Wrongful Discharge Protections in an At-Will World

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I. Introduction

The employer's presumptive right to fire employees at will—for good reason, for bad reason, or for no reason at all—has been drastically cut back in the last sixty years. In particular, the legal right to fire for bad reasons has been virtually decimated. The at-will rule now coexists with numerous important exceptions—statutory and common law, state and federal—that prohibit the discharge of employees for particular bad reasons. The law thus prohibits employer discrimination based on race, sex, age, or other characteristics, and prohibits employer retaliation for the exercise of various legal rights or duties. These laws and doctrines, which I will call the law of wrongful discharge, support not only the interests of individual employees but also important *public* interests, such as racial and sexual equality and the demands of law enforcement.

These "bad reasons" doctrines have attracted rather little fire in the current debate over employment at will. With the notable exception of Richard Epstein,[1] nobody appears anxious to revive the employer's legal right to fire employees for discriminatory or retaliatory reasons. The leading defenders of at-will concede this ground to the critics, gladly or

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1. Professor Epstein has staked out the most extreme position in the at-will debate by calling for the repeal of both the NLRA's protection of concerted labor activity and union membership, Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983) [hereinafter Epstein, *A Common Law for Labor Relations*], and Title VII's prohibition of discrimination, including the core prohibition of racial discrimination, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992). Professor Epstein and those who share his position will not be persuaded by anything that follows. It is worth noting, however, that even Professor Epstein acknowledges a small place for the public policy exception to at-will employment when, for example, an employee is fired for refusing to commit a crime such as perjury. *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 952 & n.11 (1984) [hereinafter Epstein, *In Defense of the Contract at Will*] (arguing that an employment contract to commit murder, pollute illegally, or commit perjury should be unenforceable).

grudgingly, and defend a correspondingly narrower version of at-will.[2] Indeed, to judge from the current debate over at-will employment, it would seem that the once-sweeping at-will rule has been completely and happily erased to the extent of these wrongful discharge exceptions, and that it now effectively governs only discharges for good reasons, for no reasons, or for not-quite-good-enough or not-demonstrably-good reasons.[3] In short, the debate has shifted from the wisdom of legal protections against *wrongful* discharge to the wisdom of protections against *unjustified* discharge.

The widespread acceptance of the core wrongful discharge doctrines moves the debate onto much more favorable terrain for the defense of what remains of at-will. Many wrongful discharges implicate moral and public-regarding concerns, while, to a great extent, discharges that are simply unjustified affect only the interests of the particular employers and employees—the parties to the employment contract. Not surprisingly, the debate has taken a sharp turn in the direction of economic analysis: to what extent does the prevalence of at-will employment arrangements reflect the genuine preferences of the parties to the employment contract?

I believe that the critics of at-will have played into their adversaries' hands. To the extent that they agree to narrow the dispute to the less egregious cases of opportunistic or not-clearly-justified discharges, the critics largely concede the field to economic analysis and to the powerful paradigm of freedom of contract. If only the parties' interests are at stake, then those parties' preferences—and presumptively their expressed preferences—should prevail; arguments to the contrary are quite readily characterized, and often dismissed, as paternalistic. I do not mean to say that the battle against at-will is lost if it is carried out on those grounds; on the contrary, there are good reasons to believe that existing contractual practices do not fairly reflect employee preferences. But clearly the defense of at-will is at its strongest on that terrain. Arguments based on third-party effects and public goods pose challenges to the economic de-

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2. *See infra* text accompanying notes 49-50. It is with some reluctance that I identify scholarly commentators as "critics" and "defenders" of at-will. I realize that this terminology oversimplifies the terms of the debate, within which there is clearly a middle ground and many nuances. Indeed, at least one leading commentator has a foot firmly planted in each camp, defending at-will for mid-career employees and calling for just cause protection for late-career and some very new employees. *See* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 11 (1993). Still, it is possible and, in the present context, convenient to loosely classify the positions of many participants as either basically for or against the at-will rule and the employer discretion it supports.

3. I would include economically opportunistic discharges—discharges in breach of a tacit life-cycle wage agreement—in the category of cases still governed by at-will. To the extent that the law reflects a condemnation of such opportunistic discharges, as Stewart Schwab has argued, that doctrine is not within what I will call the "bad reasons" exceptions for which there is very broad support. *See* Schwab, *supra* note 2, at 34-38 (noting that courts have regulated opportunistic discharges by inventing, *inter alia*, doctrines like "good faith").

fense of at-will that are largely avoided by confining the debate to discharges for good reasons, no reasons, and not-good-enough reasons.

My objective here is to question the apparent consensus that existing wrongful discharge law has basically taken care of the most egregious and socially harmful abuses of employer power. I will argue that the at-will presumption continues to operate within the realm of wrongful discharge protections against employer discrimination and retaliation; it continues to surround and undermine each of those protections. The law of wrongful discharge is like a fleet of vessels, varying in size and seaworthiness, that must travel over the stormy sea of employment at will. The at-will regime poses challenges in the form of difficulties of proof, delay, and cost, any of which may shipwreck many a legitimate claim.

The surrounding at-will regime affects not only the aftermath of an arguably wrongful discharge and the availability of a remedy; it also affects employee conduct and dynamics at the workplace. To the extent that wrongful discharge law provides an undependable escape from the oblivion of the at-will presumption, it provides inadequate security against employer retaliation and leaves in place powerful incentives for employee compliance and silence; we should therefore expect to see less of the voluntary employee speech and conduct that the antiretaliation laws purport to protect. The operation of antidiscrimination law against an at-will background may tend to set in motion counterproductive incentives and tensions among employers and different groups of employees. These workplace effects of at-will would be largely invisible to legal observers, for they would not be manifested in legal disputes or even in actual discharges, wrongful or otherwise, but rather in employee silence, resentment, and suspicion. These invisible but corrosive effects should count heavily among the costs of the continuing presumption of at-will employment.

By the same token, in assessing the costs and benefits of just cause protection, we must consider the effects of just cause on existing wrongful discharge doctrines and the policies underlying them. Just cause protection is important not only in the majority of discharges that lie outside the ambit of wrongful discharge doctrines, but also in those fewer but more troubling discharges that are covered by those doctrines. Just cause protection provides a stronger foundation for the existing wrongful discharge protections that are widely accepted and even embraced in principle. This should count among the admittedly less-quantifiable benefits of a shift to universal just cause protection.

II. Employment at Will and Its Exceptions

The at-will rule in its original form was short and simple: "[M]en must be left . . . without interference . . . to discharge or retain employees at will for good cause or for no cause, or even for bad cause without

thereby being guilty of an unlawful act per se."[4] The at-will rule grew out of broad notions of employer property rights and freedom of contract. Freedom of contract, while it is no longer a constitutional barrier to most regulation of employment,[5] remains the crucial background against which all workplace regulation operates and effectively governs most of what takes place within the employment relationship.

Freedom of contract permitted employers to fire or refuse to hire union supporters, African Americans, women, or other disfavored classes.[6] As particular exercises of employer discretion provoked public disfavor, legislatures carved out exceptions from the general rule of freedom of contract, while disavowing any attempt to disrupt that general rule.[7] The first important exceptions to the employer's power to hire and fire at will were in support of the young labor movement. First in the railroad industry[8] and later in nearly the entire private sector, federal legislation prohibited employers from firing (or refusing to hire) individuals for joining or supporting a labor union.[9] The National Labor Relations Act of 1935[10] remains perhaps the most sweeping limitation on employment at will, for it prohibits employers from firing or disciplining employees not only for union activity but also for a range of peaceful protests by two or more employees, including complaints, grievances, petitions, strikes, and other activity that the employer genuinely and even reasonably perceives as contrary to its economic interests.[11]

The NLRA also contained a second and far less dramatic antiretaliation provision that prefigured numerous statutory provisions enacted in

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4. Payne v. Western & Atl. R.R., 81 Tenn. 507, 518 (1884).

5. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908) (both striking down bans on yellow dog contracts on "liberty of contract" grounds).

6. *See Coppage*, 236 U.S. at 21 (expanding the notion of freedom of contract to contracts that require as a condition of employment that the worker agree not to become a union member); Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 24 (1995) ("All of the benefits of the liberal notion of freedom of contract fell to the whites and none to African-Americans.").

7. *Cf.* H.R. REP. NO. 1147, 74th Cong., 1st Sess. (1935), *reprinted in* 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 3046, 3069 (1949) ("Nothing in this subsection prohibits interference with the normal exereise of the right of employers to select their employees or to discharge them.").

8. *See* Railway Labor Act, ch. 347, § 2, 44 Stat. 577, 577-78 (1926) (codified as amended at 45 U.S.C. § 152 (1994)).

9. *See* National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1994). *Coppage* struck down a state predecessor to § 8(a)(3) of the NLRA.

10. 29 U.S.C. §§ 151-169 (1994).

11. *See* 29 U.S.C. § 158(a)(1), (3). In NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962), for example, the Supreme Court held that an employer had violated the NLRA in firing four nonunion employees who had walked off the job without permission in protest of cold working conditions. *See generally* Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921 (1993) (discussing, *inter alia*, the economic motives behind employer avoidance of unions).

the 1970s and later: what is now section 8(a)(4) of the NLRA prohibited employers from retaliating against employees based on their filing charges or giving testimony in National Labor Relations Board proceedings.[12] The logic of the provision was obvious, making it one of the few noncontroversial provisions in a highly controversial statute: the enforcement of the Act depended almost entirely on the willingness of employees to bring complaints or to testify about employer conduct. Yet employers might be tempted to deter and punish such activity by the power and the threat of discharge. The law must protect its own proceedings and facilitate its own enforcement by prohibiting retaliation against employees who participate in these processes.

The next great reconstruction of employment law, and of the power to fire at will, began with Title VII of the Civil Rights Act of 1964,[13] which established the prohibition of employer discrimination on the basis of "race, color, religion, sex, or national origin."[14] What had begun as a battle against the legacy of slavery thus took shape in Title VII as a much broader ban on discrimination based on a variety of immutable group traits. The extension of the antidiscrimination principle to private employment, though strongly opposed at the time and not yet fully vindicated, has come to occupy a virtually unchallenged place in the national conscience.

The NLRA and Title VII can be seen as the templates for two important kinds of exceptions to employment at will: antiretaliation provisions protecting voluntary, socially-valued activities and antidiscrimination provisions prohibiting adverse employment decisions based on traits that have been but should not be the basis for group disadvantage. The latter are the most familiar and most significant: in the wake of Title VII, Congress passed the Age Discrimination in Employment Act,[15] the Pregnancy Discrimination Act,[16] and the employment provisions of the Americans with Disabilities Act,[17] all based on the antidiscrimination model pioneered by the Civil Rights Act of 1964.[18]

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12. 29 U.S.C. § 158(a)(4).

13. Pub. L. No. 88-352, § 703, 78 Stat. 241, 255-57 (codified as amended at 42 U.S.C. § 2000e-2 (1994)).

14. 42 U.S.C. § 2000e-2(a).

15. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621-634 (1994)).

16. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1994)).

17. Pub. L. No. 101-336, 104 Stat. 331 (1990) (codified as amended at 42 U.S.C. § 12112 (1994)).

18. *See* H.R. REP. NO. 485(II), 101st Cong., 2d Sess. 54 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 336 (explaining that many terms of the Civil Rights Act of 1964 are adopted by the ADA); H.R. REP. NO. 948, 95th Cong., 2d Sess. 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4752 (stating an intention to amend Title VII to make it clear that it protects pregnant women from discrimination, conforming with the original intent of the legislation); MACK A. PLAYER, EMPLOYMENT

The antiretaliation principle of the NLRA has also been echoed in a less familiar set of antiretaliation or "whistleblower protection" provisions of statutes regulating working conditions or other employer conduct. Such provisions are routinely included in federal statutes regulating terms and conditions of employment, such as health and safety laws, minimum wage and maximum hours laws, and pension laws, as well as in the antidiscrimination laws.[19] In addition, many federal laws that regulate the conduct of private firms outside the employment context, such as pollution control laws, prohibit retaliation against employees who report violations or participate in proceedings against their employer.[20] Several states have enacted

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DISCRIMINATION LAW 517 (1988) (noting that the Age Discrimination in Employment Act was founded upon the principles of the Civil Rights Act of 1964).

