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Reversing the Presumption of Employment at Will

Peter S. Partee

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I. INTRODUCTION

The doctrine of employment at will has been a fixture of American common law for approximately a century.[1] In its pristine form, the doctrine is a rule of construction, establishing a rebuttable presumption that the terms of an employment agreement permit either the employer or the employee to terminate the relationship at any time and for any reason.[2] Unless the employee rebuts the at-will presumption by adducing evidence of an explicit agreement to the contrary, an employer may fire the employee for good cause, no cause, or bad cause without incur-

1. Horace Gray Wood's treatise on master and servant law offered the first scholarly statement of the at-will doctrine. *See* H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (2d ed. 1886); *see also* Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895) (stating in 1895 that the at-will doctrine was correct and widely in use). *See generally* Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976) (describing development of the at-will doctrine).

2. *See* H.G. WOOD, *supra* note 1; *see also* Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884) (providing the classic statement of the at-will doctrine and its rationale), *rev'd on other grounds sub nom.* Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915).

ring any legal liability.[3] Experts have estimated that up to seventy-five million employees are subject to this harsh dismissal standard.[4]

In recent years the at-will doctrine has suffered substantial erosion as a common-law principle. A vast majority of state courts have fashioned various tort- and contract-law exceptions in a piecemeal attempt to diminish the doctrine's inherent potential for employer abuse.[5] In a flood of normative argument, legal commentators have advocated alternatively the judicial or legislative expansion of these exceptions or abolition of the at-will doctrine and implementation of a requirement that all dismissals be for just cause.[6] In response, one state and two territorial legislatures have supplanted the at-will doctrine completely by statutorily adopting the just cause dismissal standard or an equivalent.[7]

Proponents have advanced both moral and economic considerations for replacing the at-will doctrine with a just cause dismissal standard.[8] These commentators decry the narrow protection afforded employees by the at-will exceptions and argue that a general just cause standard would be economically efficient.[9] Labor markets have not forced the adoption of just cause standards, they claim, only because employers possess unequal bargaining power and because employees are misinformed about the risks of arbitrary discharge.[10]

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3. *Payne*, 81 Tenn. at 519-20.

4. *The Employment At-Will Issue: A BNA Special Report*, Daily Lab. Rep. (BNA) No. 225, at 7 (Nov. 1982). Of course, at-will employees desire some protection from the various judicial and statutory exceptions to the at-will doctrine. *See infra* subparts II(B)-(D).

5. *See infra* subparts II(B)-(D). *But see* Murphy v. American Home Prods., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983) (rejecting judicially created exceptions to the employment at-will rule). For an overview of each state's wrongful discharge law, see Cathcart & Thomason, *State by State Survey of Wrongful Termination Case Law*, in 1 LABOR AND EMPLOYMENT LAW 433 (P. Panken 5th ed. 1990). *See also* L. LARSON & P. BOROWSKY, 1 UNJUST DISMISSAL §§ 10.01-10.52 (1990 & Supp. 1990) (analyzing the doctrine state by state); I. SHEPARD, P. HEYLMAN & R. DUSTON, WITHOUT JUST CAUSE: AN EMPLOYER'S PRACTICAL AND LEGAL GUIDE ON WRONGFUL DISCHARGE A-1 (1989) (providing a state-by-state guide to wrongful discharge law).

6. *See, e.g.*, Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983) [hereinafter Note, *Public Policy Exception*]; Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980) [hereinafter Note, *Protecting At Will Employees*]; Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974).

7. *See* MONT. CODE ANN. §§ 39-2-901 to 39-2-914 (1987); P.R. LAWS ANN. tit. 29, § 185a (1985); V.I. CODE ANN. tit. 24, §§ 76-79 (Supp. 1990). *See generally* L. LARSON & P. BOROWSKY, *supra* note 5, § 5.07.

8. *See* sources cited *supra* note 6.

9. *See, e.g.*, Note, *Protecting At Will Employees*, *supra* note 6, at 1830-36.

10. *See, e.g.*, Blades, *supra* note 6, at 1410-13; Note, *Protecting At Will Employees*, *supra* note 6, at 1830-36.

A small number of commentators have rejected the intellectual trend toward, as well as the arguments for, just cause requirements.[11] These theorists argue that economic efficiency best explains the persistence of at-will employment and that the doctrine's persistence cannot be accounted for in terms of putative market failures such as unequal bargaining power.[12] According to this argument, market constraints sufficiently check profit-draining abuse by employers, making governmental or judicial intervention unnecessary.[13] In addition, employers forced to provide job security in the form of just cause dismissal requirements merely will transfer the cost of these measures to the employee in the form of lower wages.[14] In fact, lower wage employees, perceived by employers as essentially fungible, would bear a disproportionate share of the costs of a mandatory just cause dismissal requirement precisely because of their comparatively acute lack of bargaining power.[15] This argument implies that the imposition of a just cause standard itself might be unjust.

This Note discusses the economic and moral rationales for replacing the at-will doctrine with a general just cause dismissal standard and proposes an alternative that fairly and efficiently balances all the interests involved. Part II traces the development of the at-will doctrine, describing its history and critically discussing the various kinds of judicial and statutory exceptions to the doctrine. Part III examines the economic and moral arguments for and against implementing a mandatory just cause dismissal standard. Part IV advocates reversing the presumption of employment at will on both economic and moral grounds and argues that courts should establish a rebuttable presumption that an employee can be fired only for just cause, rather than at will. This Note concludes that establishing a rebuttable presumption that an employee can be discharged only for just cause would preserve employment-at-will's economic benefits, while fully protecting those employees most likely to be devastated by an arbitrary discharge.

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11. *See, e.g.*, Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984); Freed & Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097 (1989); Note, *Employer Opportunism and the Need for a Just Cause Standard*, 103 HARV. L. REV. 510 (1989).

12. Epstein, *supra* note 11, at 973-77; Freed & Polsby, *supra* note 11, at 1099-1137.

13. Epstein, *supra* note 11, at 966-68.

14. Freed & Polsby, *supra* note 11, at 1101-02; Harrison, *The "New" Terminable-At-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327, 344-45 (1984).

15. *See* Harrison, *supra* note 14, at 342-45 (concluding that the costs of job security absorbed by workers in monopolistic contexts will be related inversely to their skill, education, and wealth).

