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THE VULNERABLE SUBJECT AT WORK: A NEW PERSPECTIVE ON THE EMPLOYMENT AT-WILL DEBATE

Jonathan Fineman*

I. INTRODUCTION

For over one hundred years, the fundamental principle of American employment law known as the "at-will rule" has remained the same: either party to an employment contract may terminate the contract at any time without cause.[1] The at-will rule is widely reviled by scholars, although it does have a few defenders.[2] For decades, many academics and practitioners have sought to abolish the at-will rule and replace it with a system whereby employees may only be terminated for just-cause.[3] Since the 1960s, courts and legislatures have carved out a number of "exceptions" to the at-will rule, such as antidiscrimination statutes.[4] According to the dominant narrative in employment law scholarship, the decades of criticism and exceptions reflect a substantial weakening of the at-will rule.[5] Many

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1. *See* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118 (1976) (summarizing the English common law and tracing the development of the at-will doctrine in the United States).

2. Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. CIN. L. REV. 517, 517, 517 n.1 (2004) (finding more than 200 articles on employment at-will published between 1985 and 2003 based on a simple Westlaw search, most critiquing the rule).

3. Daniel J. Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111, 126 (2006) ("Almost all scholars who have proposed reforming employment termination law have advocated replacing the employment at-will rule with good cause protection or something very similar."); Michael J. Phillips, *Toward a Middle Way in the Polarized Debate Over Employment At Will*, 30 AM. BUS. L.J. 441, 443 (1992).

4. Libenson, *supra* note 3, at 127-28.

5. Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment At Will*, 92 MICH. L. REV. 8, 9-10 (1993) (summarizing arguments made by other scholars).

scholars have even predicted that the at-will rule will soon be abolished or swallowed by its exceptions.[6]

In this article, I argue that employment scholars should stop trying to replace employment at-will with just-cause employment, at least in the short term. I do not take this position because I agree with supporters of the at-will rule. Indeed, I agree wholeheartedly with proponents of a just-cause system. Instead, I make the pragmatic argument that the current focus on at-will versus just-cause employment is not productive because I disagree with those scholars who argue that the at-will rule is on its last legs. Despite decades of criticism, we are nowhere close to replacing employment at-will with a just-standard. If anything, the at-will rule has become more entrenched in recent years.[7]

We should accept that the at-will rule as inevitable in the current American political and social context. Instead of trying to control employers' ability to terminate employees, we should try to deal with the *consequences* of giving employers such broad control over the workplace. Primarily focusing on termination ignores many other aspects of the employment relationship, like wages and how an employee is treated while at work. Many such aspects of an ongoing employment relationship may be more important to employees than the unlikely possibility of termination without cause.

This article applies recent "vulnerability" scholarship to employment law issues. A vulnerability approach argues that the autonomous liberal legal subject at the heart of much of political and legal thought fails to capture the material, social, and developmental realities of the human condition and thus should be replaced with a "vulnerable subject."[8] Importantly, and in contrast to the autonomous, independent, and self-sufficient abstraction of the liberal legal subject, the vulnerable legal subject is theorized as embodied and as embedded in social contexts.[9] The idea of the vulnerable subject has been described as providing a needed

6. *See* Bird, *supra* note 2, at 522-23; Donald C. Carroll, *At-Will Employment: The Arc of Justice Bends Towards the Doctrine's Rejection*, 46 U.S.F. L. REV. 655, 665 (2012); Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 1-2 (1979).

7. Carroll, *supra* note 6, at 656-57.

8. Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 263-66 (2010) [hereinafter *The Responsive State*]. The theory recognizes that institutions, including the state, are also vulnerable, although differently so. The Vulnerable Subject, therefore, can be either an individual or an institution. Id. at 14-15. *See* Anna Grear, *Vulnerability, Advanced Global Capitalism and Co-symptomatic Injustice: Locating the Vulnerable Subject, in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 41-60 (Martha Fineman & Anna Grear eds. 2013).

9. *Id.* at 48-52.

intervention into U.S. policy discussions, providing a "heuristic" – a way to shift the focus of inquiry to a more balanced or complete conception of what it means to be human in ways that will raise new questions and reveal new relationships and patterns.[10] I plan to apply this general theory to the employment context by the creation of the constructs of the "vulnerable employer" and the "vulnerable employee."

As a starting point for applying vulnerability theory to the employment relationship, this article examines the effect of employment law on employees' vulnerability and resilience to vulnerability. Importantly, we must recognize that the at-will rule is the manifestation of a policy choice made by the state. This policy choice gives a privilege to American employers that is not shared by employers in most other first-world nations.[11] That policy choice, like all others, has consequences. It decreases employees' resilience and ability to positively respond in the face of their vulnerability.

A vulnerability approach allows us to introduce the idea that the privilege the employer enjoys under the at-will regime might also appropriately be complemented by some reciprocal responsibility for the situation of the employee. To the extent possible, employment policy should attempt to mitigate the consequences of giving employers broad control over the workplace by balancing it with some benefits for employees. At present, employers receive most of the privileges of the at-will rule, but do not bear a proportionate share of the consequences. Using vulnerability and resilience as guiding principles, a vulnerability analysis asks whether those burdens and benefits should be more equitably shared. In addition, because the at-will rule is a privilege created by the state, vulnerability theory suggests the state may have some additional obligation to protect employees' resiliency beyond fashioning employment law.

II. THE DEBATE OVER EMPLOYMENT AT-WILL

A. *Just Cause Versus Employment At-Will*

The "at-will" rule has been the basic foundation of American employment law since the late Nineteenth Century.[12] The at-will rule provides that each party to an employment relationship of indefinite term is

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10. *Id.* at 58-60.

11. Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 404-06 (2001-2002); Joseph E. Slater, *The "American Rule" that Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53, 104-05 (2007).

12. *See* Feinman, *supra* note 1, at 126-27.

able to unilaterally terminate the employment without notice at any time for any reason.[13] It positions the employer and employee as equals within a bargaining relationship and is couched in terms of freedom of contract and individual liberty.

Employers and employees can contract around the at-will rule, most commonly by agreeing that employees can only be fired for good cause.[14] Such an agreement can be express or implied-in-fact in many jurisdictions.[15] There are also some statutory and common law "exceptions" to the at-will rule that prevent employers from terminating employees for certain designated improper reasons, such as discrimination on the basis of race or sex.[16] Unless an employer chooses to contract around the at-will rule or falls within one of the specific exceptions, it is still free to terminate employees for any reason without notice.[17]

The ability of the employer to terminate the employment relationship at any time also means that it may unilaterally change the terms of the relationship for any reason without notice.[18] Under the at-will rule an employer is allowed to terminate an employee without reason and then immediately offer that employee another job with different terms.

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13. *Id* at 118. The only state to change the at-will rule by statute is Montana. *See* Mont. Code Ann. § 39-2-904 (2011). Montana's Wrongful Discharge from Employment Act created a cause of action for employees who, after a probationary period, were fired without good cause. *Id.* However, the Montana statute significantly limits the remedies available to plaintiffs and it has been argued that employers in Montana are actually better off than their counterparts elsewhere. Bradley T. Ewing, Charles M. North & Beck A. Taylor, *The Employment Effects of a "Good Cause" Discharge Standard in Montana*, 59 INDUS. & LAB. REL. REV. 17, 21 (2005) (discussing the statute's trade-off between worker protections and limitations on traditional common law causes of actions and damages); Libenson, *supra* note 3, at 130-31. In fact, Montana employers supported the statute when it was passed. Libenson, *supra* note 3, at 130-31.

14. The at-will presumption does not apply to an employment contract for a definite term. The presumption for contracts of definite term is that good cause is required to terminate the employment before the term expires. The parties may contract around this presumption and agree that a contract of definite term may be terminated at-will. However, definite term employment contracts are rare in the United States. *See* Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 346-48 (2008).

15. *See id.*

16. *See infra* Part II.C (discussing the exceptions to the at-will rule more thoroughly).

17. Cynthia L. Estlund, *How Wrong Are Employees About their Rights, and Why Does It Matter?*, 77 N.Y.U. L. REV. 6, 8 (2002); Schwab, *supra* note 5, at 8.

18. In many states, like California, an employer may unilaterally modify the terms of the employment relationship even in the rare instance where the terms are memorialized in a written contract between the parties. According to the Court of Appeals, "with respect to an at-will employee, the employer can terminate the old contract and make an offer for a unilateral contract under new terms." Digiacinto v. Ameriko-Omserv Corp., 69 Cal. Rptr. 2d 300, 304 (Ct. App. 1997). As a matter of law, the *Digiancinto* Court found that "an at-will employee who continues in the employ of the employer after the employer has given notice of changed terms or conditions of employment has accepted the changed terms and conditions." *Id.* at 304-05.

Therefore, the employer should be able to achieve the same result without having to go through the formality of terminating and rehiring the employee. Of course, there may be some specific limitations on the employer's ability to set the terms and conditions of work provided by measures such as the requirement of a statutory minimum wage.[19] Apart from these specific areas of explicit substantive regulation, however, employers are positioned by the at-will rule to effectively control all of the terms and conditions of employment.

The proffered alternative to replace an at-will employment model is "just-cause" protection. Under a just-cause system, an employer must have a good reason to take an adverse employment action.[20] Although there is no uniform agreement on the details of a specific just-cause regime, most supporters agree that an employer would have to have evidence of either non-trivial employee misconduct or underperformance, or a substantial economic or other business-related reason to support a termination.[21]

Instituting a just-cause system would prevent employers from making certain types of decisions that are currently allowed under the at-will regime. Most obviously, employers could not terminate an employee arbitrarily. Neither could an employer act for a non-business-related reason; for example, replacing a competent employee because of nepotism or personal dislike. In addition, a just-cause system would likely prohibit employers from making some merit-based or economic decisions that are not considered sufficiently strong. For example, if an employer wants to replace an employee who performs her job well with another person who will do the same job more efficiently, or for less pay, there may be a question regarding whether that justification is sufficient. There may also be a question about whether some employee misconduct that does not rise to the level of insubordination would constitute sufficient justification for a termination. In addition, a just-cause system may make employers more reluctant to act even when they believe the decision to be justified, because the decision will be second-guessed by a court, arbitrator, or other adjudicative body. Therefore, an employer may not take action against an employee unless and until the employer is able to gather enough evidence to support the decision to the adjudicator, which may slow or even prevent some decisions altogether.[22]

19. *See infra* Part II.D (discussing the major areas of legislation in more detail).

20. Libenson, *supra* note 3, at 113.

21. *E.g.*, *id.* (summarizing the positions of just-cause supporters).

22. *See* Estlund, *supra* note 17, at 28; John P. Frantz, *Market Ordering Versus Statutory Control of Termination Decisions: A Case for the Inefficiency of Just Cause Dismissal Requirements*, 20 HARV. J.L. & PUB. POL'Y 555, 560-61 (1997).

B. Defenses of the At-Will Rule

Hundreds of books and law review articles have been devoted to the at-will employment rule.[23] While the overwhelming majority of scholars criticize the at-will rule, there are a vocal minority who defend it.[24] Perhaps the single most well-known defense of the at-will rule is the 1984 article by Richard Epstein entitled "In Defense of the Contract At Will."[25] Professor Epstein argues "the importance of freedom of contract is an end in itself."[26] Employees are perceived as individuals competent enough to understand and enter contracts of their own free will, and thus it is argued that they should be free to enter into at-will employment relationships on equivalent terms with the employer. Consistent with the abstract ideal of freedom of contract, Professor Epstein argues that a hypothetical typical employee will "choose" to be employed at-will because they want the reciprocal "benefits" of that arrangement, especially the ability to terminate the employment relationship at any time.[27] Therefore, he asserts that the prevalence of employment at-will reflects what would be the voluntary complementary choices of both employer and employee.[28]

Professor Epstein also describes what he sees as the objective benefits of employment at-will over the alternative of a just-cause rule.[29] He argues that the at-will rule is necessary to provide employers with the ability to motivate workers and make sure they are productive. In other words, the threat of termination prevents employees from taking advantage of employers.[30] Conversely, the ability of employees to quit at any time

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23. Bird, *supra* note 2, at 517 & n.1 (2004) (finding more than 200 articles on employment at-will published between 1985 and 2003 based on a simple Westlaw search).

