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# RACIAL RELEASES, INVOLUNTARY SEPARATIONS, AND EMPLOYMENT AT-WILL

*Donna E. Young\**

## I. INTRODUCTION

People of color in the United States have a complicated relationship with the world of work. For us, work has signified indentured servitude, slavery, mob violence, exploitation, drudgery, exhaustion, and ill-health. On the job, we have been subjected to long arduous hours, poor working conditions, and demeaning tasks. We have been segregated, oppressed, threatened, raped, injured, and killed. And throughout most of U.S. history, we have endured this mistreatment politically powerless and without meaningful legal protection.

But, we continue to work. We continue to find meaning in the jobs that we do and continue to recognize that work offers us the means for personal, social, and economic growth. It provides us with a sense of pride and identity. There is no doubt that “[w]ork is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being.”<sup>1</sup> The ability to work and the work that one does are

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\* Associate Professor of Law, Albany Law School of Union University. I would like to thank Dianne Avery, Mark Barenberg, Thomas Carbonneau, J. Stephen Clark, Kimberle Crenshaw, Darren Cunningham, Martha Fineman, Scott Goodspeed, Peter Halewood, Elizabeth Iglesias, Timothy Lytton, Lisa Natoli, Nancy Ota, Donna Parent, James G. Pope, Laura Shore, and Hilary Silver for their helpful comments, suggestions, and support. Special thanks to Isaac Young. Earlier drafts of this Article were presented at the Fourth Annual Northeastern People of Color Legal Scholarship Conference, San Juan, Puerto Rico, May 2000; the Queen’s University Faculty of Law, Kingston, Ontario, September 2000; and the Albany Law School Faculty Workshop, Albany, NY, October 2000. This Article is written in partial fulfillment of the requirements

vital to one's relationship with society.<sup>2</sup> Through work one is able to engage in fundamental civic duties.<sup>3</sup> Moreover, work enables us to assert our personal identity which is profoundly connected to our employment. In order to be recognized for the unique human beings that each of us are, we must work in order to "externalize [our] talents" and our "creative capacities" in the world.<sup>4</sup> Something more than economic harm results when one's capacity to externalize one's talents in work is impeded. The impediment often leads to psychic harm and may threaten our personhood.<sup>5</sup> Therefore, perhaps as important as work is to one's identity and social role, is the manner in which one's employment comes to an end.<sup>6</sup>

Consequently, job termination has been called the "capital punishment" of employment relations.<sup>7</sup> As a form of discipline, its

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for the degree of Doctor of the Science of Law in the School of Law, Columbia University.

1. *Machtinger v. HOJ Indus. Ltd.*, [1992] S.C.R. 986, 1002 (Can.) (quoting *Reference Re Public Service Employee Relations Act*, [1987] S.C.R. 313, 368 (Can.)).

2. See David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119, 129-30 (1988). According to Gregory: Work, or at least the aspiration to work, is ubiquitous. Work permeates, and is often nearly synonymous with, much of both individual and social life. The individual person is dignified by work; the community is enriched by work. Society stands condemned by failure to provide meaningful work. . . . Work helps us become more fully human.

*Id.*; see also J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 339 (1974) (recognizing the severe economic consequences of employment insecurity).

3. See Nancy C. Staudt, *The Hidden Costs of the Progressivity Debate*, 50 VAND. L. REV. 919, 922-23 (1997) (exploring whether the poor "might have a social duty to contribute their talents and energies to the greater social good despite their lack of income" and arguing that the fulfillment of duties as well as access to rights "are necessary components of one's full membership in a community").

4. Drucilla Cornell, *Dialogic Reciprocity and the Critique of Employment at Will*, 10 CARDOZO L. REV. 1575, 1620 (1989); see also *id.* at 1614 (explaining further that "[w]hen our ability to externalize our capacities is challenged, so is our personhood").

5. See *id.* at 1614-15.

6. See *Machtinger v. HOJ Indus. Ltd.*, [1992] S.C.R. 986, 1002 (Can.).

7. See MARK A. ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* 910 (4th ed. 1998) (explaining that the "loss of employment means not only loss of income but in our culture is often equated

seriousness is unparalleled. Dismissal affects a person's economic, emotional, and physical health in ways unparalleled by less drastic forms of discipline or transitory interruptions of work. Not only does dismissal have immediate financial consequences for the discharged worker, it also has an economic impact into the future, affecting "accrued seniority. . . accessibility to future jobs as well as entitlement to government benefits such as unemployment insurance."<sup>8</sup> The loss of one's job is felt not only by the individual worker, but by members of his or her family and the community.<sup>9</sup> Job termination is particularly distressing for those whose employment offers the only source of income for the family. If the termination is the result of factors other than an employee's conduct or performance, the loss can be devastating.<sup>10</sup> Unlike cases in which employment probation or suspension follow some form of worker misbehavior, involuntary separations<sup>11</sup> may take place even absent any fault on the part of the

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with loss of character and identity as well").