II. THE DEVELOPMENT OF THE EMPLOYMENT AT-WILL DOCTRINE

A. *Origins of the Doctrine*

English common law presumed that employment for an indefinite period was for a year, in the absence of custom or evidence to the contrary.[16] This rule had its basis in the equitable principle that neither employees nor employers should reap the benefits of the employment relationship when it was fruitful and then abandon it when it was not.[17] Courts subsequently qualified the English rule by allowing termination after reasonable notice.[18] The courts construed reasonable notice on a case-by-case basis as a question of fact.[19]

Early American law evidently exhibited some confusion about the standard for interpreting employment contracts of indefinite duration. Courts seem to have followed three different approaches. Some courts adopted a bifurcated standard, following the English rule and presuming yearly hirings for agricultural and domestic workers, while effectively treating other workers, such as day laborers, as employees at will.[20] A second approach presumed that the length of employment equalled the employee's wage period.[21] Finally, some courts discarded all presumptions and determined the duration of employment from the intent of the parties as shown by the facts and surrounding circumstances, including custom and prior course of dealing between the parties.[22]

In this context of confusion about the appropriate rule of construction for employment contracts of indefinite duration, the doctrine of employment at will made its unprecedented appearance. Although the increasingly industrialized American society recognized the English rule as anachronistic,[23] courts had not rejected the doctrine firmly and no authority even had stated the at-will doctrine in its present form until 1877, when a treatise writer, Horace Gray Wood, announced the at-will doctrine as the "inflexible" American rule.[24] Wood cited no cases actually supporting the doctrine and articulated no policy grounds for its adoption.[25] Nor was the at-will presumption an accurate reflection of

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16. Feinman, *supra* note 1, at 119-22. The English rule has its etiology in Blackstone's Commentaries. *See* 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 425-26 (Bell ed. 1771).

17. Feinman, *supra* note 1, at 119-22.

18. *Id.*

19. *Id.*

20. *See* A. HILL, WRONGFUL DISCHARGE AND THE DEROGATION OF THE AT-WILL EMPLOYMENT DOCTRINE 3 (1987); Feinman, *supra* note 1, at 122.

21. *See* 1 L. LARSON & P. BOROWSKY, *supra* note 5, § 2.03, at 2-4 to 2-6.

22. *See id.*

23. *See* Feinman, *supra* note 1, at 125.

24. *See* H.G. WOOD, *supra* note 1, § 134, at 272-73; *see also* Feinman, *supra* note 1, at 125-27.

25. *See* Feinman, *supra* note 1, at 126; *see also* Summers, *supra* note 6, at 485 (reporting

the usual duration of employment contracts in this period.[26] Despite these facts, commentators hailed Wood's treatise as a work of genius,[27] and courts throughout the United States quickly embraced and strictly applied the at-will doctrine.[28]

Scholars have posited various explanations for the reception granted the at-will doctrine in the United States.[29] Historians generally agree, however, that the laissez-faire economic ideology gaining ascendency at the time of Wood's treatise contributed significantly to the doctrine's success.[30] At one point, the at-will doctrine became so unequivocally accepted and intellectually fashionable that the Supreme Court found constitutional underpinnings for it in the due process clause.[31] Over time the Court has abandoned this position and has upheld the constitutionality of statutory exceptions to the at-will doctrine.[32] In addition, courts have developed three major judicial exceptions to the at-will doctrine that provide employees with some measure of protection against employer abuse.

B. The Public Policy Exception

Adopted in some form by a strong majority of states,[33] the public policy exception renders employers liable in tort or contract for discharges that undermine a clear public policy.[34] The general rationale underlying the exception is that the at-will doctrine should not inhibit the achievement of public policy objectives.[35] Thus, for example, in the

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that the four cases cited by Wood do not support the doctrine of employment at will).

26. *See* Feinman, *supra* note 1, at 130-31.

27. *See, e.g., id.* at 126 n.68 (quoting Book Notices, 15 ALB. L.J., Jan.-July 1877, at 378-79).

28. *See, e.g.*, Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895).

29. For a good overview of the various explanations, see A. HILL, *supra* note 20, at 5-6.

30. *See id.* at 4-5; L. LARSON & P. BOROWSKY, *supra* note 5, § 2.04, at 2-7; Feinman, *supra* note 1, at 124-25.

31. *See* Coppage v. Kansas, 236 U.S. 1 (1915) (striking down a state statute prohibiting the firing of union members as violative of due process); Adair v. United States, 208 U.S. 161 (1908) (striking down a federal statute prohibiting the firing of union members).

32. *E.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding constitutionality of those provisions of the National Labor Relations Act prohibiting employer discrimination against employees because of union activity).

33. At least 43 states have adopted the public policy exception. *See* Chagares, *Utilization of the Disclaimer As an Effective Means to Define the Employment Relationship*, 17 HOFSTRA L. REV. 365, 370 (1989); *see also* Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988); Parnar v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625 (1982); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984). *But see* Murphy v. American Home Prods., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983) (rejecting the public policy exception).

34. *See infra* notes 50-52 and accompanying text.

35. *See* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

seminal case of *Petermann v. International Brotherhood of Teamsters*[36] the court recognized a cause of action against an employer who had fired an at-will employee for refusing to perjure himself before a legislative committee. The court noted that a state statute specifically enjoined perjury and that allowing the employer to use its at-will power to force an employee to violate the statute would contravene public policy and general state interests.[37]

On its face, the public policy exception provides employees with a broad measure of protection against arbitrary dismissals. Indeed, because all arbitrary dismissals affect some public interest negatively,[38] the exception would seem to prohibit all such dismissals. In practice, however, courts have restricted the scope of the exception's operation in a number of ways. For example, courts have held that the availability of other statutory or administrative relief for a particular discharge preempts a cause of action under the public policy exception.[39] Also, courts generally have required that a discharge implicate a strong public interest to trigger the public policy exception and have refused to apply the exception if the interest at stake appeared merely private or proprietary.[40] In *Pierce v. Ortho Pharmaceutical*,[41] for example, the court held that the plaintiff did not have a cause of action under the public policy exception when she refused to perform certain research solely on personal moral grounds. The court reasoned that because the plaintiff objected for purely personal reasons, she had failed to articulate a clear public policy violation.[42]

Restrictive views on the legitimate sources of public policy also have limited the scope of discharges covered by the public policy excep-

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36. *Id.*

37. *Id.* at 188-89, 344 P.2d at 27.

38. *See* Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974) (holding that arbitrary dismissals are not in the best interest of the economic system or the public); *see also* Note, *Public Policy Exception*, *supra* note 6, at 1948 (stating that "[a]ll dismissals without 'just cause,' no matter how 'private' their motivation, undermine the community's interest in economic productivity, stable employment, and fairness in the workplace").

39. *See, e.g.*, Ficalora v. Lockheed Corp., 193 Cal. App. 3d 489, 238 Cal. Rptr. 360 (1989) (holding that the California Fair Employment and Housing Act preempts a cause of action for wrongful discharge when an employee allegedly was fired for complaining to the Department of Labor about the employer's sex discrimination); Makovi v. Sherwin Williams, 316 Md. 603, 516 A.2d 179 (1989) (refusing to recognize a common-law cause of action for wrongful discharge when Title VII provides a remedy). At least one author has argued, contrary to the holding in *Makovi*, that Title VII should not be accorded preemptive effect. *See* Greenbaum, *Toward a Common Law of Employment Discrimination*, 58 TEMP. L.Q. 65 (1985).

40. *See, e.g.*, Pierce v. Ortho Pharmaceutical, 84 N.J. 58, 417 A.2d 505 (1980); Campbell v. Ford Indus., 274 Or. 243, 546 P.2d 141 (1976) (finding no cause of action for wrongful discharge when an employee-stockholder was fired for pursuing stockholders' rights against the employer).

41. *Pierce*, 84 N.J. at 58, 417 A.2d at 505.

