[40] Employers have been advised that these systems help to avoid litigation by resolving disputes within the firm and by flagging actions that are likely to be found or plausibly claimed to be discriminatory, and that they further minimize liability by convincing adjudicators of the fairness of employers' decisionmaking.[41]

Through the creation and administration of these systems, employers act as if they must justify any serious discipline or discharge—as if they are operating under something like a just-cause regime—even while they maintain their position that their employees are legally terminable at will. That disjuncture may help to explain why employees misapprehend their legal rights: The existence and actual operation of internal grievance systems strongly imply the need to justify discipline and discharge, and are likely to be much more salient to employees than the express disclaimer. Employees may simply credit employer actions more than they credit the words of a two-sentence disclaimer on their employment application or in the employee handbook in their drawer. Like the signs we still see in places of public accommodation claiming "the right to refuse service to anyone," the standard at-will disclaimer misstates the law, does not reflect actual practice, and is just not taken seriously.

Part of the problem may be that the venerable dichotomy between substance and procedure that is so deeply embedded in both public- and private-sector employment law, and that is so self-evidently meaningful to lawyers, is not equally meaningful to ordinary employees. For all its importance in the legal universe, the distinction is not intuitively obvious. In the present context, grievance procedures seem to assume, and seem designed to test, reasons for decisions. What's the point of procedural scrutiny of a decision if you don't have to have any reason for the decision?[42] We can perhaps

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[40] See id. at 1435-36.

[41] See id. at 1412. In fact it is unclear whether an internal dispute resolution system reduces the incidence of litigation or outside complaints such as those with the EEOC. Edelman et al., Grievance Procedures, supra note 25, at 431-32. When the human relations professionals began contending that fair internal procedures would gain employers "credit" in the courts, there was no doctrinal basis for that proposition. See id. at 444-45. More recently, especially in the area of harassment, the law has come around partially to vindicate the human resource professionals' advice. See id. at 435-36.

[42] Indeed, the law of procedural due process reflects a version of the same assumption: A public employee is only entitled to due process of law in connection with her discharge if the state needs a reason to discharge her. And, by the same token, if the state does need a reason to discharge an employee, she has a right to a constitutionally adequate hearing, not just whatever process the employer chooses to afford her. See Cleveland Bd. of Educ. v.

answer that question as lawyers, but it should not surprise us if ordinary employees draw different conclusions.

So to the extent that employees observe the existence and workings of grievance and review procedures for employment decisions, this might at least reinforce their belief that they cannot be fired without a good reason. I have no empirical evidence for this particular explanation for the Kim findings,[43] but common sense recommends it.

II
How Wrong Are Employees About Their Rights? Optimism, Cynicism, or "Realism"

The Kim data[44] are said to show that employees are overly optimistic about their legal rights in that they believe the law backs up their deeply held notions of what is just. That is a fair inference. But before taking up the question of what the law does and should do about this excessive optimism, I want to offer two alternatives to the optimism hypothesis: the cynical spin and the "realist" spin. Both suggest ways in which workers may be less wrong about their rights than they seem to be. Unfortunately, neither eliminates the problem.

A. The Cynical Spin: Rights Without Effective Remedies

The data suggest that most employees believe that it is unlawful for an employer to fire them without something like just cause—that is, that "a court of law would find the discharge to be . . . unlawful."[45] That does not necessarily mean that employees believe they *will* only be fired for just cause, or that, if they are fired without cause, the law provides an effective and accessible remedy. Employees may believe that employers act illegally and get away with it—either because they can obscure the truth and manufacture a valid reason for discharge, or because legal remedies that exist in principle are unavailable or inadequate in practice.

This possibility is important because it renders the Kim findings consistent with other evidence that many employees fear unjustified discharge, and that this fear gives employers enormous power over

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Loudermill, 470 U.S. 532, 542-43 (1985) (requiring employer to provide employee pretermination "opportunity to respond"). At the same time, the law of procedural due process, like the law of private employment contracts, requires a substantive limitation on the employer's power to discharge as the predicate for constitutional or contractual protection of job security. See id. at 545-46.

43 One would want to know, for example, whether employees who had worked in large companies, which are more likely to have internal grievance systems, were more likely to express these optimistic beliefs about job security.

44 See also Freeman & Rogers, supra note 11, at 118-22.

45 Kim, Norms, supra note 12, at 489 (emphasis omitted).

their employees.[46] Many employees believe that defiance of their employer—defiance in the form of union activity, individual or collective dissent, refusal to engage in or to conceal illegal conduct, or assertion of privacy rights—may court discharge.[47] If employees believed that the law provided a fully effective remedy for any discharge without cause, then they would have little to fear in standing up for their rights and for the public good, and the public policies at stake in these wrongful discharges would be fully safeguarded. But one can credit Kim's findings while still believing that employers' implicit or explicit threats of discharge for employee defiance, and even for the exercise of employee rights, are powerful and credible to employees.

Suppose, then, that many employees believe they have an ineffective legal right to just-cause protection—that the law grants them rights that they would be unable to enforce in any event. That would suggest a particularly discouraging impediment to bargaining. Employees may place little stock in contractual promises of job security not because they do not value job security, but because they do not trust employers to honor it or the legal system to enforce it. That interpretation of the data would solve one problem—it would effectively narrow the gap between employee beliefs and employee rights—by exposing another: the gap between what the law promises and what employees believe it delivers.

B. The "Realist" Spin: Norms Under the Shadow of the Law

But there is another spin on the data that credits employees with a more astute (though still hazy and optimistic) understanding of their legal rights. I will call it the "realist" spin, not because it is necessarily more accurate than the cynical spin, but because it corresponds loosely to an antiformalist conception of legal rights.