19. *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3) (1994) (barring retaliation based on filing a complaint or participating in proceedings related to an alleged employer violation of the Act); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d) (1994) (barring retaliation based on opposing or reporting age discrimination); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c)(1) (1994) (barring retaliation based on reporting safety violations); Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140 (1994) (barring retaliation based on claiming benefits under ERISA or participating in an investigation against an employer for an alleged ERISA violation); Migrant and Seasonal Agricultural Worker Protection Act of 1983, 29 U.S.C. § 1855 (1994) (barring retaliation based on filing complaints or participating in an investigation related to an alleged employer violation of this Act); Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2002(3) (1994) (barring retaliation based on bringing or participating in actions against an employer for the employer's prohibited use of a lie detector test); Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1) (1994) (barring retaliation based on reporting employer safety violations or participating in health and safety proceedings); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (1994) (barring retaliation based on reporting employer violations of Title VII). For a partial listing of comparable state antiretaliation provisions, see STUART H. BOMPEY ET AL., WRONGFUL TERMINATION CLAIMS: A PREVENTIVE APPROACH 8-11 nn.30-35 (2d ed. 1991).

20. For examples of federal statutes barring retaliation against employees for reporting of employer misconduct affecting the public, see Department of Defense Authorization Act of 1987, 10 U.S.C. § 2409 (1994) (protecting employees of defense contractors who report employer violations of contract law); Toxic Substances Control Act of 1976, 15 U.S.C. § 2622(a) (1994) (protecting employees who initiate or testify in proceedings against an employer for violations of the Act); Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2651 (1994) (protecting employees who report a potential violation); Major Fraud Act of 1988, 18 U.S.C. § 1031(g) (1994) (protecting employees who participate in prosecution of an employer accused of defrauding the United States); Surface Mining and Reclamation Act of 1977, 30 U.S.C. § 1293 (1994) (protecting employees who report employer violations of surface mining guidelines); Federal Water Pollution Control (Clean Water) Act of 1948, 33 U.S.C. § 1367(a) (1994) (protecting employees who report employer water pollution); Title III of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. § 265(a) (1994) (protecting employees of civilian contractors who report employer contract violations); Safe Drinking Water Act of 1974, 42 U.S.C. § 300j-9(I)(1) (1994) (protecting employees who report violations); Atomic Energy Act of 1954, 42 U.S.C. § 5851 (1994) (protecting employees who report nuclear safety violations); Solid Waste Disposal Act of 1965, 42 U.S.C. § 6971(a) (1994) (protecting employees who report violations of solid waste disposal restrictions); Clean Air Act of 1955, 42 U.S.C. § 7622(a) (1994) (protecting employees who report violations of clean air standards); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9610 (1994) (protecting employees who report or participate in investigations of employer CERCLA violations). For a partial listing of comparable state provisions, see BOMPEY ET AL., *supra* note 19, at 10 n.32.

broader "whistleblower protection" statutes providing limited remedies for employees who suffer employer retaliation for reporting specified kinds of wrongdoing to public authorities.[21]

Many of these legislative inroads on employment at will were in place when the more highly-publicized judicial assault got underway. Most relevant here are the public policy cases, which have largely escaped the economic counterattack waged on behalf of employment at will. The public policy cases fall largely into three categories: discharges based on the employee's exercise of a clear legal right (such as the filing of a workers' compensation claim);[22] discharges based on the employee's performance of a clear public duty (such as the performance of jury duty);[23] and discharges based on a refusal to violate the law (such as the refusal to engage in perjury[24] or, in one well-known case, to engage in indecent exposure by "mooning"[25]). Some cases have extended the public policy doctrine to protect employees who disclose or "blow the whistle" on illegal conduct within the organization.[26] Most of these public policy cases fit

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21. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-51 (West 1987) (prohibiting an employer from "blacklisting" a former employee with the intent of preventing him from securing other employment); ME. REV. STAT. ANN. tit. 26, § 833 (West 1988) (protecting an employee from discrimination resulting from a good faith reporting of unsafe workplace conditions); MICH. COMP. LAWS ANN. § 15.362 (West 1994) (prohibiting an employer from discriminating against an employee for reporting an alleged violation of the law by an employer). For a description of these laws and an analysis of their impact, see Terry M. Dworkin & Janet P. Near, *Whistleblowing Statutes: Are They Working?*, 25 AM. BUS. L.J. 241 (1987).

22. *See, e.g.*, Hansome v. Northwestern Cooperage Co., 679 S.W.2d 273, 276 (Mo. 1984) (en banc) (finding a cause of action for an employee who was discharged for exercising his workers' compensation right to receive medical treatment).

23. *See, e.g.*, Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (finding that dismissal of an employee for serving on a jury was against the community's interest, and awarding compensatory damages).

24. *See, e.g.*, Petermann v. International Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) (holding that the dismissal of an employee for refusing to commit perjury was contrary to public policy).

25. *See* Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1027 (Ariz. 1985).

26. *See, e.g.*, Adler v. American Standard Corp., 538 F. Supp. 572, 580 (D. Md. 1982) (holding actionable the discharge of an employee for threatening to expose antitrust violations); Gould v. Maryland Sound Indus., Inc., 37 Cal. Rptr. 2d 718, 726 (Cal. Ct. App. 1995) (upholding the public policy claim of an employee who was fired for complaining to his employer that many employees were not being paid overtime wages); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 388-89 (Conn. 1980) (holding actionable the discharge of an employee for insisting that his employer comply with state drug labelling requirements); Palmateer v. International Harvester Co., 421 N.E.2d 876, 879-80 (Ill. 1981) (holding actionable the discharge of an employee who provided information to police investigating alleged criminal violations of a coworker); Palmer v. Brown, 752 P.2d 685, 689-90 (Kan. 1988) (holding actionable the discharge of an employee for failing to promise not to report a superior's fraudulent Medicaid billing practices); McQuary v. Bel Air Convalescent Home, Inc., 684 P.2d 21, 24 (Or. Ct. App. 1984) (upholding the public policy claim of an employee fired for reporting a nursing home's violation of patient rights); Harless v. First Nat'l Bank, 246 S.E.2d 270, 276 (W. Va. 1978) (holding actionable the discharge of an employee for attempting to report illegal bank overcharges to banking authorities); *cf. Petermann*, 344 P.2d at 27 (prohibiting the discharge of an employee who

comfortably into the antiretaliation model pioneered by the federal and state legislatures: they afford a remedy for discharges based on voluntary employee conduct that society values and seeks to encourage.

These antiretaliation and antidiscrimination doctrines make up what I will call the law of "wrongful discharge": unlike the doctrines of "implied covenant of good faith" or of implied contract, each of them requires proof of a particular wrongful motive on the part of the employer. Together these wrongful discharge doctrines have dramatically altered the at-will environment. What we are left with is a version of at-will employment that differs dramatically from its forbears: employers are free to fire employees for good reason or for no reason, but not for the many bad reasons that are condemned by law.

III. The Causes and the Consequences of Consensus

The "bad motive" doctrines have garnered a surprisingly broad consensus. They occupy a patch of common ground in an otherwise sharply divided battleground. I do not mean to ignore the controversy over certain applications and extensions of the core antidiscrimination and antiretaliation concepts. There is active debate over the doctrines of "disparate impact," sexual harassment, and affirmative action under Title VII, over the demise of mandatory retirement under the ADEA, and over the application of the discrimination model to pregnancy and disability. There is plenty of controversy over the size of verdicts and the cost of litigation under the common law doctrines, sometimes including the public policy doctrine. But there remains a core of "bad motive" exceptions that are widely accepted.

Employee advocates accept the "bad motive" exceptions as a good beginning, and as the harbingers of more sweeping inroads on at-will.[27] Indeed, the rapid proliferation of "bad motive" exceptions in the 1960s and

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declined to commit perjury before a legislative committee); Trombetta v. Detroit, Tol. & I. R.R., 265 N.W.2d 385, 388 (Mich. Ct. App. 1978) (protecting an employee who refused to alter state-mandated pollution control reports); Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (holding that public policy prohibits employers from firing employees who refuse to commit illegal acts). Most, but not all, states have some form of public policy exception which often includes some whistleblower protections, but the doctrines are often quite narrow and the employee's burden is heavy. *See* BOMPEY ET AL., *supra* note 19, at 51-52. For a review of the caselaw, see *id.* at 46-53.

27. *See, e.g.*, Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 1 (1979) (predicting that the courts will abandon the principle that employment contracts are to be considered terminable at will by either party); Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 81 (1988) (finding a consensus that the doctrine of just cause will replace the doctrine of employment at will); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 498-99 (1976) (arguing that legislative encroachments on employment at will demonstrate that the common law doctrine has become anachronistic).

1970s led some optimistic observers to predict the complete demise of at-will employment in favor of a general regime of "just cause."[28] This has not come about, of course. But these commentators nonetheless regard the existing wrongful discharge regime as a partial victory over the worst consequences of employment at will. The at-will rule is perceived to be in retreat, and its impact confined to cases in which the employer's reason is simply arbitrary or insufficient to justify discharge.[29]

Most of those who defend employment at will also largely accept the existing "bad motive" exceptions.[30] With respect to the common law "public policy" exceptions, this is sometimes explicit. Judge Richard Posner, for example, has asserted that "[a] common law tort of unjust termination [is] sensibly applied to cases where a worker is fired for exercising a legal right—for example, giving truthful but damaging testimony against his employer in a suit by the government against the employer for tax evasion . . . ."[31] Even Professor Epstein would recognize a narrow public policy exception for discharges based on a refusal to commit perjury or perhaps other crimes.[32] With respect to the statutory wrongful discharge exceptions, the evidence of assent is indirect but powerful: with the voluble exception of Professor Epstein, the defenders of at-will mount no serious challenge to the numerous statutory antidiscrimination and antiretaliation exceptions.[33] In this context I believe it is fair to take silence as assent: insofar as a defense of at-will does not include a defense

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28. *See, e.g.*, Peck, *supra* note 27, at 1-2.

29. Thus Professor Weiler, in his broad-gauged reassessment of the law governing the employment relationship, treats "bad reasons" discharges as "relatively easy cases" that are largely dealt with by existing law, and then turns to the harder cases—where the employer's reason is only arguably inadequate—as the true testing ground for the case for and against at-will employment. PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 51 (1990).

30. Professor Epstein remains the voluble exception, though even he acknowledges a small role for the public policy exception. *See supra* note 1.

31. The full quote reads:

> A common law tort of unjust termination, sensibly applied to cases where a worker is fired for exercising a legal right—for example, giving truthful but damaging testimony against his employer in a suit by the government against the employer for tax evasion—*is in some states turning into a de facto requirement of showing good cause for firing a worker, even though he is an employee at will.*

RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 330 (4th ed. 1992) (emphasis added).

32. *See* Epstein, *In Defense of the Contract At Will*, *supra* note 1, at 952 & n.11.

33. The apparent acceptance extends even to the NLRA's prohibition on anti-union retaliation, which may be the most controversial of the antiretaliation provisions. Professor Epstein stands virtually alone in his criticism of this provision and in his defense of "yellow dog" contracts, by which employees agree as a condition of employment not to join a union. *See* Epstein, *A Common Law for Labor Relations*, *supra* note 1, at 1370-75 (arguing that "yellow dog" contracts should be accorded the same respect as other voluntary agreements). Other commentators, such as Posner, criticize key features of the NLRA system of labor relations, POSNER, *supra* note 31, at 325-30; Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 990 (1984), but few question the core protections of union activity against employer retaliation.

of discriminatory or retaliatory discharges, I take it to accept the existing prohibitions. What the mainstream defenders of at-will employment thus defend is a modern and more moderate version of the rule under which an employer may fire an employee "for good cause or for no cause, or even for bad cause," *except* for a variety of particular bad causes condemned by law.

It is worth considering why this is so. First, the "bad motive" exceptions do not intrude deeply into the core of what the defenders of at-will regard as legitimate employer discretion—the power to evaluate employee conduct and performance and to make judgments about what is best for the organization without being second-guessed by outsiders. A general "just cause" requirement, and the broad-gauged "good faith" doctrines, pose a broader challenge to legitimate employer discretion.

