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# Employment Security: A Comparative Institutional Debate

Kenneth G. Dau-Schmidt\*

The debate at this Symposium concerning what legal doctrine should govern questions of employment security mirrors the larger academic debate on this subject in its diversity of opinions and arguments.<sup>1</sup> Supporters and detractors of the employment-at-will doctrine have presented arguments concerning the number of unjust discharges,<sup>2</sup> the preferences of employers and employees with respect to job security,<sup>3</sup> the relative bargaining power and information available to employers and employees,<sup>4</sup> the effect of the employment-at-will doctrine on the enforcement of other statutes such as Title VII,<sup>5</sup> the efficacy of collateral torts in wrongful discharge litigation,<sup>6</sup> employer opportunism over the employee life-cycle,<sup>7</sup> and the external costs of discharges in violation of public policy.<sup>8</sup>

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\* Professor of Law, Indiana University-Bloomington, on leave from the University of Wisconsin. B.A. 1978, University of Wisconsin; M.A., J.D. 1981, Ph.D. (Economics) 1984, University of Michigan. I would like to thank Sam Issacharoff, Jack Getman, and the editors of the *Texas Law Review* for inviting me to participate in the Symposium and write this comment. I would also like to thank the other participants in the Symposium for the knowledgeable and stimulating discussion that inspired these comments.

1. A nonexhaustive bibliography of the larger academic debate includes: PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679 (1994); Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56 (1988); Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8 (1993); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); and J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837.

2. Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901, 1905-14 (1996).

3. Verkerke, *supra* note 1, at 841-43.

4. Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1792-95 (1996).

5. Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1678-82 (1996).

6. Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 TEX. L. REV. 1693 (1996).

7. Morriss, *supra* note 2, at 1919; Schwab, *supra* note 1, at 39, 38-51; Verkerke, *supra* note 1, at 861-63. For the theory of opportunistic use of the life-cycle, see *infra* note 19.

8. Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943 (1996).

Although the arguments put forth in this Symposium and in the larger academic debate are diverse, I maintain that they all really address one question of comparative institutional analysis:<sup>9</sup> Which institution—individual bargaining, collective bargaining, the courts, or legislative and administrative regulation—can most efficiently accommodate employers' and employees' preferences concerning employment security? As formulated in this Symposium, the debate over this question has focused primarily on the possible failures of individual bargaining to accommodate these divergent preferences and only secondarily on the possible deficiencies of the alternative institutions—these later deficiencies being raised largely as a rear-guard action by the defenders of individual bargaining.<sup>10</sup> This focus on individual bargaining and its possible virtues and failures seems appropriate given that, despite a growing list of common-law and statutory exceptions to the notion of freedom of contract in employment law, individual bargaining remains by far the dominant institution for determining employment security rights in this country.<sup>11</sup> Under comparative institutional analysis, however, one must examine the advantages and disadvantages of each alternative institution for resolving the conflict over employment security before one can make public policy recommendations.<sup>12</sup> I will return to this question of the possible advantages and disadvantages of the alternative institutions put forth in the employment security debate toward the end of this comment.<sup>13</sup>

Morriss and Verkerke are right to extol the virtues of individual bargaining.<sup>14</sup> When it works, it provides individualized solutions to problems by balancing the divergent preferences of the affected parties

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9. For the definitive treatise on comparative institutional analysis, see NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

10. See, e.g., Morriss, *supra* note 2, at 1933-36 (arguing that the regulation of labor markets through institutions would be ineffectual or counterproductive). Professors Estlund and Issacharoff also explicitly discuss the efficacy of other institutions in dealing with the problem of employment security. See *infra* notes 22-24, 45-47 and accompanying text.

11. Kenneth G. Dau-Schmidt, *Meeting the Demands of Workers into the Twenty-First Century: The Future of Labor and Employment Law*, 68 IND. L.J. 685, 691 (1993) (stating that individual bargaining dominates collective bargaining and regulation in the resolution of employer and employee conflict over the terms of employment); see also Terry A. O'Neill, *Employees' Duty of Loyalty and the Corporate Constituency Debate*, 25 CONN. L. REV. 681, 691 (1993) (stating that the unions' ability to negotiate protective contracts is "useless to most employees because over eighty percent of the workforce is nonunion").

12. See KOMESAR, *supra* note 9, at 6 (arguing that "the correct question" is the comparative ability of institutions to deal with a specific issue).