The threat of wrongful discharge litigation of various kinds has led employers to take precautions, including the institution of internal grievance procedures. While the primary threat of litigation may be from claims of discrimination and retaliation, the realities of employee relations force employers to generalize their precautions to all employees. So while the law of wrongful discharge consists of discrete exceptions to at-will employment, the "shadow of the law" is broader and more diffuse. Relatively few employees benefit directly from wrongful discharge laws, but many more benefit from the precautions employers take to avoid litigation and liability. Most employees in

[46] Some evidence is reviewed in Cynthia L. Estlund, Free Speech and Due Process in the Workplace, 71 Ind. L.J. 101, 119-24 (1995).

[47] Id.

large firms are in fact subject to a regime of rough justice, albeit one administered by their employer. That regime is the indirect product of legal protections against some unfair discharges. In that sense, employees may not be so wrong about their rights as we initially perceive.

This is a different story than the one told by Professors Rock and Wachter, in which informal norms of fair treatment in the workplace are best left unenforced by the law.[48] In their story, the impetus to act fairly arises from the employer's interest in productivity and a satisfied workforce. Legal enforcement of the fairness norm is thus unnecessary and costly; all parties are better off with legally unenforceable norms backed by reputational and other informal sanctions.[49] Indeed, the parties choose legally unenforceable norms because employees do not wish to pay the price that employers would demand for legally enforceable rights.[50] Unfortunately, we just do not know if that is the case. The Kim data poses the same hurdles for the Rock and Wachter story as it poses for the standard contractual story.[51]

In my story, the law plays a bigger role. The informal norms of fairness and the internal procedures through which they are enforced are partly a response to the threat of legal action; they are precautions against actionable "accidents." The precautionary norms and procedures are broader than the reach of the law itself. They come about as the law's numerous discrete proscriptions are refracted through the institutional imperatives of the workplace.

On this view of things, one might conclude that the law is playing just the right role by inducing employers to give employees a reasonable degree of job security and of substantive and procedural fairness. On this view, the gap between employees' actual legal rights and their perceptions of those rights is much smaller than it first appears. Indeed, the relatively small margin of optimism that remains on this account may be, on balance, good for everyone. Employees are happier believing that they have legal job security. They would be inordi-

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48 Edward B. Rock & Michael L. Wachter, The Enforceability of Norms and the Employment Relationship, 144 U. Pa. L. Rev. 1913, 1914-19 (1996) (arguing that parties prefer state enforcement only when norms cannot constrain opportunistic behavior).

49 Id. at 1917-19.

50 See id. at 1941-42.

51 Kim and others point this out. See Walter Kamiat, Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting, 144 U. Pa. L. Rev. 1953, 1954 (1996) (questioning Rock and Wachter assumption of efficient results given alternative explanations of contract patterns, such as asymmetric information and high transaction costs); Kim, Norms, supra note 12, at 504-05 (arguing that results of study undermine assumption that employees consciously choose "self-enforcing norms").

nately unsettled and demoralized if they knew the cold hard truth of at-will employment that underlies the comparatively benign nonlegal norms under which they live. Maybe ignorance is bliss, or at least optimal under the circumstances.

This relatively happy story about the status quo is subject to a number of caveats from both employers' and employees' perspectives. Employers would decry the high cost of the current "lottery-like" system of judicial enforcement. That high cost itself is part of the inducement to employers to take precautions, some of which broadly benefit employees. But some of the defensive measures that employers take are harmful to employees, as when employers hire fewer employees, or substitute temporary for permanent employees, because of the feared cost of discharge. One might conclude that there is a more efficient way to extend an appropriate degree of job security to the employees who need and want it.

From employees' standpoint, the adequacy of the status quo depends partly on its cost, but also on the fairness of employers' internal processes: how often they misfire, how often they turn out to be a sham, and how serious the consequences are for employees whose just claims lose out under unfair procedures. There is also reason to worry that it is precisely when employers have bad reasons for firing someone that internal procedures are least likely to be effective. Not all unjustified discharges are "mistakes"; some are intentionally retaliatory or discriminatory. Of course, the legal status quo includes remedies for various "bad reason" discharges. Given the difficulty of proving bad motives, however, one of the virtues of an effective good-cause system is as a backup to our patchy and partial remedies for bad-cause discharges. I will return briefly to these points below.[52]

Our satisfaction with the status quo also depends on how much we care about those workplaces at the bottom of the labor market in which wrongful discharge litigation is not perceived as a serious threat, and in which employers are not induced to take salutary precautions against litigation. The indirect legal enforcement of norms of fairness—even if that is a fair description of the system we have—cannot work for whole groups of employees who cannot afford a ticket in the litigation lottery. Of course, any legal rights that are extended to these employees face similar problems of enforcement.

Finally, there is still no avoiding the stubborn fact that employees seem to believe they are getting something more than they are actually getting. We can thus narrow the gap between employee beliefs and legal reality, but a gap still remains, and it is one that poses a

[52] See infra notes 77-80 and accompanying text.

problem for a contractual approach to job security. The law could address that problem by bringing the law into line with employee beliefs, by seeking to bring employee beliefs into line with the law, or by doing a little of both. What does current law do?

III
How Employers Can Have It Both Ways Under Modern Contract Law

The 1980s saw the development of new legal theories under which employees could prove a binding promise of job security in an indefinite term employment contract. Cases like *Pugh v. See's Candies, Inc.*,[53] *Woolley v. Hoffman-La Roche, Inc.*,[54] and *Toussaint v. Blue Cross & Blue Shield of Michigan*[55] jettison some formal hurdles to establishing a contractual promise of job security and look instead at the entire employment relationship—with particular emphasis on the employer's written characterization of the relationship in an employee handbook. Did the words and acts of the employer give rise to a reasonable belief that the employment relationship only could be terminated for a good reason?[56] The implied contract and employee handbook cases thus aim to prevent employers from having it both ways: from fostering an expectation of job security among employees while escaping legal accountability when that expectation is disappointed.

