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EMPLOYMENT-AT-WILL: TOO SIMPLE FOR A COMPLEX WORLD

*by: Cynthia Estlund**

ABSTRACT

For Professor Epstein, the distinctively American rule of employment-at-will ("EAW") in its original, harsh form—which allowed either party to terminate employment at any time for good reason, bad reason, or no reason at all—is an exemplar of "simple rules for a complex world." This Essay will reflect on a few ways in which EAW, plain and simple, is too simple for our complex world—too simple in light of the complexities of labor markets and of human and organizational behavior, and too simple in light of evolving societal conceptions of justice. As things now stand, given the legal complexity that has been layered atop the EAW rule in this complex world, the "just cause" rival of EAW would bring greater simplicity along with its primary virtues of fairness, economic security, and dignity for workers.

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I. INTRODUCTION

The United States stands virtually alone in the developed world in its continuing adherence to the background rule of "employment-at-will" ("EAW"), under which employees can be fired without notice at any time and without any reason absent an agreement to the con-

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trary.[1] Professor Richard Epstein, for his part, stands virtually alone among U.S. legal scholars in his ardent and ongoing support for an especially stringent version of EAW on grounds of both economic efficiency and fairness.[2] And simplicity. Employment-at-will, for Epstein, is a paradigmatic example of "simple rules for a complex world," the title of Epstein's book on the manifold virtues of clear, simple, bright-line rules.[3]

The EAW rule has been under assault in the academic literature since the late 1960s. With his 1984 article, *In Defense of the Contract at Will*, Professor Epstein entered the fray as an avowed contrarian: "There is thus today a widely held view that the contract at will has outlived its usefulness. But this view is mistaken."[4] The importance of Epstein's article lay partly in its timing. In the early 1980s, the field of "employment law" was just beginning to emerge. There were no law school courses or casebooks in employment law, as distinct from both labor law and employment discrimination law (which was often taught as part of a course on civil rights law).[5] But by 1984, one theme had already emerged in the earliest employment law scholarship: criticism of the employment-at-will rule.[6] Professor Epstein had recently shaken up the labor law academy with his uncompromising defense of the *Lochner* era's liberty of contract jurisprudence—including its validation of the infamous "yellow dog contract" by which workers were required to agree as a condition of employment not to join a union—as against the New Deal labor law regime that had replaced it.[7] (When Epstein presented the paper, I was a left-leaning labor law student in

1. Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 67–68 (2000).

2. *See* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) [hereinafter Epstein, *In Defense*]. Epstein has returned many times to his case for the virtues of EAW. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 147–58 (1992) [hereinafter EPSTEIN, FORBIDDEN GROUNDS]; RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 156–59 (1995) [hereinafter EPSTEIN, SIMPLE RULES]; RICHARD A. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT 135–41 (2009); Richard A. Epstein, *Inside the Coasean Firm: Why Variations in Competence and Taste Matter*, 54 J.L. & ECON. S41, S48–57 (2011), https://doi.org/10.1086/662187; Richard A. Epstein, *The Deserved Demise of EFCA (and Why the NLRA Should Share Its Fate)*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 177, 190–93 (Cynthia L. Estlund & Michael L. Wachter eds., 2012); Richard A. Epstein, *Contractual Solutions for Employment Law Problems*, 38 HARV. J.L. & PUB. POL'Y 789, 794–96 (2015) [hereinafter Epstein, *Contractual Solutions*].

3. EPSTEIN, SIMPLE RULES, *supra* note 2, at 156–57.

4. Epstein, *In Defense*, *supra* note 2, at 951.

5. For a masterful early assembly of materials and themes that would soon become an established field of study, see Matthew W. Finkin, "*In Defense of the Contract at Will"—Some Discussion Comments and Questions*, 50 J. AIR L. & COM. 727 (1985).

6. *See infra* note 31 and accompanying text.

7. Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1370–75 (1983).

the audience and part of the chorus of vehement criticism that it immediately provoked.) That article, along with the following year's *In Defense of the Contract at Will*, delivered a jolt of intellectual energy and rigorous contrarianism and arguably helped to put employment law on the legal academic map. Said Professor Matthew Finkin, a pioneering scholar of employment law, at the time: "The thought struck me that, in traditional 'cases and materials' style, many of the[ ] as yet uncompiled casebooks on individual employment law will commence with Epstein's defense of employment-at-will as a jumping off point for classroom discussion."[8] Finkin proceeded to offer a profoundly thoughtful, historically rich, and erudite critique in the guise of a proposed set of "comments and questions" to follow the expected Epstein excerpt.[9]

All this took place several decades ago. In the meantime, much has changed. The law of employment—including the law surrounding the doctrine of EAW—has mushroomed, and the field of employment law has become well-established. And the reign of first-generation law and economics—to which Epstein contributed a libertarian strain—has made way for both heterodoxy and empiricism in the economic analysis of law. Yet Finkin's prediction about the prominence of Epstein's 1984 article has been borne out in employment law casebooks.[10] For his part, Epstein has reaffirmed his support for EAW, plain and simple, several times in the intervening years, referencing his formidable and multifaceted 1984 defense without much elaboration or revision.[11] Hence its centrality in these reflections.

As one of the multitudes of labor and employment scholars who have criticized EAW in past works, I will inevitably tread on some familiar ground here. But I will hew quite closely to the theme of simplicity and complexity. In this Essay I will reflect on a few ways in which EAW is too simple for our complex world—too simple in light of the complexities of labor markets and of human and organizational behavior, and too simple in light of evolving societal conceptions of justice. As things now stand (and as others have noted), given the legal complexity that has been layered atop the EAW rule in this complex world, the "just cause" rival of EAW would bring greater simplicity along with its primary virtues of fairness, economic security, and dignity for workers.[12]

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8. Finkin, *supra* note 5, at 729.

9. *Id.* at 733–60.

10. *See, e.g.*, MARION G. CRAIN ET AL., WORK LAW: CASES AND MATERIALS 216–18 (4th ed. 2020) (providing an excerpt of Epstein, *In Defense*, *supra* note 2, as an example of the argument in defense of EAW).

11. *See* sources cited *supra* note 2.

12. KATE ANDRIAS & ALEXANDER HERTEL-FERNANDEZ, ROOSEVELT INST., ENDING AT-WILL EMPLOYMENT: A GUIDE FOR JUST CAUSE REFORM 8–18 (2021), https://rooseveltinstitute.org/wp-content/uploads/2021/01/RI_AtWill_Report_202101.pdf [https://perma.cc/8M3Q-MKJV].