13. See *infra* text accompanying notes 41-48.

14. See Morriss, *supra* note 2, at 1923 ("[D]ifferent employees have different preferences about job security. Legal rules which apply one-size-fits-all standards of job security will inevitably disadvantage some employees."); Verkerke, *supra* note 1, at 843 (arguing that empirical data undermine claims of market failure in the employment contract context).

according to their willingness to pay.<sup>15</sup> On the problem of employment security, absent some failure of the bargaining process, employees could use individual bargaining to obtain all the contractual employment security they desire as long as the costs of those contractual protections to the employer are less than the benefits of those terms to the employees. If employees did not contract for employment security of some type, it would be because the cost to the employer of such assurances outweighed their benefits to the employees and the employees decided they would rather do without the security and take their portion of the savings in higher wages and benefits.<sup>16</sup>

Unfortunately, participants in this Symposium have identified a number of plausible ways in which individual bargaining may fail to accommodate adequately the countervailing costs and benefits of employment security. Schwab and Estlund argue that individual bargaining fails to account for all the costs of employer discretion in firing because sometimes discharges impose costs on parties other than those engaged in the negotiations.<sup>17</sup> Schwab persuasively offers this externalization-of-costs argument as a rationale for the tort of wrongful discharge in violation of public policy.<sup>18</sup> Schwab has also argued elsewhere that, because of transaction costs in negotiations and enforcement, individual bargaining fails to specify long-term implicit contracts that would provide the employee with protection from opportunistic discharge by the employer over the employee's life-cycle.<sup>19</sup> Schwab enjoys some success in linking

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15. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 11 (4th ed. 1992) ("By a process of voluntary exchange, resources are shifted to those uses in which the value to the customer, as measured by willingness to pay, is highest.").

16. See Morris, *supra* note 2, at 1902-03 ("[T]he default nature of the at-will rule allows the heterogeneous class of employees to choose among a diverse set of job characteristics when making employment decisions.").

17. See Estlund, *supra* note 5, at 1664-65 (arguing that the wrongful discharge antidiscrimination and antiretaliation doctrines protect the public as a whole by promoting the equality of citizens and providing incentives for employees to disclose illegal conduct); Schwab, *supra* note 8, at 1951-52 (noting that at-will employment does not adequately deter employers from requiring that their employees engage in activities like lying under oath, serving drinks to the drunk, or refusing jury duty).

18. Schwab, *supra* note 8, at 1950-52. For cases examining the public policy wrongful discharge tort, see, for example, *White v. American Airlines, Inc.*, 915 F.2d 1414, 1421 (10th Cir. 1990) (ordering a jury instruction that would allow the plaintiff to recover in his wrongful discharge suit if it was found that the termination was "significantly motivated by the [plaintiff's] refusal to commit perjury" because of the strong public interest in truthful testimony); *Nees v. Hocks*, 536 P.2d 512, 516 (Or. 1975) (holding that the tort of wrongful discharge for violation of public policy could be asserted by an employee who alleged that she was fired for performing jury duty because of the important community interest in the jury system).

19. Schwab, *supra* note 1, at 52-54. Under the life-cycle theory, workers are paid less than their productivity justifies early in their tenure with the firm, and more than their productivity justifies late in their tenure. *Id.* at 14-15. This practice allows employees to invest in job-specific human capital and prevents shirking because employees will not want to be discharged before they obtain the high wages of their late tenure. *Id.* at 17. Unfortunately, this life-cycle of wages and productivity gives

his economic arguments with the implied covenant of good faith and fair dealing,<sup>20</sup> although Verkerke challenges his reading of the cases.<sup>21</sup>

Issacharoff accepts Schwab's life-cycle arguments, and also argues that employees suffer in individual bargaining from an asymmetry of information and bargaining power between employees and employers.<sup>22</sup> On the basis of the asymmetries in individual bargaining, Issacharoff argues for "information-forcing" defaults in employment contract law that would effectively require employers to raise the question of employment security in individual negotiations and make clear the conditions under which employees could be discharged.<sup>23</sup> On the basis of Schwab's life-cycle analysis, Issacharoff argues for a European-style severance scheme in which, after two years of employment, a discharged employee is presumptively entitled to one month's severance pay for every year of service, unless the employer can establish that the discharge was for cause.<sup>24</sup>

The Symposium participants discussed additional arguments that other authors have raised concerning the failure of individual bargaining in the negotiation of efficient employment security provisions.<sup>25</sup> For example, some scholars argue that employees systematically underestimate the

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employers an incentive to act opportunistically by firing employees before they receive their late tenure payoff. *Id.* at 19. It is also possible for an employer to act opportunistically with respect to employees early in their job tenure by, for example, firing a salesperson after she makes a sale but before she receives her commission.