42. *Id.* at 72, 417 A.2d at 512.

tion. Under the guise of balancing the interests of employer, employee, and society, and of refusing to usurp legislative prerogative, a number of courts have limited the sources of public policy to statutes and constitutions.[43] Even courts that do not adopt this limitation are much more likely to allow a cause of action under the public policy exception if an explicit statutory basis for the public policy exists. Thus, courts have allowed a cause of action for the discharge of an employee for the refusal to violate a state statute,[44] for the exercise of a statutory right,[45] and for compliance with a statutory duty.[46] Some courts hesitantly have asserted their common-law power to modify law and have expressed a willingness to consider judicial opinions as valid sources of public policy, but have been quick to affirm the primacy of legislative pronouncements.[47] A number of states have refused to limit public policy to those policies expressed in legislative sources, but also have noted that some statutes or constitutional provisions do not inure to the benefit of the public at large and, therefore, should not serve as sources of public policy.[48] In stark contrast to these decisions, a more progressive approach treats the existence of public policy as an issue of fact to be decided by the jury.[49]

Courts also disagree on whether the public policy exception sounds in tort or contract.[50] Because the exception does not aim to enforce the intentions of contracting parties, but instead to vindicate social policy,

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43. *See, e.g.*, Sterling Drug, Inc. v. Oxford, 294 Ark. 239, 743 S.W.2d 380 (1988); Firestone Tire & Rubber Co. v. Meadows, 666 S.W.2d 730, 731 (Ky. 1983); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 573, 335 N.W.2d 834, 840 (1983). *But see Palmateer*, 85 Ill. 2d at 124, 421 N.E.2d at 876 (applying the public policy exception when no express statutory basis for public policy existed). Some courts even have based public policy on federal constitutional provisions. *See, e.g.*, Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (permitting a cause of action under the public policy exception based on first amendment rights).

44. *See, e.g.*, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (refusing to engage in price fixing); Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985) (refusing to violato indecent exposure laws); Coman v. Thomas Mfg. Co., 325 N.C. 172, 381 S.E.2d 445 (1989) (refusing to operato trucks in violation of federal law).

45. *See, e.g.*, Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (filing a worker's compensation claim); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (same).

46. *See, e.g.*, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (serving jury duty); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978) (same); Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985) (complying with a subpoena).

47. *See, e.g., Wagenseller*, 147 Ariz. at 379, 710 P.2d at 1034; Parnar v. Americana Hotels, Inc., 65 Haw. 370, 380, 652 P.2d 625, 631 (1982).

48. *See, e.g., Wagenseller*, 147 Ariz. at 378-80, 710 P.2d at 1033-35; Foley v. Interactive Data Corp., 47 Cal. 3d 654, 669, 765 P.2d 373, 379, 254 Cal. Rptr. 211, 217 (1988); Adler v. American Standard Corp., 290 Md. 615, 432 A.2d 464, 472 (1981), *aff'd in part and rev'd in part*, 830 F.2d 1303 (4th Cir. 1987).

49. Cilley v. New Hampshire Ball Bearings, Inc., 128 N.H. 401, 405-06, 514 A.2d 818, 821 (1986).

50. *See infra* notes 51-52 and accompanying text.

a majority of courts have construed the action against the employer as a tort.[51] A few courts, however, have characterized an action under the exception as one for the breach of a covenant, implied by law, that the employer will not discharge an employee for reasons contrary to public policy.[52] As a result, these courts award only contract damages.

A small minority of states have rejected the public policy exception on the grounds that the legislature, not the judiciary, should create exceptions to the at-will doctrine.[53] These states defer to the legislature to facilitate stability and predictability in contractual relations and because legislatures are better equipped to discern the public will on these issues and to assess the economic impact of exceptions to the at-will rule.[54] *Wieder v. Skala*[55] demonstrates the harsh consequences that flow from refusals to recognize the public policy exception. In *Wieder* a law firm fired an attorney after he reported another attorney in the firm to a disciplinary committee for violations of New York's Code of Professional Responsibility (Code). The fired attorney brought a wrongful discharge action against the law firm, arguing that the Code required him to report the ethical violations after the law firm refused to do so. The New York court refused to apply the public policy exception and dismissed the fired attorney's claim because he was an employee at will.[56]

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51. *See, e.g.*, Wagner v. City of Globe, 150 Ariz. 82, 722 P.2d 250 (1986); *Wagenseller*, 147 Ariz. at 381, 710 P.2d at 1036; Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); *Parnar*, 65 Haw. at 370, 652 P.2d at 625; *Palmateer*, 85 Ill. 2d at 124, 421 N.E.2d at 876; Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 230, 685 P.2d 1081, 1088 (1984).

52. *E.g., Sterling Drug, Inc.*, 294 Ark. at 239, 743 S.W.2d at 380; Johnson v. Kreiser's, Inc., 433 N.W.2d 225 (S.D. 1988); *Brockmeyer*, 113 Wis. 2d at 574-75, 335 N.W.2d at 841. At least one state recognizes both tort and contract causes of action under the public policy exception. *See* Pierce v. Ortho Pharmaceutical, 84 N.J. 58, 417 A.2d 505 (1980).

53. *See, e.g.*, Murphy v. American Home Prods., 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983); *cf.* Georgia Power Co. v. Busbin, 242 Ga. 612, 250 S.E.2d 442 (1978) (holding that allegations of unproper motive for discharge are legally irrelevant). *But see Brockmeyer*, 113 Wis. 2d at 573-74, 335 N.W.2d at 840-41 (rejecting the argument that recognizing an action for wrongful discharge usurps legislative prerogative).

54. *See, e.g.*, Hartley v. Ocean Reef Club, 476 So. 2d 1327, 1329-30 (Fla. Dist. Ct. App. 1985); Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 336-37, 506 N.E.2d 919, 923, 514 N.Y.S.2d 209, 213 (1987) (explaining the rationale of *Murphy*); *Murphy*, 58 N.Y.2d at 301-02, 448 N.E.2d at 89-90, 461 N.Y.S.2d at 235-36.

55. 144 Misc. 2d 346, 544 N.Y.S.2d 971 (Sup. Ct. 1987), *aff'd*, 562 N.Y.S.2d 930 (App. Div. 1990). The facts of the case are recounted in detail in Harold, Dilemmas, Student Writer, Nov. 1990, at 8.

56. *Wieder*, 144 Misc. 2d at 349, 544 N.Y.S.2d at 973. The public policy exception also has been criticized as incorporating bias in favor of upper-level employees. *See* Note, *Public Policy Exception*, *supra* note 6 (suggesting that the kind of discharges barred by the exception are apt to occur only in upper-level labor markets).