II. A Primer on Employment-at-Will and Its Evolution

In its original form, EAW was stark and simple: Employers could terminate employment "for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."[13] During the *Lochner* era of the early 20th century, the Supreme Court treated this stringent form of EAW as not just a common law default rule for interpretation of employment contracts, but also a core embodiment of the constitutional "liberty of contract."[14] So while *Lochner* itself recognized some limited scope for regulation of terms of employment, it was simply "not within the functions of government" to constrain employers' right to hire and fire at will.[15] In striking down a statute barring the discharge of an employee based on union membership, the Court was emphatic: Absent a contract "fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another."[16]

That last phrase usefully reminds us of the essential flipside of EAW: workers' right to quit at will.[17] Denied for much of the world's history, in which slavery or other bonded forms of labor predominated, workers' basic freedom from forced labor is now properly understood as an inalienable human right.[18] The case for employers' prerogative to fire at will—in *Lochner*-era jurisprudence as well as in Epstein's defense of EAW, as we will see—leans heavily on the fundamental right of employees to quit employment, as if the two cannot logically be separated. But in positive U.S. law, the simple symmetry of the original EAW rule gave way under the pressure of public demands for protection of employees against what came to be seen as abusive exercises of employers' prerogative to fire employees.[19]

The New Deal "switch in time" finally stripped EAW of its constitutional armor, opening the door to legislation paring back the employer side of EAW. In its unexpected decision upholding the constitutionality of the National Labor Relations Act ("NLRA") in 1937, the Supreme Court acceded to Congress's power (among other things) to

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13. Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 519–20 (1884).

14. *See* Adair v. United States, 208 U.S. 161, 171–74 (1908).

15. *See id.* at 174.

16. *Id.* at 175–76.

17. *Id.* at 174–75.

18. The International Labor Organization ("ILO") recognizes numerous human rights, including freedom from forced labor. Dinah Shelton, *International Human Rights Law: Principled, Double, or Absent Standards?*, 25 Law & Ineq. 467, 475–76 (2007). The United States ratified the ILO's Convention Number 105 on the Abolition of Forced Labor. Rebecca Smith, *Human Rights at Home: Human Rights as an Organizing and Legal Tool in Low-Wage Worker Communities*, 3 Stan. J. C.R. & C.L. 285, 298–99 (2007).

19. *See infra* notes 20–25 and accompanying text.

carve out wrongful discharge exceptions to EAW.[20] But that was just the beginning. Especially in the wake of the civil rights movement, the contemporary U.S. version of EAW became riddled with exceptions—federal, state, and local—that prohibited the discharge of employees for particular reasons that the public or the courts have deemed illegitimate.[21]

The NLRA was an early example of laws prohibiting *retaliation* against specified *protected activities*, such as union organizing or other peaceful "concerted activities," refusing to engage in unlawful conduct or disclosing or complaining of such conduct,[22] or participating or refusing to participate in the political process in various ways.[23] Title VII of the Civil Rights Act launched the epic project of prohibiting employer *discrimination*, including in discharge decisions, based on *status* or facets of individual identity, such as race, national origin, religion, sex, sexual orientation, gender identity, age, and disability.[24] Beyond federal, state, and even local wrongful discharge legislation, the courts of most U.S. states also came to recognize "public policy" as a source of additional common law exceptions to EAW—mostly in the mold of the antiretaliation exceptions—and a font of potential tort liability.[25]

I will refer here to the many antiretaliation and antidiscrimination exceptions to EAW as the law of "wrongful discharge" (although many of them also reach suspensions, demotions, and other adverse actions, and even non-hiring based on an unlawful cause or motive). Given that sprawling body of wrongful discharge law, we can restate the modern U.S. doctrine of EAW as allowing employers to fire employees for good reason or no reason, but not for a litany of specific bad reasons.

EAW is formally a background or default rule that can be overridden by a contract—individual or collective—providing for job secur-

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20. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the NLRA, and enforcing an order reinstating employees who had been fired, in violation of the statute, for union activity).

21. For an overview of the rise of wrongful discharge laws, see CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 68–71 (2010). *See also* Cynthia Estlund, *Rethinking Autocracy at Work*, 131 HARV. L. REV. 795, 803–05 (2018) (reviewing ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017)) (arguing that employment law consists mostly of exceptions to EAW).

22. ESTLUND, *supra* note 21, at 27–28.

23. On this last category of exceptions, see Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295 (2012).

24. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e–2 (2020)).

25. For a recent summary of the public policy tort of wrongful dismissal and an argument for its extension, see Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223.

ity.[26] But very few private sector employees can show an enforceable promise of job security (except for the small fraction covered by union contracts and their customary "just cause" provisions).[27] That was true a half-century ago because of doctrinal fortifications around EAW that made it peculiarly difficult for employees to prove or enforce contractual promises of job security.[28] Those doctrinal fortifications were dismantled during the era of judicial disenchantment with EAW; but employers proceeded to rebuild their own fortifications in the form of express at-will disclaimers, to which courts mostly deferred.[29] We will put aside the now-rarely-applicable contractual routes around EAW and focus here on the non-contractual and non-waivable wrongful discharge exceptions to EAW. The overwhelming majority of private sector employees can be terminated at will subject to any wrongful discharge exceptions that might apply to them.[30]

Legions of U.S. labor law scholars, advocates, policymakers, and judges have criticized the EAW-with-exceptions regime for its inadequate protections of employees.[31] For one thing, wrongful discharge claims are notoriously difficult to win, even if they are much-feared by employers.[32] That leaves employees effectively unprotected for many dismissals that *are* wrongful but not provably so, or that simply are not challenged. For another, many dismissals that are *unjustified* are not *wrongful* in the eyes of the law. As Professor Elizabeth Anderson recently observed, most workers still have no legal recourse if they are fired "for being too attractive, for failing to show up at a political rally in support of the boss's favored political candidate, [or] because their daughter was raped by a friend of the boss."[33] Such cases are rare, though revealing. The crucial point is that U.S. law (except in the sparsely populated state of Montana[34]) fails to protect employees

26. Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 484–85 (1976); ESTLUND, *supra* note 21, at 72.

27. Estlund, *supra* note 21, at 801–02; Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1410–12 (1967).

28. *See* Summers, *supra* note 26, at 488–89.

29. Summers, *supra* note 1, at 75–77.

30. Blades, *supra* note 27, at 1410–12; Summers, *supra* note 26, at 483, 520.

31. For a recent overview of arguments against EAW, see ANDRIAS & HERTEL-FERNANDEZ, *supra* note 12. For some of the classic early critiques, see Blades, *supra* note 27, at 1410–13 (1967); Summers, supra note 26, at 519–24; Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 4–10 (1979); and Summers, *supra* note 1, at 84–86. *See also* Bodie, *supra* note 25, at 258 (arguing for the extension of the tort of wrongful discharge); Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1656–57 (1996) ("[W]rongful discharge law . . . provides inadequate security against employer retaliation and leaves in place powerful incentives for employee compliance and silence.").

32. Summers, *supra* note 26, at 486–89; Estlund, *supra* note 31, at 1673–74, 1680.

33. ANDERSON, *supra* note 21, at 53 (footnotes omitted).

34. Montana's legislature adopted a "good cause" standard with a modest remedial regime in response to common law developments that employers feared would

against dismissals that are merely arbitrary or unjustified—those that are supported by no legitimate and factually supported reason—as well as many that are idiosyncratically stupid but beyond the reach of any wrongful dismissal law.