20. See Schwab, *supra* note 1, at 32-51 (arguing that the pattern of court protection of employees mimics the life-cycle theory, protecting workers at the beginning and the end of their careers when they are most vulnerable to employers). For an example of the application of the implied covenant of good faith and fair dealing in the employment context, see *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977) (finding that an employer who fired an employee in order to avoid having to pay him a large commission violated the implied covenant of good faith and fair dealing).

21. See Verkerke, *supra* note 1, at 863, 848-63 ("[Schwab's] life-cycle just cause hypothesis is far less consistent with the pattern of employment contract decisions than an alternative hypothesis of systematic jurisdictional variation.").

22. In terms far too romantic for the dismal science of economics, Issacharoff likens the bargaining relationship between an employer and an employee to courtship "between a polygamist and a monogamist." Issacharoff, *supra* note 4, at 1795. To formalize his analogy for my fellow economic nerds, I understand Issacharoff to be making two arguments. First, employers will be unable to identify perfectly the productivity of potential employees, and employees will be hesitant to request employment security in individual bargaining because this may falsely signal that they will be bad workers. See David I. Levine, *Just-Cause Employment Policies in the Presence of Worker Adverse Selection*, 9 J. LAB. ECON. 294, 295 (1991). Second, employers have more bargaining power than employees in individual bargaining because they deal with many employees, few of whom are individually of vital importance to the enterprise, while the employee deals with only one employer who provides the employee's means of sustenance. It should be noted that information asymmetry may also prevent employers from initially offering employment security provisions for fear of attracting only bad employees. Verkerke, *supra* note 1, at 902-03.

23. Issacharoff, *supra* note 4, at 1794-96.

24. *Id.* at 1806-07.

25. For a good summary of these arguments and an intelligent rebuttal, see Verkerke, *supra* note 1, at 898-912; see also Dau-Schmidt, *supra* note 11, at 688-92 (assessing the advantages and disadvantages of individual bargaining as a method of obtaining employment security).

benefits of employment security provisions because they underestimate the probability and costs of discharge.<sup>26</sup> Similarly, employers may systematically overestimate the costs of unjust discharge suits based on contractual protections.<sup>27</sup> If employees systematically underestimate the benefits of employment security while employers systematically overestimate its cost, the parties will negotiate too little employment security through individual bargaining. Finally, it has been argued that, because working under a contract with just-cause discharge provisions requires a costly managerial system for documenting employee performance, employment security is a public good in the workplace and employees will bargain for too little of that good in individual negotiations.<sup>28</sup> These arguments, along with Issacharoff's arguments above concerning asymmetries in information and bargaining power, suppose a more pervasive failure in individual bargaining than the third-party-cost and life-cycle arguments proposed by Schwab and Estlund, and thus could be used to justify a more extensive intervention on the province of individual bargaining by the courts or the legislature.<sup>29</sup>

In my mind there is no doubt that individual bargaining does, at least in some ways, fail to efficiently accommodate employers' and employees' conflicting preferences with respect to employment security. Schwab and

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26. Under established theories on the resolution of cognitive dissonance, "people prefer not to think about unpleasant possibilities." Verkerke, *supra* note 1, at 898. Also, according to prospect theory, people tend to underestimate the expected losses from relatively remote, low-probability events. See Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 464, 465 (Daniel Kahneman et al. eds., 1982) (arguing that people underestimate the risk of rare events unless they are publicized); Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 COGNITIVE PSYCHOL. 430 (1972) (exploring the factors that influence people's subjective assessments of risk). If workers tend not to think about the unfortunate circumstance of discharge and also tend to underestimate the probability of that event, then it stands to reason that they would tend to underestimate the probable costs of discharge.

27. Lauren B. Edelman et al., *Professional Construction of the Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47, 64 (1992).