C. The Implied Contract Exception

Employment law's recognition of paradigm shifts[57] in contract law has given rise to the other principal exceptions to the at-will doctrine. The first of these does not really function as an exception to the doctrine at all, but merely as an alternative doctrinal means for rebutting the at-will presumption. This alternative, the implied contract exception, simply recognizes that statements or conduct by the employer that imply some form of job security for otherwise at-will employees may rise to the level of contractually binding obligations.[58] In the past, traditional principles of formalistic contract law, such as the requirements of mutuality of obligation and express manifestations of assent, barred this avenue for rebutting the at-will presumption.[59] Contemporary contract law, however, requires mutuality of obligation only if it constitutes the sole consideration supporting a promise;[60] if other consideration exists, mutuality is not required.[61] Because a single consideration may support many promises, either an employee's obligation to work or the employee's performance of services over time may support an employer's obligation both to compensate the worker and to refrain from arbitrary dismissal.[62]

In addition, contract law's former requirement of an express manifestation of assent has given way to the use of course of performance, prior dealings, and trade practice in discerning the actual agreement of contracting parties.[63] Thus, under the implied contract exception, the absence of an express agreement binding the employee or supported by consideration aside from the employee's work will not undercut an attempt to rebut the at-will presumption.[64] Instead, courts will consider factors such as oral assurances or general statements regarding person-

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57. The phrase "paradigm shift" is used here in the sense of a wholesale change in the conceptual model underlying a subject area. *See* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

58. *Foley*, 47 Cal. 3d at 675-82, 765 P.2d at 383-88, 254 Cal. Rptr. at 221-27; Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 614-17, 292 N.W.2d 880, 892-93 (1980); Pine River State Bank v. Mettille, 333 N.W.2d 622, 626-29 (Minn. 1983); *Thompson*, 102 Wash. 2d at 227-28, 685 P.2d at 1087-88.

59. *See* Note, *Protecting At Will Employees*, *supra* note 6, at 1819-20.

60. RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981).

61. *Id.*

62. 1 A. CORBIN, CORBIN ON CONTRACTS § 125, at 536 n.68 (1963); 1A A. CORBIN, *supra*, § 152, at 13-17; *see also Foley*, 47 Cal. 3d at 679-80, 765 P.2d at 386-87, 254 Cal. Rptr. at 224-25.

63. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 4, 19, 202 (1981); U.C.C. §§ 1-205, 2-208 (1990). Some authors have described these works as effectively reversing the common-law presumption that the parties' writing contains the definitive and exhaustive contract terms. *See* Goetz & Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 273-76 (1985) (cited in *Foley*, 47 Cal. 3d at 679, 765 P.2d at 386, 254 Cal. Rptr. at 224).

64. *See supra* notes 58-62 and accompanying text.

nel practices, the employee's length of service, and industry practices in determining the parties' true agreement.[65]

Toussaint v. Blue Cross & Blue Shield[66] exemplifies the operation of the implied contract exception. In *Toussaint* the court held that an employer could not dismiss an employee hired for an indefinite term absent just cause because the employer had told the employee that he would not be discharged "as long as he did his job," a policy expressly reiterated in an employee handbook.[67] The court held that these policy statements gave rise to contractual rights even though no evidence existed that the parties mutually agreed that the policy statements would create contractual rights.[68] The court also rejected the supposed requirement of mutuality of obligation, noting that when an employer chooses to establish and promulgate personnel practices, the employer receives consideration in the form of a "cooperative and loyal work force."[69]

Serious limitations exist on the salutary effects of the implied contract exception for at-will employees.[70] The impact of the implied contract exception on at-will agreements seems likely to attenuate over time. As businesses become more aware of the kind of materials to which courts will accord contractual significance, they will constrict the dissemination of these materials and thereby reduce the opportunity for employees to use the exception. At-will disclaimers also probably will play a large role in limiting the effectiveness of the implied contract exception.[71] Finally, at least one state has purported to reject the implied contract exception outright by requiring an express agreement to rebut the at-will presumption.[72]

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65. *See, e.g.*, Pugh v. Sees Candies, 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917 (1981) (cited in *Foley*, 47 Cal. 3d at 680, 765 P.2d at 387, 254 Cal. Rptr. at 225).

66. 408 Mich. at 613-19, 292 N.W.2d at 891-95.

67. *Id.* at 613, 292 N.W.2d at 891.

68. *Id.* at 614-15, 292 N.W.2d at 892.

69. *Id.* at 615, 292 N.W.2d at 892.

70. The implied contract exception also has been criticized as incorporating bias in favor of upper-level employees. *See* Note, *Public Policy Exception*, *supra* note 6, at 1935.

71. An at-will disclaimer disavows the existence of any contractual relation between the employer and employee that is not at will. Although some commentators have suggested that such disclaimers constitute unconscionable contracts of adhesion, courts evidently have rejected this view. *See* Chagares, *supra* note 33, at 378-80.

72. Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 336, 506 N.E.2d 919, 922-23, 514 N.Y.S.2d 209, 213 (1987). New York arguably has an implied contract exception, but with an extraordinarily high burden of proof. *See* Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982) (allowing a cause of action when an employee handbook contained an express limitation on the employer's right to terminate that was incorporated into an employment application and on which the employee relied in rejecting other offers).

D. The Covenant of Good Faith and Fair Dealing

The potentially broadest exception to the at-will doctrine also has contractual underpinnings. Following the *Restatement (Second) of Contracts*[73] and the *Uniform Commercial Code*,[74] a small number of courts have implied a covenant of good faith and fair dealing into employment contracts.[75] Courts disagree about the precise effect of this covenant on at-will agreements.[76] At least one court has construed the covenant of good faith and fair dealing expansively to prohibit the discharge of an employee without good cause in certain circumstances.[77] Most courts that have recognized the covenant in employment contracts, however, have advanced a more restrictive view of its effect.[78] One line of cases interprets the covenant as prohibiting only bad cause discharges, such as dismissal to prevent the vesting of benefits in which the employee holds an equitable stake.[79] For example, in *Fortune v. National Cash Register Co.*[80] the court allowed a cause of action under the good faith covenant against an employer who had fired an at-will salesman to avoid paying a large commission. Other courts simply interpret the covenant to proscribe the same set of discharges as the public policy exception.[81]

The majority of courts confronting the issue, however, have refused on both policy and analytical grounds to imply any version of the covenant of good faith and fair dealing into employment contracts. The policies that courts have adduced in opposition to the covenant reflect the concerns that dominate the at-will debate as a whole: that the covenant is an overbroad remedy;[82] that its implication into at-will agreements would restrict unduly an employer's discretion in managing its work

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73. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

74. U.C.C. § 1-203 (1990).

75. *See* cases cited *infra* notes 77-81.

76. *See id.*

77. *See, e.g.*, Cleary v. American Airlines, Inc. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (holding that an employee could not be discharged without good cause in a case in which the employee was fired after 18 years against the express policy of the employer and thereby was deprived of benefits).

78. *See infra* notes 79-81 and accompanying text.

79. *See* Mitford v. de Lasala, 666 P.2d 1000, 1007 (Alaska 1983); Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985); Cort v. Bristol-Myers Co., 385 Mass. 300, 431 N.E.2d 908 (1982); K Mart Corp. v. Ponsock, 103 Nev. 39, 732 P.2d 1364 (1987); Hall v. Farmers Ins. Exch., 713 P.2d 1027 (Okla. 1985).

80. 373 Mass. 96, 364 N.E.2d 1251 (1977).