24. *Id.* at 522. Defenses of the at-will rule can be found in a number of articles. *E.g.*, Larry A. Dimatteo, Robert C. Bird, & Jason A. Colquitt, *Justice, Employment, and the Psychological Contract*, 90 OR. L. REV. 449, 459 (2011); Frantz, *supra* note 22, at 560-61; Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1098-99 (1989); Jeffrey L. Harrison, *The "New" Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327, 331 (1984); Lary S. Larson, *Why We Should Not Abandon the Presumption That Employment Is Terminal at Will*, 23 IDAHO L. REV. 219, 219 (1986); Ian Maitland, *Rights in the Workplace: A Nozickian Argument*, 8 J. BUS. ETHICS 951, 951 (1989); Richard A. Posner, *Hege and Employment at Will: A Comment*, 10 CARDOZO L. REV. 1625, 1626 (1989); Richard W. Power, *A Defense of the Employment at Will Rule*, 27 ST. LOUIS U. L.J. 881, 881 (1983).

25. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

26. *Id.* at 953.

27. *Id.* at 954-55.

28. *Id.* at 955-56.

29. *See infra* Part I.B (the just-cause rule prevents employers from taking adverse employment actions against employees unless there is good cause to do so).

30. Epstein, *supra* note 25, at 965.

prevents employers from taking advantage of employees, who Professor Epstein assumes would choose to leave if the burdens of employment outweighed the benefits.[31] In addition, the flexibility of the at-will employment relationship is advocated because it would allow both parties to respond to changing conditions and imperfect information.[32]

Professor Epstein asserts that the increased costs and reduced flexibility of a just-cause rule would "hamper general mobility in labor markets."[33] Specifically, he predicts that employers would be worried about the possibility of lawsuits and therefore would not be as willing to hire.[34] Other scholars have expanded this argument to claim more broadly that employment at will is the most efficient system.[35] Employers are posited as being more willing to hire in times of growth and invest in labor instead of capital improvements because they know they can jettison employees if it does not work out.[36] Furthermore, Epstein believes that giving employees job security is inefficient because the costs associated with processing and protecting themselves against claims will take up resources that could be directed towards the enterprise or given to employees.[37]

Finally, Professor Epstein argues that market forces will naturally prevent employers from abusing whatever superior bargaining position they are argued to have under the at-will rule because if an employer terminates an employee arbitrarily or for some improper reason, that employer will have a difficult time retaining and recruiting other employees who might then perceive the employer as unfair.[38] Failing to explain how such information will be made available to potential employees, he sees further restraint in the fact that the employer would also bear the costs of selecting and training a new employee, a cost which the employer might also evade unless a replacement is not only necessary, but in need of training.[39]

31. *Id.* at 966.

32. *Id.* at 969 ("The at-will contract is an essential part of [planning for the unknown] because it allows both sides to take a wait-and-see attitude to their relationship so that new and more accurate choices can be made on the strength of improved information.").

33. *Id.* at 972.

34. *Id.*

35. *See* Frantz, *supra* note 22, at 558, 560-61; Freed & Polsby, *supra* note 24, at 1097-98; Harrison, *supra* note 24, at 331.

36. Dimatteo, Bird, & Colquitt, *supra* note 24, at 459.

37. Posner, *supra* note 24, at 1633-34.

38. Epstein, *supra* note 25, at 967-68. This assumes not only perfect information but also viable options on the part of the subsequent employees.

39. *Id.* at 973-74.

C. Direct Challenges to the At-Will Rule

In recent years, a number of academics have criticized the at-will rule.[40] In fact, many scholars predict that the at-will rule will be abolished or "swallowed" by its exceptions in the near future.[41] Criticisms of the at-will approach are based on a few different grounds, such as inequality of power[42], fairness to employees[43], human rights or ethics[44], and social consequences.[45] Many critics also disagree with the efficiency arguments raised by Professor Epstein and others, arguing that costs to employers from a just-cause system are outweighed by increases in productivity provided by job security.[46]

Critics of the at-will rule focus on the potential for employers to take advantage of employees who are typically in a less favorable position when it comes to making choices about employment.[47] The modern workplace allows for greater abuse by the employer than was present in the past. Employees are now more dependent on employers and less likely to be able to effectively bargain because of a decline in union density.[48] Critics of the at-will rule often note that the United States is one of the very few industrialized countries that lacks some form of just-cause standard for

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40. Bird, *supra* note 2, at 517 & n.1 (noting that over 200 scholarly articles critical of the at-will rule have been published between 1985 and 2004).

41. Bird, *supra* note 2, at 522-23; Carroll, *supra* note 6, at 655; Peck, *supra* note 6, at 1-2; Schwab, *supra* note 5, at 9-10 (summarizing arguments made by other scholars).

42. *E.g.* Andre D. Bouffard, *Emerging Protection Against Retaliatory Discharge: A Public Policy Exception to the Employment At-Will Doctrine in Maine*, 38 ME. L. REV. 67, 70 (1986) ("In the last two decades, however, courts and commentators have recognized that, because the mutuality of obligations rationale is based on the false premise of relatively equal bargaining power between employees at-will and employers, the traditional employment at-will doctrine has little or no legitimate economic justification.").

43. Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 67 (1988) (focusing on harm suffered by unjustly terminated employees).

44. *See* Carroll, *supra* note 6, at 672-83; Phillips, *supra* note 3, at 456-57; Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 506 (1979).

45. *See* St. Antoine, *supra* note 43, at 67-68.

46. *See* Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631, 677 (1988).

47. *See* Feinman, *supra* note 1, at 132-33. Although either party has equal ability to terminate the relationship, the consequences of doing so are often imbalanced. Frank J. Cavico, *Employment At Will and Public Policy*, 25 AKRON L. REV. 497, 502 (1992). ("Given the considerable disparity in economic power and bargaining positions between employers and employees, particularly large corporate employers, and the employer's chiefly unchecked control over the terms and conditions of the employment relation, abuses in the treatment of employees naturally arise.").

48. *See* Bird, *supra* note 2, at 520-21.

employment contracts.[49] The mismatch between the American system and the rest of the world is sometimes viewed as a human rights issue.[50] It has been noted that while the rest of the industrialized world establishes a baseline of fairness to employees, the at-will rule violates some fundamental "right" of employees to be treated fairly.[51]

Significantly, the way criticisms have been structured around the European alternatives to the at-will rule cast the debate as a binary choice in which either at-will survives in its current form or it is done away with completely by statute or by being swallowed by its exceptions.[52] This is unfortunate. The U.S. does not have a robust employee rights framework with which to vanquish employment at-will, and such an all or nothing approach has deterred the development of more "moderate" or pragmatic, but potentially politically acceptable alternative lines of reform.[53] Such an approach could retain an at-will framework, allowing termination without cause in most instances, but nonetheless urge other forms of protection for employees; forms that recognize and respond to the nature of their distinct disadvantages within the contemporary employment relationship. It is not likely the courts can fashion such an approach at this time, but arguments focused on legislative responsibility could ultimately prove effective.

D. *Direct Challenges to the At-Will Rule Have Not Been Effective*

The belief expressed by many scholars that the at-will rule is in the process of being replaced by a just-cause system through judicial challenges or legislative action is not borne out in practice. Instead, it appears that the employment at will doctrine has remained stable if not gotten stronger in the last few decades.[54] In particular, attempts to substitute a just-cause

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49. *See* Befort, *supra* note 11, at 404-06; Slater, *supra* note 11, at 104-05.

50. *See* Befort, *supra* note 11, at 407.

51. *See id.* at 407-08.

52. Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment At Will*, 58 UCLA L. REV. 1, 8-9 (2010) (criticizing the "dichotomy" between at-will and just-cause and advocating a middle ground based on notice to terminated employees); *see generally* Phillips, *supra* note 3.

53. *See* Bird, *supra* note 2, at 536-37.

54. *See* Rachel Arnow-Richman, *Response to Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Putting the Restatement in its Place*, 13 EMP. RTS. & EMP. POL'Y J. 143, 145-46 (2009) (describing the trend away from judicial expansion of employee contract rights); William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 133 (2003); Libenson, *supra* note 3, at 130 ("prospects are exceedingly dim that any state will adopt the kind of good cause standard that at-will's scholarly opponents want."); Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces*, 76 IND. L.J. 29, 36 (2001) (predicting that support for a just-cause standard will weaken because of changes in the workplace).

standard for the at-will rule through legislation have made little headway, and there does not appear to be any substantial political will to change the system.[55] The Model Employment Termination Act has been the primary effort to institute a just-cause rule, but it has not been adopted by any state even though it contains limitations on liability, an opt-out provision, and other provisions intended to make it attractive to employers and the at-will lobby.[56]

A number of commentators have attempted to explain why the much-maligned at-will rule seems impervious to change.[57] Some argue that legislatures are not likely to enact statutes modifying the at-will rule because employees are too diverse and unorganized to form a strong lobby, while organized labor has no incentive to change the at-will rule because doing so would essentially give all employees one of the main benefits of a union contract without the need for unions. The argument continues that because employers have a strong lobbying presence, abolishing the at-will rule must come from the courts.[58] On the other hand, other scholars argue that courts either are unwilling or unable to break with over one hundred years of precedent, and therefore any solution must be legislative in nature.[59]

In fact, considering all factors it seems that the at-will framework for employment relations has actually gained ground in some areas, with segments of employees in the US that have historically benefited from a just-cause system now subject to employment at-will. This is the result of individual, judicial, and legislative actions. For example, unions historically were successful in obtaining collective bargaining agreements containing just-cause provisions.[60] But union density has been declining since the 1950s.[61] Public employment is increasingly subsumed within a privatized model where unionization is rejected in favor of at-will arrangements.[62] In the universities, there are attacks on the tenure system.[63]

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55. Bird, *supra* note 2, at 522-24.

56. *See* Libenson, *supra* note 3, at 131-33; Slater, *supra* note 11, at 107-08.

57. *See* Phillips, *supra* note 3; Carroll, *supra* note 6.

58. *See* Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1433-34 (1967).

59. Summers, *supra* note 44, at 521.

60. *See* Blades, *supra* note 58, at 1410-11.

61. SEE GERALD MAYER, CONG. RESEARCH. SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES (AUG. 31, 2004), *available at* http://digitalcommons.ilr.cornell.edu/key_workplace/174/.

62. *See generally* James O. Castagnera, Patrick J. Cihon, & Andrew M. Morriss, *Public Employees: Under the Gun in 2002*, 18(4) TERMINATION OF EMP'T BULLETIN 1 (2002).

63. *Id.*

Over the past decades the decline in the unionized labor force to less than 17% of all workers has been spurred on by "right-to-work" legislation that leaves employees free to reap union benefits without paying union dues, further weakening unions.[64]

Significantly, protections for non-unionized employees have also declined. Even without unions, public employees have historically enjoyed just-cause protections under civil service rules. For the last few decades, however, this has been changing based on a reform movement known as New Public Management that has resulted in a shrinking of civil service protections.[65] In 1953, almost ninety percent of the federal civilian workforce was covered by the civil service system.[66] Today, fewer than 50% of such employees are covered.[67] Reformers continue their attempts to deregulate more federal employees.[68] Inroads have also been made into state and local civil service systems, where we see an even more dramatic transformation in public employment civil service protection, especially in

64. Todd Spangler, *Union Membership Shrinks to 11.3% of Workers*, USA TODAY (Jan. 23, 2013), *available at* http://www.usatoday.com/story/money/business/2013/01/23/union-membership-2012/1858705/ (last visited Aug. 28, 2013).

65. *See* Jonathan Fineman, *Cronyism, Corruption, and Political Intrigue: A New Approach for Old Problems in Public Employment Law*, 8 CHARLESTON L. REV. 51 (2013).