That is exactly the right approach for the law to take, as long as the matter of job security is left to the realm of contract law. Only if employees know what the employer is offering can they decide whether to unionize, to bargain, or to shop for more job security or for a compensatory wage premium. Only if employees know what deal the employer is offering can we have any confidence that the deal they reach reflects their genuine preferences.

If the law aims to insure that employees' expectations are vindicated, it needs to take better account of the emerging picture of actual employee beliefs. The courts generally require evidence of employer assurances of job security, and they generally treat clearly worded and

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53 171 Cal. Rptr. 917 (1981).

54 491 A.2d 1257, modified, 499 A.2d 515 (N.J. 1985).

55 292 N.W.2d 880 (Mich. 1980).

56 See *Pugh*, 171 Cal. Rptr. at 927 (finding implied promise not to discharge without cause based on "totality of the parties' relationship," including duration of employment, commendations and assurances); *Toussaint*, 292 N.W.2d at 892 (enforcing "employee's legitimate expectations [of job security] based on an employer's statements of policy"); *Woolley*, 491 A.2d at 1264 (finding enforceable promise of job security in employment manual that, "fairly read," provides such a benefit).

prominently displayed disclaimers of job security as dispositive.[57] Yet Kim's studies indicate that most employees need no particular affirmative cue from employers to encourage a belief that they are protected from discharge without cause and that they are not dissuaded from that belief by a simple disclaimer.[58] And, given employees' erroneous background beliefs about the law, employers' maintenance of internal "process without substance" may reinforce their erroneous beliefs and encourage the disregard of a disclaimer.

The law may simply regard employee beliefs, and particularly their flat refusal to credit the plain terms of an at-will disclaimer, as unreasonable. But the economist must acknowledge that such beliefs allow employers to get something for nothing. In other words, if Kim's data and my gloss on them are right, then employers are still able to have it both ways under current law.

Should the law then simply accede to these widely shared beliefs and deem them "reasonable"? That would certainly boost the profile (and earning power) of social scientists in the courtroom. As a general matter, it seems ill advised to define reasonableness by reference to survey data. In defining the "reasonable person" for purposes of tort liability, for example, the law imposes a standard of care that aims to serve the interests of society and respect the integrity of persons and property. Evidence that most people disregarded those interests when it suited them would hardly count as a reason for lowering the standard of care. But in the context of a contractual relationship that typically is characterized by unequal knowledge and experience, in which the better-informed party systematically benefits from the ignorance of the less-informed party, this approach cannot be rejected so easily. It might at least point the way toward an analysis that really does what implied contract and employee handbook law aims to do: to prevent employers from enjoying the benefits of employee beliefs about job security without legal accountability.

What would it mean to take actual employee beliefs as the benchmark for "reasonableness" in the law of employment contracts? It might mean "switching the default," proposed here by Professor Sunstein,[59] better to reflect employee perceptions of what the law is. The question is what difference this would make.

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[57] See supra note 36.

[58] See supra notes 11-17 and accompanying text.

[59] Sunstein, supra note 3. For an earlier suggestion along these lines, particularly in the context of job security, see Samuel Issacharoff, Contracting for Employment: The Limited Return of the Common Law, 74 Tex. L. Rev. 1783, 1791-97 (1996).

IV
WOULD SWITCHING THE DEFAULT MATTER? WEAK AND STRONG DEFAULTS

The evidence that most employees believe that they cannot legally be fired without cause of some kind undermines the case for the at-will default. First, it contradicts the claim that employment at will represents what both parties typically choose when they explicitly choose a rule (the "majority default"), and thus reduces transaction costs. Indeed, Kim's data attest to significant informational asymmetries between employees and employers, and bolster the information-forcing argument for a "penalty default" that operates against the better-informed employer.[60] A default that operates in favor of employees should force employers to inform employees of any less favorable proposed terms, and thus should allow employees to bargain for better job security or for compensatory wages or benefits.[61]

But how much good would it do to switch to a for-cause default? That may depend on whether we adopt a weak or a strong default. A weak default simply fills a gap or a silence in contracting; all it takes to overcome a default rule of just cause is for the contract to speak to the issue. By a "strong default," I mean something more: a waivable right, subject to a reasonably exacting standard for knowing waiver.

A. Switching To a Weak For-Cause Default Will Not Matter Much

For the many employers who have responded to the current legal landscape with a combination of express disclaimers and procedures without substance, and for their employees, switching the default in the weak sense is unlikely to make any difference. I say this with a specific but fairly conventional understanding of default rules: Weak default rules simply fill gaps or silences in contracting; all it takes to avoid a gap-filling default rule is to avoid the gap. A one-sentence disclaimer in an application or an employee handbook does that.

Switching the default in this weak sense is unlikely to make any difference to how most employers act, and it is unlikely to make any difference to most employees' perceptions of their rights, for it turns out that most employers already act as if the default is termination for cause. They act by expressly disclaiming any contractual promise of job security and asserting their power to fire at will. But they also act, in the eyes of employees, as if they are still subject to a just-cause regime by establishing decisionmaking and grievance procedures that effectively require cause—to the satisfaction of management—for dis-

[60] See Issacharoff, supra note 59, at 1792; Sunstein, supra note 3, at 105.
[61] Sunstein, supra note 3, at 113-14.

charge and discipline. It is hard to see how these employers would act differently under a default for-cause rule.