28. Douglas L. Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353, 355-56 (1984). Verkerke's data seem to support the hypothesis that the standard of discharge is a public good because most employers have all their employees on the same standard of discharge. See Verkerke, *supra* note 1, at 866. A "public good" is a good or benefit that exhibits the characteristic that if one person obtains it, others cannot be excluded from its enjoyment. For example, if it is efficient for employers to operate under only one standard of discharge for their employees, then if one employee negotiates a just-cause standard of discharge, all employees will enjoy the benefits of that standard. Employees will individually bargain for too little of public goods because in their individual negotiations they will tend not to ask for such goods with the hope that another employee will negotiate such a term from which they can all benefit. See ROBERT H. FRANK, MICROECONOMICS AND BEHAVIOR 646-52 (1991) (discussing the concept of public goods and contending that private provisions of public goods may be lower than the socially optimal level).

29. If defects in individual bargaining produce employment security contract terms that differ significantly from what the efficient terms would be, then one could argue that the judicial or legislative imposition of the efficient employment security terms would increase wealth.

Estlund have made compelling and largely noncontroversial arguments concerning the externalization of costs in employers' decisions to fire employees for refusing to break the law, fulfilling a public obligation (including "whistleblowing"), or exercising a statutory right.<sup>30</sup> Schwab's arguments concerning employers' opportunistic behavior associated with the life-cycle also seem well founded, although Verkerke has convinced me that Schwab's normative arguments for common-law regulation of this behavior are well ahead of his positive arguments that such regulation is in fact taking place.<sup>31</sup> Verkerke presents empirical evidence that the life-cycle problems raised by Schwab are not reflected in the employment contracts actually negotiated by employers and employees, and argues on this basis that opportunistic firings late in the life-cycle are not a substantial concern of employees.<sup>32</sup> Although Verkerke's survey of actual employment contracts is very useful and long overdue, his argument against Schwab's life-cycle analysis assumes that current employment contracts accurately and efficiently reflect employee preferences. Given the empirical evidence on the divergence of productivity and pay over the life-cycle<sup>33</sup> and the position of the life-cycle theory in labor economies at one

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30. As Professor Estlund points out, even such an advocate of the free market as Judge Posner has recognized a common-law exception to employment at will to protect employees in exercising a legal right. Estlund, *supra* note 5, at 1663 & n.31; see also POSNER, *supra* note 15, at 330. The only instance among these examples that Professor Schwab wrestles with in his public good/externalization-of-costs model is the discharge of an employee for exercising a statutory right with no obvious public benefit (filing for workers' compensation, for example). Schwab, *supra* note 8, at 1954-55. In that case, there are no costs from the decision that are obviously external to the parties. *Id.* However, I suspect that in many cases the original rationale for creating the employee's statutory right will also provide a rationale for prohibiting the effective waiver of that right in any case in which the employee would not exercise the statutory right for fear of losing his job. For example, assume the rationale for workers' compensation is that individual employees underestimate the risk and costs of injury and thus do not ask for appropriate compensating wages, and that the tort system is a less efficient institution than workers' compensation for resolving injury disputes; this rationale would support the required payment of compensation, even in cases in which the employee would not file if he could lose his job for such filing, in order to adequately and efficiently compensate workers for their injuries and provide employers incentive to make the workplace safe.

31. There are, of course, cases prohibiting various types of employer opportunistic behavior on the grounds that it violates an implied covenant of good faith and fair dealing, e.g., *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1256-58 (Mass. 1977), but Verkerke persuasively argues that the common-law understanding of opportunism is not yet tied to years of service under the life-cycle model. Verkerke, *supra* note 1, at 848-62; see also *Harris v. Arkansas Book Co.*, 700 S.W.2d 41 (Ark. 1985) (allowing arbitrary discharge of an employee of 49 years without severance pay or a pension).