In contrast, the law across the rest of the developed world requires employers to justify dismissals. An unjust dismissal regime typically affords redress—usually in some kind of specialized labor tribunal—where the employer failed to follow a reasonably fair process, or had no legally sufficient reason or lacked a factual basis for dismissal. Employees can win many cases under a just-cause, good-cause, or unjust dismissal standard—and I will use those terms interchangeably here—that they would lose, or never contest, if they had the burden of proving a particular wrongful motive. That difference between the U.S. regime of EAW-with-exceptions and the good-cause regimes that prevail elsewhere epitomizes the value that the latter places on employees' interest in job security. Unjust dismissal laws vary in how strongly they protect job security versus competing employer interests, and there is debate over how strongly they should do so.[35] But the U.S. regime of EAW-with-exceptions effectively accords no value to employees' interest in job security as such. Rather, it values managerial prerogatives up to the point that proof of a particular unlawful motive offends public policy.

III. The Epsteinian Defense of Employment-at-Will, Plain and Simple

Epstein's classic 1984 article defends the original stark version of EAW on grounds of both fairness and utility. Both the fairness and utility arguments in turn rest heavily on the same two pillars: freedom of contract and the mutuality, or symmetry, of EAW. The central fairness argument is thus based on the "importance of freedom of contract as an end in itself."[36] As "[f]reedom of contract is an aspect of individual liberty," it is "presumptively unjust" for the law to interfere

lead to a common law "good cause" standard that was more threatening. For an overview of Montana's good cause law, see Bradley T. Ewing et al., *The Employment Effects of a "Good Cause" Discharge Standard in Montana*, 59 Indus. & Lab. Rels. Rev. 17 (2005), https://doi.org/10.1177/001979390505900102. More recently, New York City enacted a "just cause" law for fast food workers, which is currently being challenged by employers, mainly on federal preemption grounds. *See* Sarah Leadem, *Federal Court Upholds New York's Just Cause Protections for Fast Food Workers*, OnLabor (May 9, 2022), https://onlabor.org/federal-court-upholds-new-yorks-just-cause-protections-for-fast-food-workers/ [https://perma.cc/G3QS-8YU7].

35. Hugh Collins has argued, for example, that the United Kingdom's unjust dismissal law under-protects job security by giving too much ground to managerial prerogatives. Hugh Collins, *Happy Birthday: Unfair Dismissal at 50*, U.K. Labour L. Blog (Mar. 3, 2022), https://uklabourlawblog.com/2022/03/03/happy-birthday-unfair-dismissal-at-50-by-hugh-collins%EF%BF%BC/#comments [https://perma.cc/JY4G-XHP9].

36. Epstein, *In Defense*, *supra* note 2, at 953.

with the right of competent parties to contract as they choose.[37] Lest there be any doubt on the matter, "freedom of contract" here requires presuming—absent proof of force or fraud—that both parties to the contract were equally free to choose its terms. Epstein accordingly admits to only the narrowest restrictions on the freedom of contract in employment, as in the case of contracts to commit crimes, and therefore on the freedom to dismiss workers under an at-will contract.[38] (In particular, in his 1992 book *Forbidden Grounds*, Epstein later doubled down on his defense of EAW as against what is probably its most widely accepted carve-out: the prohibition of racial discrimination in employment.[39])

If the freedom of contract argument goes to the *procedural* fairness of EAW, the *substantive* fairness of EAW lies mainly in its mutuality, as "[a]ny limitation upon the freedom to enter into such contracts limits the power of workers as well as employers."[40] (How so?, one might begin to wonder.) Epstein approvingly cites *Payne* for the reciprocal nature of at-will termination: It is "a right which an employe[e] may exercise in the same way, to the same extent, for the same cause or want of cause as the employer."[41] In further support of the fairness of EAW, Epstein cites its simplicity—though symmetry appears there, too: "An employee who knows that he can quit at will understands what it means to be fired at will, even though he may not like it after the fact."[42] Epstein also argues that the ubiquity of EAW attests to its fairness, for "[i]t is hardly plausible that contracts at will could be so pervasive in all businesses and at all levels if they did not serve the interests of employees as well as employers."[43]

Both freedom of contract and mutuality return in Epstein's case for the utility of EAW, in particular for employees. First, the fact that employees so often agree to EAW is powerful evidence for Epstein that the rule serves employees' interests.[44] Epstein thus vigorously denies that the prevalence of EAW reflects a systematic imbalance of bargaining power between employers and employees.[45] Yes, employers, as repeat players, might have better negotiation skills and greater knowledge of market wages.[46] But employees know or can learn about prevailing wages, and, unlike employers, they bear neither agency costs from bargaining through subordinates nor significant op-

37. *Id.* at 953–54.
38. *Id.* at 954–55.
39. EPSTEIN, FORBIDDEN GROUNDS, *supra* note 2, at 147–58.
40. Epstein, *In Defense*, *supra* note 2, at 954.
41. *Id.* at 947–48 (quoting Payne v. W. & Atl. R.R., 81 Tenn. 507, 518–19 (1884)).
42. *Id.* at 955.
43. *Id.*
44. *See id.* at 956–57.
45. *See id.*
46. *See id.* at 975.

portunity costs for time spent in negotiations.[47] As for employers' greater wealth, Epstein finds its impact on bargaining to be indeterminate; they might be able to hold out longer in negotiations, but they gain less by doing so.[48] (Curiously, much of the argument here on unequal bargaining power seems to envision one-on-one bargaining as opposed to a take-it-or-leave-it deal presented by the employer.)

Mutuality also features prominently in the case for EAW's utility. The rule is not skewed in employers' favor, per Epstein, because "the rights under the contract at will are fully bilateral, so that the employee can use the contract as a means to control the firm, just as the firm uses it to control the worker."[49] In order to monitor and counteract employee abuses, employers need the ability to resort to sanctions; and it is "far easier to use those powers that can be unilaterally exercised: to fire, to demote, to withhold wages, or to reprimand."[50] The risk of employer abuse is controlled by workers' ability to "quit whenever the net value of the employment contract turns negative,"[51] while employers' abuse of their unilateral power of dismissal under EAW is constrained by the reputational impact of arbitrary dismissals.[52]

Notably, the benefits of EAW for employees, in Epstein's account, derive almost exclusively from their right to *quit* at will, not from employers' ability to *fire* at will.[53] The one distinct benefit of the latter to employees lies in employers' ability to get rid of "uncooperative or obtuse coworkers"[54] (which might of course be possible under a "just cause" standard, too). Otherwise, it is employees' right to quit that allows them to sanction and deter employer abuse, to diversify risk over time by exiting contracts when better options arise, and to try out a new employment relationship without binding themselves to it or to change their minds along the way.[55]

One big advantage of EAW that could benefit both parties is its much lower administrative costs,[56] which stem again from its simplicity. Under a just-cause system, "all, or at least a substantial fraction of,

47. *Id.* at 975–76.

48. *Id.* at 976.

49. *Id.* at 957 (citing Payne v. W. & Atl. R.R., 81 Tenn. 507, 518–19 (1884)).

50. *Id.* at 965.

51. *Id.* at 966–67.