Similarly, a weak default for-cause regime would bring employee perceptions of their rights no closer to the legal reality. The information that would be forced by a switched default—that is, the employer's express assertion of employment at will—is evidently not enough to change most employees' erroneous understanding of their rights. The "fairness heuristic," whatever its cognitive roots, is too powerful to be countered effectively by even seemingly clear disclaimer language. It is hard to see how switching to a just-cause default would make employees any more receptive to the information provided by a disclaimer.[62]

The well-documented endowment effect may raise even more questions about the utility of switching the default. In many contexts, people attach greater value to things that they have than to those they do not have but could bargain for.[63] Endowment effects, along with other transaction costs, help to explain the often-observed "stickiness" of entitlements.[64] In the present context, we might predict that employees would demand a higher price—here, for example, a bigger wage premium—to give up their entitlement to just-cause protection than they would pay in order to secure just-cause protection.[65]

But once we factor in employees' erroneous and resilient beliefs about their entitlements in this context, the endowment effect plays an uncertain and possibly paradoxical role. Whatever endowment effect attaches to legal entitlements presumably must attach to one's *beliefs* about one's legal entitlements, however misguided. Employees' attachment to what they believe to be their entitlement to job security appears to be so strong that they ignore or disregard contrary information of the sort that would be "forced" by a just-cause default. If employees do not believe that an employer disclaimer of just-cause protection is effective, they will fail to bargain over it. This might suggest that an entitlement to job security is extremely sticky: Employees are loath to part with what they believe to be their entitlement. But in

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[62] On the contrary, switching to a just-cause default actually could reinforce the widely shared norm in favor of just cause, fortifying employee beliefs in the strength of that entitlement and making them even more inclined to ignore employer disclaimers or to dismiss them as meaningless.

[63] See, e.g., Daniel Kahneman et al., Experimental Tests of the Endowment Effect and the Coase Theorem, 98 J. Pol. Econ. 1325, 1346 (1990) (concluding from empirical data that endowment effects are "fundamental characteristics of preferences").

[64] See Sunstein, supra note 3 at 107.

[65] Sunstein, supra note 3, at 112. Indeed, as Professor Sunstein suggests, they might even demand too high a price—higher than it is actually worth to them given the prevalent norms of fair treatment even under employment at will.

another sense the entitlement is all too "unsticky," for employers seem to be able to reclaim it without paying anything in exchange. The supposed entitlement to just-cause protection appears to be "priceless" in this strange sense: Employers pay nothing to buy it back, and employees get nothing for giving it up, because they do not believe they *are* giving it up.

Of course, that is not the case for all employees. In Kim's study, for example, a small minority of employees had a reasonably accurate perception of the law.[66] And, among those who initially thought that it was illegal to fire an employee in order to hire another at a lower wage, about one-quarter changed their view in the face of an at-will disclaimer.[67] It is possible that the few employees who accurately perceive their legal entitlements "endow" those legal entitlements as the behavioral economists would predict, and effectively set the price. To that extent, it would matter if we switched the default. Switching the default would also matter for the significant minority of employers who currently say nothing about the matter, either for or against just cause. On the other hand, it seems likely that if the default were switched, many employers who currently remain silent about grounds for termination would speak, and would expressly assert employment at will. And we have reason to believe that their employees mostly would ignore that disclaimer.

For all these reasons, switching the default rule in this weak, gap-filling sense seems unlikely to result in a significant shift of the effective legal entitlement toward greater just-cause protection. Nor does it seem likely to bring employee beliefs about the law much closer to the reality or to keep employers from "having it both ways" on the matter of job security. But there is a stronger form of "switching the default" rule that might do the trick.

B. Switching to a Strong Default: A Waivable Right to For-Cause Protection

The idea of a waivable right to just-cause protection sounds deceptively similar to a just-cause default. But if we think of just-cause protection as a substantive right, then we would demand more than a one-sentence unilateral disclaimer by the employer in order to return to employment at will.[68] We would require some kind of a knowing and voluntary waiver. So, for example, the employer might be re-

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[66] See Kim, Norms, supra note 12, at 461 fig.1.

[67] Id. at 463.

[68] Proponents of judicial restraint might also say that we should demand more than a judicial decree to adopt such a right, even a waivable right. See infra note 99.

quired to inform employees, in writing, of their legal right to be fired only for just cause. An employer who sought to buy back the right to terminate employment at will would have to seek a signed and informed waiver of that right.

The dichotomy between "weak" and "strong" defaults is of course artificial; they lie on a continuum, and each could be operationalized in a stronger or weaker form. A "waivable right" might be more or less easily waivable. At the least waivable end of the spectrum, waiver may resemble a settlement of a litigable dispute. That may best describe the exacting requirements for a waiver of the Age Discrimination in Employment Act (ADEA) rights under the Older Workers' Benefits Protection Act (OWBPA): Consideration "in addition to anything of value to which the [employee] is already entitled," a form of minimal, informal discovery about the facts surrounding the triggering event, and advice and time to consult with an attorney.[69]

Such exacting requirements are not easily adaptable to a waiver that is sought before any dispute actually arises. That makes all the more critical the question whether a waiver of for-cause rights could be made a condition of employment.[70] Unless we mean to abandon the contractual approach to job security entirely, it is hard to see why not. But there is more to recommend this approach than the abstract demands of contractual choice. We will return to that question below.

As for the standards for knowing waiver, they should be designed at a minimum to make employees aware of what they are and are not getting in light of what we know about how employees think about these things. A high standard for waiver might take some cues from OWBPA standards described above, and require employers to give employees *relevant* information (for example, about involuntary terminations in the last five years), some time and advice to consult an

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[69] Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(f)(1)(A)-(H). Although this legal safe harbor formally exists only for the ADEA, employers are beginning to use the Older Workers' Benefits Protection Act (OWBPA) provisions as a template for seeking from employees broad, all-purpose waivers of potential employment disputes as a condition of more generous severance payments. See Jonathan D. Glater, For Last Paycheck, More Workers Cede Their Rights to Sue, N.Y. Times, Feb. 24, 2001, at A1 ("[M]any employees are facing an uncomfortable new choice as they walk out the door: agree never to sue them or walk away with less money.").