66. David E. Lewis, *Modern Presidents and the Transformation of the Federal Personnel System*, 7(4) FORUM 6 (2010).

67. *Id.* at 11. The weakening of public sector employment protections in the federal government began with the passage of the Civil Service Reform Act of 1978, which eliminated the Civil Service Commission and allowed some agencies to fashion their own personnel practices outside of the civil service system. Lewis, *supra* note 66; 5 U.S.C. § 2302(a)(2)(C) (indicating that CSRA merit system principles do not apply to government corporations, the General Accounting Office (GAO), the Federal Bureau of Investigation (FBI), the CIA, the DIA, the NSA, and any Executive agency or component part whose principle function the President determines is "the conduct of foreign intelligence or counterintelligence activities"); Sarah T. Zaffina, *For Whom the Bell Tolls: The New Human Resources Management System at the Department of Homeland Security Sounds the Death Knell for a Uniform Civil Service*, 14 FED. CIRC. B. J. 705, 713-18 (2005). The creation of federal Senior Executive Service in 1978 induced senior managers (GS 16 and higher) to give up civil service protections in exchange for private-style incentives and greater responsibility. See *generally* PATRICIA W. INGRAHAM, THE FOUNDATION OF MERIT: PUBLIC SERVICE IN AMERICAN DEMOCRACY 55-56 (1995). More than 98% of eligible managers did so. As a result of these reforms, the percentage of public employees who have civil service protection has declined significantly.

68. For example, in the wake of the tragedy of 9/11, there were arguments that the ability to respond quickly to terrorist threats might be hampered by cumbersome employee protections. The Bush administration proposed that the newly-created Transportation Security Agency and Department of Homeland Security be allowed to operate outside of civil service protections. Zaffina, *supra* note 67. However, the statute as ultimately adopted did not exempt these departments from the civil service laws. If the Bush administration's plans for the Department of Homeland Security had been implemented, fewer than 30% of federal employees would now be covered by civil service rules. Lewis, *supra* note 66, at 12.

recent years.[69] Some states have substantially increased the number of at-will public employees, while others effectively eliminated just-cause employment and made all state employees at-will.[70]

E. *Statutory and Common Law Exceptions to the At-Will Rule*

The at-will rule has not been the only principle that governs the employment relationship, which is recognized as one of the most complex and important relationships in modern society.[71] State and federal legislatures have adopted statutes that limit employers' discretion in some respects, and the courts have also acted through common law doctrines.[72] The primary exceptions to employers' right to terminate or take other adverse employment actions are anti-discrimination statutes, public policy claims, and implied-in-fact contract claims.[73]

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69. For the most part, courts have enabled the managerial reform movement in public employment to proceed. Significantly, the Eighth Circuit allowed a state legislature to unilaterally alter the public employment contract for its workers by removing just-cause protections. Where the legislature extinguishes a property interest for a general class of people, rather than an individual employee, no due process is required. This rule has been followed in other jurisdictions. *See* Gattis v. Gravett, 806 F.2d 778, 781 (8th Cir. 1986); Sally C. Gertz, *At-Will Employment: Origins, Applications, Exceptions and Expansions in Public Service*, *in* AMERICAN PUBLIC SERVICE: RADICAL REFORM AND THE MERIT SYSTEM 47, 59-60 (James S. Bowman & Jonathan P. West eds., 2007).

70. Texas was first state to convert a large number of employees to at-will status. In 1985, the legislature eliminated the Texas Merit Council and let agencies design their own personnel systems. *See* James S. Bowman & Jonathan P. West, *Ending Civil Service Protections in Florida Government: Experiences in State Agencies*, *in* AMERICAN PUBLIC SERVICE: RADICAL REFORM AND THE MERIT SYSTEM 151, 152-53; Jerrell D. Coggburn, *At-Will Employment in Government: Its Impact in the State of Texas*, *in* AMERICAN PUBLIC SERVICE: RADICAL REFORM AND THE MERIT SYSTEM 151, 152-53 (James S. Bowman & Jonathan P. West eds., 2007); Richard Green, Robert Forbis, Anne Golden, Stephen L. Nelson, & Jennifer Robinson, *On the Ethics of At-Will Employment in the Public Sector*, 8 PUBLIC INTEGRITY 305, 305 (2006); J. Edward Kellough & Lloyd G. Nigro, *Dramatic Reform in the Public Service: At-Will Employment and the Creation of a New Public Workforce*, 16(3) J. PUB. ADMIN. RES. & THEORY 447 (2010); Terrence S. Welch, *A Primer on Texas Public Employment Law*, 56 BAYLOR L. REV. 981, 983-88 (2004).

71. Developments like civil service protection for public employees and the ascendancy of organized labor after the National Labor Relations Act was passed in 1935 meant that "just-cause" requirements applied to much of the labor force, perhaps setting the stage for reconsideration of the at-will rule in private employment contexts in the latter half of the century. *See* Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment-at-Will*, 67 U. PITT. L. REV 295, 361-64 (2005).

72. *See* Carroll, *supra* note 6, at 668.

73. In addition to the recognized exceptions to the at-will rule, there are federal statutes regulating the terms and conditions of employment. The primary statutes set minimum wages, establish rules for overtime pay, and create standards for workplace safety. *See, e.g.*, the Fair Labor Standards Act, 29 U.S.C.A. §§ 201-219; the Occupational Safety and Health Act, 29 U.S.C.A. §§ 651-678 (1970). States also have legislation to deal with issues such as unemployment and workers' compensation benefits. These statutes do not directly implicate the

Importantly, however, these exceptions do not displace the at-will rule. Rather, the exceptions merely identify certain specific, designated unlawful reasons for termination that allow an employee to bring a wrongful termination claim. Unless the reason for termination can be shown to fall within one of these delineated exceptions, at-will employment will apply.[74]

Commentators often situate these exceptions as part of a larger trend towards erosion of the at-will rule.[75] According to this view, for years courts and legislatures have been busy creating exceptions to the at-will rule. Many scholars see these combined changes as cumulative evidence that substantial portions of the judiciary and legislature are willing to recognize the essential unfairness of the at-will rule.[76] Some even believe that an increasing number of exceptions to the at-will rule is an intermediate stage in the process of ultimately doing away with the at-will rule altogether.[77]

I do not agree that the at-will rule is in imminent danger of being abolished or swallowed by its exceptions. The established exceptions do not undermine the at-will rule or suggest any substantial second-guessing by the judiciary or legislative bodies. Instead, the exceptions are consistent with the continuation of the at-will rule and reflect the policy justifications that continue to support it. In support of this argument, this article examines each major exception separately.

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at-will rule because they do not limit employers' ability to take adverse employment actions against employees.

74. *See, e.g.*, MARK A. ROTHSTEIN ET. AL., EMPLOYMENT LAW 594-95 (4th ed. 2009) (discussing an Arizona statute that establishes four exclusive grounds for a claim for termination of employment).

75. *See, e.g.*, Alfred W. Blumrosen, *Strangers No More: All Workers Are Entitled to Just Cause Protection Under Title VII*, 2 INDUS. REL. L.J. 519 (1978); Peck, *supra* note 6, at 1; St. Antoine, *supra* note 43; Summers, *supra* note 44, at 484.

76. *See* Moss, *supra* note 71, at 341 (arguing that the proliferation of exceptions to employment at-will indicates courts' discomfort with the harsh effects of the at-will rule on employees).

77. *See, e.g.*, Peck, *supra* note 6; In the literature, the cumulative effects of both implied contract and these other innovations are described as modifying or limiting the at-will rule because although an employer may still terminate an employee for a good or arbitrary reason, it may not do so for a "bad" reason. "Bad" is defined as a reason prohibited by statute or public policy. As the number of impermissible reasons grows through additional legislation or affirmations of public policy concerns, the at-will rule is in a sense eroded. Moss, *supra* note 71, at 300-02.

1. Antidiscrimination

Federal statutes prohibit discrimination on the basis of gender, race, color, national origin, religion, disability, and age.[78] Some states add additional prohibitions, primarily against discrimination on the basis of sexual orientation and marital status.[79]

The right of individuals to bring antidiscrimination claims does not present substantial challenges to the fundamental nature of the at-will employment relationship. In fact, in that they concede that the employment relationship is fundamentally governed by individual employer/employee decisions and private ordering, allowing only minimal state intervention when instances of impermissible discrimination can be established to have occurred. Instead of undermining the notion of freedom in employer decision making, such exceptions function as a safety valve by removing from a pure at-will system socially condemned categories of discrimination against some workers based on certain immutable personal characteristics.

A targeted model based on discrimination starkly differentiates what is impermissible from what is permissible by designating an exceptional form of discrimination (and an individual bad actor), positioning them as distinct from the everyday process of making decisions. That everyday, unexceptional process is the at-will regime, which is premised as not only permitted, but required for the operation of a vibrant employment market. The discrimination exception reinforces the fundamental nature of the employment relationship. Impermissible discrimination is posited as isolated, as an aberration in an otherwise free market in employment. Intervention is viewed as necessary to correct this distortion in the market so the market can preserve its integrity, and can be viewed as appropriate and efficient. The conclusion that the Title VII approach does not fundamentally disturb the underlying structure or nature of the employment relationship is supported by the fact that stanch proponents of at-will can, and do, argue that even this targeted form of discrimination should not be the basis of regulation. According to some proponents of the at-will rule, the market will address discrimination because employers who discriminate will be acting less efficiently than those who do not.[80]

78. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-2000e-17 (2006 & Supp. V 2011); the Americans with Disabilities Act 29 U.S.C. §§ 12101-12213 (2006 & Supp. V 2011); the Age Discrimination in Employment Act 29 U.S.C. §§ 621-634 (2006).

79. *See, e.g.* OR. REV. STAT. § 659.870 (2011); CONN. GEN. STAT. ANN. § 46(a)-81(a) (1958).

80. *See* Epstein, *supra* note 25.

2. Public Policy

Most states prevent employers from terminating employees when it would adversely affect the states' public policies or general laws.[81] For example, in almost all jurisdictions it is unlawful to fire an employee for refusal to perform an unlawful act.[82] Whistleblowing generates an exception to the at-will rule in a majority of states, particularly when it involves a matter of public concern brought to the attention of authorities.[83] Public policy exceptions to the at-will framework reflect attempts to integrate certain public interest concerns beyond impermissible discrimination into the employment relationship. These exceptions are very limited, involving situations such as protection of whistleblowing and refusal to violate the law.

As with the discrimination exception, it is important to note that the at-will rule does not technically displace the at-will. Rather, public policy exceptions merely identify certain motivations on the part of the employer that will give rise to a wrongful discharge claim on the part of the employee.[84] In essence, allowing these claims is seen as providing an additional incentive to employers not to violate other laws. Public policy in this regard is not expansive enough to capture the broader societal implications of the way in which the employment relationship is generally and historically constructed. Like discrimination, the public policy exception deals with individual acts, and does not alter the nature of the employment relationship itself.

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81. Many jurisdictions follow expansive rules broadly prohibiting terminations that violate important public policies. *See, e.g.*, Tameny v. Atl. Richfield Co., 610 P.2d 1330 (Cal. 1980); Geary v. U.S. Steel Corp., 319 A.2d 174 (Pa. 1974); Palmateer v. Int'l Harvester, 421 N.E.2d 876 (Ill. 1981).

82. One of the earliest case on this point, in which an employee was fired for refusing to commit perjury at a legislative hearing, was *Petermann v. International Brotherhood of Teamsters*, Local 396, 344 P.2d 25 (Cal. Ct. App. 1959). Moss, *supra* note 71, at 295 (discussing variation among states in recognizing public policy and other common-law exceptions to employment-at-will).

83. There are wide variations among states when it comes to whistle blowing exceptions. One area of dispute is whether internal whistle blowing situations are covered in the same way as external cases. If someone has only complained to internal management and not to public authorities a court may feel this reflects no more than an internal disagreement between the employee and those decision makers within the company and is not sufficient to be deemed a wrongful discharge. *See* House v. Carter-Wallace, Inc., 232 A.2d 353, 357-58 (N.J. Super. Ct. App. Div. 1989). *But see* Belline v. K-Mart Corp. 940 F.2d 184, 187 (7th Cir. 1991). Federal legislation is found in the Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 1701 (2002), 18 U.S.C.A § 1514A (2010), and 18 U.S.C.A. § 287 (1985). Federal employees are further protected under the Civil Service Reform Act, 5 U.S.C. § 1101 (1978) and the Whistleblower Protection Act, 5 U.S.C.A §§ 1201-1222 (1989).