Second, the "bad motive" exceptions at their core rest on strong and widely shared moral commitments that reach well beyond the workplace. The basic antidiscrimination principle has constitutional roots and has been extended through legislation into nearly every sphere of public and economic life; its meaning is contested and its realization very partial, but its status is secure.[34] The scope of the antiretaliation principle is less sweeping, but it too resonates with a basic constitutional principle—that of the First Amendment[35]—and extends beyond the employment sphere.[36] Many of those who defend broad employer discretion nonetheless recognize limits on that discretion in some egregious cases. Moreover, as a tactical matter, the defense of at-will would be a steep uphill battle if it required a direct confrontation with the broad moral consensus behind the antidiscrimination and antiretaliation principles.[37] It is far easier to defend a narrower at-will rule that merely requires us to tolerate discharges based on reasons that are not good enough.

There is a third and related reason, I believe, for the relatively firm consensus in favor of the "bad motive" branch of wrongful discharge law. Many of these wrongful discharge doctrines protect not only the interests

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34. Professor Epstein notes the broad acceptance of the antidiscrimination laws at the very outset of his attack on those laws. EPSTEIN, *supra* note 1, at 1. Professor Brilmayer argues that the breadth and depth of this consensus provide normative support for the laws. Lea Brilmayer, *Lonely Libertarian: One Man's View of Antidiscrimination Law*, 31 SAN DIEGO L. REV. 105, 105-06 (1994).

35. *See generally* Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101 (1995).

36. For example, in the arena of landlord-tenant law, the rise of the implied warranty of habitability soon led courts and legislatures to declare a prohibition on retaliatory eviction for the exercise of these new tenant rights. *See, e.g.*, Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969) (holding that proof of a retaliatory motive would constitute a defense to an eviction action). *See also* RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT §§ 14.8, 14.9 (1977) (recognizing retaliation as a defense to eviction).

37. Professor Epstein does not shrink from this confrontation. *See* EPSTEIN, *supra* note 1.

of employees but also the interests of third parties or of the public—interests that would suffer if employers were given the full power over their employees that the pure at-will regime would afford.[38] That is true in different ways for both the antidiscrimination and the antiretaliation doctrines.

Professor Richard Epstein's attack on Title VII has spurred the growth of a rich scholarly literature on the social costs—economic, political, and moral—of employment discrimination, particularly that based on race.[39] Given the importance of jobs to economic and psychic well-being, social status, and integration into civic life,[40] employment discrimination based on immutable traits or group membership contributes to economic stratification, division, and conflict. Racial discrimination also tends to promote underinvestment in human capital, to the detriment of the economy as a whole.[41] Moreover, just as some individuals may have a "taste for discrimination," many have a "taste for equality" that would be defeated by widespread employment discrimination and its consequences. Title VII places the weight of federal law on the side of equality.[42]

The antiretaliation doctrines also support public interests beyond the employment relationship. The public costs of prohibited retaliation are easy to grasp, for example, when an employer retaliates against an employee who refuses to engage in unlawful conduct. If the underlying law—the

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38. Professor Stewart Schwab, in his very fine article on life-cycle employment, puts the public policy cases to one side precisely because of their focus on "outsiders to the employment relationship." Schwab, *supra* note 2, at 11 n.11. He returns to those cases and the issue of third-party effects in this Symposium. Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1950 (1996) (arguing that a policy legitimating judicial intervention in private employment contractual conflicts, when there are detrimental effects to third parties, is preferable to justifications of court action on public policy grounds).

39. *See, e.g.*, Brilmayer, *supra* note 34, at 117-31 (leveraging broad normative approval of antidiscrimination laws into a critique of Epstein on utilitarian, libertarian, and liberty-of-contract grounds); John J. Donahue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1584 (1992) (book review) (arguing that Epstein fails to grasp the social benefit associated with public support for Title VII); Samuel Issacharoff, *Contractual Liberties in Discriminatory Markets*, 70 TEX. L. REV. 1219, 1258 (1992) (book review) (criticizing the absence of a normative basis for Epstein's notions of liberty and aggregate social utility as they pertain to employment discrimination); J. Hoult Verkerke, *Free to Search*, 105 HARV. L. REV. 2080, 2089-96 (1992) (book review) (raising a historical challenge based on the Jim Crow South to reject Epstein's claim that at-will employment is the best means by which to end private discrimination); Ian Ayres, *Price and Prejudice*, NEW REPUBLIC, July 6, 1992, at 30, 31 (reviewing EPSTEIN, *supra* note 1) (criticizing Epstein's "specious interpretation of history" advanced to denote the effects of racial discrimination).

40. WEILER, *supra* note 29, at 63-67.

41. *See* David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1626-27 (1991).

42. There are also redistributive and remedial arguments for Title VII and similar laws. These arguments, along with the "social cost" arguments, disrupt the economic paradigm of freedom of contract.

law against perjury or fraud or pollution, for example—makes sense and promotes public purposes, then so does the prohibition of employer coercion of the unlawful conduct. Similarly, many antiretaliation provisions protect employees who disclose illegal conduct. To the extent that law enforcement depends on, or is aided by, voluntary employee informants and complainants, retaliation against those employees undermines law enforcement. A thorough justification of these antiretaliation provisions would require a defense of the underlying regulations.[43] The present analysis offers a more limited defense: assuming that the underlying regulations serve the public good, the protection of employee informants from employer retaliation serves the same public good.[44]

The most important remaining antiretaliation provision protects conduct that the employee has a right to engage in but that perhaps less obviously serves public objectives: the NLRA's prohibition on discrimination against union activity.[45] Still, employee free choice regarding unionization lies at the foundation of the entire existing legal regime for the governance of labor-management relations; employee free choice, at a minimum, is deemed necessary to promote industrial peace. Much labor law is under political scrutiny, but the core premise of employee freedom to choose unionization is not up for grabs. Unless we revisit that entire

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43. The theory of public choice would militate for skepticism (at best) about the public-regarding ends and means of many of these laws. *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); DANIEL A. FARBER & PHILLIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991). Public choice theory has enliveued scholarly debate over such matters, but consideration of these issues is well beyond my present objectives. I take the legitimacy and value of the underlying laws—*e.g.*, laws against perjury or pollution—as given.

44. That does not mean that any and all remedies would, on balance, serve the public interest. It is certainly possible to over-encourage employee production of information about their employers.

45. 29 U.S.C. § 157 (1994). In this Symposium, Professor Keith Hylton undertakes to justify the prohibition of yellow dog contracts ou efficiency grounds, without reference to goals of industrial peace, workplace democracy, or redistributiou. Keith N. Hylton, *A Theory of Minimum Contract Terms, with Implications for Labor Law*, 74 TEX. L. REV. 1741, 1763-69 (1996). He argues effectively that without a ban on yellow dog contracts, the employer could secure the waiver of employees' right to organize too cheaply because of the necessity and the difficulty of coordinating bargaining among employees. *Id.* at 1764, 1768. Hylton's argument is an elaboration and a specific application of the pervasive problem of "public goods" within the workplace. *See also* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 8-9 (1984) (discussing the need for collective bargaining to remedy safety concerns which would not be addressed if workers contracted individually); WEILER, *supra* note 29, at 75 (suggesting that unions are necessary to secure the public goods workers could not obtain through individual negotiation). My argument here is neither depeudent on nor inconsistent with the proposition that § 7 serves the public interest in allocative efficiency; Michael H. Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. 2767, 2789-90 (1991) (reviewing WEILER, *supra* note 29) (arguing that intervention in labor disputes is justified on neoclassical efficiency grounds when public goods are in question). Section 7 is conventionally and explicitly justified in terms of public-regarding purposes such as the advancement of industrial peace and democracy (as well as, perhaps, redistributive purposes). *See* Estlund, *supra* note 11, at 970-77. To the extent that § 7 and the right to engage in union activity advance those purposes, § 8's prohibition on employer retaliation does so as well.

regime—and I do not intend to do so here—we must acknowledge that employer retaliation against employees who exercise that choice undermines the objectives of national labor policy.[46]

There is thus a fairly wide consensus among the leading commentators on at-will employment that the law has legitimately and more or less adequately taken care of the most egregious unjustified discharges—those that are based on particular discriminatory or retaliatory motives that society has explicitly disapproved. Both critics and supporters of the modern at-will regime tend to regard the at-will rule, and the debate over the at-will rule, as concerning a different set of cases in which the employer's reason for discharge is not particularly bad, or at least not illegal, but is arguably arbitrary or inadequate.

Once the debate is framed in these terms, it becomes readily amenable to economic analysis: the costs and benefits of what remains of the at-will rule and of its just cause alternative appear to be basically economic in nature. Most crucially, those costs and benefits accrue to the parties to the employment contract. Much of the debate has thus revolved around the contractarian model and its standard economic qualifications—information costs and disparities, collective action problems within the workforce, and other transaction costs.[47]

The early challenges to at-will employment produced a near consensus that the rule was unfair and outmoded.[48] These critics argued that the prevalence of at-will employment reflects the enormous inequality in bargaining power between employers and employees, that it gives too little

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46. This proposition is not entirely circular: it would be possible to recognize an employee "right" to choose unionization—a right against government interference—without at the same time prohibiting employer retaliation based on that choice; that seems to be Professor Epstein's preferred regime. *See* Epstein, *A Common Law for Labor Relations*, *supra* note 1, at 1370. Professor Hylton and others show why this regime might lead to allocative inefficiency even considering only interests within the workplace. *See* Hylton, *supra* note 45, at 1758, 1763-65. I argue that this regime would also sacrifice public interests outside of the workplace.

47. Professor Weiler offers a thoughtful assessment of the economic arguments for and against at-will in his book, GOVERNING THE WORKPLACE, *supra* note 29, at 48-104. What follows in the text is a very brief digest of those arguments.

48. *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, 1405 (1967) (explaining that because modern technology requires ever-increasing specialization, employees are becoming less mobile and increasingly bound to their employers, thus making an employee a "docile follower of his employer's every wish"); Mary A. Glendon & Edward R. Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C. L. REV. 457, 473-74, 484 (1979) (hypothesizing that the late 20th century has seen a strengthening in the importance of work ties at the same time family ties have lessened, and that courts are gradually responding to this phenomenon by finding ways around the at-will rule); Peck, *supra* note 27, at 49 (arguing that the at-will rule "does not accord human dignity the value it deserves" and should be entirely replaced by a just cause regime); Summers, *supra* note 26, at 483 (contrasting the broad protection given to employees covered by collective agreements with the lack of security of employees at the same firm who are not so covered).

protection to workers' stakes in their jobs, and that it countenances a significant number of precipitous, ill-informed, or opportunistic discharges. They argued for the recognition of a kind of property right based on the investment that individuals make in their jobs and on the catastrophic consequences of discharge. These critics also appealed to basic notions of fairness and to procedural norms developed in the public sector under the Due Process Clause.

Supporters of at-will responded, and laid down the terms of the current debate, with a vigorous defense of the market and the choices it generates.[49] In a competitive labor market, they argue, arbitrary discharges are costly to the employer and therefore rare. They argue that the at-will rule functions largely as a shield against erroneous and costly second-guessing of employers' judgments about employee performance and conduct, particularly when employee "shirking" or misconduct is difficult to detect. They reject the claim of unequal bargaining power, arguing that employees are fully capable of demanding protection against the risk of unjustified discharge by choosing employers who offer such protection. However, given the costs of such protection to the employer, employees would have to pay a premium for just cause protection; and given the low risk of unjustified discharge, for most employees such protection is simply not worth the price. It is therefore probable that the continuing currency of at-will employment simply reflects the preferences of the parties, and that imposition of a just cause alternative would make both employers and employees worse off.