[70] Different considerations enter the picture, and may call for a different resolution, in the case of rights under antidiscrimination laws or other wrongful-discharge doctrines. Even predispute waiver of the judicial forum for such claims, broadly sanctioned in Circuit City Stores v. Adams, 121 S.Ct. 1302, 1306 (2001), raises serious concerns not present in the case of for-cause rights. The appropriate relationship between for-cause rights and remedies (where they exist) and other rights in the employment relationship is a large topic that I do not cover here.

attorney, and even "consideration" in some form.[71] A lower standard of waiver might simply require that the employee sign a clear and prominent statement of what the for-cause right is and of the employee's decision to give it up. The choice of standards will depend on considerations of cost and efficiency, as well as on the extent to which more than the individual employee's interests are thought to be at stake, a question to which I will return below. Here I want only to suggest the range of possibilities within the concept of a waivable right to for-cause protection.

Whatever the form of a predispute waiver of rights, there is reason to be skeptical that employees faced with such a waiver will be in a position to refuse. Even if this language is sufficient to inform them of their diminished legal protections, and any alternative nonlegal protections that the employer is offering, there are other barriers to bargaining that might impede employees from seeking the job security that they want and would be willing to pay for.[72] On the other hand, the economists have long argued that actual bargaining is not necessary if shopping around is possible.[73] As long as employees know exactly what they are getting *before* they make any investment in the job, and as long as labor markets are reasonably competitive, employees can "vote with their feet" for more or less job security. And if employees accept a job with less job security than they prefer, employers presumably will pay a price in terms of employee morale and commitment. If a strong waiver requirement did what the standard disclaimer language apparently does not—that is, inform employees of their actual legal position—then employers would be forced to choose between the benefits of affording their employees legally enforceable job security and the benefits of greater discretion under employment at will. Employers could not have it both ways.

What this adds up to is an affirmative argument for allowing employers to secure a waiver of litigable for-cause rights as a condition of employment. Full-fledged civil litigation is a costly and unwieldy mechanism for adjudicating the existence of cause for discharge. Yet we have seen that the threat of litigation can be very effective leverage. If that threat can only be traded away once an individual dispute has arisen, it will be leverage only for the individual employee. But if

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[71] See supra note 69 and accompanying text.

[72] For an overview of impediments to job security, see Paul C. Weiler, Governing the Workplace: The Future of Labor and Employment Law 71-78 (1990) (canvassing impediments to fair contracting over matter of job security).

[73] See Richard A. Posner, Economic Analysis of Law 127-28 (5th ed. 1998) (defending form contracts as efficient and consistent with contractual choice within competitive markets).

it can be traded up front as a condition of employment, it may afford systemic leverage on behalf of employees. It may induce employers to offer a more accessible, speedy, and efficient alternative regime for determining the fairness of discharge (perhaps, for example, some kind of arbitration process).

This somewhat paradoxical claim rests on several assumptions. It assumes, as I have already argued, that employers benefit from employees' sense of job security, and that the law can be calibrated, through a demanding standard of waiver, to insure that employees' sense of their job security is reasonably accurate. It does not assume that employees faced with the decision to waive their legal for-cause rights have a real choice in the matter, other than the choice to work elsewhere; indeed, it assumes that they generally do not. It accepts the employer's ability to offer a "take it or leave it" deal, *as long as employees know what the deal is before they become invested in the job*.

The claimed virtue of a fully informed "take it or leave it" regime rests on one further set of assumptions: It assumes that an improved internal system of job security entails additional costs; that a combination of economic and psychological factors will make it practically necessary to extend the system to the workforce as a whole; and that the investment will not be worthwhile unless the workforce as a whole can be made to trade off their litigable for-cause rights in advance. The assumption is, in other words, that internal guarantees of job security are "public goods" within the workplace, and are subject to the standard collective-action problems of holdouts and free riders.[74] That suggests that what is actually needed is an effective mechanism of collective employee voice so as to enable genuine bargaining over job security. Collective employee voice in the workplace offers, in my view, a better solution to the problems discussed in this Essay, and to many other problems of workplace governance.[75] But this Essay seeks a solution for the vast majority of workplaces that are nonunion and currently governed by employment at will. It suggests that, within a modestly reconstructed legal regime aimed at insuring employee knowledge of their rights, even a one-sided solution to the collective-action problem—allowing employers to bar holdouts and free riders by enforcing a workforce-wide deal on basic job security—may work significant improvements in the nature of that deal.

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[74] On the public nature of many workplace goods, see Michael H. Gottesman, Wither Goest Labor Law: Law and Economics in the Workplace, 100 Yale L. J. 2767, 2789-90 (1991).

[75] For persuasive arguments to that effect, see Weiler, supra note 72, at 48-104; Gottesman, supra note 74, at 2775-93 (reviewing and augmenting Weiler's arguments).

On the other side of the ledger are the nontrivial transaction costs of requiring employers who prefer employment at will—apparently most employers—to secure at least a signed written waiver of just cause rights. The costs obviously rise as the standard for waiver rises. The costs would rise further if the resulting contracts provided for more job security, and more judicial or internal process, than they do now. That would happen if the for-cause entitlement in fact proved to be sticky once it was understood correctly by employees, or, more likely, if employers decided that providing some form of job security yielded greater benefits (in terms of recruitment, retention, and employee commitment) than it cost. Both increased transaction costs and increased process costs presumably would be borne largely by employees in the form of lower wages or lower employment levels.

Are those costs outweighed by the benefits of more informed contracting, and our greater confidence that resulting contracts reflect the real preferences of the parties? The answer is not at all clear. If all that is at stake in the allocation of this entitlement are the interests and preferences of the individual employee and her employer—in other words, if this problem is properly viewed as one for purely contractual resolution—then it may be a toss-up. It is even possible that, under a regime of waivable for-cause rights, because of a combination of transaction costs and endowment effects, workers would end up paying too much—more than it was really worth to them—for their for-cause rights.[76] But what if there are interests at stake beyond those of the particular parties in the allocation of rights to job security? The law might then justifiably put a thumb on the scale in favor of for-cause protection, for example, in the form of a strong default. Let us turn briefly to the question of whether society should put a thumb on the scale in favor of just cause.