81. *See, e.g.*, Magnan v. Anaconda Indus., 193 Conn. 558, 479 A.2d 781 (1984) (stating that a breach of covenant exists when a discharge violates an important public policy); Howard v. Dorr Woolen Co., 120 N.H. 295, 414 A.2d 1273 (1980) (modifying Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974)).

82. *See, e.g.*, Morriss v. Coleman Co., 241 Kan. 501, 518, 738 P.2d 841, 851 (1987); Breen v. Dakota Gear & Joint Co., 433 N.W.2d 221 (S.D. 1988).

force;[83] that it does not strike the appropriate balance of employer and employee interests;[84] that it would subject all firings to judicial incursions into amorphous discharge standards;[85] and finally, that the covenant would amount to the judicial imposition of a collective bargaining agreement, a move best left to the legislature.[86]

Courts have contended that, as an analytical matter, implying the covenant into at-will employment agreements would render those agreements internally inconsistent.[87] In commercial contexts the covenant imposes a duty on the contracting parties to exercise all rights and perform all obligations in good faith.[88] Because at-will agreements allow an employer to discharge an employee for bad cause, the covenant would impose a duty on the employer to use good faith in making bad cause discharges, a proposition that is merely a semantic step away from a fiat contradiction.[89] Given the apparently exclusive dilemma of choosing between enforcing a covenant of good faith and fair dealing and protecting the at-will employers' right to fire for bad cause, these courts simply have opted for the latter alternative. Consequently, the covenant of good faith and fair dealing remains a limited exception to the at-will doctrine.[90]

E. Statutory Exceptions

Statutory exceptions to the employment at-will doctrine generally fall into two basic categories.[91] Exceptions of the first variety prohibit

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83. *See, e.g., Wagenseller*, 147 Ariz. at 386, 710 P.2d at 1041; Parnar v. Americana Hotels, Inc., 65 Haw. 370, 377, 652 P.2d 625, 629 (1982); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 226-27, 685 P.2d 1081, 1086-87 (1984); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 569, 335 N.W.2d 834, 838 (1983).

84. *See, e.g.*, Hillesland v. Federal Land Bank Ass'n, 407 N.W.2d 206, 214 (N.D. 1987); *Thompson*, 102 Wash. 2d. at 226-27, 685 P.2d at 1086.

85. *See, e.g., Parnar*, 65 Haw. 370, 377, 652 P.2d 625, 629; *Hillesland*, 407 N.W.2d at 214; *Brockmeyer*, 113 Wis. 2d at 569, 335 N.W.2d at 838.

86. *See Thompson*, 102 Wash. 2d at 226-27, 685 P.2d at 1086-87.

87. *See, e.g.*, Murphy v. American Home Prods., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983); *Hillesland*, 407 N.W.2d at 214; *Thompson*, 102 Wash. 2d at 226-27, 685 P.2d at 1086-87.

88. *See* Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980) (interpreting the covenant of good faith and fair dealing).

89. *See* sources cited *supra* note 87.

90. Although most courts that recognize the covenant in employment contracts construe its breach as a contract action, *see, e.g.*, ARCO Alaska, Inc. v. Akers, 753 P.2d 1150, 1153-54 (Alaska 1988); Foley v. Interactive Data Corp., 47 Cal. 3d 654, 682-700, 765 P.2d 373, 389-401, 254 Cal. Rptr. 211, 227-39 (1988), at least three courts have construed it as a tort. *See* Carter v. Catamore Co., 571 F. Supp. 94, 97 (N.D. Ill. 1983) (applying Rhode Island law); Dare v. Montana Petroleum Mktg., 212 Mont. 274, 687 P.2d 1015 (1984); K Mart Corp. v. Ponsock, 103 Nev. 39, 45-47, 732 P.2d 1364, 1368-69 (1987).

91. *See* Note, *supra* note 11, at 514 (recognizing and describing these categories more fully).

discharges based on specific conduct, such as whistleblowing,[92] or characteristics of the employee, such as race, sex, or age.[93] The second, more controversial, kind of legislation effectively proscribes all discharges without just cause.[94]

III. Arguments for and Against a Just Cause Dismissal Standard

While applauding judicial recognition of exceptions to the at-will doctrine, many commentators nonetheless have argued for more extensive reform.[95] Noting that the current exceptions to the doctrine provide employees with less than uniform protection against arbitrary discharges by employers, these commentators generally have advocated the adoption of just cause dismissal standards.[96] This call for reform, however, has met with spirited opposition from a small group of normative legal theorists.[97] These theorists argue that economic efficiency favors employment at will over just cause dismissal standards and that the ubiquity of at-will employment best supports this claim.[98] Although an agreement providing for only just cause dismissals can overcome the presumption of at-will employment,[99] employees regularly do not bargain for these agreements. Because properly functioning markets by definition allocate resources to those who value them most, by hypothesis, employers must value at-will powers more than employees value the job security that just cause provisions would provide.[100] Judicially or legislatively mandated just cause dismissal standards, therefore, would fail to allocate scarce resources to those who value them most and result in economic inefficiency.[101]

Any proponent of general just cause dismissal standards must deal with this powerful argnment. Logically, two ways to refute the argument exist. One can challenge the assumption of a properly functioning labor market by diagnosing a systemic market failure that causes the regular adoption of at-will agreements in spite of their economic inefficiency. Alternatively, one can argue that although economically ineffi-

92. At least 10 states have enacted "whistleblower" statutes. *See id.* at 514 n.18 (stating that California, Connecticut, Iowa, Maine, Michigan, Minnesota, New Jersey, New York, Rhode Island, and Utah have enacted whistleblower statutes).

93. *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988).

94. *See* statutes cited *supra* note 7. The Virgin Islands statute has hybrid characteristics in that it spells out acceptable causes for dismissal.

95. *See* sources cited *supra* note 6.

96. *See id.*

97. *See* sources cited *supra* note 11.

98. *See* Epstein, *supra* note 11, at 965-66; Freed & Polsby, *supra* note 11, at 1097-99.

99. *See* Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884).

100. Freed & Polsby, *supra* note 11, at 1097-99.

101. *Id.*

cient, just cause standards are morally superior to the at-will doctrine.

A. Economic Arguments

1. The Monopoly Power Explanation

Commentators most often identify unequal bargaining power as the market failure responsible for causing the prevalence of at-will employment.[102] Employment at will creates economic inefficiencies, according to this view, because the doctrine allows employers to use their radically unequal bargaining power to force employees into a position from which employees may be discharged arbitrarily, even though rational employees may value job security more than rational, profit-maximizing employers value the right to fire arbitrarily.[103] Under this theory, even if employees wanted to bargain for just cause dismissal standards, employers would refuse;[104] the loss of employees and their particular skills, character, and willingness to work, along with the threat of losing employees to a competitor, are not sufficient to motivate an employer to bargain over job security.[105]

Of course, for many employees, this assertion simply ignores reality; in many instances, for example, the employee's labor talents are sufficiently unique or in demand to induce an employer to bargain over job security and employment perquisites. As a result, the argument that employers' unequal bargaining power leads to at-will agreements and explains their ubiquity applies only to those employees for whom working on the employer's terms is a practical economic necessity. Only an employee subject to this "monopoly power"[106] of an employer can be forced to accept at-will employment. The possession of monopoly power by employers, therefore, explains only those at-will agreements entered into by employees truly subject to the exercise of monopoly power.