32. Verkerke, *supra* note 1, at 879-82.

33. See JACOB MINCER, *SCHOOLING, EXPERIENCE AND EARNINGS* 120 (1974) (concluding that because "earnings are a return on cumulated net investments, they also rise at a diminishing rate over the working life, and decline when net investment becomes negative, as in old age"); JACOB MINCER, *JOB TRAINING: COSTS, RETURNS, AND WAGE PROFILES* 7 (National Bureau of Economic Research Working Paper No. 3208, 1989) (finding that "wage growth decelerates with age because training does, and that no other variable appears to affect individual wage growth"); James N. Brown, *Why Do Wages Increase With Tenure? On-the-Job Training and Life-Cycle Wage Growth Observed Within Firms*, 79

geological stratum above bedrock,<sup>34</sup> the absence of sufficient provisions against opportunism in actual employment contracts is more a reflection on the failure of individual bargaining than on the failure of the life-cycle hypothesis.<sup>35</sup> Moreover, if one accepts Priest's strong theory on the efficient evolution of the common law,<sup>36</sup> then the very emergence in the common law of the tort of wrongful discharge in violation of public policy and the implied covenant of good faith and fair dealing suggests that these doctrines are responding to some inadequacy in individual bargaining.

I am also persuaded that there is probably a more pervasive failure in individual bargaining to reflect adequately employee preferences on the subject of employment security, although I think it is too early to say whether this is due to the public-good nature of managerial systems, asymmetries in information and bargaining power, systematically inaccurate estimates of benefits and costs, or some combination of these three explanations. The principal evidence that I would cite in support of this assertion is the prevalence of just-cause provisions in collective bargaining agreements.<sup>37</sup> If workers do not desire job security, why do they negotiate for it collectively? Morriss cites the General Social Survey<sup>38</sup>

AM. ECON. REV. 771, 771 (1989) (explaining the divergence of pay and productivity as "deriving from optimal investments that diminish gradually over the life-cycle"); James L. Medoff & Catherine G. Abraham, *Experience, Performance, and Earnings*, 95 Q.J. ECON. 703, 730 (1980) (finding that the earnings of older managerial employees do not correlate with productivity).

34. See generally SOLOMON W. POLACHEK & W. STANLEY SIEBERT, *THE ECONOMICS OF EARNING* 15, 1-34 (1993) (remarking that the life-cycle model "forms a core of human capital theory which deals with the acquisitions of earnings power so crucial to understanding earnings differences").

35. Indeed, proponents of the life-cycle theory maintain that the long-term contract governing the parties' relationship will be implicit and so will not be reflected in explicit employment contracts such as those in Verkerke's study. See Donald O. Parsons, *The Employment Relationship: Job Attachment, Work Effort, and the Nature of Contracts*, in 2 HANDBOOK OF LABOR ECONOMICS 790, 799 (Orley C. Ashenfelter & Richard Layard eds., 1986) (explaining that "[p]rivate agreements of implicit contracts that are not enforceable in the courts may . . . be attractive and, depending on circumstances, more or less efficient"); Oliver E. Williamson et al., *Understanding the Employment Relation: The Analysis of Idiosyncratic Exchange*, 6 BELL J. ECON. 250, 261 (1975) (noting that many essential details of a job are not easily identified or described and must therefore be left implicit in the employment contract).

36. See George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD., 65, 72 (1977) (arguing that legal rules inevitably become efficient over time). I refer to this as the "strong theory" on the efficient evolution of the common law to distinguish it from Rubin's theory which requires that both parties to a conflict be repeat players for the common law to evolve toward efficiency. See Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 61 (1977). Because employees are not usually repeat players in employment security cases, one must subscribe to Priest's analysis, which requires only that transaction costs be positive for efficient evolution to take place, see Priest, *supra*, at 65, in order for my argument in the text to follow.

37. Ninety percent of all collective bargaining agreements include some form of employment security, with "just cause" being by far the dominant standard for discharge. 40 Collective Bargaining Negot. & Cont. (BNA) 63 (1979).

38. JAMES A. DAVIS & TOM W. SMITH, *GENERAL SOCIAL SURVEYS, 1972-1991: CUMULATIVE CODEBOOK* 230-31 (1991) (reporting the results of a study that shows job security ranks fourth among five job characteristics, but that union members rank job security more highly than nonmembers).



and argues that although union members may value job security, most employees do not value it highly.<sup>39</sup> Verkerke distinguishes the nonunion and union sectors, arguing that collective agreements cater to average rather than marginal workers, that the existence of a union makes it cheaper to enforce employment security provisions, and that workers sort into the nonunion and union sectors according to their preferences for job security according to the Tiebout effect.<sup>40</sup> However, neither of these lines of attack explains to my satisfaction why employees who have recently organized, and so who have not had time to sort according to their preferences, commonly negotiate just-cause protection in their collective agreements. If it is due to the differences between the preferences of (younger) marginal workers and (older) average workers or to the efficiencies of union arbitration, why doesn't individual bargaining regularly produce modest administrative protections for senior workers? I believe the answer lies in the theories of individual bargaining failure discussed above.