V
SOCIETAL BENEFITS OF FOR-CAUSE PROTECTION IN THE BRAVE NEW WORKPLACE

It is worth noting at the outset that the substance of just-cause protection—assuming that it makes room for economically motivated employment decisions—is not especially controversial. Even in the brave new workplace of fluidity and free agency,[77] involuntary job loss

[76] See Sunstein, supra note 3, at 112.

[77] See generally Peter Cappelli, The New Deal at Work (1999) (describing new market-driven employment relationships that are emerging in response to changes in product markets); Katherine V.W. Stone, The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law, 48 UCLA L. Rev. 519 (2001) (analyzing impact of changing employment relationship on labor and employment law).

is usually a serious economic and psychic blow; where it takes the form of selective individual discharge, it carries with it a stigma on the job market. Employees still have an interest in not being discharged arbitrarily even if they have no expectation of career-long employment. And even in the brave new workplace, employers have little interest in firing employees arbitrarily. Employers hardly ever fire people for no reason. Employers generally fire employees only for good, business-related reasons, except when they fire employees for bad and mostly illegal reasons such as discrimination or retaliation for socially valued activity that may hurt the firm. In the modern era of wrongful discharge law, employers value what is left of employment at will primarily to insulate their good-faith judgment on good cause from expensive and potentially erroneous second-guessing by third parties, and secondarily to insulate their bad-faith decisions from effective outside scrutiny. For the at-will rule casts a heavy burden on alleged victims of bad-reason discharges to prove the often unprovable bad motive.[78]

The problem is that any rights that we grant employees are highly vulnerable if the employer has an interest in invading them and has the power to fire employees for no good reason. We may make it unlawful to fire employees for exercising rights to privacy, for organizing a union, for blowing the whistle on or refusing to engage in illegal activity, for engaging in independent political activities, affiliations, and expression, or for complaining about discrimination or harassment or safety violations at work. None of these rights is very secure if the employer still can fire employees for no good reason.

The power to fire for no reason—or, realistically, for a not-good-enough reason—thus functions as a two-way buffer that partially insulates both good-faith and bad-faith discharges from scrutiny. As long as involuntary job loss is still a serious economic threat to employees, the power to fire for no good reason enhances the employer's power to demand compliance—compliance with legitimate demands for competence and good behavior, as well as compliance with illegitimate demands for silence and complicity in illegal conduct. And as long as society seeks to set limits on employers' power over employees' private and civic lives, and seeks to enable employees to stand up for their own rights and the interests of the public against employer overreaching and opportunism, there is a societal interest in protecting employees against arbitrary, unjustified discharge.

There is another more diffuse societal interest in the protection of job security that I can only briefly sketch in this short Essay. As tradi-

[78] I develop this argument in Estlund, supra note 9.

tional opportunities for face-to-face civic engagement and sociability are declining, the workplace is emerging as an ever more important site of constructive and cooperative social engagement among adult citizens.[79] Society has an interest in the workplace serving as a site of ongoing engagement, adjustment, discussion, compromise, informal sociability, and participation in decisionmaking—in short, as a community in which people exercise a voice and engage with their diverse fellow citizens. The sheer decline in the longevity of workplace relationships seems bound to detract from the spillover social benefits of those relationships, though the increasing number and diversity of those relationships may have countervailing benefits. But even apart from the declining duration of workplace relationships, the increasing influence of external labor market pressures inside the workplace has ominous implications.[80] A workplace that is thoroughly infused with the demands of the external labor market, and that relies predominantly on the market mechanism of exit rather than reciprocal voice and loyalty as a response to friction and dissatisfaction is bound to be less effective at fostering these valuable social relationships and civic skills and habits. There may be little the law can do to resist the powerful economic pressures that are eroding internal labor markets. But there is some chance that strengthening legal job security might force employers to rely on mechanisms other than the threat of discharge to motivate employee commitment, and might free employees to exercise voice and induce them to invest more in the particular workplace and particular workplace relationships.[81]

Of course, recognizing the societal costs of employment at will—the greater power it effectively gives employers to discriminate and retaliate on socially harmful grounds, and the corrosive effect of de-

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[79] See generally Cynthia L. Estlund, Working Together: The Workplace, Civil Society, and the Law, 89 Geo. L.J. 1 (2000) (discussing role of workplace in democratic and civil society as supporting democratic values, institutions, and practices).

[80] See id.; Cynthia L. Estlund, The Changing Workplace as a Locus of Integration in a Diverse Society, 2000 Col. Bus. L. Rev. 331, 349-60 (identifying both problems and promises of new emerging patterns for workplace as site for social integration in society).

[81] Such an argument would be almost a mirror image of Professor Schwab's well-known depiction of wrongful-discharge law as enforcing the implied promises in the lifetime employment relationship. Stewart J. Schwab, Life-Cycle Justice: Accommodating Just Cause and Employment at Will, 92 Mich. L. Rev. 8 (1993). His was an argument about the law reflecting and enforcing expectations that arose in internal labor markets; the argument suggested here is that the law might resist the decline of internal labor markets—supplying greater job security just as, and just because, the market is supplying less of it. That may make the argument quixotic; it certainly would confront obstacles that Professor Schwab did not have to confront. For example, labor market pressures that are resisted at one point will seek other outlets, and may produce counterproductive consequences, such as increasing employers' reliance on ever more marginal, contingent, and temporary workers.

clining job security on workplace communities—is hardly determinative. The societal costs of employment at will might justify a strong but waivable right to for-cause protection, or it might even justify overriding individual choice and imposing a mandatory just-cause standard. Or those societal costs might be outweighed by the economic costs of administering a universal, or more nearly universal, just-cause right. But recall that virtually the entire case against the extension of just-cause protection turns not on the substance but on the process for its enforcement—the expected error rate as well as the sheer expenditure of time and money.[82] If we could devise a fair and efficient system for adjudicating just cause that took appropriate account of the economic realities that employers face, it is hard to see what legitimate objections would remain to a universal for-cause requirement.