The critics of at-will counterattack on two fronts: they challenge the effectiveness of the external labor market in vindicating employee preferences in light of inadequate information about an employer's practices

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49. *See, e.g.*, POSNER, *supra* note 31, at 329-30 (arguing that labor market pressures effectively deter most arbitrary discharges); Epstein, *In Defense of the Contract At Will*, *supra* note 1, at 969-77 (arguing that at-will employment usually works for the benefit of both sides); Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1131-37 (1989) (marsballing neoclassical economic analyses to reject "paternalistic" arguments in favor of a legally imposed just cause requirement); Jeffrey L. Harrison, *The 'New' Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327, 331-45 (1984) (predicting increased costs to employees, employers, and consumers as a consequence of a sbift in discharge rights); Richard W. Power, *A Defense of the Employment at Will Rule*, 27 ST. LOUIS U. L.J. 881, 889 (1983) (suggesting that adopting a just cause rule would subject employers to voluminous record keeping). More recent contributions to this literature include several participants in this Symposium: Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901, 1923 (1996) ("Default rules, like the at-will rule, allow individuals freedom to find employment situations which more closely approximate their preferences." (foomote omitted)); J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 842 (arguing that courts and legislatures "should reject mandatory rules and reaffirm the at-will doctrine"); *cf.* Schwab, *supra* note 2, at 47-51 (advancing these arguments within the narrower realm of the mid-career employee, who faces little risk of opportunistic discharge, but who poses a serious risk to the employer of "shirking").

regarding discipline and discharge, biases in individuals' decisionmaking and assessment of risk, and the high cost of exit, particularly to the career employee. These critics emphasize instead the importance of the internal labor market, workers' investment in human—and sometimes firm-specific—capital, and the life-cycle wage model, as well as the related problems of public goods, employer opportunism, and the virtues of employee voice. These arguments undermine the claim that actual contractual practices, and the prevalence of at-will employment contracts, reflect the genuine preferences of employees.[50]

This debate has immeasurably advanced the understanding of employment contracts and their legal regulation. But it is based on the premise that we have taken care of the recognized social problems of discrimination and retaliation through existing wrongful discharge laws, and that all that is at stake in the debate over at-will employment is the middle ground of not-clearly-justified discharges affecting only the individual worker and her employer. I want to dispute that premise. I will argue that the at-will regime exists not just alongside the established wrongful discharge laws, but underneath those laws. It governs not only the residual cases to which existing wrongful discharge laws do not apply; it also undermines and distorts the operation of those laws. To the extent that this is true, the economic defense of at-will is incomplete and vulnerable.

IV. The Continuing Influence of Employment at Will on the Effectiveness of Wrongful Discharge Law

Proof of a wrongful discharge requires the plaintiff to prove one particular unlawful motive on the part of the employer, of whom the law otherwise requires no reason at all. The at-will regime is thus actively and aggressively present in every wrongful discharge dispute. What is therefore at stake in the debate over the modern version of at-will employment

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50. *See, e.g.*, WEILER, *supra* note 29, at 71-78 (evaluating the hypothesis that workers prefer to bear the risk of at-will employment and concluding that the labor market functions improperly in this context); Gottesman, *supra* note 45, at 2771-93 (emphasizing the "public" nature of most workplace goods as an explanation for workers' failure to negotiate successfully for those goods without union representation); Schwab, *supra* note 2, at 24-28 (arguing that employees invest heavily in their careers, leaving them vulnerable to employer opportunism); Cass R. Sunstein, *Rights, Minimal Terms, and Solidarity: A Comment*, 51 U. CHI. L. REV. 1041, 1050-57 (1984) (arguing that the freedom-of-contract justification for employment at will is weak because employers will pass the costs of "for cause" provisions on to employees, employees suffer from "information failure," and employees will often make bad bargains); Steven L. Willborn, *Individual Employment Rights and the Standard Economic Objection: Theory and Empiricism*, 67 NEB. L. REV. 101, 127-32 (1988) (arguing that government intervention is justified when there are impediments to the free flow of information to employees); Samuel Issacharoff, *Reconstructing Employment*, 104 HARV. L. REV. 607, 619-20 (1990) (reviewing WEILER, *supra* note 29) (emphasizing the life-cycle wage model and arguing that the neoclassical market model overstates the mobility of employees in response to job opportunities).

is the efficacy of each of the policies underlying the existing and largely uncontested "bad motive" exceptions to the at-will regime.

This is true for both of the two large categories of wrongful discharge doctrines: those that prohibit discrimination based on some trait or group membership, such as race, sex, religion, ethnicity, age, or disability, and those that prohibit retaliation for some socially valued activity, such as the exercise of a legal right or duty or the disclosure of wrongful conduct. The efficacy of both types of wrongful discharge doctrines is undermined by problems traceable to the surrounding at-will environment. One set of problems is common to both the antidiscrimination and antiretaliation areas; other problems are peculiar to each.

A. *The Generic Problems of the Wrongful Discharge Model: Burdens of Proof and of Process*

The fundamental problem with the existing "bad motive" exceptions to employment at will is the inherent difficulty of proving that bad motive. The burden invariably lies with the employee (or an agency on the employee's behalf) to prove a particular prohibited motive on the part of an employer who is almost certainly better advised than the employee and who creates and controls virtually all of the relevant documents and employs most of the potential witnesses.

This burden is all the greater for imperfect employees who have made mistakes, fallen short of the employer's standards on occasion, or sometimes been absent or late or irritating. Although the law protects imperfect as well as perfect employees from discrimination and retaliation, the burden of proving the bad motive may be overwhelming for the former. The problems of proof are further magnified to the extent that employers and their supervisors are reasonably well-educated about the employment laws, reasonably cautious in avoiding statements evidencing bad motives, and reasonably diligent in documenting employee shortcomings. 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.[51]

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51. This proposition suggests two rejoinders to my thesis: First, if employers can so easily defeat the employee's proof of motive in a wrongful discharge case, won't they also easily meet their burden under a just cause standard? If this were the case, the whole debate over at-will would be basically moot. However, the defenders of at-will believe—correctly, I think—that there is a very significant difference between rebutting an employee's claim of unlawful motive and establishing good cause. For example, *St. Mary's Honor Center v. Hicks*, discussed *infra* in the text accompanying note 53, establishes that a Title VII plaintiff cannot prevail simply by discrediting the employer's proffered, legitimate reason for discharge; she must still show that the actual motive was discriminatory. The second rejoinder is similar but more challenging: if existing wrongful discharge law leads employers to prophylactically demand and document good reasons for discharge, then, contrary to my claim that

But in fact the employer need not document any legitimate motive; that is what the at-will rule means in the context of a wrongful discharge action.[52] This point was driven home in the context of Title VII by the Supreme Court's recent decision in *St. Mary's Honor Center v. Hicks*.[53] The plaintiff in *Hicks* had made out a prima facie case of race discrimination: he was black, he was fired, and he was replaced by a white employee.[54] This showing shifted to the employer the burden of coming forward with a nondiscriminatory explanation for the decision. The employer did so, but Hicks refuted this explanation to the satisfaction of the lower court, leaving his prima facie case unanswered. The Supreme Court held that this was not enough to establish Title VII liability; the plaintiff must still prove the presence of a discriminatory motive.[55] Whether that interpretation of Title VII is right or wrong (and it is not obviously wrong[56]), it vividly illustrates the gravitational pull of the at-will presumption even within the most entrenched province of wrongful discharge law.[57] When liability depends on proof of a particular bad reason for discharge, "no reason" or even a demonstrably false or fabricated reason is good enough for the employer to escape liability.

The at-will rule continues to rear its head even after proof of an unlawful motive.[58] For once an employee has shown that her discharge was motivated in part by an unlawful consideration such as race, sex, or protected activity, the employer still has an opportunity to prove that it would have made the same decision anyway for permissible reasons.[59]

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at-will undermines wrongful discharge law, wrongful discharge law has undermined and effectively destroyed at-will. I will respond to that claim below.

52. A similar argument is developed in William R. Corbett, *The "Fall" of* Summers, *the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305 (1996). Professor Corbett explores in much more detail than I do here the many ways in which Title VII *doctrine* has subordinated the prohibition of discrimination to the preservation of employment at will. My point here is compatible but different: while doctrinal moves have surely enhanced the continuing power of the at-will presumption, to a great extent the power of employment at will is inherent in the very structure of wrongful discharge law as a collection of exceptions to at-will that are triggered by particular disfavored grounds for decision.

53. 509 U.S. 502 (1993).

54. This is the prima facie showing required under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to shift the burden of production to the employer.

55. *Hicks*, 509 U.S. at 511.

56. For a thoughtful defense of this much maligned decision, see Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229 (1995).

57. *Cf.* Corbett, *supra* note 52, at 341-59 (arguing that *Hicks* is a grossly unjustified subordination of antidiscrimination policies to employment at will).

58. This point is amplified in Corbett, *supra* note 52, at 337-39.

59. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 244-45 (1989) (finding that an employer may avoid liability if it shows it would have made the same decision even absent the discriminatory motive); NLRB v. Transportation Management Corp., 462 U.S. 393, 399-401 (1983) (noting that an employer may avoid reinstatement and backpay—the only normal remedies in anti-union discrimination

These are the "mixed motive" cases. As a justification for giving the unlawfully motivated employer this opportunity to escape liability, the Supreme Court has cited "employer prerogatives,"[60] which are epitomized by employment at will. Employment at will also makes this employer defense an especially potent weapon against plaintiffs, for employment at will means that "permissible reasons" need not be fair or just or reasonable, but simply not unlawful. Employment at will means that the entire universe of foolish, petty, unfounded, or arbitrary reasons for discharge—as long as they are not unlawfully discriminatory or retaliatory—are available to the employer to excuse a discharge that has already been proven to be motivated in part by unlawful reasons.

The problems of proof are magnified by the procedural hurdles that employees face in making their claims. Some wrongful discharge doctrines are enforced through administrative procedures, while others are enforced through a private right of action; Title VII combines the two. But either sort of remedial scheme poses hurdles that inevitably screen out many meritorious claims and that undermine the underlying antidiscrimination or antiretaliation policies.

In the case of administrative schemes, an agency may reject many meritorious but hard-to-prove cases, particularly when enforcement resources are tight.[61] For the vast majority of these statutory schemes that afford no private cause of action, the agency's decision not to prosecute is the end of the matter. Perhaps in part for that reason, most of these provisions are virtually unknown to employees and even lawyers. Some combination of employee ignorance about these provisions, short limitations periods, inadequate agency resources, lack of political will, and

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cases—if it shows it would have made the same decision even absent anti-union animus); *see also* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-87 (1977) (finding an employee's rights under the First Amendment are not violated when a government employer shows it would have made the same decision even absent protected speech).

60. The Court stated in *Price Waterhouse* that

> [t]o say that an employer may not take gender into account is not, however, the end of the matter . . . . The other important aspect of the statute is its preservation of an employer's remaining freedom of choice. We conclude that the preservation of this freedom means that an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person. The statute's maintenance of employer prerogatives is evident from the statute itself and from its history, both in Congress and in this Court.

Price Waterhouse, 490 U.S. at 242. *See generally* Corbett, *supra* note 52, at 337-39.

61. The difficulty of proving reprisals—particularly the causal link between the protected disclosure and the adverse action—has greatly limited the impact of the Whistleblower Protection Act for federal employees. *See* U.S. GEN. ACCOUNTING OFFICE, WHISTLEBLOWER PROTECTION: DETERMINING WHETHER REPRISAL OCCURRED REMAINS DIFFICULT 13-14 (1992). Of 805 complaints received by the Office of Special Counsel under the Act from July 1989 through September 1991, 72.3% were dismissed for insufficient evidence; 13.5% were "disproved." Only 3.4% resulted in "corrective action." *Id.* at 13.

vagaries of proof have rendered many statutory antiretaliation provisions virtually dormant.[62] An important example is Section 11(c) of the Occupational Safety and Health Act, which prohibits retaliation against employees who report workplace health and safety violations.[63] Most workers are unaware of this section's protections, so there are few complaints, only a tiny fraction of which result in any relief.[64] Even administrative processes that are comparatively well known, such as those of the EEOC, have pitfalls that either delay or deny a remedy in many meritorious cases.[65]

In the case of private rights of action under statutes and common law doctrines (such as the public policy torts), the difficulty of establishing motive, together with the relatively limited economic damages that most plaintiffs can hope to recover, make it difficult for middle- and lower-income plaintiffs to find a lawyer. The typical discharged (and probably unemployed) employee cannot afford to pay a lawyer, and the likely recovery in most cases does not promise a big contingency fee. The normally modest recoveries, difficulties of proof, delay, and expense of litigation make many of these protections the near-exclusive province of professionals and white-collar employees. Indeed, while employers continue to deplore the rising cost of wrongful discharge litigation, plaintiffs' actual success rates and recoveries in these cases appear to be quite modest.[66]

I want to stress the extent to which all of these problems are traceable to the at-will background against which these wrongful discharge doctrines

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62. Of 16 federal health and safety statutes with antiretaliation provisions for private-sector employees, only 3 generated more than 45 claims in 1985; 12 of them generated fewer than 5 complaints. *See Employee Health and Safety Whistleblower Protection Act: Hearings on S. 436 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 116, 183-84 (1989) [hereinafter *Hearings*] (report by Eugene R. Fidell).