52. *Id.* at 968. For a fuller exploration of how reputation can effectively enforce non-legally-enforceable norms of fairness in discipline and discharge, see Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913 (1996) [hereinafter Rock & Wachter, *Enforceability of Norms*], and Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619 (2001).

53. *See* Epstein, *In Defense*, *supra* note 2, at 955.

54. *Id.* at 968.

55. *Id.* at 969.

56. Rock and Wachter develop a similar point: Given the labor market dynamics that tend to enforce non-legally-enforceable *norms* of fairness, the additional margin of job security from legal enforceability (as under a just-cause principle) is not worth it to employees, who will end up bearing the much greater administrative costs associ-

dismissals [may] generate litigation," with ubiquitous factual disputes about the reasons for dismissal that are likely to require trial, and with pretrial discovery allowing "exploration into every aspect of the employment relation."[57] Epstein returned to this point in his book *Simple Rules for a Complex World*.[58] The great virtue of EAW is that employers need only say, "You're fired," to end the contractual relationship, with the "critical set-off" that employees need only say, "I quit."[59]

> The one feature that the "just cause" rule has in common with the at-will rule is that both can be captured with a verbal tag that is only two words long. But while "at will" is a phrase that gets the courts out of the business of overseeing employment contracts, a state-imposed "just cause" immerses them in an endless variety of litigation.[60]

The simplicity of EAW lies in employees' sheer lack of legal recourse against termination, no matter what the cause.[61] Sure, employees might occasionally suffer from employer errors or venality.[62] But "[a]ble employees" are likely to get another job; indeed, they are less likely to be scarred by a dismissal under EAW, as "termination no longer implies employee misconduct" or incompetence.[63] (Well, it does if Epstein is right that employers have no incentive under EAW to fire employees without a good reason.)

At the end of the day, says Epstein, a modest-sounding just-cause regime will be sufficiently costly to employers that it will end up discouraging them from hiring workers—especially "risky" workers.[64] Ultimately, "it is hard to see how employees *as a class* benefit from a rule that can only hamper general mobility in labor markets."[65]

IV. An Empirical Interlude: Employment Protections in Real Labor Markets

The last point is a good place to start our analysis. In neoclassical economic theory, with its simplified model of competitive labor markets, the economic impact of legal restraints on dismissal seemed clear: Employment protections that make it harder to fire or lay off workers will inhibit new hiring, increase unemployment, and impair

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ated with enforcement (in lower wages or fewer jobs). Rock & Wachter, *Enforceability of Norms*, *supra* note 52, at 1939–40.

57. Epstein, *In Defense*, *supra* note 2, at 970.
58. Epstein, Simple Rules, *supra* note 2, at 156–59.
59. *Id.* at 156–57.
60. *Id.* at 159.
61. Epstein, *In Defense*, *supra* note 2, at 968.
62. *Id.*
63. *Id.* at 970.
64. *Id.* at 972.
65. *Id.*

overall economic vitality.[66] Epstein's prediction echoed that view, as did the World Bank for many years.[67] In recent decades, however, the neoclassical and neoliberal consensus has been increasingly challenged both theoretically and empirically.

Leading scholars have long observed that "the theoretical effect of firing restrictions on employment levels is ambiguous."[68] On the one hand,

> the imposition of statutory controls could induce distortions or imperfections in the allocation of resources by raising firms' firing (and hence hiring) costs. . . . [S]lowing down labour market transitions may have broader negative effects, including deterring innovation by market entrants concerned about high severance costs in the event of business failure, and exaggerating the effects of the economic cycle.
>
> On the other hand, if fairness at work is a benefit that workers value but employers tend to under-provide, for example because of adverse selection effects, dismissal legislation can induce an increase in labour supply and also help shift the employment exchange to a more efficient contractual equilibrium.[69]

So, too, statutory employment protections might "provide elements of insurance and income smoothing that are not straightforward to obtain through private contracting, due to information asymmetries and collective action costs."[70] Empirically, some studies associated employment protection laws with "enhanced worker–employer cooperation and labour productivity," and with "increases in firm-level innovation, the logic being that workers are more prepared to share knowledge with managers if the firm can make credible job security commitments."[71] The overall picture was (shall we say?) complex.

Recently, scholars from Cambridge University have conducted a series of massive comparative studies of the economic impact of em-

66. Reaffirming that position, see Olivier Blanchard & Pedro Portugal, *What Hides Behind an Unemployment Rate: Comparing Portuguese and U.S. Labor Markets*, 91 AM. ECON. REV. 187, 196 (2001), https://doi.org/10.1257/aer.91.1.187, and Edward P. Lazear, *Job Security Provisions and Employment*, 105 Q.J. ECON. 699, 704–06 (1990), https://doi.org/10.2307/2937895. Those predictions found some empirical support. *See* Lazear, *supra*, at 724–25 (1990); Andrea Bassanini et al., *Job Protection Legislation and Productivity Growth in OECD Countries*, 24 ECON. POL'Y 349, 369–73 (2009), https://doi.org/10.1111/j.1468-0327.2009.00221.x.

67. *See, e.g.*, WORLD BANK, DOING BUSINESS 2008 19–23 (2007), https://archive.doingbusiness.org///doingBusiness/media/Annual-Reports/English/DB08-FullReport.pdf [https://perma.cc/GLR9-94C8].

68. Zoe Adams et al., The Economic Significance of Laws Relating to Employment Protection and Different Forms of Employment: Analysis of a Panel of 117 Countries, 1990–2013, 158 Int'l Labour Rev. 1, 3 (2019) (quoting David H. Autor et al., *The Costs of Wrongful-Discharge Laws*, 88 REV. ECON. & STAT. 211, 214 (2006), https://doi.org/ 10.1162/rest.88.2.211), https://doi.org/10.1111/ilr.12128.

69. *Id.* (citations omitted).

70. *Id.* at 2.

71. *Id.* at 3.

ployment protection legislation ("EPL"), based on carefully coded data from 117 countries over four decades.[72] Focusing on data from 1990 to 2013, the researchers found that EPL was associated with small but mostly *positive* long-term net effects on national economic performance, including modestly *lower* unemployment levels in the long run and a higher labor share of national income.[73] They also found a significant correlation between EPL and measures of overall economic inequality among Organisation for Economic Co-operation and Development ("OECD") countries (though not across all 117 countries).[74]

These results may be surprising, for restrictions on firms' ability to shed workers would seem almost inevitably to inhibit new hiring. One explanation (in addition to those suggested above) might lie in the coexistence of employment protections and higher public and private investments in worker training.[75] Indeed, job-security protections should themselves encourage employers to invest in incumbent workers' skills, and to cultivate their ability to switch to new tasks, rather than treating them as disposable. That could boost both workers' productivity and their labor market power.[76]

Even the World Bank has taken notice. After years of preaching that employment protections harm firms, workers, and national economies, the Bank's 2015 *Doing Business* report proclaimed that "[e]mployment regulations are unquestionably necessary" and "benefit both workers and firms";[77] indeed, labor laws could impair national competitiveness and growth "not simply where they were 'excessive' but also where they were 'insufficient.'"[78]

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72. On the methodology and coding of the Cambridge Centre for Business Regulation Labour Regulation Index ("CBR-LRI"), see Zoe Adams et al., *The CBR-LRI Dataset: Methods, Properties and Potential of Leximetric Coding of Labour Laws*, 33 INT'L J. COMPAR. LABOUR L. & INDUS. RELS. 59, 66–75 (2017), https://doi.org/10.54648/ijcl2017004.