The *in terrorum* effect of civil litigation has usefully fueled employer efforts thus far to supply nonjudicial dispute resolution procedures for workplace disputes. A pivotal question is whether and how that useful fear of litigation can be tapped to move toward a more fair, accessible, and efficient system for adjudicating disputes and enforcing rights in the employment setting.

VI

On Changing the Law to Fit Employees' "Legitimate Expectations"

I want to return to the more general question of whether erroneous but widely shared and deeply held beliefs about the law might be grounds for changing the law. I have already suggested that the idea has the greatest traction in the context of contractual relationships between more and less sophisticated parties, in which the more sophisticated party predictably benefits from the misconceptions of the less sophisticated party. In that context, widespread beliefs about what the contract means might be the right starting point for determining "reasonable expectations." There is precedent for such a move in one analogous contractual context: the landlord-tenant relationship.[83]

At common law, the lease was conceived of as a conveyance; once having conveyed the right to possession, the landlord owed very

[82] See supra note 18.

[83] The analogy between reform of employment at will and the adoption of the implied warranty of habitability in the landlord-tenant context has been drawn before, to somewhat different ends. See Martin H. Malin, The Distributive and Corrective Justice Concerns in the Debate Over Employment At-Will: Some Preliminary Thoughts, 68 Chi.-Kent L. Rev. 117, 120-21 (1992).

little to the tenant.[84] With respect to the condition of the premises, the law's motto was "caveat lessee."[85] Premises were leased "as is," with no implied warranty of habitability and no implied covenant to maintain the premises during the lease.[86] Any express landlord covenants were held to be independent of the tenant's covenant to pay rent; the landlord's breach did not excuse the tenant's nonpayment.[87] These principles, perhaps well suited to the typical agricultural lease, became problematic in the context of urban housing. Beginning in the 1960s, caveat lessee came under increasing pressure in the courts as tenants challenged the landlord's right to threaten eviction for nonpayment of rent when the housing was unsafe, unhealthy, and often in violation of local housing codes.[88] The courts in one jurisdiction after another abandoned the old rules and imposed on landlords an implied, and typically nonwaivable, warranty of habitability and duty to maintain a habitable dwelling.[89]

The courts' reasoning in the landlord-tenant context is instructive here. Consider the D.C. Circuit's watershed decision in *Javins v. First National Realty Corp.*[90] The court began by observing that a lease increasingly was viewed as a contract rather than as a conveyance. As such, an urban housing lease "should be interpreted and construed like any other contract."[91] That led the court in two seemingly opposite directions that converged on the implied warranty of habitability. First, the court turned to the expectations of the parties—the touchstone of contract. However, these expectations were not to be found in the express terms of the contract, but rather in extrinsic evidence of what tenants in modern society "legitimately" expected.[92] According to the court, what tenants think they are getting when they enter a lease for an urban dwelling is not simply physical possession of the premises but "a well known package of goods and services," including "adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance."[93] In other words, the court credited tenants' heretofore erro-

[84] For an overview of this history, see Joseph W. Singer, Introduction to Property 411-12 (2001).

[85] Id. at 412.

[86] Id. at 412, 452.

[87] Id. at 454.

[88] Id. at 412, 452-55.

[89] Id.

[90] 428 F.2d 1071 (D.C. Cir. 1970).

[91] Id. at 1075.

[92] The court cited no actual evidence of what tenants expected; the court rather took informal notice of these expectations. Id. at 1075-79.

[93] Id. at 1074.

neous belief that the landlord had a duty to supply those services as part of the lease.

But how did contract law support the judicial implication of these "legitimate expectations" into the contract—contrary to the common law's background rule, absent any promise by the landlord, and even in the face of express lease provisions to the contrary? Here the court turned to the analogy of implied warranties in the law of consumer products—to the inroads that had already been made on contract-as-agreement in another domain of "unequal bargaining power."[94] The *idea* of contract thus became the vehicle for overriding the express *terms* of the contract. Contract was the vehicle, but it did not provide the fuel. That was provided, for the *Javins* court and others, by a set of broader policy concerns: tenants' fundamental need for housing, the chronic shortage of urban housing, the "inequality of bargaining power" between the typical landlord and the typical tenant, and the societal externalities of substandard housing.[95]

Now we can return to the employment contract. The case for judicial abandonment of employment at will has much in common with the case for judicial abandonment of caveat lessee. First, the common law's background rule of employment at will is at least as much at odds with employees' beliefs about their legal rights as caveat lessee was at odds with tenants' beliefs. Indeed, the empirical evidence of those beliefs is stronger here. Second, contract law, in the form of the "implied covenant of good faith and fair dealing,"[96] provides at least as comfortable a vehicle for transporting those expectations into the employment contract as was available in the case of the lease. Third, bargaining in the labor market is skewed much as it is said to be skewed in the housing market: Most employers are better-heeled, better-advised repeat players, and employees are typically more dependent on one job than is the employer on any one employee. Fourth, as with "caveat lessee" and substandard housing conditions, employment at will, and the vulnerability of employees to discharge for no good reason, has external effects that fall on other employees and on society as a whole. While those effects do not threaten public health and safety as directly as do substandard hous-

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[94] Id. at 1075-76.

[95] Id. at 1079-80.