The question that has received far less attention in this Symposium, and in the larger academic debate, is how well the alternative institutions of collective bargaining, the common law, and legislation will fare in efficiently accommodating employer and employee preferences with respect to employment security. As previously mentioned, a complete comparative institutional analysis of the question not only will assess the deficiencies of individual bargaining in the employment security context, but also will assess the relative deficiencies of the alternative institutions.<sup>41</sup> Morriss has done the most to address this question, rightly arguing that imposition of a mandatory just-cause standard on all employment relationships, either by common-law rule or by legislation, will provide an inefficient solution for those employees who prefer higher wages to greater job security.<sup>42</sup> Morriss also argues that a just-cause standard will be costly because employers will be confined to using only verifiable information in making discharge decisions, in case they are challenged in court.<sup>43</sup> Estlund

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39. Morriss, *supra* note 2, at 1922-24.

40. Verkerke, *supra* note 1, at 890-94. In the labor economics literature there is a distinction drawn between "marginal," generally younger workers, who have attractive job alternatives and "average," generally older workers, who do not have attractive job alternatives. Predictably, marginal workers are less concerned with job security than average workers because of their better job alternatives. See RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 9-10 (1984); Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, 438 n.63 (1992) (both arguing that unions give more weight to the interests of average workers, as reflected by negotiations for pension provisions and just-cause clauses).

41. See *supra* note 12 and accompanying text.

42. See Morriss, *supra* note 2, at 1902-03.

43. *Id.* at 1934.

responds that the current at-will regime undermines the enforcement of statutory protections against discriminatory discharge such as Title VII,<sup>44</sup> because the burden is on employees to show that they were discharged for reasons that violated the statute rather than for "any" or "no" reason as allowed under the at-will doctrine.<sup>45</sup> A mandatory just-cause standard will, she argues, improve the operation of our other statutory protections by putting the burden on employers to show legitimate reasons why the employee was discharged.<sup>46</sup> Finally, Issacharoff touts the administrative efficiency of his proposed information-forcing standards and European-style severance rules as a major reason for adopting his proposal.<sup>47</sup>

In my view, more work needs to be done on the efficacy of these alternative institutions in addressing the problem of employment security. My own impression is that the current common-law exceptions of the public policy wrongful discharge tort and the implied covenant of good faith and fair dealing constitute fairly narrow incursions on the institution of individual bargaining that add little to the overall cost of managing employees and provide important protections against the most egregious employer acts. Imposition of a common-law or statutory mandatory just-cause standard for employment contracts would constitute a broader incursion, which should be undertaken only after careful study of the Montana and Puerto Rico experiments<sup>48</sup> and foreign administrative schemes such as those championed by Professor Issacharoff. Among the questions to examine in studying these experiments are the effects of the mandatory rule or administrative scheme on wages, shirking, the number of discharges, the type of discharges, the cost of managing employees, and the cost of administration. In closing, let me say that one of the unfortunate aspects of the decline of the labor movement in this country has been that this institution, which has proven itself so adept at addressing the employment security problem, is no longer a realistic alternative for many workers.<sup>49</sup> The absence of a discussion at this Symposium of the institution of collective bargaining as a means of solving employee job security problems is indicative of the institution's current decline.

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44. 42 U.S.C. § 2000e-2(a)(1) (1994) (making illegal discrimination on the basis of race, color, religion, sex, or national origin in the employment context).

45. Estlund, *supra* note 5, at 1671-72; *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) ("The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination.").

46. Estlund, *supra* note 5, at 1682-86.

47. *See* Issacharoff, *supra* note 4, at 1794-96, 1811.

48. *See* MONT. CODE ANN. §§ 39-2-901 to -914 (1994) (requiring that employees that have completed their employer's probationary period of employment be discharged only for "good cause"); P.R. LAWS ANN. tit. 29, § 185a (1985 & Supp. 1991) (granting employees discharged "without good cause" an indemnity, to be paid by their former employer, equal to one month's salary plus one week's pay for each year of employment).

49. *See supra* note 11 and accompanying text.