73. Adams et al., *supra* note 68, at 20.

74. *Id.* at 18.

75. *See* Simon Deakin et al., *How Do Labour Laws Affect Unemployment and the Labour Share of National Income? The Experience of Six OECD Countries, 1970–2010*, 153 INT'L LABOUR REV. 1, 5–6 (2014), https://doi.org/10.1111/j.1564-913X.2014.00195.x.

76. *Id.* at 17. Those productivity benefits of employment protections might offset other negative effects; the Cambridge study found no overall impact of employment protections on productivity. Adams et al., *supra* note 68, at 17.

77. WORLD BANK, DOING BUSINESS 2015: GOING BEYOND EFFICIENCY 231 (2014), https://archive.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB15-Full-Report.pdf [https://perma.cc/7XJ2-L9NJ].

78. Adams et al., *supra* note 68, at 2 (quoting WORLD BANK, *supra* note 77, at 231). In the face of concerns about data irregularities, the Bank decided in 2021 to discontinue the report. WORLD BANK GROUP TO DISCONTINUE DOING BUSINESS REPORT (Sept. 16, 2021), https://www.worldbank.org/en/news/statement/2021/09/16/world-bank-group-to-discontinue-doing-business-report [https://perma.cc/X562-6QMT] (official statement by the Bank).

Undoubtedly, employment protections can be excessive. (The case against just-cause protections gains credence from stories—especially from the public sector—about the near-impossibility or absurd costs of getting rid of incompetent workers.[79]) One study found that, "at low levels of regulation, an increase in EPL is associated with a rise in employment; at medium levels, with a 'plateau', signifying little or no impact; and at higher levels, employment declines."[80] In other words, job security is a good thing, but only up to a point. Still, it appears that the United States could enhance job security protections before reaching the point of diminishing or negative returns.

Relying on empirical evidence to refute Epstein's defense of EAW—or indeed, neoclassical theory's predictions about the effects of regulating dismissals—might evoke an iconically Epsteinian retort: "It takes a theory to beat a theory."[81] Or, as Epstein says elsewhere, empirical evidence should be viewed with skepticism: "No one should of course turn a blind eye to empirical information," but "[t]he data is always incomplete. The studies are often too esoteric. The chains of inference are long and disputed."[82] As he put it in commenting on this Essay, empirical assessments can be "spongy."[83] Still, the Cambridge studies are about as good as it gets, and the latest word empirically on a set of questions on which the theory potentially pointed both ways. So let us take this recent influx of evidence on board. It suggests that labor markets, workplaces, and even humans are more complex than they are in the assumptions that drive neoclassical economic theory, and that pop up in and between the lines of Professor Epstein's defense of EAW.

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79. *See, e.g.*, Ronald N. Johnson & Gary D. Libecap, *Courts, a Protected Bureaucracy, and Reinventing Government*, 37 ARIZ. L. REV. 791, 792 (1995) ("[J]ob termination is not a personnel management tool that is readily available to supervisors in the public sector. Civil service rules, which have been installed as alternatives to patronage employment, make it difficult for supervisors either to reward productivity or to punish poor performance.").

80. Adams et al., *supra* note 68, at 3 (citing Sandrine Cazes et al., *Employment Protection and Collective Bargaining: Beyond the Deregulation Agenda* (ILO, Employment Working Paper No. 133, 2012), https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_191726.pdf [https://perma.cc/72DV-Q7ET]).

81. Lawrence Solum, *Legal Theory Lexicon: It Takes a Theory to Beat a Theory*, LEGAL THEORY BLOG (Oct. 21, 2012), https://lsolum.typepad.com/legaltheory/2012/10/introduction-it-takes-a-theory-to-beat-a-theory-this-is-surely-one-of-the-top-ten-all-time-comments-uttered-by-law-professo.html [https://perma.cc/A22U-Y3NY] (citing Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 YALE L.J. 1435, 1435 (1983)).

82. Epstein, *Contractual Solutions*, *supra* note 2, at 789.

83. This particular description of empirical assessments was made by Professor Epstein while commenting on my presentation of this Essay on February 23, 2023, at the Texas A&M University School of Law.

V. Labor Market Complexity, Human Complexity, and Moral Complexity

The EAW rule in its original (and Epsteinian) form was indeed clean and simple in the sense that it virtually eliminated legal disputes about termination of employment and the need to determine the reasons for termination. All else being equal, simplicity might be a virtue. "Might be" because clean and simple rules can also create opportunities for abuse or brinksmanship, at least in the context of relationships characterized by asymmetries of power and information.[84] By foreclosing inquiries into overall fairness, simple rules can invite unfair and oppressive behavior by a better-heeled and better-informed party. That general point holds especially true within employment relationships and labor markets, which turn out to be more complex and unequal than Epstein admits. Additional complexity has come about as the original, simple EAW rule has run up against evolving public morality and democratic policymaking. As between the extremely complex EAW-with-exceptions regime that has resulted and the good- or just-cause regime that was and is the chief rival to EAW, it is the latter that can now claim simplicity as a virtue.

A. *Simplicity and Symmetry in the Face of Labor Market Asymmetry*

One aspect of EAW's simplicity was its symmetry. It recognized no constraints on either employers' or employees' right to terminate the employment relationship.[85] Arguments in defense of employment-at-will—both Epstein's and that of the *Lochner*-era Supreme Court—rest heavily on the "mutuality" or symmetry of the rule.[86] But they derive much of their normative appeal, as we have noted, from just one side of the rule: employees' right to quit for any reason at any time.[87] That is unquestionably an essential (though not sufficient) safeguard against employer abuse. But that employee right is portrayed as somehow inseparable from an unfettered right of employers to fire employees at will. The common law courts that cited "mutuality of obligation" as a basis for refusing to enforce certain employer promises of job security made a similar leap of logic, resisting even contractual constraints on employers' prerogative to fire at will based

84. *See* Henry E. Smith, *Equity as Second-Order Law: The Problem of Opportunism* 17–19 (Harv. Public Law Working Paper, Paper No. 15-13, 2015), https://doi.org/10.2139/ssrn.2617413 (arguing that the simplicity of the rule-based structure of property rights means that "actors who have *too much* information . . . are in a position to engage in opportunism"); Henry E. Smith, *Equity as Meta-Law*, 130 Yale L.J. 1050, 1080 (2021) ("[A]nnouncing a clear list of ex ante rules enables evaders to exploit their knowledge of where the bright line is.").

85. *See supra* note 13–19 and accompanying text.

86. *See, e.g.*, Epstein, *In Defense*, *supra* note 2, at 956–57.