63. 29 U.S.C. § 660(c) (1994).

64. OSHA has the sole power to enforce the whistleblower protection provision, 29 U.S.C. § 660(c)(2), and "in the past OSHA has not been a diligent protector of employee whistle-blowers." Thomas O. McGarity, *Reforming OSHA: Some Thoughts for the Current Legislative Agenda*, 31 HOUS. L. REV. 99, 115 (1994). For example, of 3600 complaints filed in fiscal year 1989, 31% were dismissed by OSHA out of hand, 38% were dismissed after an initial screening, 15% were withdrawn by the complainant, and 16% were deemed meritorious. *See generally* THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION 336-40 (1993). Only some smaller number of these are referred to the Solicitor of Labor for civil prosecution, which is the only means of enforcement. *Hearings*, *supra* note 62, at 184.

65. *See* Michael Selmi, The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law 9-17 (1996) (unpublished manuscript, on file with the *Texas Law Review*).

66. *See* JAMES N. DERTOUZOS & LYNN A. KAROLY, RAND INST. FOR CIVIL JUSTICE, LABOR MARKET RESPONSES TO EMPLOYER LIABILITY 36 (1992) (noting that employers' "average liabilities and litigation costs [due to wrongful discharge suits] are dwarfed in comparison with standard expenses incurred as a result of labor turnover").

play out. The at-will rule presumptively concedes to the employer the power to fire at any time for any reason; 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.

B. The Effect of At-Will on Antiretaliation Doctrines and the Protection of Voluntary, Socially Valued Conduct

The at-will doctrine also has some consequences that are peculiar to either the antidiscrimination or the antiretaliation field. Let me begin with the antiretaliation doctrines, which generally protect some voluntary activity on the part of the employee that society wishes to encourage, such as discussions of unionization or the disclosure of unsafe conditions or unlawful activity.[67] Most of these protected employee activities threaten the interests of the employer, or are thought to do so; otherwise it would not be necessary to prohibit employer retaliation. Moreover, most of these employee activities chiefly benefit others—other employees, customers, the public at large. They are, in short, public goods that are likely to be "underproduced" even without the threat of retaliation.

To the extent that the law does not effectively remedy or deter retaliation—and I believe that is the net effect of the various hurdles to relief described above—then employees are likely to be deterred from engaging in the socially valued activity that the law purports to protect. In this way, I believe the powerful and often overpowering pull of at-will undermines each of the policies underlying the antiretaliation laws.

Let me suggest an analogy to freedom of speech as against the government. The analogy is in fact quite apt, because many of the antiretaliation laws do protect employee expression of some kind against retaliation by the employer, or the "government" of the workplace. Suppose the government were prohibited from retaliating against its citizens because of their criticism of public officials, but were otherwise free to punish them for "good reason, bad reason, or no reason at all," without notice or a hearing. The citizen who was thrown in jail, and who believed it was based on her political dissent, could bring a lawsuit; if she proved that the government's motive was to censure protected speech, she would be released from jail and awarded damages. Would the cautious citizen feel free to speak against the government? The answer seems clear: without basic due process protections, free speech rights would be extremely vulnerable. It seems equally clear to me that the existing wrongful discharge doctrines, and the rights of freedom of speech and action that they purport to secure,

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67. *See generally* Estlund, *supra* note 35.

are undermined by the absence of a basic regime of substantive and procedural fairness in the workplace.

The analogy also suggests two further thoughts: first, if the problem with existing wrongful discharge doctrines is the at-will regime's lack of substantive and procedural guarantees of fair treatment, then the solution may be some form of "due process." That, of course, is exactly what a "just cause" requirement, together with some reasonably expeditious enforcement mechanism, would accomplish. Second, if due process is an effective precaution against wrongful discharge (and I believe that is the case for some forms of due process—particularly those that require a prompt decision by a fair outside decisionmaker), then it is a precaution that employers will take on their own if wrongful discharges are made sufficiently costly. I want to return to this proposition after considering the antidiscrimination doctrines, for it applies to the full range of wrongful discharge doctrines.

To the extent that problems of proof and of procedural friction do, as I claim, undermine the effectiveness of legal remedies against retaliation, a sensible employee will be even less willing than she would otherwise be to speak out or act in a way that largely benefits others and risks employer reprisals. Employees who are vulnerable to summary discharge without cause are less likely to criticize their supervisors, to question workplace conditions or methods of production, or to seek better mechanisms for employee participation, much less to disclose or refuse to engage in illegal conduct.[68] To the extent these difficulties are traceable to the surrounding at-will environment, as I believe they are in part, this is a significant cost of the at-will regime that is ignored in the present debate.

This proposition profoundly unsettles the foundations of the economic defense of at-will. For example, the defenders argue that the number of unjustified discharges is actually quite low, and that the adoption of a just cause requirement would impose significant costs on employers with very little payoff in avoidance of arbitrary discharges.[69] But suppose that part of the explanation for the relatively small number of arbitrary discharges is that employees are choosing not to engage in socially valued conduct that might get them fired? That employees' vulnerability to discharge leads

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68. *See* Willborn, *supra* note 50, at 131 ("A minimal term requiring cause for discharge, for example, would be likely to cause workers to increase the use of voice to communicate with the employer (because they would be less fearful of discharge when they expressed displeasure), and to decrease correspondingly the use of exit."). Willborn is concerned here with employees' willingness to voice their own interests, and generally with the efficiency arguments for and against just cause protection; but the same claim is even more powerful in the context of employee "voice" and action that mainly benefit the public at large.

69. *See, e.g.*, POSNER, *supra* note 31, at 329-30; Freed & Polsby, *supra* note 49, at 1131-37; Harrison, *supra* note 49, at 331-45; Morriss, *supra* note 49, at 1925-27; Verkerke, *supra* note 49, at 842.

them to comply with unjustified employer demands? If that is true, then the prevalence of unjustified discharges may be only a small part of the picture that is relevant to the assessment of at-will employment and its costs.[70]

Along similar lines, the defenders of at-will claim that employees accurately perceive a low risk of discharge; the employee herself can minimize the risk by behaving herself and complying with the employer's rules and standards of performance. The well-behaved employee who plans to meet employer demands will appropriately discount the value of just cause protection and trade off that protection for higher wages or other benefits that she values more highly.[71] Indeed, if the law then imposes just cause protection on the parties, the employer will adjust the remainder of the employment package, and the employee will be forced to give up something she values more in exchange for this less valued protection. But what if the employer's tacit rules and expectations for employees prohibit disclosure of illegal activity or discussion of unionization, for example? The employee may minimize the risk of unjustified discharge in part by complying with employer demands that harm the public interest. Even if the at-will bargain accurately reflects the employer's and the employee's preferences, the public or third parties will suffer.[72]

Finally (and I realize I am making the same basic argument in different forms), one argument in defense of at-will is that it serves to protect the employer's good faith judgment about employee "shirkers"—those who underperform, and particularly those who do so in a way that is difficult to monitor or document.[73] The at-will rule allows the employer to fire

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70. Professor Morriss discusses the problem of "alienated" employees as the only source of public costs associated with unfair discharges. *See* Morriss, *supra* note 49, at 1928-29. That is obviously not the only or perhaps even the most important social cost of unfair discharges, as Professor Morriss himself acknowledges when he concedes that a just cause rule may produce "less perjury," for example. *Id.* at 1918. In the latter passage, he views this gain as irrelevant to the welfare of employees and thus unhelpful to the primary critiques of at-will. *Id.*

71. *See, e.g.*, Morriss, *supra* note 49, at 1921. Professor Morriss bolsters this argument with empirical evidence that employees generally place less value on complete job security ("no chance of being fired") than on several other job characteristics, including high income and meaningful work. Of course, "no chance of being fired" is far more job security than "just cause" would afford, and more than most rational employees would want (since one's coworkers would presumably enjoy the same protection). In any event, this empirical evidence does not meet my argument that employees may accurately perceive a low risk of discharge, and thus discount the value of job security, to the extent that they plan to comply with even illegitimate employer rules and expectations regarding socially valued activity.

72. That is, of course, the widely accepted justification for many of the antiretaliation doctrines and the public policy tort doctrine. *See supra* notes 37-46 and accompanying text. But if those doctrines do not afford dependable and prompt protection against discharge, then the incentives for employee silence and compliance with unlawful employer demands remain.

73. *See* Schwab, *supra* note 2, at 22 ("The heart of the employment-at-will argument is that proving cause under what is essentially an unverifiable agreement against shirking places too great a burden on employers, preventing them from effectively using efficiency wages to deter shirking.").

the shirker without having to document the inevitably incomplete and subjective basis for the decision; as a consequence, at-will provides better incentives against shirking, particularly in jobs in which performance is difficult to measure, than would a just cause rule. My claim is exactly parallel: at-will allows the employer to fire the *dissenter* (who also fails to comply with the employer's demands) without having to document the inevitably obscure basis for the decision; as a consequence, at-will provides incentives for conformity with employer demands and against dissent.

The significance of these arguments depends largely on facts about employer and employee behavior and about the importance of the employee activity that these doctrines protect. Such facts are vastly more difficult to adduce than the assumptions that underlie most of the economic debate. How much illegal conduct do employees observe and fail to report, and how serious is this illegal conduct? How significant is the fear of employer retaliation in deterring them from reporting it? If it is significant, to what extent is it attributable to weaknesses in the enforcement mechanisms for antiretaliation provisions, and to what extent would the fear be reduced by a just cause regime? Similarly, to what extent does fear of retaliation deter union activity and interest in unionization? And to what extent could a different enforcement regime founded on the basis of just cause alleviate that fear?[74]

These are tremendously difficult empirical questions.[75] My belief that they are genuinely important questions, and that the chilling of valued employee activity figures prominently among the costs of at-will employment, is itself based to a great extent on some spare assumptions about human behavior: I assume that people, including employees, respond in a basically rational way to the incentives that face them. Speaking out or acting in the public interest or in the interest of third parties (which is mostly what the law protects) promises little personal benefit; it also often appears likely to provoke employer hostility. In an at-will regime with a wrongful discharge overlay, any resulting retaliation is likely to be very difficult to prove and to remedy. In that environment only the rare heroic (or foolhardy) employee will take the risk. These claims, if correct, render the at-will rule a serious threat to the interests advanced by the antiretaliation laws.

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74. Of course, a legal mandate of just cause would also remove some of the incentive to unionize. On balance, however, I believe that greater security against retaliation would do more to protect than to dampen union organizing activity.

75. I examine the empirical evidence I have found in Estlund, *supra* note 35, at 119-24. I have also undertaken, with the support of the Fund for Labor Relations Studies, a preliminary empirical study—a "soft" empirical study based at least initially on nonrandom and nonrepresentative interviews—of employee perceptions of their freedom of expression in the workplace and of the threat of employer retaliation for legally protected speech.

The costs of employee fear and silence go beyond the particulars of these laws. The push for greater employee participation at work—championed in principle by nearly everyone in the labor relations field—cannot succeed unless employees feel free to offer criticisms and to seek improvements in workplace decisions and in participatory mechanisms.[76] And in an era of deregulation and defunding of the regulatory enforcement apparatus, the enforcement of such workplace regulations as remain will be increasingly dependent on employee monitoring and complaints. The tragic 1991 fire in a North Carolina poultry plant brought to light the infrequency and inadequacy of workplace safety inspections, as well as the disastrous costs of employee silence in the face of manifestly dangerous conditions.[77] I do not know if these kinds of costs—even if they can be fairly attributed to the at-will regime that surrounds existing protections—can be quantified or brought into the economic calculus of at-will and just cause. But they cannot be ignored.