8. *Machtinger*, [1992] S.C.R. at 991 (quoting Katherine Swinton, *Contract Law and the Employment Relationship: The Proper Forum for Reform*, in *STUDIES IN CONTRACT LAW* 357, 360-61 (Barry J. Reiter & John Swan eds., 1980)).

9. For example, the loss of a job may necessitate relocation, place burdens on a spouse and children, etc. If one is a single parent or the sole wage earner in the family, the loss of a job can create serious financial pressures and risks to the family's health and integrity. Furthermore, dismissal of a worker has implications for employers too. See Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1834 (1980) (pointing out that "an arbitrary discharge may mean a waste of training, continuity, and expertise").

10. See *id.* at 1833-34 (arguing that a loss of one's job leads to embarrassment and loss of status).

11. I have chosen to use the terms *involuntary* "separation," "dismissal," or "discharge" in order to avoid confusion with the terms "unjust/unfair" or "wrongful" discharge. The latter terms define a narrower set of circumstances in which the courts have recognized tort or contractual exceptions to the at-will doctrine, or in which collective bargaining agreements require employer justification for employee dismissals. See, e.g., *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385, 386-87 (Conn. 1980) (recognizing a common-law cause of action in tort for the discharge of an at-will employee "if the former employee can prove a demonstrably *improper* reason for dismissal, a reason whose impropriety is derived from some important violation of public policy"). My use of the term *involuntary separation* is meant to be broader in scope in order to encompass a common-sense approach that covers dismissals that would typically be thought of as unfair, but for which public policy or other exceptions to the at-will doctrine are probably unavailable.

employee. The loss is all the more bitter if an employee perceives it to be due not to any fault or misdeed on her part, but rather to unspecified reasons having nothing to do with performance, attitude, behavior, or economic necessity.<sup>12</sup>

Given the centrality of work in people's lives, it may come as a surprise to those not familiar with U.S. employment law that only recently has the law provided protections against the most blatantly unjust forms of summary discharge of employees.<sup>13</sup> Even so, many types of involuntary discharge are left free from judicial scrutiny. For example, in addition to dismissals that are patently justified, such as those resulting from employee misdeeds or layoffs for economic reasons, there are dismissals not predicated upon employee culpability or financial exigency. So long as the employee and employer have entered into an agreement in which no set period of employment has been specified, the employee can be dismissed at will, for no reason, and without notice. This common-law rule, the employment at-will doctrine,<sup>14</sup> has been in force for over a century and

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12. See Note, *supra* note 9, at 1834 (stating that the risks of unemployment are disproportionately felt by employees, and there is little deterrence for employers to avoid unjust dismissal since any costs involved can be passed on to consumers).

13. See, e.g., National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1994) (prohibiting an employer from discharging an employee for union activities); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994) (protecting employees from discriminatory dismissals based on age); Rehabilitation Act, 29 U.S.C. §§ 710-796 (1994) (protecting the disabled from discriminatory discharge); Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994) (prohibiting discharges based on race, color, religion, national origin, and sex); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994) (protecting the disabled from discriminatory discharge).

14. See H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272 (Albany, N.Y., John D. Parsons, Jr. 1877). Wood explains that employment at-will is a rebuttable presumption:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . [I]t is an indefinite hiring and is determinable at the will of either party . . . .

*Id.*; see also *Sabetay v. Sterling Drug, Inc.*, 506 N.E.2d 919, 920 (N.Y. 1987) (holding that "absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party").

continues to be the basis of state and federal employment laws which regulate the workplace.