84. ROTHSTEIN ET AL., *supra* note 74, at 774.

3. Implied-in-Fact Contract

The implied contract exception to the at-will rule is based on general contract principles. Where the parties' actions suggest that they intended to enter into a contract, or intended to make certain terms a part of their contract, the court will enforce those terms as if the parties had expressly agreed to them.[85] Courts originally applied implied contract doctrine to prevent employer opportunism, whereby employers would receive the benefits of representing to employees that they followed job protection policies, but would then terminate an employee in violation of those policies after years of loyal service.[86] In some such situations, courts have held that an employer's policies and practices, together with the employee's reasonable expectation that those policies would be followed, constituted an enforceable implied contract.[87]

Like the other exceptions, implied contract claims are not a significant challenge to the dominance of the at-will rule for both practical and structural reasons. As a practical matter, employers learned how to immunize themselves against liability for these claims. Courts began enforcing implied-in-fact employment contracts in the late 1970s and early 1980s.[88] After the first few cases were decided, there was an immediate reaction on the part of employers who did not want their voluntary policies to become enforceable contracts.[89] Employers began restructuring their employment documents, policies and practices to avoid liability.[90] Through a process of trial and error, employers eventually were able to find a way to significantly reduce their chances of liability.[91] With careful drafting of

85. Implied in fact employment contracts are not recognized in all jurisdictions.

86. *See, e.g.*, Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917 (Ct. App. 1981). The prevalent theory is that a unilateral contract is formed when an employer issues statements limiting its prerogatives, such as the application of the at-will rule, and the employee subsequently begins or continues work. The language must be clear enough so that an employee can reasonably believe that he or she has been offered employment under its terms and the offer must be disseminated to the employee. There is no further consideration required, and hence no mutuality of obligation is required. ROTHSTEIN ET AL., *supra* note 74, at 749, 751.

87. An implied contract can arise from, among other sources: oral representations, terms in manuals and handbooks, the past practices of the employer or the mandates of the type of employment, including custom in the trade or industry. ROTHSTEIN ET AL., *supra* note 74, at 764.

88. *See* Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47, 51-52 (1992).

89. *Id.*

90. *Id.* at 66-68, 79-80. The authors hypothesize that personnel and legal professionals overstated the threat of implied contract liability to create a market for their own services. *Id.* at 73-74. In reality, the threat of liability was low. Even in the employee-friendly State of California, employees prevailed in only 15% of the reported implied contract decisions from 1980 to 1989. *Id.* at 58-59, Table 1.

91. Fineman, *supra* note 14, at 365-66, 368-69.

personnel documents, employers today have little fear of implied contract lawsuits.[92] As a result, many employees are arguably now worse off than they were in the 1970s because employers now do not advertise, or perhaps even formulate, protective policies for fear of liability. Not only are implied contract claims now nearly impossible to win, most employees no longer have the benefit of formal job protections that employers abandoned to avoid potential liability.

Structurally, implied contract claims work within the logic of the at-will rule, rather than against it. An employer may impliedly enter into an agreement to limit its own ability to terminate employees, but this conception of the relationship implies that the employer had the discretion not to enter into such an agreement in the first place. As long as the claim is framed as a matter of employer choice, enforcing the contract does not conflict with the at-will rule. Employers are still free to refuse to offer job protections and engage in genuine at-will employment. Implied contract theory cannot be used to import an extrinsic set of rules into the employment relationship where the intent of the contract is unambiguous and the contract has been properly formed. Traditional contract law enforces the agreement between the parties, even if outsiders might view that agreement as unfair.

4. Is the Whole Greater than the Sum of Its Parts?

As the brief description of accepted exceptions shows, there seems to be no clearly developed unifying principles justifying deviation from the dominant at-will frame for US employment law.[93] In fact, as a result of this rather haphazard patchwork of exceptions, there is little but uncertainty for both employers and employees.

Employers are dissatisfied because even though they technically have broad power to terminate employees without cause, employees potentially have a wide range of claims they can threaten to bring in the event of termination. Even where those claims might be meritless, employers may feel pressure to settle in order to avoid the expenses and uncertainty of

92. Employers who wish to avoid liability for implied contract claims take a two-pronged approach. First, in personnel documents they refrain from promising any sort of job security and include prominent disclaimers that employment is at-will. This is in marked contrast to a typical employee handbook from forty years ago. Second, employers require employees to sign a contract acknowledging that employment is at-will before they begin work. *Id.* at 372-77.

93. Befort, *supra* note 11, at 396 ("[O]ne cannot extrapolate a unifying principle from the spate of new regulations emerging in the past fifty years . . . What we have is not one or two bedrock principles, but a number of competing, overlapping, and sometimes contradictory themes.").

defending a threatened suit in court.[94] Some employers may choose not to terminate genuinely unproductive employees unless and until there is strong, documented evidence suggesting good cause to do so.

On the other hand, fear of liability does not seem to deter other employers from terminating employees arbitrarily or even in clear violation of the law. Terminated employees and their attorneys may find it impossible to conclusively predict when an exception might apply or when it might be dissolved on appeal in an individual case.[95]

Given their unpredictable, seemingly arbitrary nature, it is no surprise that neither employers nor employees particularly like the current patchwork of exceptions or the way they operate in practice.[96] As articulated by Professor Joseph E. Slater, "the best description of the at-will rule today is that it embodies the worst of both worlds, with exceptions so numerous and unclear as to frustrate employers but too small and narrow to protect employees in the vast majority of circumstances."[97]

III. RECONCEPTUALIZING THE EMPLOYMENT AT-WILL DEBATE

As the preceding section illustrates, the arguments about the at-will rule and its implications for balancing the interests of employers and employees are not constructive in their current form. What few changes have been made in the application of the rule are arbitrary and substantively inconsistent. Dealing with discreet issues through the crafting of exceptions, as important as they may be, has not led to fashioning a comprehensive and coherent approach to the existing inequality of power inherent in the modern employment relationship. The resulting patchwork of exceptions offers limited protections for only some workers in a haphazard system that pleases neither employers nor academic critics of the at-will rule. On the other hand, the grand aspiration of a European-style just-cause standard seems unrealistic.

Moreover, it may be that obtaining a just-cause rule is not as important as other issues that have more of an impact on employees' lives. It might be more productive to focus on the consequences of employment at-will and consider how to mediate them rather than trying to eliminate employment at-will. In adjusting our focus in this way, it would be helpful

94. *Id.* at 402-03.

95. Libenson, *supra* note 3, at 112-13.

96. *Id.* at 112-13 ("American employment termination law is a mess, and neither employees nor employers get what they need from it.").

97. Slater, *supra* note 11, at 98.

to have a theoretical framework with which to organize possibilities beyond an objection to employment at-will.

A. *Focusing on the At-Will Rule is Too Limiting*

Many critics of employment law focus narrowly on the at-will rule and its exceptions. This has meant that too much of current debates address only a limited aspect of the over-all employment relationship – that of "adverse employment actions."[98] An adverse employment action is typically defined as failure to hire or promote or a demotion or termination. When considering an adverse employment action, the question is whether a particular employer action is "improper" because it violates one of the exceptions to the at-will rule.[99] An adverse employment action is typically defined as failure to hire or promote or a demotion or termination.[100] The question currently is whether the adverse employment action violates one of the specific prohibitions that are recognized as exceptions to the at-will rule. If it does not, the employer's decision stands; if does, then the employee has a cause of action.[101] The potential remedies available if the suit is successful include reinstatement, damages, and possible injunctive relief.[102] Such remedies will remain elusive for most employees, however, given the uncertainty of successful challenges under current law.

However, within an existing employment relationship, the typical employee can do little to address the terms and conditions of employment or challenge employer decisions that do not qualify as an adverse employment action. As discussed above, one consequence of the employer's ability to terminate an employee at-will and for any reason is that the employer effectively control all other aspects of the employment relationship.[103] If the employee doesn't like the way the relationship is structured, they are free to leave.

In addition, and perhaps more significant, is the fact that for some employees the provision of remedies for unlawful termination is far less important than other employment-related issues. This is particularly true in regard to an employee's preserving or establishing the ability to move in

98. A notable exception is recent scholarship by Rachel Arnow-Richman. In a 2010 article, she argues that the focus on just case as an alternative to the at-will rule is too limiting because it only provides remedies for employees who can prove they were terminated without cause, affording too little protection for employees. Arnow-Richman, *supra* note 52, at 6-7.

99. *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 760-66 (1998).

100. *See id.*

101. *See id.*

102. Edelman, *supra* note 88, at 58-60.

103. *See infra* Part II.

response to either an adverse employment action or the presentation of a new employment opportunity.[104] In other words, employees are concerned with many other aspects of the employment relationship beyond termination and significant changes in employment status. For example, employees are typically concerned with work environment and training and advancement possibilities.[105] Scholars such as Katherine Stone have argued that for some employees networking opportunities, skill development, and resume building are more important than retaining their positions.[106] She also notes that employees today are generally more mobile as a group than employees have been in the past and that many expect to transfer among employers over the course of their work lives.[107] Employment law could require or subsidize mobility-enhancing practices on the part of employers.[108] To do so would provide greater substance and fairness to the idea that employees and employers are on equal footing when it comes to terminating an employment relationship.

Significantly, states and the federal government do currently regulate the workplace beyond adverse employment actions. For example, the Fair Labor Standards Act requires payment of a minimum wage and overtime wages, and the Occupational Health and Safety Act requires employers to follow safety standards.[109] However, even these minimal provisions for regulating the day-to-day conditions under which employees work are resisted by some employer advocates. Not surprisingly, these provisions have proven politically difficult to enlarge, change or adapt to modern circumstances, with employer resistance to promulgating new or updating existing OSHA standards, as well as resistance to raising the minimum wage.[110] Employer advocates argue that employers must be free from regulation in order to provide jobs, economic growth, and benefits for the

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104. This ability to move to a new employment situation on the part of the employee is assumed by the at-will rule, which constructs employees and employers as equally flexible actors within their relationship. Without a realistic possibility for such mobility, the employee can hardly be perceived as in an equal bargaining position.

105. *See generally* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004).

106. *Id.*

107. *Id.*

108. This could be accomplished by on-the-job training, the requirement of post-termination training, a mandatory notice period before termination, and tax incentives.

109. Fair Labor Standards Act § 29 U.S.C. §§ 206, 208 (2006); the Occupational Safety and Health Act § 29 U.S.C. § 651 (1970).

110. Christina D. Romer, *The Business of the Minimum Wage*, N.Y. TIMES March 2, 2013, at BU8.

whole of society.[111] Arguments based on pleas for recognition of employee welfare or need are perceived by opponents of such regulations as advocacy on behalf of special interests asking for special favors.[112]

B. The Need for a Coherent Theory of Employment Law

It is beyond doubt that much has changed in the actual experience of the employment relationship since the at-will employment rule was established centuries ago. Katherine Stone argues that the old "psychological contract" between employers and employees (loyal service in exchange for lifetime employment) has been replaced by a culture in which employees no longer value or respect the same things.[113] Further transforming the conditions and contexts of employment in the Twenty-first century have been the decline of unions and the withering away of job retention security in general, all of which has been accompanied by a rise in contingent labor.[114] Also of contemporary significance are other forms of changes in the economic and societal contexts in which the employment relationship is played out. Of particular and increasing importance are trends in globalization and privatization, as well as rapid and far-reaching technological changes and alterations in basic societal arrangements, such as those within the family.[115]

In the face of such changes, we need a robust and comprehensive approach to the employment relationship and employment law. This approach must be both flexible and context specific enough to accommodate adjustments as employment changes over time. Without such a comprehensive theoretical base, today's revisions will inevitably present yet another set of problems in a few years' time. Society and the nature of the employment experience will shift in ways that will almost certainly require further recalibration.

An approach built by focusing on the changing nature and quality of the employment relationship should also incorporate consideration of the possible impacts of those changes on society. The workplace influences the operation and organization of other (symbiotic) societal relationships and institutions. Essentially, this is an argument that a forward looking,

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111. Elizabeth MacDonald, *Higher Minimum Wage, Higher Unemployment?* FOX BUSINESS (Feb. 13, 2013), http://www.foxbusiness.com/economy/2013/02/13/higher-minimum-wage-higher-unemployment/.