C. *The Effects of At-Will on Antidiscrimination Doctrines and on Equality Within the Workplace*

Just as many of the antiretaliation doctrines form a kind of quasi-First Amendment doctrine for the workplace, the antidiscrimination doctrines form an "equal protection doctrine" for the workplace. And we can perform the same mental experiment that I suggested above: would equal protection law, and the prohibition against invidious class-based discrimination by the state, be effective without the independent due process protections of the Fifth, Sixth, Seventh, and Fourteenth Amendments? Again, I would argue that procedural protections against government arbitrariness and overreaching may do as much to secure citizens against invidious discrimination as do the explicit commands of the Equal Protection Clause and the ability to challenge discriminatory government conduct. In the at-will workplace—that is, without those basic guarantees of rationality, fairness, and process—the antidiscrimination laws stand on shaky ground.

Moreover, the foregoing section articulates another important way in which the at-will background undermines Title VII and similar antidiscrimination laws: each of those laws depends largely on the willingness of employees to come forward with complaints and evidence of discrimination. But if the protection of employees against employer retaliation is weakened by the at-will background, employees will be reluctant to come

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76. *See id.* at 106-14.

77. *See* Ronald Smothers, *25 Die, Many Reported Trapped, As Blaze Engulfs Carolina Plant*, N.Y. TIMES, Sept. 4, 1991, at A1, B7 (reporting on the fire, the unsafe conditions at the plant, and the lack of safety inspections, and quoting workers who knew of the dangers).

forward with complaints until they have quit or been fired and will be reluctant to testify for coworkers who do complain.[78]

But I want to explore another dimension of the problem of workplace equality in an at-will environment. The superimposition of the antidiscrimination laws on top of an at-will background not only undermines the efficacy of those laws; it may also contribute to perverse employer incentives and to divisive tensions between the members of "protected groups," such as women and minorities, and other employees. While the latter normally have no recourse at all against an unfair employment action, including discharge, the former may have a potential remedy *if* they plausibly claim discrimination. That contrast may lead employers to be more cautious, at least superficially, in their treatment of minorities and women; it may lead minorities and women to see discrimination in ambiguous cases. It may also lead other employees, themselves exposed to the full brunt of the at-will regime, to see "special treatment" of women and minorities when there may in fact be only an inadequate remedy for discrimination and superficial efforts by the employer to avoid litigation and liability. These observations are speculative and tentative, of course; I do not think they are far-fetched.

Let us look at the present legal environment through the eyes of a prospective complainant. In the at-will workplace, simple negligence, lack of notice or of warnings, personal favoritism, pique, or sloppiness in evaluation or investigation gives no basis for relief. The at-will employee must make a plausible claim of unlawful discrimination (or retaliation) in order to secure any impartial review of her otherwise unappealable termination. Those who fit into one of the classes protected by antidiscrimination law—mainly women, minorities, older, or handicapped workers—may consequently see and claim discrimination when there is simple garden-variety unfairness. Certainly if they consult an attorney about their legal options, they will be encouraged to look for signs of discrimination. So the gap between the protections of the antidiscrimination laws and the non-protections of at-will may push employees to claim discrimination in response to perceived unfairness of any kind.

How are employers likely to react to discrimination claims and to the prospect of such claims? Once they have hired a member of a protected group, they should seek to avoid obvious signs and statements of discrimination by managers and supervisors, and to engage in some defensive

78. There is some empirical evidence for this proposition, and for the corollary proposition that employees protected by "just cause" should be more willing to make complaints: Title VII complaints by *current* employees (as opposed to employees who have quit or been fired) are more frequent in federal government workplaces, where "just cause" is the rule, than in at-will workplaces. John J. Donahue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1031-32, 1032 n.145 (1991).

documentation and process so as to head off or defeat discrimination claims. In an otherwise at-will environment, we would expect litigation-conscious employers to give more process and more leeway, at least superficially, to employees in protected groups. It is thus increasingly rare to find "smoking gun" evidence of discrimination, or to find an employer who does not have some evidence—at least enough to muddy the waters—of some other reason for an allegedly discriminatory firing or refusal to hire or to promote.

Defensive measures by employers will make it more difficult for employees to prevail even on meritorious discrimination claims; but such measures will hardly avert all litigation (particularly given the incentive for employees to see and claim discrimination). An accusation of discrimination is particularly likely to provoke a vigorous and costly fight, at least in close (*i.e.*, most) cases; such an accusation raises the temperature of an employment dispute and puts the moral reputation of the employer and its agents on the line. Far more than a claim of "no just cause" or the like, a claim of discrimination damages the prospects for an amicable resolution or a mending of the employment relationship.

We can anticipate other consequences as well. Professors Donahue and Siegelman have shown that the antidiscrimination laws are much more likely to be enforced at the discharge point than at the hiring point.[79] They argue persuasively that, to the extent that employers see some identifiable classes of employees—chiefly minorities and women—as posing the risk of a costly discrimination charge in case of discharge, a rational response is to discriminate—illegally but probably undetectably—at the hiring stage.[80] Perversely, the antidiscrimination laws may thus increase the incentive to discriminate in hiring. I would add simply that it is not the antidiscrimination laws alone that generate these incentives; it is the gap between the protection those laws afford to some identifiable groups and the lack of protection that at-will affords to other groups.[81]

Let us now look at this landscape from the standpoint of employees who are not members of a protected class. The problems of proof that an

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79. *Id.* at 1015-20 (noting that in 1985 charges of discrimination at termination outnumbered similar charges at hiring by a ratio of six to one).

80. *Id.* at 1024; *see also* Ian Ayres & Peter Siegelman, *The Q-Word As Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 TEX. L. REV. 1487, 1489-91 (1996) (developing this argument in the context of disparate impact law).

81. Ayres & Siegelman recognize this. They write:

> Any law that enhances employees' job security generally . . . will tend to mitigate the effect of disparate impact firing liability on initial hiring decisions. . . . Paradoxically, minorities should find Title VII's "pseudo just cause" firing protection more attractive if whites also have such protection, because employers would no longer have an incentive to substitute away from blacks at the hiring stage.

Id. at 1519.

alleged victim faces may not be enough to dispel the perception among some of her white coworkers that she is getting something they are not—that the employer is especially cautious when dealing with minority employees (and women), and considers and reviews adverse decisions affecting those groups more carefully, while white men in particular remain subject to the unalloyed and merciless at-will regime. However ineffectual existing remedies for discrimination may be for most employees, their availability to some may foster resentment by others. Employees who are not "protected" by those laws may perceive fairness itself as a special privilege from which they are excluded. The claim of "reverse discrimination" is a tempting response that mirrors the victim-orientation of wrongful discharge law and aggravates the dynamic of fragmentation and polarization.

I do not mean to suggest that discrimination against women, racial and ethnic minorities, or older or disabled workers is imaginary, or is a minor problem. Each of the existing antidiscrimination provisions is based on a sad record of bias based on traits irrelevant to job performance. And we could well continue to document and outlaw additional forms of discrimination based on traits such as sexual orientation, height, weight, physical attractiveness, and other traits. The antidiscrimination model that was first developed to deal with the historic subjugation of African Americans in the labor market has been and could continue to be extended to other classes suffering less egregious but still grossly unfair discrimination. But the continuing existence of employment discrimination does not necessarily call for further movement down the current path of antidiscrimination law.

The centrality of group identification and the proliferation of categories is troubling on a number of counts. First, laws that call for people to categorize themselves along racial lines raise the shadow of Nuremburg and of our own past—how much black blood does it take to "count" as African American? And as society becomes increasingly multiracial, and interracial unions become more common, it becomes increasingly difficult to force individual identities into discrete racial boxes. As we multiply the dimensions along which people may be classified, the problem grows exponentially. How does the law deal with the discrimination claim of a wheelchair-bound forty-five-year-old woman of mixed Asian and Latino parentage?[82]

Obviously these difficulties can be exaggerated and can be used to overshadow and trivialize the continuing reality of racial and sexual bias

82. This issue is explored in Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103, 139-40 (1994) (discussing the problems arising from the law's requirement that an individual plaintiff's identity be divided into discrete protected traits); *see also* Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994) (exploring the difficulties inherent in attempting to define the nature and boundaries of distinct racial groups for purposes of antidiscrimination law).

and stratification in the labor market. That is very far from my objective. I want instead to explore alternative regimes for addressing this reality. I propose that we revisit the background principle against which these antidiscrimination policies evolved—the principle of freedom of contract and its embodiment in the presumption that employment is terminable at-will—and consider how much we could accomplish by reversing that background principle.

Fair treatment should not be or appear to be a special privilege. The time may have come to move from the old rule of unfettered employer discretion, riddled as it now is with exceptions, to a new rule of fair treatment. A requirement of just cause for discharge and a fair process for enforcing it would help to realize the policies underlying each of the existing exceptions to employment at will while responding to the concerns—both the valid concerns and those that are understandable but exaggerated—of those who do not normally qualify for any of those exceptions.

Here, too, there are important empirical issues. To what extent does the harshness of the background at-will regime encourage women, minorities, and others protected by the antidiscrimination laws to perceive discrimination in ambiguous cases? To what extent does it foster a perception that women and minorities get "special" or "preferential" treatment under the antidiscrimination laws? To what extent do these perceptions contribute to tensions among groups at the workplace and to racial and political attitudes in general? I do not know of any data that answer these questions, but the questions should be asked when assessing the virtues of at-will and just cause.

D. Sexual Harassment, Employment at Will, and Just Cause: The Significance of the Background Regime

Harassment law under Title VII, though not strictly a wrongful discharge doctrine, brings together a number of the issues discussed here. Title VII's law of workplace harassment, particularly its "hostile environment" doctrine, makes employers liable for employee conduct that creates discriminatory working conditions.[83] Some employers may respond by promulgating broad anti-harassment policies, or by punishing accused harassers without fully investigating the facts or based on isolated offensive comments. Employers may face real constraints on their ability

83. An employee makes out a "hostile environment" claim by showing that "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65, 67 (1986) (citations omitted)).

to "overreact" in this way: they may hurt employee morale and lose productive workers. But as far as the law is concerned, the at-will employer cannot lose by taking action against the employee accused of harassment, because the employee who believes he was unjustly punished, even fired, for alleged harassment has no legal recourse.[84] In an at-will environment, there is no baseline requirement that the employer act fairly in combating harassment—that the employer give clear notice of what is prohibited, prove the relevant facts, and enforce regulations evenhandedly. When harassment law is superimposed on an at-will background, the law's incentives appear to push in one direction only, and may induce some employers to sacrifice employees accused of harassment in an attempt to insure against harassment liability.

The threat of censorship and overenforcement may be overstated; underenforcement is still the greater problem. Rather than discipline accused harassers, some employers retaliate against complainants, or allow harassment to escalate; some employees who do complain of sexual harassment end up being fired or quitting in response to what they regard as employer retaliation.[85] Many incidents of perceived sexual harassment go unreported, and many would-be complainants cite a fear of reprisals as a reason for remaining silent.[86]

Employers who allow harassment to continue, or who retaliate against complainants, are vulnerable to a Title VII suit on both counts. But they may calculate that the actual risk of liability is very limited. As I argued above, the legal protection of such complaints against retaliation is undermined by the background presumption of an employer's power to fire

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84. I am ignoring the relatively remote threat of a libel or other tort action by the accused employee. But Professor Gergen explores those issues, among others, in his contribution to this Symposium. Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 TEX. L. REV. 1693 (1996) (defending the use of collateral torts such as intentional infliction of emotional distress and defamation as an employee's only protection from an employer's extreme conduct).

85. *See* BARBARA A. GUTEK, SEX AND THE WORKPLACE 58 (1985) (documenting that 20% of respondents had quit, been transferred, been fired, or stopped applying for a job because of harassment); Frances S. Coles, *Forced to Quit: Sexual Harassment Complaints and Agency Response*, 14 SEX ROLES 81, 89 (1986) (noting that of 81 complainants between 1979 and 1983, nearly half had been fired and 25% had quit).