In this Article, I address what I believe to be fundamental problems with the at-will doctrine's foundation in a theory of formal equality and its collaborative role in the subordination of women and people of color. Borrowing from competing jurisprudential models of equality and job security, I will offer a legislative alternative to at-will employment requiring employers to provide notice of dismissal or pay in lieu of notice. In doing so, I am entering a lively and increasingly heated debate about the validity of the employment at-will doctrine. I place myself firmly on the side of the critics. However, I differ from my fellow critics in several fundamental ways. First, I have chosen to place people of color at the center of my analysis; up to now they have been relegated to the margins of the academic dialogue on employment at-will. This is perplexing since intuition suggests and recent studies confirm that people of color are much more likely to be discharged from employment than Whites. I argue that the employment at-will doctrine works in tandem with ineffectual antidiscrimination laws to facilitate these dismissals by shielding employers from having to justify the terminations. Second, I contend that placing people of color at the center of the analysis makes apparent the shortcomings of a pure "just-cause" scheme that employment at-will critics have presented as an alternative to the at-will presumption. Studies have found that in the federal employment sector in which just-cause requirements are the norm, people of color are still more likely than Whites to be involuntarily dismissed. Third, I argue that the United States stands virtually alone among Western industrialized nations in its failure to furnish its workers adequate job security. I argue that American lawmakers should emulate Canada's employment regulation scheme as a model for law reform. Fourth, I offer my solution which is that the law ought to require mandatory notice or pay in lieu of notice; I argue that a minimum notice requirement would have the effect of compensating those victims of discriminatory discharge who cannot rely on current antidiscrimination laws to protect them. In sum, I wish to challenge commonly held notions about the appropriate legal regulation of the employment relationship in the context of the social and economic inequality which currently permeates the American workplace.

## II. THE CRITIQUE IN BRIEF

In regulating the workplace, government must try to balance various interests, including the employer's interest in managing its enterprise in ways that maximize profit or improve service; the employee's interest in obtaining favorable terms and conditions of employment; and the public's interest in the establishment of minimum standards in order to maintain harmonious industrial relations. Not surprisingly, however, debates about the extent to which law should interfere in the employment relationship persist. Be that as it may, the cornerstone of United States employment law continues to be the employment at-will doctrine, a common-law invention the purpose of which is to ensure that either the employer or employee engaged in a labor contract of indefinite duration may quit the contract at any time, for any reason, without notice. On its own terms, the doctrine imposes an approach to employment that posits that employer and employee are formally equal. That is, each party is free to leave the employment relationship at any time, thereby promoting equality, individual autonomy, freedom of contract, and efficiency. The parties are presumed to enter the employment contract willingly and equally able to negotiate the terms of the agreement. The doctrine, therefore, presumes symmetry in bargaining power between worker and employer, equal knowledge about the rights and responsibilities inherent in the employment relationship, and the parties' free choice in entering into an employment agreement.<sup>15</sup> Since the parties are presumptively equal, the law must act neutrally and refrain from obstructing the ability of the parties to end the employment relationship at their will. In the United States, by far the most common

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15. See Katherine Swinton, *Contract Law and the Employment Relationship: The Proper Forum for Reform*, in *STUDIES IN CONTRACT LAW* 357, 363 (Barry J. Reiter & John Swan eds., 1980). Swinton observed that

the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.

*Id.*

employment arrangement is at-will, involving an indefinite term in which there is no written contract.<sup>16</sup>

Superimposed upon the at-will employment relationship is the notion of managerial prerogative or discretion—that is, the right of management to do whatever is necessary to ensure peaceful working relations and productivity, in short, “management’s right to manage.”<sup>17</sup> Labor and employment laws recognize that employers must be given some leeway in determining what is best for the enterprise. However, the law comes into play in order to provide protections against dismissals that fall within certain categories deemed by labor, employment, and civil rights laws to be unjustified. Even in unionized settings, where relations between employer and employee are mediated through collective bargaining agreements, most of which contain provisions guarding against unjust dismissals, managerial prerogatives leave intact certain unchallengeable managerial decisions over plant closings<sup>18</sup> and layoffs over which employees, unions, and government regulatory agencies may have little or no input.<sup>19</sup>

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16. See J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 837 (setting out the results of a survey examining nonunion employment contract practices).

17. H.W. ARTHURS ET AL., *LABOR LAW AND INDUSTRIAL RELATIONS IN CANADA* 298 (3d ed. 1988); see also Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1664 (1996) (defining “what the defenders of at-will regard as legitimate employer discretion [as] the power to evaluate employee conduct and performance and to make judgments about what is best for the organization without being second-guessed by outsiders”).