The monopoly power explanation for the ubiquity of at-will agreements gains force from the fact that those employees subject to monop-

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102. *See* Blades, *supra* note 6, at 1410-13; Freed & Polsby, *supra* note 11, at 1099-1102.

103. For a description and criticism of this theory, see Freed & Polsby, *supra* note 11, at 1099-1102.

104. *See id.*

105. *See id.*

106. This Note eschews the use of the term "monopsony" in favor of a more intuitive term. A monopsony exists when workers can sell their labor to only one employer. "Monopsonistic conditions may exist when there are few purchasers of labor, each of whom has power to control wage levels." *See* Harrison, *supra* note 14, at 352 n.129 (citing A. REES, THE ECONOMICS OF WORK AND PAY 75-80 (1973)). As the phrase is used in this Note, an employer has "monopoly power" over an employee only if it is a practical economic necessity that the employee work on that employer's terms. Defining "monopoly power" in this way leaves logical room for the possibility that conditions other than monopsony may render an employee subject to coercion hy an employer over employment terms.

oly power are likely to suffer the most from being at-will employees. The expected harm[107] from a firing in bad faith or without cause is greatest in these cases because, by definition, these employees are least likely to be able to find a comparable job and lack the resources to cope with unemployment. Thus, the class of employees with the most incentive to object to at-will employment has the least amount of bargaining power to do so.

Commentators have tendered various objections to the monopoly power explanation for the prevalence of at-will agreements.[108] First, the monopoly power explanation does not account for the number of at-will employees not subject to monopoly power.[109] The best response to this objection is that these employees simply do not need to bargain for more job security because they possess characteristics, such as unique or otherwise marketable skills, that give them leverage in bargaining with employers. These same characteristics lower both the probability of discharge and the amount of potential harm these employees would suffer from an arbitrary discharge. As a result, employees who are not subject to monopoly power have significantly less incentive to bargain for job security than other employees.

A second, more powerful objection to the monopoly power explanation holds that the theory does not predict the existence of at-will agreements even for those employees truly subject to monopoly power.[110] As commentators have noted, if the law forced monopolistic employers to provide employees with just cause job security, employers merely would use their monopoly power to shift the resulting costs back to employees in the form of lower wages.[111] Because the employer's labor costs would remain the same either way, the employer would have no reason to prefer at-will employment over paying lower wages in combination with a just cause dismissal standard.[112] An employer's possession of monopoly power, therefore, fails to explain why that employer would choose employment at will over other, equally profitable methods of conducting business.[113]

Intuitively, employment at will necessarily would seem to cost the employer less than a just cause dismissal standard combined with lower wages. Perhaps even a monopolistic employer cannot shift all the costs

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107. An event's expected harm equals the probability that it will occur multiplied by the amount of monetary damage the event would cause if it occurred. *See* R. POSNER, TORT LAW—CASES AND ECONOMIC ANALYSIS 1 (1982) (defining the "expected cost" of an event).

108. *See infra* notes 109-31 and accompanying text.

109. *See* Note, *Protecting At Will Employees*, *supra* note 6, at 1829.

110. Freed & Polsby, *supra* note 11, at 1101-02.

111. *See id.* at 1102; Harrison, *supra* note 14, at 344-45.

112. Freed & Polsby, *supra* note 11, at 1101-02; Harrison, *supra* note 14, at 354.

113. Freed & Polsby, *supra* note 11, at 1101-02.

of job security to the employee. If the reason that a monopolistic employer cannot shift all of these costs to the employee is that employees would quit, however, then this fact conflicts with the assumption of a monopolistic employer. Working on the employer's terms is not a practical economic necessity for an employee who realistically has the option of quitting under these circumstances. Thus, the claim that employers cannot shift all the costs of job security to the employee cannot resuscitate the monopoly power explanation, for that claim conflicts with the assumption that the employee is subject to the employer's monopoly power.

The possession of monopoly power by employers, therefore, does not explain completely the ubiquity and persistence of employment at will; some additional fact must explain why employers use their monopoly power to establish employment at will rather than other, equally profitable, employment relationships. The explanation cannot be that employers prefer employment at will solely because it saves administrative and other costs associated with stricter dismissal standards; for under the assumption of a monopolistic employer, the employer always could shift these costs to employees in the form of lower wages. Employers could force even employees protected by minimum wage legislation to bear the costs of job security through less frequent wage raises and the reduction or elimination of fringe benefits.

Although it can be argued that monopolistic employers prefer employment at will because it provides unparalleled incentives for superior employee performance, various objections undercut this argument. In theory, employees will improve or maintain their output to lessen the possibility of arbitrary discharge. If an employer is determined to fire an employee arbitrarily, however, considerations of employee performance are unlikely to enter into the employer's decision. To the extent that employees recognize that their on-the-job performance has no bearing on the probability of arbitrary discharge, this realization will reduce their performance incentives. In addition, as both courts[114] and commentators[115] have argued, job security actually may increase worker productivity and efficiency by improving job satisfaction.

The only remaining possibility is a disconcerting one: monopolistic employers prefer employment at will on the irrational ground that it

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114. *See, e.g.*, Toussaint v. Blue Cross & Blue Shield, 408 Mich. 519, 613, 292 N.W.2d 880, 892 (1980) (concluding that job security benefits the employer through producing a loyal and cooperative work force).

115. *See, e.g.*, Decker, *At-Will Employment: Abolition and Federal Statutory Regulation*, 61 U. DET. J. URB. L. 351, 364 (1984). *But see* Freed & Polsby, *supra* note 11, at 1131-34 (concluding that job security affects employee performance and efficiency only tangentially and possibly even negatively).

enables them to fire employees arbitrarily. This preference for employment at will is irrational because, by definition, an arbitrary discharge is not related to business considerations, such as economic necessity or the employee's on-the-job performance. Thus, monopolistic employers seemingly have no reason to want the power to fire arbitrarily, but nevertheless use their monopoly power to achieve precisely that end.[116]

The power to fire arbitrarily does represent an attractive freedom from regulation, which may explain this irrational desire, at least in part. Regardless of whether stricter dismissal standards actually would have any negative impact on the employer's business, they may seem to encroach on employer discretion in controlling the workplace, thereby relinquishing powers to the judiciary that naturally seem to belong to the employer. Rational or not, employment at will may seem to be the last refuge for employers besieged with attempts to lessen their plenary power over the workplace.[117]

2. The Employee Misperception Explanation

Commentators have offered employee misperception as the other principal market defect that explains the prevalence of employment at will.[118] According to this view, employees fail to bargain for just cause dismissal standards because they erroneously perceive the risk of arbitrary dismissal to be low.[119] These misperceptions by employees may result from the common psychological tendency to discount unpleasant possibilities, such as job loss, or from an inability to obtain accurate information on the employer's dismissal practices.[120] In addition, employers may convey a less-than-accurate image of job security and thereby exacerbate employees' misperceptions.[121]

Whatever the cause of the misperceptions, this explanation implies that employers might yield to just cause dismissal standards in exchange for lower wages, but employees simply never bargain for it during hiring negotiations. The result is an efficiency loss. Because markets

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116. *See* Note, *supra* note 11, at 517 (noting that an employer would seem to have no reason to violate a just cause dismissal statute). Although the author develops an economic rationale for the right to fire arbitrarily, the author assumes a competitive labor market, and, therefore, this rationale does not apply when employers exert monopoly power. *Id.* at 511-12 & n.7.