87. *See id.* at 968–69.

on the lack of constraints on employees' right to quit.[88] In both cases, there was an implicit but undefended assumption that the two sides of EAW could not or should not be separated.[89]

The argument from symmetry fails, however. It is a non-sequitur. Nothing in logic or otherwise dictates symmetrical treatment of quits and dismissals (nor does the law of contract normally require symmetry as to any other terms of a contract). On the contrary, the *reasons* for protecting employees' right to quit at will are of an entirely different order than the reasons for protecting employers' right to fire employees at will. Nothing on employers' side of the ledger is remotely comparable to the freedom from involuntary servitude—from compelled performance of personal services and submission to employer control—that underlies workers' right to quit. That is so even for the relative handful of employers that are natural persons, and whose personal liberty might be implicated by constraints on dismissal of employees. It is even more obvious that corporations suffer nothing analogous to forced labor if they are unable to fire employees without a justification. A defense of employers' unconstrained right to fire employees at any time for any reason or no reason will have to stand on its own two feet.

The argument from symmetry ignores not only the asymmetrical human and moral stakes between employers and employees but also the basic asymmetry of market power that characterizes most employment relationships most of the time. Indeed, the symmetry argument for EAW—if it is more than a logical non-sequitur—reflects more or less explicit assumptions about the *economic* symmetry of employment relations. Those assumptions, which are prominent in Epstein's defense of EAW, have been thoroughly critiqued elsewhere.[90] The systematic asymmetry of bargaining power between employers and employees rests partly on individual workers' inability either to save up their labor power for a better investment opportunity (as it expires each day) or to diversify its investment (as they can hold just one or at most two jobs at any one time).[91]

So there are many reasons why workers might be moved to accept terms of employment—like at-will termination—that are distinctly unfavorable to them, especially if that is all that is on offer from em-

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88. *See, e.g.*, Swart v. Hutson, 117 P.2d 576, 579–80 (Kan. 1941) (refusing to enforce promise of either notice or severance pay based on lack of mutual obligation between the parties); Criscione v. Sears, Roebuck & Co., 384 N.E.2d 91, 95 (Ill. App. Ct. 1978) ("An employee at will may quit his employment for any reason at any time and is not bound to make his decision on the basis of whether or not it is a good business decision. The obligation of the employer should be no more nor less.").

89. *See* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 57–58 (1990).

90. *See id.* at 56–61, 71–74; Hiba Hafiz, *Structural Labor Rights*, 119 MICH. L. REV. 651, 688–711 (2021).

91. *See* Hafiz, *supra* note 90, at 696–97.

ployers. But I want to emphasize a different aspect of the relationship between asymmetry of bargaining power and EAW—not how unequal bargaining leverage contributes to the ubiquity of EAW, but the converse: how EAW *contributes* to workers' lack of leverage within the employment relationship.

Let us begin by observing that the losses associated with an involuntary dismissal for most individuals, *relative to their total wealth and income*, almost always dwarf the losses to an employer from an individual's voluntary departure (again, relative to its total assets, revenues, or labor force). There are surely exceptional cases. Loss of a single highly-skilled, hard-to-replace employee could be a serious, even fatal, blow for a smaller firm; and a fired worker who (despite the reputational impact of a discharge) can easily replace her job in the same geographic area, given the supply and demand for her skills, may suffer little economic loss or dislocation from discharge. But for many or most workers most of the time, involuntary dismissal is a very hard blow that may trigger an economic crisis for them and their families. And for most firms most of the time, voluntary quits and the need to replace workers are among the costs of doing business—costs that may be substantial in the aggregate, but not the catalyst for a serious crisis akin to losing one's sole source of income without substantial savings to fall back on.

Involuntary dismissal may entail intangible losses as well as large tangible losses. The fired employee loses human connections in the workplace (for many individuals, among their most important social attachments). If she has to move to find a job, she also loses community connections and perhaps an extended-family support network. Again, voluntary quits rarely trigger any comparable social losses on the employer's side of the equation. Where one works shapes one's life in innumerable ways, and some of those amount to "frictions" in the theoretically frictionless process of switching jobs. Even without literal monopsony power or employer collusion, those frictions add up to a chronic imbalance of labor market power. Labor markets are more complex than the neoclassical models suggest in part because life is complex.

Given the significant tangible and intangible losses that most employees suffer in case of dismissal, employers' prerogative to fire employees without legal constraint gives them power over employees—not unlimited power, but power measured by the employee's expected losses. Employer power is thus greater relative to employees without scarce in-demand skills, who lack the resources to tide them over during a job search, who are geographically constrained, or who are more likely to face discrimination in the job market, among other contingencies.

The asymmetries of power that favor employers in most actual labor markets have become a growing subject of study and concern

among labor economists.[92] Some of those asymmetries come under the umbrella of monopsony power, which may stem from product market concentration, or employer practices that constrain voluntary quits (for example, non-compete agreements) or even horizontal collusion (for example, "no-poach" clauses).[93] Epstein recently expressed skepticism toward the importance of employer collusion and monopsony power, suggesting that labor unions—though weaker than they have been in a century—pose the greater threat to labor market competition.[94] That prompted a rejoinder from Eric Posner, contending that "Epstein's assumptions about labor market structure are contradicted by mountains of empirical evidence."[95]

The balance of power in employment relationships reflects not only how hard it is for employees to replace their jobs but also how easy it is for employers to replace workers. A constellation of economic trends in the technology and organization of work has made it easier and cheaper for firms to replace employees or avoid employment by contracting out or automating tasks.[96] Both automation and "fissuring"—or contracting out labor needs to domestic or overseas supplier firms or to individuals—enhance employers' leverage in the labor market by making it easier to replace, or to avoid hiring, any particular workers.[97] Growing employee replacement options are the counterparts to developments such as monopsony, employer collusion, and post-employment restraints that have made it harder for workers to replace their jobs.

Employers' replacement or displacement of employees could be—and are in the rest of the advanced industrial world—legally constrained, in part by the need to justify dismissals and layoffs. Employment protection laws moderate the impact of the various trends that make it easier for employers to fulfill labor needs from outside the firm or with machines; as I have noted, those laws might steer employers toward retraining and redeployment instead of replacement of workers. By contrast, the U.S. rule of EAW greases the skids for employers, allowing them to dismiss or lay off employees without any justification.[98] The ease with which employers can fire or replace em-

92. *See id.* at 690–92.

93. *See, e.g.*, *id.* at 653–55.

94. Richard A. Epstein, *The Application of Antitrust Law to Labor Markets—Then and Now*, 15 N.Y.U. J.L. & LIBERTY 709 (2021).

95. Eric A. Posner, *Antitrust and Labor Markets: A Reply to Richard Epstein* (Univ. of Chi. Coase-Sandor Inst. for L. & Econ. Rsch. Paper, Paper No. 945, 2021), https://doi.org/10.2139/ssrn.3977736. The reply summarized a fraction of the evidence and theory found in ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS (2021).

96. I explore these trends and their commonalities in Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254 (2018) [hereinafter Estlund, *Automation*], and Cynthia Estlund, *Losing Leverage: Employee Replaceability and Labor Market Power*, 90 U. CHI. L. REV. 437 (2022).