86. Some studies have shown high levels of sexual harassment at work. *See, e.g.*, GUTEK, *supra* note 85, at 46 (reporting that 53% of women surveyed reported sexual harassment); U.S. MERIT SYS. PROTECTION BD., SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 11 (1988) (finding that 42% of women surveyed reported being sexually harassed); Edward LaFontaine & Leslie Tredeau, *The Frequency, Sources, and Correlates of Sexual Harassment Among Women in Traditional Male Occupations*, 15 SEX ROLES 433, 436 (1986) (reporting that 75% of women respondents in engineering, science, and management reported sexual harassment). But most incidents of sexual harassment go unreported, and many who do not report harassment cite fear of "being blamed" or of more severe harassment or other reprisals. GUTEK, *supra* note 85, at 72; U.S. MERIT SYS. PROTECTION BD., *supra*, at 28.

employees at will, which pushes the burden of litigation, of proof, and of delay onto the employee claiming retaliation.[87] An employee who perceives these hurdles is unlikely to feel free to bring a harassment claim to which she believes her employer or supervisor may be antagonistic, at least until she has, for one reason or another, left the job.

These seemingly contradictory dynamics—the vulnerability of the accused to overzealous enforcement and of the accuser to retaliation—can both exist, albeit most likely in different contexts. The problem arises from the fact that, in an at-will environment, both the accused and the accuser are largely at the mercy of the employer, who may be moved by whim or sexism or favoritism or fear of litigation or a rational assessment of the costs and benefits of various responses. The accuser who suffers retaliation has a legal remedy that is unwieldy and undependable to many; the accused who is fired summarily has no remedy at all.

By way of contrast, consider the dynamics of a harassment complaint in a workplace in which the employer must show just cause to discipline or discharge employees, as in the unionized private sector.[88] At an arbitration hearing, the employer bears the burden of proof of the facts justifying the discharge. The employee may also challenge the adequacy of the employer's pre-termination process—the adequacy of notice, compliance with "progressive discipline," including warnings, equitable treatment vis-à-vis other offenders, etc. The employee may also challenge the substantive justification for discipline—the reasonableness of the employer's rules, the job-relatedness of the alleged misconduct—and the severity of the penalty.[89] This process gives employees an opportunity to challenge discipline or discharge for harassment charges that are factually weak or that are based on minor infractions or first offenses or on extremely censorious antiharassment rules.

Due process also makes it harder for the employer to discipline employees who complain of harassment. In an at-will environment, retaliation is easy to mask because the employer need not prove or even explain the charges. But in a "just cause" environment, the employer must show that its reason is "just" and is proven by the evidence. Procedural norms

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87. These burdens are reduced in Title VII by its unusual combination of administrative enforcement procedures and provision of a private right of action; since the 1992 amendments, the complainant has the added clout of a potential claim for punitive damages. Still, a perusal of recent caselaw suggests that the hurdles to a successful hostile environment claim are formidable. *See, e.g.*, *Harris*, 114 S. Ct. at 370 (requiring that a work environment be both objectively hostile to a reasonable person and subjectively hostile to the complaining employee in order to violate Title VII).

88. If an employee "grieves" or challenges a discharge (or other discipline) through a union, the grievanee proceeds through a number of steps culminating in arbitration. The pre-arbitration process gives the employee an opportunity to probe the employer's case and often to settle the dispute prior to arbitration.

89. FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 668 n.95 (1985).

of fair and equal treatment, as well as simply putting the employer to its proof, make it more difficult to discharge a workplace critic on manufactured grounds or to seize upon minor infractions or lags in performance as a pretext for retaliatory discipline. These features of just cause offer a hedge against retaliation that Title VII prohibits but does not quickly and readily remedy. Employees in this setting should be less fearful of employer retaliation and more willing to speak out about harassment. Employer retaliation is not the only source of employee fears and silence; just cause requirements alone can do nothing to combat coworker retaliation in the form of escalated harassment. But those requirements can tame some of the most potent weapons—the power of discipline and discharge—in the hands of antagonistic supervisors.

Just cause is not a panacea. A just cause regime may stymie certain efforts to punish sexual harassment, effectively "protecting" some offensive conduct.[90] For example, an employer who has tolerated widespread sexual harassment may be forced to reinstate an employee who is fired for engaging in widely tolerated behavior.[91] But this same employer may face Title VII liability. The employer who tolerates widespread harassment, but who seeks to limit liability by summarily firing an accused employee, may be forced *both* to reinstate the employee *and* to compensate the victim of harassment. At least when the reinstatement is based on the lack of a clear policy, of evenhanded enforcement, or of fair investigative and adjudicative procedures, there is no inconsistency between employer liability under Title VII and the reinstatement of the accused employee.[92]

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90. Indeed, proceedings on behalf of an accused have unfortunately sometimes provided the vehicle for unions to put their institutional imprimatur on the prevailing culture of harassment—by defending grossly offensive conduct as inevitable and as a male prerogative, or by blaming and discrediting the accuser. *See* Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harrassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 36-45 (1995) (cataloguing means by which labor unions systematically devalue sexual harassment complaints). It is useful to keep in mind, however, that such a pattern may be overrepresented among litigated (or arbitrated) cases, which necessarily exclude cases in which the union either refused to grieve the discipline against the accused or played a constructive role in resolving the conflict without arbitration.

91. In Workman v. Jordan, 32 F.3d 475, 477 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1357 (1995), for example, a police officer was accused of making sexually suggestive remarks to female employees, repeatedly calling them "biteh," "bimbo," and other derogatory terms, stating that women could not do certain work, and pinching a woman on the cheek. The employer investigated the claims and fired the accused employee. *Id.* Because the accused enjoyed just cause protection, he was entitled to a full post-termination hearing. *Id.* at 477-78. The hearing officer found the allegations to be substantially true but insufficient to make out just cause for discharge, particularly in light of the sexist atmosphere that pervaded the department. *Id.* at 482-83. The employee was reinstated, effectively suffering a suspension for his misconduct. *Id.*

92. In some cases, arbitrators' decisions reinstating accused harassers have been overturned in court as contrary to public policy—specifically, the policy against harassment embodied in Title VII. *See, e.g.*, Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436 (3d Cir.) (vacating an arbitrator's decision to reinstate a deliveryman accused of sexual harassment), *cert. denied*, 499 U.S. 922 (1991); Newsday, Inc. v. Long Island Typographical Union, No. 915, 915 F.2d 840,

On the other hand, the employer who promulgates reasonable rules against sexual harassment and enforces them consistently and fairly should be in a position both to defend as "just" the discharge of an employee who violates the rules and to defend against Title VII liability for sexual harassment. Replacing the at-will presumption with a requirement of just cause for discharge tends to frustrate the attempt to single out one employee for conduct that is widely tolerated in the workplace; as such, it may force the employer to act more systematically and evenhandedly if also more deliberately, and may lay the foundation for fair resolution of the conflicting interests of employers, alleged harassers, and those who claim harassment.

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The realm of employment at will—and thus the significance of a just cause alternative—appears to shrink with the adoption of each of the many statutory and common-law exceptions for discharges that are retaliatory, discriminatory, or otherwise wrongful. But that appearance is misleading. A requirement that employers show good reasons for discharge would make it significantly harder for employers to fire employees for bad reasons. A just cause requirement would thus support the strong public policies that underlie wrongful discharge law. Moreover, the existence of a general just cause requirement would tend to defuse some of the harmful and perverse workplace dynamics that flow from the sharp discontinuities of the current regime—the contrast between unfettered employer power in the normal case and the heightened scrutiny and condemnation associated with the various wrongful discharge exceptions.

The ability to challenge a discharge or discipline under a just cause provision would not entirely eliminate the "chilling effect" of overbroad harassment policies that concern some critics.[93] Nor would just cause

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845 (2d Cir. 1990) (upholding the reversal of an arbitrator's reinstatement of a worker discharged for harassment of female coworkers based on the public policy against sexual harassment in the workplace), *cert. denied*, 506 U.S. 922 (1991). These court decisions turn in part on a broad view of the public policy exception to the finality of labor arbitration awards. The scope of that exception is sharply contested by courts and commentators. *See generally* Jeffrey Sarles, *The Case of the Missing Woman: Sexual Harassment and Judicial Review of Arbitration Awards*, 17 HARV. WOMEN'S L.J. 17 (1994) (reviewing cases and commentary and arguing for broader reviewability of arbitration awards). That is not an issue that I wish to take up here. But in the context of harassment charges, my view of the public policy exception follows from what I have said: the reinstatement of an alleged harasser that results from the application of principles of industrial due process—burdens of proof, procedural requirements, principles of evenhandedness, or progressive discipline—should not be deemed contrary to Title VII.

93. *See* Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L.J. 563, 568 (1995) (noting that the uncertainty of the law causes people to refrain from speech that is probably

always protect complainants against retaliation, or remove all inhibitions on employee speech and conduct that are protected by law, or magically dissolve tensions among different groups in the workplace. Moreover, just cause can stand in the way of aggressive employer efforts to address harassment charges as well as to maintain high standards of conduct and productivity in jobs that are hard to monitor. Just cause tends, for better and worse, to push employers toward more rigid and objective standards of conduct and performance. But on balance, a regime of due process, and of enforceable basic norms of fairness, operates as an impetus for even-handed and consistent policies toward employees and as a stronger foundation for employee rights that are already recognized.

V. Has Employment at Will Hobbled Wrongful Discharge Law, or Is It the Other Way Around?

One expected reaction to my argument is that I have it backwards: rather than at-will undermining wrongful discharge law, wrongful discharge law has undermined at-will. On this view, the multiplication of exceptions to at-will, and the fear of massive judgments under some of those exceptions, has induced managers to investigate, review, and justify every discharge almost as if they are bound by a just cause standard. The supposed managerial discretion protected by the at-will rule has thus become illusory.

One could surely find support for this view in the labor and personnel management literature, which urges employers to minimize employment law liability by instituting preventive practices and procedures.[94] And a number of studies have found a sharp increase in nonunion procedures to challenge discharges.[95] This should not be surprising. To the extent that due process, in the form of a just cause requirement and fair review procedures, is a useful hedge or precaution against wrongful discharges,

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protected). I discuss the free speech objections to harassment law in a forthcoming article, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. (forthcoming 1997).

94. *See* BOMPEY ET AL., *supra* note 19, at 213-84 (recommending that employers attempt to reduce wrongful discharge liability through the use of employment application disclaimers, employment manuals detailing all workplace rules, performance evaluations, and explicit discipline policies and procedures).

95. *See, e.g.*, Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1401 n.2 (1990) (citing a 1988 study finding an increase in the use of nonunion formal complaint procedures from 10-15% of companies in 1979 to "about one-third" in 1984, and noting the author's own findings of an "exponential increase" in such procedures between 1964 and 1983). A recent study showed that private firms' maintenance of internal disciplinary procedures for nonunion employees rose from about 5% in 1960-65 to about 45% in 1985. John R. Sutton et al., *The Legalization of the Workplace*, 99 AM. J. SOC. 944, 955 (1994).

it is a precaution that employers might take on their own to avoid wrongful discharge liability.[96] Has the proliferation of "corporate due process" ushered in a de facto just cause regime through the back door?

First, it is unclear how this claim would cut. To the extent that this is the consequence of doctrines that we are committed to maintaining, such as the existing "bad reasons" exceptions, it would suggest that the cost of overturning what remains of at-will is lower than the defenders claim. But I suspect that stories of the demise of employment at will are greatly exaggerated. Moreover, some of the liability that employers fear stems not from the "bad reasons" exceptions but from the broader doctrines of implied contract and good faith covenants that the defenders of at-will would sharply limit or eliminate, and from collateral tort actions. The argument that wrongful discharge law has eviscerated employment at will is simply overstated.

But even if employers perceive their discretion to be illusory, it is important to look at the existing legal landscape from the employee's perspective as well as the employer's. The law of wrongful discharge has not necessarily conferred gains on employees that are commensurate with the costs it has imposed on employers. There appears to be a great deal of uncertainty and anxiety on both sides. Corporate due process represents an important employer response to that uncertainty; the question is whether corporate due process addresses employee concerns of the sort I have addressed.