117. *See, e.g.*, International Union v. Johnson Controls, Inc., No. 89-1215 (U.S. Mar. 20, 1991) (holding that Title VII bans sex-specific fetal protection policies).

118. *See* Freed & Polsby, *supra* note 11, at 1103-30; Note, *supra* note 11, at 524; Note, *Protecting At Will Employees*, *supra* note 6, at 1830-32.

119. *See* Note, *supra* note 11, at 524; Note, *Protecting At Will Employees*, *supra* note 6, at 1831. These authors simply assume that the risk of arbitrary discharge is high enough that a reasonable person could not disregard it. *But see* Freed & Polsby, *supra* note 11, at 1105-07 (arguing that the risk of arbitrary discharge is low enough for a reasonable person to disregard).

120. *See* Note, *Protecting At Will Employees*, *supra* note 6, at 1831.

121. *Id.*

operate efficiently and allocate scarce resources to those who value them most only if all market participants can make fully informed resource valuations, employee misperception of the risks of arbitrary discharge and the commensurate value of job security will result in economic inefficiency.[122]

The employee misperception explanation for the prevalence of employment at will seems to hinge precariously on the assumption that the risk of arbitrary discharge significantly exceeds employees' perceptions.[123] Some commentators have rejected this assumption, arguing both that employees tend to exaggerate, rather than discount, the probability of arbitrary discharge and that the risk of arbitrary discharge in any case remains so low that a reasonable person could disregard it.[124]

Two variations of the employee misperception explanation avoid these criticisms. First, although the probability of an arbitrary discharge may be low, discharge may place exorbitant costs on employees subject to monopoly power. By definition, these employees cannot secure comparable employment,[125] and as a result, their financial status is likely to devolve quickly and permanently after an arbitrary discharge. Thus, for these employees the expected harm[126] from an arbitrary discharge is likely to be extremely high, or at least high enough that an employee could not disregard it reasonably.

Under the second variation of the misperception explanation, which actually constitutes an independent argument, employees may perceive the risks and costs of an arbitrary discharge quite clearly, yet still reasonably refrain from bargaining for job security.[127] Employees reasonably could determine that inquiring about dismissal standards would reflect badly on them, a circumstance that an at-will employee subject to monopoly power quite literally cannot afford.[128] Employment at will embodies economic inefficiencies, according to this argument, because it unnecessarily raises the employees' costs of bargaining for job security.[129]

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122. *Id.* at 1830.

123. *See* Freed & Polsby, *supra* note 11, at 1105-07 (calculating the probability that an employee will be discharged arbitrarily to be as low as .0154%).

124. *See id.* at 1107.

125. *See supra* note 106 (defining monopoly power).

126. *See supra* note 107 (defining expected harm).

127. *See* Note, *supra* note 11, at 524.

128. *Id.*

129. *See id.*

B. Moral Arguments

The argument that the persistence of the at-will doctrine supports its economic efficiency purports to make no comment on the morality of the at-will doctrine.[130] As those theorists supporting the doctrine's economic efficiency have been quick to point out, economic efficiency is a narrow concern that ethical constraints may supersede.[131] Under this view, economic efficiency and morality are discrete inquiries.[132] Thus, even if employment at will is economically efficient, it may constitute a morally despicable policy.

Of course, moral and economic considerations may not be as separable as this analysis suggests. The definition of economic efficiency has normative characteristics that commentators frequently ignore.[133] For example, the definition presumes market participants make only rational valuations of resources, but this assumption itself may carry widely varying ethical implications.[134] Conversely, in a world of scarce resources, notions such as fairness may not have much content apart from a particular conception of rational valuations or distributions of resources. Thus, economic concepts and arguments may start to look like moral ones and vice versa.

Strong intuitions support the argument, however, that the employment at-will doctrine is inherently unfair.[135] The at-will doctrine effectively removes the task of predicting the costs of employee job security from employers and instead burdens employees with predicting the probability and costs of arbitrary discharge. Of course, employers seem to have an incentive to avoid predicting the costs of job security because the expense necessarily includes the additional litigation costs imposed by stricter dismissal standards, costs that are difficult to predict and pose a high risk of miscalculation. But employees typically have less access to resources that would enable them to predict accurately the probability and costs of arbitrary discharge than employers have to resources to predict accurately the costs of job security. Moreover, un-

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130. Freed & Polsby, *supra* note 11, at 1144; Harrison, *supra* note 14, at 361; Note, *supra* note 11, at 511-12.

131. *See* Freed & Polsby, *supra* note 11, at 1144; Harrison, *supra* note 14, at 361; Note, *supra* note 11, at 524.

132. *See* sources cited *supra* note 131.

133. *E.g.*, Harrison, *supra* note 14, at 355 (noting that "[a]n efficient allocation is not necessarily one that favors those who desire or need the right most, or even those who[m] it would make happiest") (footnote omitted).

134. In fact, two diametrically opposed moral philosophies, utilitarianism and Neo-Kantianism, claim rationality as their basis. *Compare* R. HARE, MORAL THINKING (1981) (advocating utilitarianism) *with* J. RAWLS, A THEORY OF JUSTICE (1971) (advocating Neo-Kantian theory of justice).

135. *But see* Epstein, *supra* note 11, at 953-55 (criticizing fairness critiques of employment at will by emphasizing the importance of freedom of contract).

like employees, employers can shift at least some of any unexpected costs of job security to consumers and employees and spread these costs over time, even in nonmonopolistic contexts. In short, employers seem much more capable of providing job security to employees than employees do of shouldering the burdens of the at-will doctrine. The at-will doctrine thus runs counter to the intuitive notion of fairness that those who can best bear a particular burden should do so.

The imposition of an across-the-board just cause standard for all employees, however, also could cause substantial unfairness. By definition, employees who are not subject to monopoly power have skills or other characteristics that enable them to switch employers more easily than other employees.[136] As a result, employees not subject to monopoly power are much more likely to respond to a wage reduction exacted as a quid pro quo for just cause job security by quitting. This fact may cause employers to shift to employees subject to monopoly power some of the costs of providing job security to employees not subject to monopoly power. Thus, employees subject to monopoly power would bear not only the costs of their own job security, but at least part of the costs of job security for employees not subject to monopoly power.[137] The resulting unfairness is exacerbated by the fact that employees subject to monopoly power form the class least capable of bearing these additional costs. A uniform just cause standard, therefore, could engender the same kind of unfairness as employment at will.