97. *See* Estlund, *Automation*, *supra* note 96, at 283–86.

98. *See* Summers, *supra* note 1, at 67–68.

ployees in the United States under EAW, as well as the frictions that employees face in replacing their jobs, contribute to employees' lack of leverage in dealing with their employers.

Employees' lack of leverage on the job may be felt not only in lower wages but also in less opportunity for advancement, more burdensome schedules, less physical safety, less privacy both on and off the job, and greater vulnerability to abuse. Even as to matters that are legally regulated, employees with little bargaining power and no enforceable job security rights may feel compelled to tolerate violations of other rights. They will be less willing or able to resist dangerous working conditions, discriminatory harassment, or demands for off-the-clock work if they fear that the price of complaining may be their job. Many workers, especially those without higher education or advanced skills, find themselves in just that position most of the time.[99]

The growing literature on asymmetries of labor market power and labor's declining share of income points to one enormous source of complexity—call it labor market complexity—that the case for the simple EAW rule tends to ignore. The employment-at-will rule might sound simple, neutral, and symmetrical, but its impact is far from symmetrical. Employers' prerogative to fire or lay off employees at will both reflects and exacerbates the disempowerment of workers relative to employers.

B. *Moral Complexity and the Procedural Complexity That Follows*

So one kind of moral complexity that gets largely ignored in the defense of a strong and symmetrical EAW rule is the highly asymmetric consequences of constraining employees from quitting—which is akin to compelling personal servitude—versus constraining dismissals—which is nothing of the kind. Other moral complications arise as to reasons or motives for dismissal that have come to be widely regarded as wrong, immoral, or unfair. The core cases are identity- or trait-based discrimination and retaliation against activity that serves the public.[100] Each of the motive-based exceptions to EAW attests to a consensus in public morality, usually embodied in legislation, that it is unfair, socially harmful, and blameworthy to fire people because of aspects of identity that are intimate, immutable, or matters of conscience, or because of activities that ought to be allowed or even encouraged.[101] The stark, freedom of contract case for ignoring the reasons for and consequences of dismissal failed to carry the day as against the perceived threats to individuals' autonomy and identity and their equal standing in society. Hence the proliferation of wrong-

99. *See* Andrias & Hertel-Fernandez, *supra* note 12, at 10–12.

100. *See, e.g.*, Title VII, 42 U.S.C. § 2000e–2.

101. *See* Cynthia Estlund, *Wrongful Discharge Law in the Land of Employment-at-Will: A US Perspective on Unjust Dismissal*, 33 King's L.J. 298, 299 (2022), https://doi.org/10.1080/09615768.2022.2092938.

ful discharge exceptions to EAW, mostly adopted by legislation, some through common law.

My aim here is not to defend those exceptions on the merits—though I favor most of them—but rather to explore the problem of complexity that results. I might seem to be playing into Epstein's hands here, for the patchwork of exceptions to employment-at-will resembles the very complexity that the "simple rule" of EAW aims to avoid. But in terms of complexity, the existing EAW-with-exceptions regime is much worse than either EAW *or its chief rival*.

The alternative to EAW is "for-cause" termination—a requirement that employers justify dismissals on the basis of legitimate business needs and a solid factual record.[102] That test is not much more difficult to state or to understand than EAW; the complications, costs, and risks of error come mostly in first defining what counts as a legitimate business reason for dismissal, and then in resolving factual disputes.[103] Those complications and administrative costs are substantial, as I have conceded. But they pale beside what we now have—that is, literally hundreds of separate wrongful discharge prohibitions scattered throughout the law, many with their own enforcement processes and agencies where complaints must be filed and processed, with or without judicial recourse in some designated court. That is apart from the constitutional and common law wrongful discharge doctrines that support a private right of action in state court. The complexity of the overall EAW-with-exceptions regime reflects, in part, the multiplicity of jurisdictions that regulate employment, including 50 states and many cities. The burden of much of this legal complexity falls initially on complainants, who must somehow figure out how to file the right papers with the right agency (usually without legal counsel).

We have not yet folded in the difficulty of determining the motive or cause of a discharge decision. Nearly all of the wrongful discharge exceptions turn on the complainant's proof of a wrongful motive (putting aside both disparate impact claims and the kinds of "structural discrimination" claims that are the subject of much academic literature though rather little litigation).[104] Proof of bad motive is inherently more difficult than proof of good cause for dismissal, for the latter generally turns on observable facts about an employee's job per-

102. *See, e.g.*, *id*. at 300.

103. Some additional complications would come in defining the scope of "for-cause" protections. Professor Epstein, in his written response to this Essay, makes much of the potential burden of for-cause dismissal laws on small and especially "start-up" firms. Richard A. Epstein, *A Modern Defense of Simple Rules for a Complex World*, 10 TEX. A&M L. REV. 581, 597–602 (2023). It would be possible, and perhaps sensible, to exclude some firms or some employees from the reach of an unjust dismissal law, or to allow some employees in some circumstances—for example, if they receive a substantial portion of their compensation in the form of equity, or ownership shares—to waive "for-cause" protections.

104. *See, e.g.*, Estlund, *supra* note 101, at 307–08.

formance and behavior, while the former is often assiduously hidden. Moreover, each wrongful discharge statute or cause of action potentially has its own test for proving wrongful motive, which might have to be ascertained through judicial interpretation: Does the complainant have to show that the bad motive was a but-for cause of the dismissal or only a "motivating factor"? And how does the law deal with mixed motives? Does proof that the defendant would have made the "same decision anyway," notwithstanding the presence of an unlawful motive, avoid liability altogether or only certain make-whole remedies? (The answers are different even across federal wrongful discharge laws, and the questions recur across all wrongful discharge disputes.)

We could go on in this vein, but the point should be clear: The sprawling collection of wrongful discharge exceptions that have been carved out of the sweeping and simple EAW rule in the past century has created a morass of procedural complexity. How much simpler might it be to adjudicate dismissals under a single unjust dismissal statute, perhaps in a dedicated tribunal for such claims, in which the employer bears the burden of proving a legitimate business justification for dismissal, generally based on the job performance or workplace conduct (or perhaps redundancy)?[105]

For Epstein, the morass of complexity created by EAW-with-exceptions would be all the more reason to roll back the exceptions and return to the plain and simple rule of no recourse against termination of employment, whatever the reason. But that is not on the current menu of options. The strong version of EAW tolerated discharges that offended public morality and unfairly upended individuals' lives—discharges displaying mean-spiritedness, opportunism, denial of workers' associational rights, or numbingly common biases that distorted the life chances of out-groups. (One might believe that few employers make a habit of firing employees without good reasons; but "good reasons" in some employers' eyes included indulgence of customer biases, or employee disloyalty in the form of union advocacy or disclosure of unlawful conduct or refusal to join in such conduct, for example.) Those discharges provoked a stream of statutory and judicial exceptions, turning a simple, harsh, absolute rule of EAW into the regime of EAW-with-exceptions that we now have. The latter is much more morally defensible but also much more complex and costly to administer.