18. See *Local 1330, United Steel Workers v. U.S. Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980) (denying relief to plaintiff steel worker unions, a Congressman from the district, and the Attorney General of Ohio, and holding that the plaintiffs are not entitled to a court order directing the defendant to stay in operation).

19. See Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §§ 2101-2109 (1994) (providing some protections for workers from plant closing). For example, WARN requires employers who employ at least 100 workers and who intend to close the plant to give sixty days notice to unions, workers, and the state and local government officials. See *id.* § 2102. If proper notice is not given, then those workers are entitled to back pay and fringe benefits they may have lost. See *id.* § 2104.



In the at-will setting, in which employees are not covered by collective bargaining agreements, legal and normative interpretations of “management’s right to manage” and employment at-will coalesce to make it difficult for employees to attain legal redress for a termination they think is unfair. Job security for the vast majority of workers is thus severely undermined. For instance, the employment at-will doctrine makes ineffective an employee’s argument that she was dismissed because of her supervisor’s personal grudge against her. Under the at-will theory, it does not matter what the personal motives of one’s supervisor are. The firing of an otherwise good worker who has become the object of an irrational grudge is protected under the at-will theory. According to the doctrine, as long as the firing does not contravene state or federal labor or civil rights legislation, or fall under common-law exceptions to the rule, an employee can be fired for any reason whatsoever. The employer need not “show cause” to justify the dismissal. If the personal grudge results in workplace disharmony, the at-will doctrine allows for the dismissal of the employee who is the subject of the grudge and implicated in the disharmony. As one court put it:

The narrow exceptions to the ‘employment at-will’ doctrine which we have recognized in [our previous decisions] were not designed to prevent an employer from terminating an at-will employee in order to eliminate unacceptable internal conflict and turmoil. It matters little, if at all, who was most at fault. An employer is not required to tolerate an intolerable working environment.<sup>20</sup>

In other words, employee fault is not required to justify dismissal. In effect, managerial prerogative came to define “just-cause” for dismissal.

Another problem with the at-will doctrine is its foundation in a formal theory of equality. Because the doctrine is based on the premise that employee and employer are equal bargaining partners in the employment relationship, the doctrine does not take into account the real, substantive inequality between the parties. Therefore, both parties are deemed to be equally free to make good bargains, bad

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20. *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 886 (D.C. 1998).

bargains, or indeed no bargain at all. Since the at-will doctrine provides the basis upon which governmental regulation of employment is constructed, its presumption of equality permeates interpretations placed upon various themes in employment and labor law and often masks actual inequality between employer and employee.

In addition, by permitting discharges without explanation the at-will rule may provide employers with a shield against claims of discriminatory dismissals, leaving inadequate protection for workers of color, women, gays, and lesbians who cannot always rely on antidiscrimination laws to address the systemic and often subtle forms of discrimination to which they are regularly subjected. Studies suggest that people of color are more likely than Whites to be involuntarily discharged from employment,<sup>21</sup> and that Black and Hispanic employees are more likely than Whites to hold mistaken views about laws governing discharge.<sup>22</sup> The at-will doctrine, therefore, must be seen in the context of gross racial disparities both in the rates of discharge and in workers' knowledge of their legal rights.

Similarly, given societal expectations about women's role in the family, women are more likely to leave employment periodically in order to raise children, creating a disincentive for employers to enter into definite term employment contracts with women. Women are disproportionately represented in the part-time and contingency workforce and less likely to work in organized workplaces.<sup>23</sup> Consequently, they are highly likely to be in at-will settings. When

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21. See Hilary Silver, *Firing Federal Employees: Does Race Make a Difference?*, in U.S. OFFICE OF PERS. MGMT., *FEDERAL DISCHARGE RATES* app. D (1995).

22. See Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 476-77 (explaining that even after controlling for demographic factors such as income and education, Black and Hispanic workers scored significantly worse on a test measuring knowledge of the legal rules governing workplace dismissals). All workers, however, tended to believe "that the law prohibits what fairness [i.e. discharge for cause only] forbids." *Id.* at 480.

23. See Clyde W. Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L.J. 503, 506, 510 (1997) (stating that women represent two-thirds of the part-time workforce; that the majority of temporary workers are women, African American, and workers under the age of twenty-five; and that most part-time and temporary jobs are unskilled, and many of these jobs pay at or below the minimum wage).

women are the primary breadwinners for their families, which is often the case in African American households,<sup>24</sup> a loss of employment compounds the difficulties they face in supporting their families.