112. *See id.*

113. *See* STONE, *supra* note 105.

114. *See* Befort, *supra* note 11, at 361-62, 366-70; STONE, *supra* note 105, at 67-72.

115. *See* Befort, *supra* note 11, at 363-66; STONE, *supra* note 105, at 67-72.

adaptable reassessment of employment law must also anchor the employment relationship in larger societal contexts. Employment law establishes the terms of the relationship between employers and employees, but its influence does not stop there. Employment law and policy must also consider how interests well beyond those of the employers and employees who will be bound by the terms operative in the default employment contract.

Employment law has significant implications for the functioning and wellbeing of societal structures and institutions, such as the family. It also profoundly affects the ability of society to address persistent social problems, such as poverty. Employment laws and the bargains they detail affect or influence educational policy, thus the opportunities provided for the next generation. They have implications for public health and wellbeing, particularly as they shape governmental responses in areas such as the provision of child or health care.

A theory of employment law that is comprehensive and clear about its objectives will help the United States deal with today's problems and challenges, as well as the inevitable changes that will surely come in the future. The theory should address not only the direct employment objectives to be accomplished, but also the underlying assumptions about the respective interests, obligations, and capacities of the parties to the employment relationship and those third parties (including society) affected by that relationship.

The current state of employment law does not provide a coherent, uniform framework–quite the opposite. There is no common theoretical underpinning to the at-will rule and its exceptions. Nor is there an agreed basis or guiding set of principles for discussing the effects of employment law on the rest of society. Even within a single exception, such as antidiscrimination law, there appears to be no coherent, principled reason why, for example, federal law prohibits discrimination based on gender, but not sexual orientation.

This lack of theoretical coherence as to social policy objectives extends beyond the exceptions to the at-will rule to other areas of employment regulation. For example, the minimum wage and overtime provisions of the Fair Labor Standards Act were originally enacted in order to stimulate the economy during the Great Depression, while workers' compensation laws were established as a way to limit tort claims brought by injured employees against their employers.[116] In addition, innovations based on common law

116. Shawn D. Vance, *Trying to Give Private Sector Employees a Break: Congress's Efforts to Amend The Fair Labor Standards Act*, 19 HOFSTRA LAB. & EMP. LAW J. 311, 312-14 (2002);

rules, such as implied contract claims and public policy torts, are inconsistently adopted and sporadically applied in large part because there has been no coherent agreement as to the justifications for or appropriateness of such rules.

The theoretical rationale behind legislation such as Social Security passed early in the 20th century and justified by the crisis of the Great Depression has not been significantly reformulated. This is in spite of the fact that there are significant contemporary political challenges to its continuation, with critics pointing to changed conditions to support changing or eliminating the program. Historic compromises may not make sense to today's politicians because they are inadequate to address the very different and specific needs of employees and employers (or the state) today.

In sum, we have a system of rules and exception adopted in response to a specific historic crisis or as the result of a rare confluence of interests between the parties to the employment contract and the well-being of society and the general public.[117] Further, given the cumbersome process for making revisions and the fear of giving up what small gains have been made, it may be difficult to substantially change such rules once they are adopted.

C. Shifting Focus to the Effects of Employer Decisions

Instead of continuing to engage in efforts to eliminate the at-will rule, it might be more fruitful to argue for significant progressive reforms short of abolition. Such an approach would begin by addressing why it is not only fair, but also imperative in the twenty-first century that employers assume some responsibility for the negative consequences their decisions have on their employees and society.

To achieve this type of more balanced or socially equitable end, we do not need to completely rethink the employment relationship. Employment can still be perceived as primarily a "private" or individual contractual relationship between employer and employee; one recognizing the abstract liberty of the interests of the respective parties in shaping the relationship to their mutual advantage. But recognizing this basic conceptual framework does not mean that parties should also be viewed as equally positioned or similarly empowered in regard to negotiating an actual employment relationship. Nor should abstract liberty interests mean that employment

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Ellen R. Pierce & Terry Morehead Dworkin, *Workers' Compensation and Occupational Disease: A Return to Original Intent*, 67 OR. L. REV. 649, 653 (1988).

117. *See* discussion of Great Depression *supra* Part III.B.

law should impose an unrealistic and forced form of egalitarianism on the respective positions of the parties, assuming they are operating from exactly the same vantage points and, face similar or equivalent constraints and consequences. The law must recognize there are relevant and significant differences between the positions of and possibilities for employers and employees in terms of their ability to bargain with each other, but also in terms of their abilities to successfully respond to such things as economic dislocations, market fluctuations or distortions, and disruption of "business as usual."

What has been muted by the debates focusing on the unfairness of at-will employment is the articulation of a well-developed theoretical argument about the significance of the employer/employee relationship reflected as also social policy. Employment law establishes the terms that will ultimately apply to most employment relationships by defining the nature, extent and consequences of that relationship for both employer and employee. In this way, the state plays a residual, but vital role in the shaping of the agreement and subsequent relationship.[118]

Employment agreements should be further understood to be forged in relations of interdependence--the interdependence relevant here is that of employers and employees upon each other,[119] as well as the interdependence of society and its institutions on a fundamental societal relationship as employment. European societies use human rights principles and conventions to give substance to the interconnectedness of societal interests with the employer/employee relationship. The United States has not ratified these approaches, making it imperative to search for some alternative theoretical framework with which to address the employment relationship and its implications for society.

IV. THE VULNERABILITY THESIS

Recent vulnerability scholarship uses the concepts of vulnerability and resilience to fashion a more equitable and holistic approach to legal and political thought outside of a human rights paradigm.[120] A vulnerability

118. Employment law sets the default or background rules that govern the employment relationship and also operate as legal context in which actual negotiations will occur.

119. Interestingly, a notion of interdependence is also apparent in the justifications for the at-will rule set out in Section II *supra*. The employment market will assure efficient operation in that the actions of both employers and employees will be constrained by its forces. Epstein, *supra* note 25, at 957, 973.

120. *See, e.g.*, PEADAR KIRBY, VULNERABILITY AND VIOLENCE: THE IMPACT OF GLOBALIZATION (2006); BRYAN S. TURNER, VULNERABILITY AND HUMAN RIGHTS (2006); Nick Brooks, *Vulnerability, Risk and Adaptation: A Conceptual Framework*, TYNDALL CENTRE

approach argues that the autonomous liberal legal subject at the heart of much of political and legal thought fails to capture the material, social, and developmental realities of the human condition.[121] The construct of the "vulnerable subject" is offered as the liberal subject's replacement.[122] The approach looks first at what it means to be human, ultimately focusing on the ultimate implications of the answer to that question for the construction of society and the conferral or responsibility as between the individual and the state and its institutions.[123]

Under the vulnerability theory, both individuals and institutions are seen as vulnerable, including the institutions representing the state.[124] For purposes of this article, this insight into institutional vulnerability means that both employees and employers can and should be perceived as vulnerable, only differently so.[125] Instead of being cast unrealistically as equals in some contractual relationship, the vulnerability approach would recognize the differences between employee and employer in positioning, context, and possible consequences to determine appropriate employment policy and regulation.

Importantly and in contrast to the autonomous, independent, and self-sufficient abstraction of the liberal legal subject, the vulnerable legal subject is theorized as embodied and embedded in social contexts.[126] The vulnerable legal subject is a universal subject (as is the liberal legal subject), but it is a dynamic subject that is conceptualized as developing and existing over the life course and not a static construct like the liberal subject

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WORKING PAPER NO. 38, Sept. 2003, at 1, 2; Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8, 11 (2008) [hereinafter *The Vulnerable Subject*]; Anna Grear, *The Vulnerable Living Order: Human Rights and the Environment in a Critical and Philosophical Perspective*, 2(1) J. HUM. RTS. & ENV'T 22, 43, 44 (2011); Peadar Kirby, *Vulnerability and Violence: The Impact of Globalization*, J. HUM. RTS. & ENV'T, Mar. 1, 2011, at 86-105; *The Responsive State*, *supra* note 8, at 274; Ani B. Satz, *Fragmented Lives: Disability Discrimination and the Role of "Environment-Framing"*, 68 WASH. & LEE L. REV. 187 (2011); Barbara Bennett Woodhouse, *A World Fit for Children Is A World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability*, 46 HOUS. L. REV. 817, 853-54 (2009).

121. *The Responsive State*, *supra* note 8, at 263-66.

122. *The Vulnerable Subject*, *supra* note 120, at 11-12. The theory recognizes that institutions, including the state, are also vulnerable, although differently so. The Vulnerable Subject, therefore, can be either an individual or an institution. Grear, *supra* note 8, at 41-49.

123. *The Vulnerable Subject*, *supra* note 120, at 8, 12; *see generally* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH 10 (2004).

124. *See The Vulnerable Subject*, *supra* note 120, at 12, 13, 17.

125. Because they are differently positioned in regard to the employment relationship, there will be differences in the vulnerabilities shaping their realities. In addition, many employers are actually not human, but artificial creations of law, which is a decidedly different form of vulnerability from that which underlies human embodiment.

126. *The Vulnerable Subject*, *supra* note 120, at 10, 13.

that merely captures one moment (likely to be the least acutely vulnerable) in the life of any real-life embodied individual.[127] This means that as the subject of policy and politics, the vulnerable subject cannot merely be left to his autonomy, liberty, and independence, but should be cushioned by a responsive state.

Because we are embodied beings, humans are universally and constantly vulnerable to experience dependency and need over our lifetime: all of us as infants and children and many of us as we age, become ill or are disabled.[128] Importantly, while beginning with bodily vulnerability, the thesis recognizes that a state of "invulnerability," is impossible to achieve.[129] Instead, the goal over the course of an individual's (or institution's) life is to obtain the assets and resources that will provide for "resilience," which will allow the individual to address, mitigate, or mediate vulnerability and also provide the wherewithal to take advantage of opportunities and exercise options when they present themselves, as a good education allows us to secure and advance in a career.[130] This shift from the universality and significance of bodily vulnerability to resilience is theoretically important since it refocuses the legal and policy lens away from an exclusive focus on the individual to also encompass society and its institutions.[131]

It is important that the vulnerable subject is conceptualized as a dynamic actor, one who is engaged in building resilience through accumulating assets and resources over a lifetime. She is also constantly encountering a variety of situations and circumstances that can result in harms or present risks, but can also be an occasion for the conferral of benefits or offer positive challenges and opportunities. In this way, the vulnerable subject's accumulated resources also represent the conferral of advantages or disadvantages.[132] The ability to successfully respond to

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127. *Id.* at 12

128. *The Responsive State*, *supra* note 8, at 267; Martha Albertson Fineman, *"Elderly" As Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*, 20 ELDER L.J. 101, 116 (2012) [hereinafter *Elderly As Vulnerable*].

129. *The Responsive State*, *supra* note 8, at 269; *Elderly As Vulnerable*, *supra* note 128, at 116-17.

130. This discussion on systems addressing vulnerability builds on Peadar Kirby's work. *See* KIRBY, *supra* note 120. In discussing resilience, Kirby builds on earlier definitions that understood resilience as "enabling units such as individuals, households, communities and nations to withstand internal and external shocks." Id. at 55 (quoting the United Nations Economic Commission for Latin American and the Caribbean).

131. *The Vulnerable Subject*, *supra* note 120, at 12, 13.

132. *Id.* at 12.

situations and circumstances as they arise is dependent upon the degree of resilience the vulnerable subject has acquired.[133]

The dynamic and complex nature of the vulnerable subject also presents a paradox: while all humans are universally and constantly vulnerable, our individual differences mean we may experience vulnerability differently.[134] The most recognized differences (and ones already recognized in the law's response in the employment context) are found in our embodiment. Human differences are manifested across differences in age, gender, race, and we also have different abilities or capabilities. Employment law has responded to discrimination or biased responses to some of these forms of embodied difference.[135]

In the employment context, recognizing that some employees belonging to historically subordinated groups are vulnerable to stereotyping and animus, the law has fashioned remedies that can be viewed as directed toward preserving the integrity of the employment relationship as one based on merit-based employer determinations in a way that upholds the principle of equal protection of law.[136] In these situations, employer control over the employment relationship has been limited on the basis of a principle against unwarranted discrimination.