Under these systems, decisionmaking is more centralized and more elaborate, providing some mechanism for employees to challenge within the firm what they regard as unfair decisions and for employers to avoid potentially costly mistakes. But most companies' procedures consist of either an informal or a formal "open door" policy—a policy allowing aggrieved employees to approach anyone in management regarding their complaint.[97] Relatively few private firms have more elaborate procedures, such as the right to a hearing of some kind.[98] Even fewer provide for decisions by an impartial outside decisionmaker.[99] The vast majority of

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96. *See* Freed & Polsby, *supra* note 49, at 1130-31 (noting that economic theory predicts that companies will expend marginal resources on "bureaucratic systems" such as "written criteria for dismissal" and "formal grievance and hearing procedures" until the marginal benefit of the precaution ceases to exceed its cost).

97. *See* J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 370-71 (1995) (finding that 37% of employers had an oral "open door" policy while another one-third had a written "open door" policy; 12% had no detailed procedures at all).

98. *See* Edelman, *supra* note 95, at 1401 n.2 (citing a study finding that only "about one-third of companies with 100 or more employees" had formal complaint procedures in 1988).

99. That has been true even though courts in some wrongful discharge litigation tend to look favorably on employers' use of outside arbitration. *See* Toussaint v. Blue Cross & Blue Shield, 292

firms with more elaborate forms of due process retain ultimate decision-making power within the company, typically with upper management.[100] The resistance to outside arbitration may be changing in response to legal pressures,[101] but it remains strong.

N.W.2d 880, 897 (1980) (finding that employers might be able to avoid litigation by providing for binding arbitration). But as several attorneys for management have observed, "not too many employers have adopted the 'velvet glove' suggestion made in *Toussaint*. The obvious reason is a traditional reluctance on the part of management to voluntarily place itself in a situation where its decisions can be reversed or modified by others." Charles S. Mishkind et al., *Alternative Dispute Resolution of Employment Disputes: A Pro-Active Alternative to the Armorplate/Litigation Approach to Employment Disputes*, *in* BOMPEY ET AL., *supra* note 19, at 377, 379. The authors urge employers to take another look. They conclude, "ADR is a reasonable approach to dispute management. It reduces an employer's exposure to and liability for wrongful discharge litigation, while at the same time maintaining a positive employee relations climate." *Id.* at 428.

100. Estimates vary. A 1985 BNA survey found that, among 218 employers with nonunion workforces, 71% maintained formal procedures for appealing disciplinary actions. BUREAU OF NAT'L AFFAIRS, PERSONNEL POLICY FORUM SURVEY NO. 139: EMPLOYEE DISCIPLINE AND DISCHARGE 10 (1985) [hereinafter BNA SURVEY NO. 139]. Among those 154 companies, in 56% the final decision was made by the chief executive officer, 16% by a personnel manager, 5% by a department head, and 19% by some other company official. *Id.* Only 2%—5 employers—provided for a decision by an outside arbitrator. *Id.* These 5 were all "non-business" entities—government or non-profit employers. *Id.* Another more recent study, however, found that 17% of nonunion businesses had third-party arbitration systems for manufacturing and production employees, 24% for clerical employees, 21% for professional and technical employees, and 20% for managers. David Lewin, *Grievance Procedures in Nonunion Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes*, 66 CHI.-KENT L. REV. 823, 824-25 (1990). On the other hand, in a very recent survey conducted by the Society of Human Resource Management of 300 human resource professionals from various industries, 92.5% of nonunion employers reported "never" using arbitration to resolve personnel disputes. *Survey Finds Half of HR Professionals Favor Arbitration of Employee Complaints*, DAILY LAB. REP., Oct. 4, 1994, *available in* LEXIS, Nexis Library, DLABRT File. Less than 1% use arbitration "always" and 6.7% "sometimes." *Id.* Of those who use arbitration, however, 30% use nonbinding arbitration, and some use an in-house arbitrator. *Id.*

101. The Supreme Court offered a possible inducement to arbitration in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991), which upheld an employee's prehire agreement to submit employment disputes to final and binding arbitration, thereby foreclosing litigation of an employee's federal age discrimination claim. The application of *Gilmer* to ordinary employment contracts is in doubt; *Gilmer* itself involved not an employment contract per se but a securities industry brokers agreement. *Id.* But some later decisions have construed *Gilmer* broadly, opening the door to widespread use of binding arbitration agreements in nonunion employment. *See, e.g.*, Crawford v. West Jersey Health Sys., 847 F. Supp. 1232, 1240-41 (D.N.J. 1993) (holding a medical director's employment agreement arbitrable); Williams v. Katten, Muchin & Zavis, 837 F. Supp. 1430, 1431 (N.D. Ill. 1993) (holding a law firm's noncapital partnership agreement arbitrable); Hampton v. ITT Corp., 829 F. Supp. 202, 204 (S.D. Tex. 1993) (holding that plaintiffs' Fair Labor Standards Act suit did not preclude arbitration); Scott v. Farm Family Life Ins. Co., 827 F. Supp. 76, 80-81 (D. Mass. 1993) (holding an insurance sales agent agreement arbitrable); Hull v. NCR Corp., 826 F. Supp. 303, 306 (E.D. Mo. 1993) (holding that a terminable-at-will employee's Title VII claim was arbitrable because she signed an arbitration agreement when the employment began); DiCrisci v. Lyndon Guar. Bank, 807 F. Supp. 947, 950 (W.D.N.Y. 1992) (holding a personnel placement company employment contract arbitrable); Hydrick v. Management Recruiters, Inc., 738 F. Supp. 1434, 1435 (N.D. Ga. 1990) (holding employment contracts in the loan servicing industry arbitrable). A broad interpretation of *Gilmer* would make arbitration not simply an additional precaution against mistaken wrongful discharges, but a shield against litigation. It seems likely that many employers will be willing to give up final control over some discharge decisions in exchange for freedom from most wrongful discharge litigation.

Nor has the threat of liability (or any other incentives) led management to make substantive promises of fair treatment. On the contrary, employers *increase* their exposure to one kind of liability—liability for breach of an implied contract—by explicitly limiting (or seeming to limit) their right to fire at will in employee handbooks and the like.[102] So alongside the growth of internal corporate grievance *procedures* for challenging discipline and discharge, we have seen a flight from substance: the trend is toward adding to employee handbooks express language affirming the right to discharge at will, and toward removing language that appears to limit the permissible grounds for discharge.[103] A typical corporate due process scheme thus offers nothing like the "just cause" requirement that, in my view, is a necessary element of due process.

Corporate due process mechanisms are indeed proliferating, but their prevailing forms are shorn of two crucial features: impartial resolution of grievances and substantive guarantees that discipline will be for just and fair reasons. We can assume that these systems deliver something that employees value; if they did not, they would seem to accomplish few of management's own objectives. These systems are likely to address "agency problems" in the personnel process by curbing ill-considered or personally motivated actions by lower-level supervisors. They should produce more evenhandedness in discipline and more routinized systems of employee evaluation. That in itself may give some "breathing room" for employee voice, such as criticism of supervisors and the like.[104] But purely internal corporate due process seems unlikely to effectively support employee freedom of speech and action in areas in which management itself feels threatened. The retaliatory discharges that are prohibited by law cannot be assumed to be the sort of "accidents" that management seeks to

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102. *See* BOMPEY ET AL., *supra* note 19, at 243-50 (describing the risks of handbooks to employers and the importance of express "disclaimers" reaffirming the right to fire at will). In fact, employers' fear of implied contract liability seems to be greatly exaggerated, largely by employment relations specialists who might thereby increase the demand for their services. *See* Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47, 75 (1992) (arguing that the "personnel profession as a whole has greater influence when it can arguably offer protection against a threatening legal environment").

103. A survey of predominantly large companies found that 71% had taken at least one of the following measures in the previous two years to avoid wrongful discharge liability: removing language from handbooks that could be construed as a promise of job security ("permanent employee," "tenure") or as a limit on the permissible reasons for discharge ("just cause" required for discharge), or adding language affirming the employer's right to terminate employment for any reason and disavowing any oral promises to the contrary; training recruiters to refrain from promises of job security; and using severance agreements to arrange for the release of all claims against the company by terminated employees. BNA SURVEY NO. 139, *supra* note 100, at 26-27.

104. *See* FREEMAN & MEDOFF, *supra* note 45, at 9 (suggesting that the presence of unions frees workers to air their grievances without the fear of employer retribution); Willborn, *supra* note 50, at 131 (noting that companies may learn about worker ideas in regard to acceptance of a compensation practice that spells out employment terms and rights as an inducement to hiring).

avoid by these procedural precautions; on the contrary, such discharges may be cost effective even with the risk of liability.

With regard to the tensions that flow from the juxtaposition of at-will and antidiscrimination law, internal due process may be considerably more helpful. Employers may be practically precluded from maintaining different personnel procedures for different groups of employees.[105] This may be one lesson from a study of internal resolution of equal employment complaints: "Complaint handlers' conception of dispute handling appears to subsume law within the broad confines of the managerial realm, thus transforming [antidiscrimination] law into a diffuse standard of fairness."[106] To the extent that dispute resolution procedures and a "diffuse standard of fairness" extend beyond the realm of discrimination complaints, the gap—and, importantly, the perceived gap—between the at-will regime and the protections of antidiscrimination law are narrowed. On the other hand, it is very difficult to determine whether the same system works equally well, or is seen by employees as working equally well, for those employees who are and are not protected by the antidiscrimination laws. A sizable gap between the protections of the antidiscrimination laws and employment at will may remain in the absence of impartial resolution of disputes and a uniform substantive standard of just cause.

VI. Conclusion

Employment at will affects not only employees, and not only cases in which the reason for discharge is simply weak or hard to demonstrate; it also undermines the effectiveness of the important public policies behind the largely unchallenged limits on discharges for "bad reasons" such as retaliation or discrimination. By the same token, among the significant benefits of just cause protection is the support of these policies and the public interests behind them. Just cause operates at the ground level within the workplace. It gives employees a degree of security against arbitrary or unfair treatment that a wrongful discharge model, based on post-hoc proof of an unlawful motive, never can.

The pressure of wrongful discharge litigation can lead employers to generate some of these protections internally; that pressure forces the parties to internalize to some extent the public interests represented by wrongful discharge law. The virtue of this indirect method of securing

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105. *See* Morriss, *supra* note 49, at 1912 ("[M]aintaining two sets of personnel practices to prevent prohibited discrimination while allowing other arbitrary actions would be expensive, breed resentment, and produce no discernible benefits.").

106. Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 529 (1993). Edelman found that complaint handlers emphasized complaint resolution and the maintenance of employee relationships and morale over the vindication of employee rights to equal treatment.

workplace due process is that employers (and, if one is optimistic about the opportunities for employee voice, employees) could decide what substantive and procedural protections best suit the needs of the parties within the particular workplace.[107] But this approach to workplace fairness depends largely on a significant threat of damages, a threat that is minimal for most of the statutory actions and for low- and middle-income workers in many workplaces. Thus far this approach has had very partial success—partial both in its dissemination among employers and in the protection these systems afford employees—and a notoriously high cost.[108]

Assessing the costs and benefits of at-will and of just cause is a difficult and complicated undertaking, and one that is well beyond the scope of this Paper. Indeed, my objective here is to further complicate the picture by reintroducing the public interests and shared moral commitments that underlie much of wrongful discharge law, but that are not effectively vindicated by the wrongful discharge approach. Somehow we must take into account the cost of employee silence and of tensions and resentment among groups that may flow from the hybrid at-will/wrongful discharge system that has evolved.

The existing debate over at-will is artificially narrowed by the unrealistic assumption that at-will no longer applies to the kind of "bad reasons" dealt with by existing laws against discrimination and retaliation. The interests advanced by those laws are hard to quantify and are partly or largely external to the parties to the employment contract; that makes them highly problematic factors in economic analysis. But they should not be relegated to a footnote in the debate.

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107. That virtue could be largely captured by some form of "responsive regulation" in which firms were given substantial freedom to define and apply the just cause standard subject to minimum standards of substantive and procedural fairness. For a general exposition of the theory of "responsive regulation," see IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992).

108. *See* DERTOUZOS & KAROLY, *supra* note 66, at vii (pointing out that concern with wrongful termination actions has led many firms to increase spending on personnel and recruitment management).