In addition, the at-will doctrine provides employers with protection against charges of discrimination based on sexual orientation. Unlike the legal treatment of enumerated grounds such as race, gender, religion, and national origin, few laws exist to protect gays and lesbians from discriminatory discharge in private employment.<sup>25</sup> Employers are free, in most jurisdictions, to discriminate against gays and lesbians on the basis of sexual orientation, a practice facilitated by employment at-will. Moreover, there are no signs that Congress and the majority of state legislatures will enact legislation protecting gays and lesbians from employment discrimination any time soon.

Given that the majority of workers in the United States are employed at-will, that workers are generally in weaker bargaining positions than employers, that workers of color are more likely to be discharged than Whites, that women are more likely to be in non-unionized at-will positions, and that gays and lesbians cannot rely on existing antidiscrimination laws to protect them from sexual orientation discrimination, a regulatory regime requiring notice or just-cause for dismissal would be of real benefit to all workers. This is especially true for those employees whose employment experiences

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24. See JOYCE P. JACOBSEN, *THE ECONOMICS OF GENDER* 499 (1994) ("By 1990, less than two-fifths of [B]lack women were currently married. This trend, combined with high birth rates for [B]lack women, has led to a high rate of female-headed family formation.").

25. Prohibitions against private and public sector employment discrimination based on an employee's sexual orientation have been adopted in only nine states. See CAL. LAB. CODE § 1102.1 (West 1992) (repealed 1999); CONN. GEN. STAT. ANN. § 46a-81c (West 1995); D.C. CODE ANN. § 1-2501 (2000); HAW. REV. STAT. § 378-2 (1993); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2000); MINN. STAT. § 181.67 (1986); N.H. REV. STAT. ANN. § 354-A:7 (1995); N.J. STAT. ANN. § 10:5-4 (West 1993); R.I. GEN. LAWS § 28-5-7 (2000); VT. STAT. ANN. tit. 3, § 961(6), tit. 21, §§ 495(a), 1726(a)(7) (1991); WIS. STAT. § 111.31 (1999). Thirteen states offer some protection in the form of executive orders against sexual orientation discrimination for state workers. These states include Pennsylvania, California, Colorado, Illinois, Louisiana, Maryland, Minnesota, New Mexico, New York, Ohio, Oregon, Rhode Island, and Washington. In addition, about fifty cities have enacted laws prohibiting discrimination in private employment on the basis of sexual orientation.

are affected by race and racism, sex and sexism, or homophobia, and who cannot rely on current antidiscrimination law to address the problem.

A substantive equality approach to employment requires that a moratorium be placed on the use of the at-will doctrine. It is indefensible that a law regulating the majority of employment contracts in the United States has a more severe impact on certain already disadvantaged groups. At a minimum, the at-will rule should be replaced by legislation that requires an employer to provide minimum notice, or pay in lieu of notice of discharge. Such a system would result in protections for everyone who is involuntarily discharged<sup>26</sup> and has an added benefit for certain groups who, for various reasons, are left unprotected under existing antidiscrimination laws.

Several critics of at-will employment have argued that, given the wide disparity between the bargaining powers of employer and employee, laws requiring a just-cause standard for discharge are desirable.<sup>27</sup> This Article suggests, however, that a more desirable default

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26. Ironically, enacting a more protective "just-cause" standard for discharge may, in the long run, provide no added protection against sexual orientation discrimination. Since there are so few antidiscrimination laws prohibiting discharge on the basis of sexual orientation, there is a possibility that dismissing someone based on sexual orientation will constitute "just-cause" for discharge. For example, in the federal civil service, there are specific provisions protecting gays and lesbians from discrimination. *See, e.g.*, 5 U.S.C. § 2302(b)(10) (1998). However, there are cases in which an employee's sexual orientation has successfully been invoked by an employer to justify discriminatory treatment. *See, e.g.*, *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (holding that the FBI's refusal to hire a lesbian was justified by the concern that since she would have access to classified information, she would be highly susceptible to blackmail).