The strength of the vulnerability analysis for employment, however, is founded on a second form of difference recognized by the approach – those differences in individual position and placement within status hierarchies. These differences are produced by society and its institutions. As noted earlier, the thesis posits that people are not born resilient, but resilience is both produced and dissipated over time within social and institutional webs of interaction and relationships.[137]

Resilience is a key term or concept to understand in applying the vulnerability thesis. Resilience is perceived as necessary to both confront life's challenges and to allow individuals to rise to take advantage of life's opportunities and enjoyments.[138] The idea that resilience is directly related to the amount and nature of the accumulated assets or resources an individual possess highlights the central role of societal organization in

133. *The Responsive State*, *supra* note 8, at 269-70.

134. *The Vulnerable Subject*, *supra* note 120, at 10.

135. *See, e.g.*, Equal Pay Act of 1963, 29 U.S.C. §§ 206(d), 206(g) (2006); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2006); Rehabilitation Act of 1973, 29 U.S.C. § 701 (2006); Civil Rights Act of 1964, 42 U.S.C.A. § 2000e (2006); Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff-1 (Supp. 2008); Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 (2006).

136. *See* Civil Rights Act of 1964, 42 U.S.C.A. § 2000e (2006).

137. *The Responsive State*, *supra* note 8, at 269-70.

138. *Id.*

addressing human vulnerability.[139] No one is born with resilience. It is produced in society and within webs of interacting relationships and institutions.[140]

Institutions and relationships can be seen as products of society. Law establishes the terms of formation and some of the terms of operation, as well as the legal consequences and implications of fundamentally important institutions such as the family, the marketplace, risk management or insurance systems, banking or wealth accumulation arrangements, and rules governing business operation or incorporation.[141] Law not only legitimatizes such entities and associations, it also controls their dissolution (delegitimization) and may also set standards for significant aspects of their functioning.[142] This is no less true when it comes to employment law and its role in shaping the employment relationship.

Vulnerability theorists have set out at least five different asset or resource conferring systems: physical or material; human; relational; environmental; and existential.[143] Briefly, the physical includes the material resources that determine our standard of living and ability to invest or respond to economic crisis. The human are those assets we gather in terms of education or training that allow us to accumulate assets as well as provide for our daily needs. Relational resources are found in the support and strengths provided by family, friends, and associations such as labor or political affiliates. Environmental resources place us in a natural and built environment with implications for well-being in both a present and future sense. Existential resources are found in religion and esthetics – the beliefs or sensations that can give life meaning and offer solace and comfort.[144]

The idea of the vulnerable subject has been described as providing a needed intervention into US policy discussions, providing a heuristic – a way to shift the focus of inquiry to a more balanced or complete conception of what it means to be human in ways that will raise new questions and reveal new relationships and patterns.[145] The idea of a vulnerable subject

139. *See id.*

140. *See id.*

141. *The Vulnerable Subject*, *supra* note 120, at 6, 19.

142. *Id.*

143. Kirby originally set out 4 categories of assets: physical assets, human assets, social assets, and environmental assets. KIRBY, *supra* note 120, at 55. Fineman expanded about that thesis and identified a fifth asset: Existential resources are provided by systems of belief or aesthetics, such as religion, culture, or art, and perhaps even politics. *The Responsive State*, *supra* note 8, at 271.

144. *The Responsive State*, *supra* note 8, at 271.

145. *The Vulnerable Subject*, *supra* note 120, at 19-20.

has been used to explore issues concerning the environment,[146] aging,[147] disability,[148] children,[149] human rights,[150] housing,[151] school violence,[152] ethics,[153] and reproduction,[154] among other areas. This article seeks to articulate the construct of the vulnerable employee and the vulnerable employer and to use these constructs to fashion a new lens for examining the employment relationship. Significantly, looking at the employee as a vulnerable subject in this dynamic way, while considering the construction of resilience over the course of her lifetime, allows us to make some interesting observations about vulnerability, resilience, state, and institutional responsibility.

V. APPLYING THE VULNERABILITY THESIS TO THE EMPLOYMENT RELATIONSHIP

There are several significant aspects of a vulnerability analysis that are useful in considering the power imbalance of the modern employment relationship. First, the focus is shifted to institutional arrangements and the individual is thus contextualized. Second, the theory looks not only at discrimination, but also at the ways in which privilege or advantage can be conferred through institutional operation and law.[155] In addition, vulnerability theory asserts that the state is always a residual actor, particularly in regard to the ways in which it regulates institutions through law.[156] Consequentially, there should be a state responsibility to see that the

146. *See* Grear, *supra* note 120, at 42.

147. *Elderly As Vulnerable*, *supra* note 128, at 119.

148. Ani B. Satz, *Disability, Vulnerability, and the Limits of Antidiscrimination*, 38 WASH. L. REV. 513, 522 (2008).

149. *See* Woodhouse, *supra* note 120, at 854, 861.

150. TURNER, *supra* note 120, at 25.

151. Susan S. Kuo & Benjamin Means, *After the Storm: The Vulnerability and Resilience of Locally Owned Business*, *in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 95-107 (Martha Fineman & Anna Grear eds. 2013).

152. Benjamin Reiss, *Campus Security and the Specter of Mental-Health Profiling*, THE CHRON. OF HIGHER EDUC., (Jan. 30, 2011), *available at* http://chronicle.com/article/Campus-Securitythe/126075/#comments.

153. *See* Wendy Rogers, Catriona Mackenzie & Susan Dodds, *Why Bioethics Needs a Concept of Vulnerability*, *in* INTERNATIONAL JOURNAL OF FEMINIST APPROACHES TO BIOETHICS 12 (2012).

154. Rachel Ann Fenton, *Assisted Reproductive Technology Provision and the Vulnerability Thesis: From the UK to the Global Market*, *in* VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 125-47 (Martha Fineman & Anna Grear eds. 2013).

155. *The Vulnerable Subject*, *supra* note 120, at 1.

156. *Id.* at 7.

law is equitable and institutions and individuals interact in a just and fair manner.

The prototypical parties to the employment relationship–the employer and the employee—should both be viewed as vulnerable.[157] Although the employer and the employee are vulnerable in different ways and to different degrees and have different needs to be satisfied through the relationship, they are nevertheless both relying on the relationship, particularly in economic and financial terms. In certain situations, the interests of employers and employees may contradict each other. In those cases, employment law has to balance the interests and needs of the parties to the relationship and resolve the contradiction in favor of one or the other. This resolution should be seen as the conferral of a form of "privilege" or advantage on one party to the employment relationship. It should be informed by a comprehensive understanding of the interests and positions of the parties, including the costs of the conferral of privilege to the other party and the implications of the balance for society's interests.

In recognizing both individual and institutional vulnerabilities, the theory allows for a comprehensive and inclusive consideration of specific circumstances and actions in play in the employment context. In addition, vulnerability theory is flexible enough to adjust to changing circumstances, which is a considerable advantage in a rapidly changing world. As the positions of employers and employees alter in the wake of new technologies, innovations, and opportunities consequences to the relationship can be reexamined without need for a fundamentally new theoretical framework.

A. The Vulnerable Employee

Certainly the at-will rule has serious implications for the well-being and resilience of the vulnerable employee. With termination, an employee's access to and opportunities within employment are cut off and his or her ability to continue to build the resources necessary for resilience is impaired.

1. Harm – Employee Vulnerability Realized

Termination greatly increases the likelihood that the individual will experience harm and lose future options and opportunities. Termination of

157. The terms "employer" and "employee" refer to the status of those prototypes, not to specific individuals. Specific employment relationships will vary, but the law assumes a universal subject when drawing categories.

employment can lead to unemployment or under-employment in the future.[158] The disruption of the employment relationship also often results in eroding or diminishing of other resources an employee has accumulated, such as savings or investments, further undermining his or her resilience, and hence, ability to meet challenges going forward.[159] Loss of employment can also have implications on existing social and esthetic resources. Just as accumulated financial resources may be consumed when there is no paycheck forthcoming, family relations and feelings of self-worth and dignity can be eroded by a termination and there can be serious impacts on children and spouses of the unemployed.[160]

Unemployment affects the health of the family and its members, with, inter-generational implications. The inability of one generation to adequately provide for their children in terms of providing education, childcare, and basic necessities has long-term implications for the individuals, the family, and the society.

Studies have shown that employees who are fired from their jobs have an increased likelihood of suffering from depression, substance abuse, illness, and suicide.[161] Their families also are often harmed: evidence shows that spouses also suffer effects similar to those experienced by the terminated employee.[162] In addition, unemployment is linked to increased levels of divorce, child abuse, and infant mortality.[163] Unemployment also contributes to poverty and crime.[164] For every 1% increase in

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158. *See* Lee Dye, *Unemployment: UCLA Study Shows Stigma of Joblessness Is Immediate*, ABC NEWS (April 6, 2001), http://abcnews.go.com/Technology/unemployment-stigma-begins-quickly-makes-job-search-harder/story?id=13302693) (reporting that researchers at the University of California, Los Angeles, have found that the stigma of being unemployed begins the minute the person walks out the door).

159. This possibility represents the universal aspect of the analysis. Of course individual experience will depend of individual factors, such as how quickly on is reemployed, the nature of that employment another economic and social factors.

160. AMERICAN PSYCHOLOGICAL ASSOCIATION, PSYCHOLOGICAL EFFECTS OF UNEMPLOYMENT AND UNDEREMPLOYMENT (2014), http://www.apa.org/about/gr/issues/socioeconomic/unemployment.aspx.

161. *See* Melanie Greenberg, *Preserving Mental Health During Unemployment*, THE MINDFUL SELF-EXPRESS BLOG, PSYCHOLOGY TODAY (Oct. 13, 2011), http://www.psychologytoday.com/blog/the-mindful-self-express/201110/preserving-mental-health-during-unemployment.

162. *See id.*

163. ROBERT MOOMAW, KENT OLSON, MICHAEL APPLEGATE & WILLIAM MCLEAN, ECONOMICS & CONTEMPORARY ISSUES 308 (Jack W. Calhoun et al. eds., 8th ed. 2009).

164. *See* Jeff Grabeier, *Higher Crime Rate Linked to Wages and Unemployment, Study Finds*, OHIO STATE RESEARCH NEWS, http://researchnews.osu.edu/archive/crimwage.htm (last updated Apr. 4, 2002); Matthew D. Melick, *The Relationship Between Crime and Unemployment*, 11, THE PARK PLACE ECONOMIST, 30–32 (Apr. 2003), http://www.iwu.edu/economics/PPE11/mattmelick.pdf.

unemployment, it is projected that there will be increases of 5.7% in homicides, 4.1% in suicides, and 1.9% in heart, liver, and stress-related diseases and disorders.[165]

Similar to termination, the employer's ability to set the terms and conditions of work can exacerbate employee vulnerability and resiliency of employees.[166] The employer has the unilateral ability to set pay, hours, and benefits. Its control also extends to determining the form and nature of how the work is characterized and the type of work an employee does. Since employment is the means whereby most people obtain physical or material and human resources, if an employer does not provide benefits, or provides them inadequately, it will be difficult for the employee (and those dependent on the employee) to gain/maintain resilience without some additional help.[167]

Obviously, physical conditions can profoundly affect the health and economic wellbeing of employees if and when they are injured, but beyond possible physical harm, employer actions may also affect the social and psychological wellbeing of employees.[168] For example, bullying by a supervisor or co-worker can have devastating effects on the ability to adequately perform tasks, perhaps even leading to resignation.[169] Requiring permission to use the restroom outside of schedule breaks reduces

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165. Robert Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 162 (2005) (citing John J. Peregoy & Connie T. Schliebner, *Long-Term Unemployment: Effects and Counseling Interventions*, 13 INT'L J. ADVANCEMENT COUNSELING 193 (1990)); Connie T. Schliebner & John J. Peregoy, *Unemployment Effects on the Family and Child: Interventions for Counselors*, 72 J. COUNSELING & DEV. 368 (1994); Lea E. Waters & Kathleen A. Moore, *Predicting Self-Esteem During Unemployment: The Effect of Gender, Financial Deprivation, Alternate Roles, and Social Support*, 39 J. EMP. COUNSELING 171 (2002); Thomas Keefe, *The Stress of Unemployment*, 29 SOC. WORK 264 (1984); Vonnie C. McLoyd, *Socialization and Development in a Changing Economy: The Effects of Parental Job and Income Loss on Children*, 44 AM. PSYCHOLOGIST 293, 299 (1989); Philip Harvey, *Combating Joblessness: An Analysis of the Principal Strategies that Have Influenced the Development of American Employment and Social Welfare Law During the 20th Century*, 20 BERKELEY J. EMP. & LAB. L. 677, 679-80 (2000).