IV. A Proposal: A Rebuttable Just Cause Presumption

Notice, however, that the moral and economic arguments against employment at will have their greatest, if not their only, force in monopolistic contexts. Employees not subject to monopoly power simply do not have the same need for job security as employees subject to monopoly power. The probability and costs of an arbitrary discharge would be significantly lower for these employees than for employees who are subject to monopoly power. Employees not subject to monopoly power, therefore, rationally may value higher wages in combination with no job security more than lower wages and a just cause dismissal standard. As a result, applying a mandatory just cause standard to these employees likely would fail to allocate resources according to the values set by rational market participants and thereby would result in economic inefficiency.

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136. *See supra* note 106 and accompanying text (discussing employees who are subject to monopoly power).

137. *See* Harrison, *supra* note 14, at 345 (concluding that in monopolistic contexts the costs of job security absorbed by workers will be related inversely to their skill, education, and wealth).

Moreover, employees not subject to monopoly power are more likely to possess the resources to investigate and compare employers' personnel policies. Also, because arbitrary discharge poses less of a threat for these employees, they may be more apt to inquire and negotiate with prospective employers over dismissal standards. Thus, employees not subject to monopoly power tend to know more about the risks of arbitrary discharge and to make informed decisions about whether to bargain for more job security than employment at will provides. The employee misperception argument, therefore, applies with less force to these employees, and the persistence of employment at will in this class of employees is strong evidence of the doctrine's economic efficiency. Consequently, a mandatory just cause standard applied to employees not subject to monopoly power likely would create economic inefficiencies.[138]

Reversing the presumption of employment at will would avoid these problems by differentiating between distinct labor markets. Instead of presuming that employees hired for an indefinite term are dischargeable at will, courts should establish a rebuttable presumption that these employees can be fired only for just cause. Employers could rebut the presumption by proving two elements: the employer's lack of monopoly power over the employee and some form of an at-will agreement. Thus, employees not subject to monopoly power could sign at-will disclaimers and thereby continue forging employment at-will relationships almost as easily as under the at-will doctrine.

For employees subject to monopoly power,[139] on the other hand, at-will disclaimers, or other means of rebutting the just cause presumption, would be virtually per se invalid. Employers still could establish employment at-will relationships with these employees, but only by using procedural safeguards that would ensure a coercion-free bargaining process. Employers would be required to give the employee an unfettered choice between at-will and just cause dismissal standards. Of course, an employer could provide incentives, such as higher wages, for employees to choose the at-will option. The burden of proof, however, would be on the employer to show that its hiring practices would inform a reasonable person fully about the consequences of at-will employment and that it made good faith efforts to encourage an independent choice by the employee.

The test for determining the existence of monopoly power would follow this Note's definition of that phrase: An employer has monopoly

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138. *Id.* at 358 (stating that "[w]hat is efficient in one labor market may be inefficient in another").

139. *See supra* note 106 and accompanying text.

power over an employee if and only if it is a practical economic necessity that the employee work on that employer's terms.[140] In short, if economic circumstances allow the employee the realistic option of quitting when the employer refuses to bargain over job security, then that employee is not subject to monopoly power.

Thus construed, a rebuttable just cause presumption would increase economic efficiency by allowing distinct dismissal standards to govern discrete labor markets, while providing just cause job security to those employees who need it most. A rebuttable just cause presumption would protect those employees who, if discharged arbitrarily, would cost society the most, while allowing employees not subject to monopoly power greater freedom in determining the amount of job security that is appropriate for them. If these latter employees mistakenly choose at-will employment because of misperceptions or lack of information, their expected harm in the event of arbitrary discharge is likely to be low enough to be outweighed by the costs that the at-will doctrine saves employers.

Moreover, a rebuttable just cause presumption would provide employers with an incentive to disclose to employees the amount of job security they actually possess. Under the at-will doctrine, employers have the incentive to remain quiet during job negotiations in the hope of achieving the at-will employment relationship they irrationally prefer.[141] A rebuttable just cause presumption, on the other hand, would motivate employers to discuss the issue of dismissal standards even in negotiations with employees not subject to monopoly power, for if employers do not broach the issue, they cannot rebut the just cause presumption. Because the employer, rather than the employee, must open the subject, employee inhibitions about discussing job security also will be countered. Since a rebuttable just cause presumption would promote more informed bargaining, it would increase economic efficiency.

Additionally, reversing the presumption of employment at will would avoid the fairness criticisms[142] that plague both employment at will and across-the-board just cause standards. Under a rebuttable just cause presumption, employees subject to monopoly power would no longer bear the burden of predicting or absorbing the costs of an arbitrary discharge. Also, some, if not most, employees not subject to monopoly power would be at-will employees under a rebuttable just cause presumption, whereas none of these employees would be at-will employees under a general just cause standard. Employees subject to monopoly

140. *See supra* note 106 (defining monopoly power).

141. *See supra* notes 119-23 and accompanying text.

142. *See supra* notes 131-38 and accompanying text.

power, therefore, would pay primarily for their own job security through lower wages and not for job security for these other employees. In this way, reversing the presumption of employment at will would ameliorate the unfairness of an across-the-board just cause standard.

Possible employer concern with the supposed unpredictability that would stem from a rebuttable just cause presumption is largely unfounded. Under employment at will, employers readily distinguish between those employees they can force into employment at will and those they cannot. It would be disingenuous for employers to suggest that under a rebuttable just cause presumption they suddenly are unable to make this distinction.

Finally, as some commentators have implied, the class of employees subject to monopoly power as defined in this Note may be extremely small or nonexistent.[143] Arguably, all employees possess some market power in the form of the ability to quit and work elsewhere. Even if this class of employees is nonexistent, however, this Note's rebuttable just cause presumption would increase overall economic efficiency by promoting informed bargaining over job security.

V. Conclusion

Although various judicial and statutory exceptions to employment at will provide employees with some measure of protection from arbitrary discharge, these exceptions are limited and sometimes unavailable. The prevalence of at-will agreements seems attributable to various systemic market defects, such as employers' possession of monopoly power, employer irrationality, and employee misperceptions, which cause the regular adoption of at-will agreements in spite of their economic inefficiency. Moreover, the doctrine of employment at will conflicts with basic notions of fairness. Thus, the case against employment at will and in favor of just cause dismissal standards seems persuasive. An across-the-board just cause standard, however, also would be economically inefficient because employees not subject to monopoly power rationally may choose at-will employment over a just cause standard. An across-the-board just cause standard could engender substantial unfairness by forcing employees subject to monopoly power to bear a disproportionate share of the costs of job security.

Reversing the presumption of employment at will and instituting a rebuttable just cause presumption would remedy the economic and moral defects that inhere in both employment at will and across-the-

143. *See* Epstein, *supra* note 11, at 973 (doubting the existence of employers' "inexhaustible" bargaining power); Freed & Polsby, *supra* note 11, at 1100-01 (arguing that monopoly power could not exist in a capitalist economy).

board just cause standards. A rebuttable just cause presumption would allow different labor markets to be governed by distinct dismissal standards, thereby preserving and improving upon the economic benefits of employment at will, while providing job security to those who need it most.

*Peter Stone Partee**

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