[96] A covenant of good faith and fair dealing is implied in commercial transactions under the Uniform Commercial Code, U.C.C. § 1-203 (1990). For an example of a decision implying the good-faith covenant into the employment contract, and finding that it constrains the employer's power to discharge an at-will employee, see Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1257 (Mass. 1977).

ing conditions, they do threaten important public policies reflected in the statutory and common law of wrongful discharge.[97]

There are differences, of course. Insofar as labor is a basic factor of production, flexibility in its utilization may be more crucial to economic productivity, and may be more threatened by legally imposed job security than in the landlord-tenant context. And in the employment relationship, the employer faces formidable monitoring problems that neither landlords nor tenants face with regard to the other's performance of contractual duties. These differences, among others, may call for a greater role for contractual freedom in the employment market than in the housing market.[98] So, for example, whereas the implied warranty of habitability is typically nonwaivable, a for-cause right may justifiably be made waivable, provided that the standard for waiver is high enough to insure that both parties are operating on the same understanding of what the contract means. Still, the case for shifting away from the old background assumption of employment at will, and substituting something stronger than a weak default of for-cause discharge, is strikingly parallel to the case that was successfully made for abandoning caveat lessee in favor of the implied warranty.

For some readers, this may seem to be an odd place to turn for support, for the implied warranty of habitability has attracted serious criticism.[99] According to some economically oriented critics, the warranty of habitability has led, or is bound by the laws of supply and demand to lead, to perverse and unintended consequences: Poor tenants are said to suffer, and homelessness to swell, as landlords reduce

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[97] Many of those public policies are based on public health and safety and other public interests. See generally Stewart J. Schwab, Wrongful Discharge Law and the Search for Third Party Effects, 74 Tex. L. Rev. 1943 (1996) (explaining many public-policy exceptions to employment at will on basis of "third-party effects" on public).

[98] The lack of an analogue to housing codes in the employment context points to important differences in the two settings: Housing codes provide both democratic legitimacy and a benchmark for the content of a judicially imposed standard. They also attest to the fact that the societal externalities of substandard housing—fire hazard, vermin, contagious diseases—are more direct and more compelling than the externalities of arbitrary discharge. Note, however, that the *Javins* court treated the existence of a housing code as an independent argument for the implied warranty; the main argument did not rely directly on the housing code. In another leading decision finding an implied warranty of habitability, Hilder v. St. Peter, 478 A.2d 202 (Vt. 1984), there appears to have been no applicable housing code.

[99] Apart from the economic arguments, arguments based on democratic accountability might be raised against the effort to overturn employment at will by common-law decree. Suffice it to say here that the same objections were available in the case of caveat lessee. In both cases, the old rules originated in common lawmaking; the legislature retains the power to override a common law change; and the party disfavored by that change is comparatively well situated to seek legislative reform.

the supply and increase the price of rental housing in response to the cost of complying with the implied warranty.[100] Similarly, in the employment context, employers are expected to respond to legally imposed job security by reducing wages or employment levels to the detriment of employees and the economy as a whole.[101]

In both areas, many of the important questions are ultimately empirical. In the housing context, empirical studies have found less clear-cut effects than theorists predicted.[102] Markets turn out to be very complex, and the consequences of legal reforms much harder to predict than one might wish, partly for reasons that the behavioral economists have begun to plumb. This is bound to be especially true in the case of labor markets, in which what both employers and employees seek from the employment contract is deeply intertwined with human psychology. Job performance is a product of employees' fears, aspirations, loyalties, moral convictions, and sense of self-worth. And the value of a job to an employee derives not only from wages and benefits but from the satisfaction of needs for security, sociability, self-respect, and meaning in life. That means that there are different strategies—not all of which can be plotted on supply and demand curves—for attracting workers to a job and inducing them to perform competently or even consummately. If the law puts hurdles in the path of one strategy, employers may discover other ways to tap human potential. That does not mean that the traditional economists' predictions can be safely ignored, but neither should they end the discussion.

CONCLUSION

Most employees believe that they have the right to challenge an arbitrary discharge in court, but the law affords them no such right.

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100 See Posner, supra note 73, at 514-18 (using economic analysis to show that housing codes may not necessarily benefit poor); Charles J. Meyers, The Covenant of Habitability and the American Law Institute, 27 Stan. L. Rev. 879, 889-97 (1975) (arguing against adoption of ALI's warranty of habitability).

101 See, e.g., Mayer G. Freed & Daniel D. Polsby, Just Cause for Termination Rules and Economic Efficiency, 38 Emory L. J. 1097, 1131-37 (1989) (marshalling neoclassical economic arguments against legally mandated just cause).

102 See, e.g., Roger A. Cunningham, The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status, 16 Urb. L. Ann. 3, 144-53 (1979) (analyzing effects of warranties of habitability in different jurisdictions); Edward H. Rabin, The Revolution in Residential Landlord-Tenant Law: Causes and Consequences, 69 Cornell L. Rev. 517, 561-78 (1984) (finding no evidence that protenant reforms, including warranty of habitability, caused a reduction in supply of housing). But see Werner Z. Hirsch, Law and Economics: An Introductory Analysis 64-81 (2d ed. 1988) (concluding that habitability laws cost low-income tenants more than value of improvements that laws prompted).

That gap seriously undermines the long-standing and almost uniquely American determination to leave the matter of job security within the domain of contract. One way or another, the law should undertake to bring employees' perceptions of their legal rights into line with reality. That could be done either by pulling employee perceptions down toward the legal reality of employment at will, or by pushing up the level of legal rights to comport with employee perceptions. The second approach has advantages that accrue not only to employees themselves but to the quality of social life for all of us; but the first approach fits more comfortably into the realm of what judges conventionally do, and have tried to do, through enlightened common law adjudication.

I have argued here that, happily, imposing a legal standard that accomplishes the first may help to bring about the second. That is, switching to a strong but waivable legal default in favor of job security, and making reasonably certain that employees know what they are getting if they give it up, will force employers to choose between the benefits of their employees' belief that they are secure against unjustified discharge and the benefits of freedom from outside scrutiny of most termination decisions. And once forced to choose, many employers may find that providing greater job security—something more than the internal review that many employers now afford, though something less than the full-blown judicial enforcement that they fear—is worth the cost.