166. *See* Cavico, *supra* note 47, at 500–02 (discussing the employers control within the workplace).

167. For instance, "Walmart . . . refuses to pay its employees a livable wage or provide any form of decent healthcare, increasing reliance on government assistance. . ." Paddy Ryan, *Walmart: America's Real Welfare Queen*, DAILY KOS (Oct. 10, 2012), http://www.dailykos.com/story/2012/10/10/1141724/-Walmart-fuels-inequality-epidemic-taking-advantage-of-our-safety-net#.

168. Canadian law imposes an obligation on the employers to maintain not only a physically safe workplace, but also a psychologically safe work environment. *See* ISSUE: WORKPLACE, http://www.mentalhealthcommission.ca/English/Pages/Mentalhealthintheworkplace.aspx (last visited Mar. 18, 2014).

169. *See* WASH. STATE DEP'T OF LAB. & INDUS., WORKPLACE BULLYING AND DISRUPTIVE BEHAVIOR, 1–2 (Apr. 2011).

employees to the status of kindergarteners and is affront to their dignity.[170]The employer also controls the interaction of employees and can influence workplace culture, which might result in depriving employees of the opportunity to build positive working relationships.[171] As with the other categories falling under conditions in the workplace, with only a few exceptions the employer has the unilateral ability to determine the rules of the game.

2. Providing and Preserving Employee Resilience Through Law

There are two ways in which the law has responded to threats to the employee's resilience: the provision of social welfare benefits and the direct intervention into the consequences of the employment relationship on the employer.[172] In each situation, the law could be characterized as responding to vulnerability, although at the time the policy outlook behind the actions were not explicitly couched in terms of resilience.

For example, the Great Depression, with its resulting massive unemployment, hunger, poverty, and need, led to the creation of the modern US welfare state, with programs such as Social Security addressing vulnerability to aging and disability and the corresponding decline in ability to gain resources essential for resilience.[173] Aid to Families with Dependent Children responded to the needs of the family when the head of household or wage earner was unavailable or unable to provide for them.[174] Such social welfare provisions generally responded to hunger, dispossession, and other harms related to poverty and resulting lack of resilience.

State response during these times of national crisis also set the stage for certain direct interventions into and regulation of the employment relationship. For example, the Fair Labor Standards Act perceived the possibility of the employee being exploited by the employer.[175] In structuring a concept of employer responsibility for the meeting the needs

170. *See* David L. Ostendorf, *Packing House Bathroom Breaks*, IMAGINE 2050 (May, 18, 2011, 8:13 AM), http://imagine2050.newcomm.org/2011/05/18/packinghouse-bathroom-breaks-leaving-human-dignity-at-the-plant-gate/.

171. *See State of the Global Workplace*, GALLUP CONSULTING 1, 1–26 (2011), *available at* http://www.gallup.com/strategicconsulting/145535/State-Global-Workplace-2011.aspx.

172. *See* Fair Labor Standards Act, 29 U.S.C. §§ 215–216 (2006).

173. *See generally* CONSTITUTIONAL RIGHTS FOUNDATION, BILL OF RIGHTS IN ACTION (1998), http://www.crf-usa.org/bill-of-rights-in-action/bria-14-3-a-how-welfare-began-in-the-united-states.html (providing general background information on the Great Depression, the creation of national welfare, and the current state of the system).

174. *See* Social Security Act, 42 U.S.C. §§ 601–615 (2006).

175. *See generally* Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2006).

of the employee, the state did not only address temporary situations, but put permanent protective response mechanisms in place.

There are other instances where the legal system has imposed some conditions on employers. At various times in our history, the state has intervened into the employment relationship and acted to ameliorate the burdens on employees by imposing some costs on employers. One way the state does this is by redefining rights as between employer and employee. While it appears that the state has generally given the primary position of power to employers, at various points in our history it has also recognized that the social consequences of employer freedom to act required the imposition of regulation and responsibility on employers. In those circumstances, the state has intervened into what is often thought of as a binary and individualized employment relationship by becoming involved in employer decision-making in areas not involving adverse employment actions.[176]

Programs such as the Occupational Safety and Health Act[177] and Worker's Compensation[178] can be understood as recognizing employee vulnerability and as reflecting a policy choice that mandated employers share the costs of disruption in employment, at least to some extent.[179] These measures, which provided an income (continued means of resilience) after dissolution of the employment relationship or in the case of injury simultaneously acted to relieve or supplement the responsibility of the newly responsible welfare state. These programs spread the costs of responding to the economic risks associated with a modern economy beyond the employee, who still risked unemployment, injury, or other harms, to the employer who was to be part of the scheme to ensure some continued resources for the employee.

Such systems do have real economic consequences for the employer as well as positive ones for the employee. They demonstrate that at least in some situations society recognizes that workers are too unevenly and negatively affected by termination of employment. Importantly however, workers' compensation and unemployment benefits are conceptually designed in such a way as not to limit the employer's choice about termination or undermine the idea of at-will employment. Rather, they

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176. *See id.*

177. *See generally* Occupational Safety and Health Act, 29.U.S.C. §§ 651–678 (2006).

178. *See* Federal Employers Liability Act, 45 U.S.C. § 51 (2006).

179. *See generally* Arthur D. Rutkowski & Barbara Lang Rutkowski, *OSHA Proposed Rule*, 14 EMPLOYMENT LAW UPDATE (Apr. 1999); MICHAEL B. SNYDER, COMPENSATION AND BENEFITS 52 (Thomson Reuters 2013); ROGER HEROD, INTERNATIONAL HUMAN RESOURCES GUIDE 17 (Thomson Reuters 2013).

merely attach some consequences to exercising employer's choice in certain circumstances in the interest of seeing the employee maintain some degree of resilience.

If an employer chooses to put workers at risk of injury or fails to provide adequate safeguards, it will be responsible for the employee's medical bills if she is injured. If the employer chooses to terminate an employee without just-cause, its payments to the unemployment system may be affected.

These provisions for continued employee resilience are not comprehensive or adequate, however.[180] In some situations terminated or injured employees must also resort to the state for supplemental resources, which may only be provided in a stigmatized process.[181] And, as welcome as is the imposition of this kind of cost sharing on employers, it is important to realize that these schemes do not fundamentally alter the traditional model of employer-employee relationship and are based only on a limited principle of compensation in limited circumstances. Termination outside of those circumstances typically carries no substantial shifting of the costs from the employee to the employer.

However, despite the shortcomings of the existing provisions, the history of state intervention into the employment relationship and the concept of cost shifting are important. They suggest there is a productive way to refocus employment law short of removing or substantially eroding the at-will rule.[182] The focus can usefully turn to the question of equitable allocation of costs and consequences of termination among the employee, the employer, and the state. Just as vulnerability approach helps underscore the need for social welfare legislation that provides a floor in terms of access to assets or resources necessary for minimal resilience, it should also help us to see what is involved in arguing for shifting of some costs now borne by the employee to the employer. Before proceeding to that argument, however, it is necessary to assess both the vulnerability of the employer and its mechanisms of resilience.

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180. *See generally Receiving Medicare and Disability Benefits*, U.S. SOCIAL SECURITY ADMINISTRATION, http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/155/~/receiving-medicare-and-disability-benefits (last updated Jan. 2, 2013, 10:26 AM) (explaining the process of receiving Medicare once becoming eligible for the program).

181. *See The Responsive State*, *supra* note 8, at 259.

182. *See id* at 261–62.

B. *The Vulnerable Employer*

As business and corporate structures, employers are also vulnerable to harm, decline, and demise. They too must be understood as vulnerable and as evoking state response.

1. Harm – Employer Vulnerability Realized

The vulnerability of the employer is qualitatively different from that of the employee.[183] In addition to the risks and rewards of the market and threats from competitors, the employer must negotiate legal regulations when they apply to its operations. Firms do go out of business or can be taken over, but that sort of "demise" is not the same as the death of a human individual and may, in fact, result in a more vigorous resurrected entity through bankruptcy and reorganization.[184] Similarly, while loss of profits resulting from natural or market disasters can hurt and weaken the employer as an entity, those harms are economic rather than corporal , as the business is an artificial legal construct, rather than an embodied living creature. As such, the employer has a different set of concerns about and experiences with vulnerability, which are largely economic and financial in nature. Significantly, there are typically vast differences in the nature and quantity of economic resources (resilience) that an employer can muster as contrasted with the average employee when facing the risks and opportunities presented in volatile and uncertain markets or competitive situations.[185]

In some cases, the sources of employer and employee vulnerability are in conflict with each other. For instance, the employer interest in minimizing costs and improving necessities to guard itself against economic sources of vulnerabilities can lead to deprivation of basic employees' financial and physical safety, security, and health. As we have seen, in those cases, the states' response has been to preserve employer flexibility or choice, perhaps with a floor of minimum standards, and possibly shift some costs to the employer.[186] While the employer can then been seen as vulnerable to the law and legal measures protective of employees, if the

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183. Institutional vulnerability of businesses is also different from the embodied vulnerability of their managers, stockholders and executives as individuals, although economic and some other forms of vulnerability, despite differences in magnitude, can be analogized across these categories.

184. Human managers and owners are of course vulnerable as human beings, but here the discussion is on the business entity, not the human individual.

185. Economic resources allow access to legal resources and can also provide access to political power.

186. *See* Zev J. Eigen et al., *Shifting the Paradigm of the Debate*, IND. L.J. 271 (2012).

employer terminates an employee, some economic and social costs to the employee may not be remediable. An example would be the possible stigma associated with being fired or the family relationships put under pressure or damaged by financial hardship. That some employers under current law may be found to have violated a specific exception, and thus may suffer consequences by paying damages in the form of lost income and costs of a job search, does not negate the fact that the focus of employment law remains on preserving employer choice, intent, and actions, not on the consequences and costs suffered by the employee.[187]

2. Providing and Preserving Employer Resilience Through Law

Importantly, similar to its response to individual vulnerability, the law has responded to some of the perceived vulnerability of employers by providing mechanisms of resilience and risk mitigation. As in the case of the social welfare provisions for individuals in perceived need, the vulnerability of corporate or business institutions to start-up costs, operating costs, or costs associated with maintaining on-going production schedules are routinely evoked to justify subsidies,[188] whether they take the form of tax policies,[189] come in the form of direct transfers and investments,[190] or are delivered through facilitating access to mechanisms of state authority, such as law.[191] Additionally, it could be asserted that employment law has generally responded to the needs of the vulnerable employer in regard to unpredictable market conditions by shaping the nature of the employment relationship in order to increase resilience of the employer without similar regard for the resilience of employees.

Employment law generally allocates significant advantages and privileges to employers, who gain or maintain significant resilience as a

187. *See generally id.* (arguing at-will employment should be eliminated and replaced with a mandatory arbitration act).

188. *See generally Corporate Subsidy Watch*, GOOD JOBS FIRST, http://www.goodjobsfirst.org/corporate-subsidy-watch (last visited Aug. 29, 2013) (providing a list of the largest subsidies for US companies).

189. *See* Phillip Moeller, *Top 10 Corporate Tax Breaks*, MONEY RETIREMENT, http://money.usnews.com/money/retirement/slideshows/top-10-corporate-tax-breaks (last visited Aug. 29, 2013).