It is not surprising, given the interaction of democratic institutions and evolving public morality, that the once-simple and symmetrical rule of EAW has given way to so many exceptions. It is perhaps more

105. For a rough template of such legislation, see International Labour Organization [ILO], Termination of Employment Convention, C158 (June 22, 1982), https://www.ilo.org/dyn/normlex/en/f?p=::0:::12100:P12100_INSTRUMENT_ID:312303:NO [https://perma.cc/3FV3-UPTB].

surprising that EAW still survives as a background rule. Once a simple but harsh bright-line rule gives way to a profusion of exceptions, we might expect that path to lead toward abandonment of the rule in favor of a simpler standard that vindicates the normative underpinnings of the exceptions.[106] A just-cause regime would fit the bill nicely. But that has not happened here (except for Montana).[107]

One reason for the survival of the unwieldy EAW-with-exceptions regime lies, again, in the multiplicity of institutions that share in the construction of U.S. employment law—legislatures and courts in both federal and state (and even municipal) jurisdictions. Each of the exceptions addresses real injustices; each has powerful normative justifications, and sometimes constituencies. (As a bonus for legislators, wrongful discharge laws usually involve no significant budgetary outlays.) But legislatures do not internalize the costs of the complexity they produce as the justifiable exceptions mount. Courts might recognize the mounting complexity, even as they add to it (for example, through public policy tort exceptions to EAW); but their ability to respond to it is highly constrained. An activist state court might overturn the EAW background rule—where it has not been codified into legislation—in favor of a good-faith or just-cause standard. But it cannot lodge those cases in a dedicated employment tribunal (as is the norm in unjust dismissal jurisdictions across much of the world). Nor can any court or any state legislature integrate state and federal wrongful discharge law into the unjust dismissal regime, say, by authorizing additional remedies for claims based on wrongful versus merely unjustified dismissal. Only Congress could rationalize the system as a whole (and that seems both unlikely and risky from the perspective of employees).

Still, there is no simple explanation for why the rising tide of exceptions to EAW did not culminate in the adoption of good-cause regimes at the state level (except in Montana). That in fact seemed likely to happen in the 1970s and 1980s, at the high tide of judicial skepticism toward EAW. Several state courts had expanded common law tort exceptions to EAW, including one for "bad faith" discharges

106. *See* Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305, 377 (2003) ("[E]xceptions to the rule are created in certain factual situations. The more exceptions that arise, the less determinative the rule is. If an underlying policy is identified that explains the rule and all of its various exceptions, the law may be more simply expressed in light of this underlying policy, and the rule has evolved into a standard." (footnotes omitted)); *see also* Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 25-30 (2000) (illustrating how a rule can evolve into a standard through the creation of exceptions).

107. *See* MONT. CODE ANN. § 39-2-904 (West 2021); ANDRIAS & HERTEL-FERNANDEZ, *supra* note 12, at 14.

by way of the implied covenant of good faith;[108] and several had made it easier, through doctrines of implied and oral contract,[109] for employees to show enforceable promises of job security. (Some combination of these judicial innovations seems to have led parts of Montana's business community to regard a statutory good-cause regime as a lesser evil.) But the wave of judicial innovation crested and receded, and the momentum for reform stalled. That is perhaps best illustrated by a pair of California decisions foreclosing tort remedies for "bad faith" discharge and affirming employers' ability to avoid claims under both the implied covenant of good faith and doctrines of implied contract by adopting express disclaimer clauses affirming that employment was terminable at will.[110]

Perhaps equally important in stalling the momentum for overturning EAW was the rise of mandatory arbitration under the 1925 Federal Arbitration Act ("FAA"),[111] which the Supreme Court later transformed into a potent instrument for squelching employee (and consumer) litigation. Beginning in 1992, the Court pointed the way for employers to tame their employment liabilities by requiring employees to agree (usually as a condition of employment) to submit future employment law disputes to private arbitration on an individual basis.[112] While private arbitration in principle merely substituted an arbitral for a judicial forum, mandatory arbitration appears to have allowed employers to avoid most employment claims altogether; it has created what I have described elsewhere as a "black hole."[113] The FAA juggernaut owes much, in turn, to the same conception of "freedom of contract" and presumed equality of bargaining power that underlies Epstein's defense of EAW.[114] Mandatory arbitration under the FAA has accomplished for employers much of what a restoration of EAW, pure and simple, would do: It has achieved a measure of "simplicity" by effectively eliminating many legal disputes over dismissal.

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108. *See* James J. Brudney, *Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law*, 32 COMP. LAB. L. & POL'Y J. 773, 779–82 (2011).

109. *See* Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 356–62 (2008).

110. See, respectively, Foley v. Interactive Data Corp., 765 P.2d 373, 401–02 (Cal. 1988), and Guz v. Bechtel Nat'l Inc., 8 P.3d 1089, 1100–12 (Cal. 2000).

111. 9 U.S.C. §§ 1–16.

112. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Cir. City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (two key cases relating to the arbitration of employment liability disputes). For an overview of the FAA jurisprudence on mandatory arbitration of employment cases, see Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1316–22 (2015).

113. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 699–700 (2018).

114. *See* Samuel R. Bagenstos, *Consent, Coercion, and Employment Law*, 55 HARV. C.R.-C.L. L. REV. 409, 415–18, 429–34 (2020).

For employees and the public policies that underlie their wrongful discharge claims, that is far too high a price to pay for simplicity.

VI. Conclusion

Only Congress can tame the FAA, and only Congress could simplify the law governing termination of employment through a federal "good-cause" law and enforcement process. The latter is not itself a simple undertaking. For one thing, such a law would still have to afford additional remedies for discrimination and retaliation, including for adverse actions short of dismissal. More generally, there is little doubt that a weak or poorly crafted federal good-cause law could be much worse for employees than the patchwork of protections they now have. Still, it would surely be possible to design a federal unjust dismissal law that would achieve both greater fairness and economic security for workers and lower cost and complexity for all parties, as compared to the status quo. Perhaps that will be on Congress's agenda in a better political future.

Barring congressional action, individual states could accomplish much by abandoning the EAW background rule in favor of a good-cause standard. Such a law could codify and synthesize existing *state* wrongful discharge remedies, especially those arising under the common law. Such a law would also likely siphon many other wrongful discharge claims, including federal claims, out of existing channels and into the simpler good-cause process. (Commentators have long observed that, given the background rule of EAW, discrimination and other wrongful discharge lawsuits sometimes serve as imperfect vehicles for employee grievances over dismissals that are "merely" unjustified or arbitrary.[115]) While many of those with strong discrimination or retaliation claims would still seek existing wrongful discharge remedies, most workers who believed they were fired unfairly would probably be content, and better off, with an accessible forum and remedy for unjustified dismissal. Affording those workers with a hearing and a chance of redress would better serve simple justice and fairness than the current byzantine maze of wrongful discharge law.

115. *See, e.g.*, William R. Corbett, *"You're Fired!": The Common Law Should Respond with the Refashioned Tort of Abusive Discharge*, 41 Berkeley J. Emp. & Lab. L. 63, 101–06 (2020).