190. *See, e.g.*, Josh Max, *US Auto Bailout Cost Rises to $25.1 Billion*, N.Y. DAILY NEWS, (Aug. 15, 2012 1:39 PM), http://www.nydailynews.com/autos/auto-bailout-cost-rises-25-1-billion-3-4-billion-previously-estimated-article-1.1136798#ixzz2LuEaMjUl; *see generally Bailout Recipients*, PRO PUBLICA, http://projects.propublica.org/bailout/list (last updated Aug. 27, 2013) (tracking taxpayer money by creating a list of all bailout recipients).

191. For instance, because they are more sophisticated, corporations can take advantage of protections granted to secured parties in debt repayment and bankruptcy proceedings. *See* U.C.C. § 9–501 (2010); Bankruptcy Act § 11 U.S.C. § 726 (2006).

group from those legal structures.[192] At-will employment, although it is couched in neutral terms–providing freedom of contract for employees and well as employers–in practice operates as the conferral of significant advantage on the employer vis-à-vis the employee. The rule allocates the costs and risks associated with uncertainties inherent in the labor market disproportionately to the employee, providing flexibility for the employer at the cost of insecurity for the employee.

One primary justification for the rule in today's employment world has been need for flexibility that the at-will employment relationship provides, which, it is argued, allows both parties to respond to changing conditions and imperfect information in the market.[193] In addition, at-will arrangements are said to facilitate hiring, thus also invigorating the labor market and benefitting employees generally. This benefit results, it is argued, because employers are more likely to hire instead of investing in capital improvements when they know they can easily get rid of any individual employees whenever they want to.[194] In this way, the at-will rule fictitiously and erroneously creates the illusion of equivalence between the employer and employee's uncertainty, which works in practice to confer substantial benefits on employers. It also means that the substantial economic and social costs of terminating the employment relationship fall largely on the employee, who, if unable to bear them, will ultimately have to turn to society's social welfare programs and safety nets.

Currently, employment law's response to the employment relationship seems only equitable if we ignore both how employer vulnerability differs from that of the employee in today's markets and how the resources the employer can command (including law) place it in a far superior position than the employee in regard to the ability to preserve and maintain its unique form of resilience. The at-will rule invariably gives employers flexibility to deal with changing conditions to address vulnerabilities arising from the way we have structured the marketplace. By contrast employees are not positioned by law to deal with their vulnerability and loss of resilience without state intervention, which as we have seen, usually happens only in response to crisis.[195]

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192. Employment law privileges business through whole areas of regulation. But for purposes this paper, I only look at the at-will rule or more specifically what it represents in terms of employer monopoly control over the workplace and conditions of employment.

193. *See* Epstein, *supra* note 25, at 982.

194. *Id.* at 975.

195. *See* BILL OF RIGHTS IN ACTION, *supra* note 173.

C. Benefits of Vulnerability Over the Current At-Will Debate

As discussed above, our society inequitably distributes the costs of economic uncertainty and loss of resilience in the employment relationship to the employee, with the social safety net as his or her fragile backup. It is time to rethink the way law confers privilege in defining this important relationship, a task with significant public implications. The law should be adjusted so there is a more equitable allocation of the costs currently placed on individuals and society as a result of employer privilege, and more balanced concern for the protection of resilience as between employer and employee.

What I suggest we develop is not an all or nothing approach. I do not argue for a wholesale rejection of the idealized autonomous private actor model embodied in the at-will doctrine. Rather, I want to leave behind the lost battle over the at-will rule, at least temporarily, and focus on the privilege it confers on employers with respect to vulnerability and resilience. Examining privilege and its justification will allow us to focus on other inequitable and harmful aspects of the employment relationship, as well as the costs of privilege. In thinking about the equities in employment law, I am not advocating for a human rights model to be applied to labor relations,[196] a strategy unlikely to succeed politically. A human rights approach would require cutting back, even uprooting, on ideals of individual choice and autonomy in decision-making that are foundational principles the American political context.[197]

However, conceding the strength of the at-will paradigm does not mean that the way it is understood today is inevitable. Vulnerability theory offers a way to think about workplace issues and the employment relationship less antagonistically and more constructively than frontal attacks on the at-will doctrine and the ideals of liberty and freedom of contract. It provides a common framework that ties together all aspects of the employment relationship and also allows us to bring in the interests of the society and develop the concept of social or public responsibility in light of employee vulnerability and need for resilience. In particular, a vulnerability approach allows us to introduce the idea that the privilege the employer enjoys under

196. *See* James A. Gross, *Workers Rights As Human Rights*, 4 U. PA. J. LAB. & EMP. L. 479, 479–92 (2002); James A. Gross & Lance Compa, *Human Rights in Labor and Employment Relations*, DIGITAL COMMONS @ ILR 1, 8 (Jan. 1, 2009), http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1051&context=books.

197. *See* Martha Albertson Fineman, *Beyond Identities*, 92 B.U. L. REV. 1713, 1747 (2012), *available at* http://www.bu.edu/law/central/jd/organizations/journals/bulr/volume92n4/documents/FINEMAN.pdf.

the at-will regime might appropriately be accompanied by some reciprocal responsibility for the situation of the employee.

As long as employer control of the workplace and ability to make unilateral decisions in regard to employment remain givens required by the overriding need for flexibility, any improvements in the workplace, whether initiated by employer or structured by state, will be seen as generous or gratuitous concessions to employees. Such voluntary concessions can be revoked in times of economic downturn or in response to business necessity as determined by the employer. However, if we view exclusive employer control over both the decisions and the allocation of costs associated with decisions not as natural and inevitable, but as the consequence of the power conferred on the employer through the organization of the employment relationship in employment law, then we can approach workplace regulation in a different light.

This article cannot examine all the manifestations, affects, and consequences that could arise as a result of applying vulnerability theory to the employment relationship. That would require a wide variety of detailed and extensive inquiries over time. However, the article can and does set the stage for such further examinations of the employment relationship using the vulnerability framework to outline the factors that should be weighed and balanced in assessing privilege and disadvantage.

1. Justifying Employer Privilege

As indicated earlier, the major rationales for employer control over the employment relationship and the workplace are economic, i.e. based on the need for flexibility and efficiency in light of myriad possibilities for change. It has been argued that employers who are free to act unencumbered will be able to maximize profits and remain competitive and that this happy result will confer benefits on society in terms of jobs and prosperity.[198] These justifications resonate in American notions of capitalism and free market ideology.

Revealing the potential severity of the individual and societal costs that can follow from particular actions on the part of the employer raises the question of whether this general justification for employer privilege can be stretched to cover these specific manifestations of control. If some employer actions (or inactions) cause unwarranted harm and confer unnecessary costs on employees, they may also arguably be strongly inconsistent with generally accepted societal norms. The first question to ask in considering a specific practice or action is whether the action is in

198. *See supra* Part II.

fact encompassed within and consistent with the justification for employer privilege. Here, we should make a distinction between the privilege itself and actions that are taken under protection of the privilege.

In some instances employer discretion should be subjected to political and societal scrutiny and not left solely to employer discretion. Conceding the general right of employers under the at-will model of employment to generally control their enterprises does not mean that their control can or should be absolute. There may be some particular exercises of employer discretion that do not fall within the scope of the justification establishing the blanket privilege. Some employer actions can result in substantial harm. For example, employers currently are not prohibited from maintaining a coercive work environment, such as an environment that might exist in a work culture that is tolerant, even accepting, of the bullying or ridicule of some employees by others. If ridicule or bullying is done on the basis of a prohibited category such as race or gender, an employee may have recourse, but if it is not, there is no remedy for the employee.

Since the justifications for employer's control over the workplace revolve around the need for freedom to make business decisions, there are questions that should be asked about that justification. Does the business necessity justification for employer control also justify a decision to allow harassment in the workplace? Would removing the privilege of the employer to maintain an abusive or coercive work environment negatively affect its economic success or interfere with production? What are the costs to employees if employer privilege in this area is not permitted? Are there societal interests that are affected by allowing employers to maintain such a workplace? The appropriate response to this particular type of employer decision-making is perhaps the expansion of the existing exceptions to employer control based on prohibited categories under Title VII [199] to all workers. Other situations falling outside of the rationale for employer control might require the addition of a new exception to those already providing vulnerable employees with protections.

2. Allocating the Costs of Employer Privilege

Of course, most employer actions can and will be justified under the terms of the business rationales for privileging employer control in the employment relationship. But the inquiry should not stop there. We must also consider the costs that result from the exercise of this privilege by the employer, particularly the effect on the employee's vulnerability and impaired resilience. One significant problem with the current focus on the

199. *See* Civil Rights Act § 42 U.S.C. § 2000e–2000e17 (2009).

at-will rule is that there is little attempt to address the issue of allocation of costs or consequences that flow from termination of the employment relationship. Unless the termination is one of those rare instances where the employer is found to have violated some clear exception, the costs are allocated to the employee and whatever existing programs can help cushion the blow. In other words, the focus on at-will has largely limited the debate to the issue of the validity of the employer's decision, rather than the consequences or costs of those choices. Understanding those costs and their distribution and allocation may suggest that, in some circumstances, the employer should share in the costs inherent in the exercise of their privilege upon terminating an employee.

To recognize that the costs associated with termination are significant and generally borne by the employee and the state (in terms of the cost to its safety net) is not to suggest that the employer should be responsible for *all* of the costs. Employers are also vulnerable, particularly economically, but they should not be exempt from the costs of their actions for that reason alone and be able to shift all the costs to the employee. In the same way, because employers are also vulnerable, employees do not have the right to demand that they keep their jobs in times of economic uncertainty, thereby shifting all the costs of uncertainty onto the employer. We should not view either employer or employee vulnerabilities as absolute determinants in developing an equitable employment law. There will always be a need for a balancing of interests and consideration of competing arguments around the question of privilege. However, certainly one compelling reason for placing at least *some* of the costs on the employer is the fact that it reaps most of the potential benefits from the privilege conferred by the at-will rule in terms of flexibility, planning, mitigation of harm, and control.[200]

Some employer responsibility for the costs of termination has already been legislated, as we have seen with programs such as Workers Compensation. Perhaps other cost-sharing provisions could be added. The vulnerable employee's need for flexibility in the face of economic uncertainty could be addressed by requiring the employer to provide some form of severance package that could include severance pay and continued health insurance coverage for a period of time after termination. At a minimum, employers should be required to provide sufficient notice of intent to terminate and a paid waiting period so the employee has some chance to mitigate the damages of termination. Employers could be made

200. There are also costs to employer if employee leaves, but while the fact of the existence of those costs may be thought of as equivalent in abstract to employee costs, those costs are indeed not equal in nature or degree. Employer's costs are qualitatively different, and the employer is typically able to mitigate harm more quickly and easily than most employees.

responsible for providing assistance to help the employee obtain another position. It is well documented that opportunities in employment are largely dependent on education and training.[201] In situations of termination, further education or training could prove beneficial to the employee. Assistance with job search and access to human resource personnel could also be helpful.

Some of these services are provided voluntarily by some employers. The state also has programs that help terminated employees.[202] But employment law is structured so that the default rule is that the employee bears the costs of termination except in those limited situations where the law mandates the employer assume some responsibility. That is the inequitable allocation that must be remedied by an equitable distribution of the risks and costs of economic uncertainty between the individual, the state, and the employer.

VI. CONCLUSION

I argue here for a shift in focus, not necessarily a permanent abandonment of the fight for just-cause employment. One day we might see a change in the American legal system's fealty to principles of individualism and free enterprise, or perhaps an embrace of the concept of human rights in regard to economic and employment issues. Or there may be some catastrophic event or political alignment of the stars that would set the stage for a reconsideration of employment at-will. If that moment arrives, employment law scholars should be prepared to seize it. In the meantime, however, the struggle to abolish employment at-will is not productive.

I believe that vulnerability theory and its application to employment law warrants further exploration. Employer advocates have been very successful in arguing against regulation. They point to free market principles and economic arguments that resonate strongly with lawmakers, judges, and the public. Employee advocates need a theoretical basis and a vocabulary to support new rules (and hold on to old ones) that is consistent and persuasive. The concepts of vulnerability, resilience, and the premise that the state has an obligation to ensure a minimum level of resilience in the face of vulnerability, may serve as a guiding principle to think about all areas of employment law.

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201. *See The Responsive State*, *supra* note 8, at 270.

202. *See generally* BILL OF RIGHTS IN ACTION, *supra* note 173.