27. *See* Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 594; Estlund, *supra* note 17, at 1667-68 (stating that there is a large disparity in bargaining power between the employer and employee); Kim, *supra* note 22, at 449-50; Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1445-46 (1996) (stating that despite increased legislation, employees have even less job security than in the past); Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment At Will*, 92 MICH. L. REV. 8, 20-28 (1993) (discussing the potential for opportunism by the employer over the employee); Summers, *supra* note 23, at 504 (stating the at-will doctrine expresses and effectuates employer dominance).

rule would require notice or pay in lieu of notice. Although a just-cause default rule is an improvement over the current at-will rule, it does not provide adequate protection against involuntary discharge for people of color. People of color, in particular African Americans and indigenous peoples, are more likely to be discharged than Whites in federal public sector employment, where just-cause standards are the norm.<sup>28</sup> Requiring just-cause for dismissal does not sufficiently protect workers of color from involuntary discharge in federal government employment, nor is there reason to believe that such a requirement, even if implemented, will protect them in the private sector. If a racial disparity in dismissal rates exists in federal public sector employment, it is likely that such a disparity exists in the private sector as well.

In addition, employers are becoming much more sophisticated in avoiding discrimination charges. It is increasingly rare that employers will leave direct evidence of discrimination supporting disparate treatment analysis, or that there will be an identifiable employment practice that is amenable to disparate impact analysis. Moreover, there is a justifiable suspicion that employers will fabricate reasons for dismissal that obscure discriminatory motives. In other words, requiring the employer to articulate a just-cause for dismissal may create an incentive for the employer to invent reasons for the discharge. There seems to be little benefit to disadvantaged groups in an approach that encourages employers to provide false reasons for discharge instead of no reasons. Given the U.S. Supreme Court's decision in *St. Mary's Honor Center v. Hicks*,<sup>29</sup> such invention is not unlikely; for, according to this case, as long as the employer's articulated reasons constitutes just-cause such as absences, lateness, or insubordination, the employer is unlikely to be found liable for discriminatory discharge. Moreover, in many cases the requirement of just-cause will not deter discriminatory treatment because much of the disparity in discharge rates is the result of unconscious, unintentional bias, or systemic discrimination. The benefit of a reasonable

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28. See Silver, *supra* note 21, at app. D-2.

29. 509 U.S. 502 (1993). The Court held that a plaintiff in a disparate treatment case bears the ultimate burden of proving that the employer's proffered reason for the adverse treatment was not its true reason, but was a pretext for discrimination. See *id.* at 511.

notice requirement is that it provides, at a minimum, some monetary compensation in those instances in which the employer can provide "cause," but where the "cause" obscures the intentional or unintentional discriminatory treatment of minorities, women, gays, and lesbians.

Admittedly, requiring notice instead of just-cause is an acknowledgment that discrimination cannot always be ameliorated through existing laws. Current antidiscrimination laws are ill-equipped to address unintentional, subtle, or systemic discrimination. Therefore, requiring at a minimum that every discharged employee be given notice or pay in lieu of notice will have the benefit of compensating members of historically disadvantaged groups and others whose discharges do not easily fit into the existing civil rights paradigm<sup>30</sup> or common-law exceptions to the at-will rule.

The at-will doctrine's genesis at the turn of the twentieth century during a period of widespread faith in laissez-faire free market economic theory, resulted in hardship for employees. More than one hundred years after it was introduced into American common-law it continues to result in hardship for employees. The at-will doctrine must be set aside in favor of a more equitable or just theory of employment relations. Clearly, when there are available to us alternative employment law regimes with similar roots in the common law but whose effect on historically disadvantaged groups is not as severe as at will, it is indefensible that the default rule in the United States continues to be the at-will doctrine. Hence, the at-will doctrine, a legal invention stemming from a theory of formal equality which assumes symmetry in bargaining strength between employer and employee,<sup>31</sup> must be challenged because it contributes to the

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30. See Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719, 772 (1991) (arguing that "[s]ociety has an interest in ensuring that all employees are protected from abuse of employer power, and that protection not be limited to those who experienced a particular type of abuse through discrimination").

31. See, e.g., *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 518-19 (1884). According to the *Payne* court:

Men must be left, without interference to buy and sell where they please, and to discharge or retain employes at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se*. It is a right which an employee may exercise in

erroneous assumption that those with the power to quit enjoy the same advantage in the employment relationship as those with the power to fire.<sup>32</sup> In light of chronic inequality in the United States, the at-will doctrine must be rejected as an anachronistic reflection of a bygone era, ill-suited for regulating employment relations in which one party has greater bargaining strength than the other. Indeed, it contributes to that inequality. Furthermore, the at-will doctrine bolsters a system of employment regulation that perpetuates societal inequalities between races, sexes, and classes and must therefore be abandoned. A notice requirement should be implemented in its place, thereby striking a better balance between the relevant social interests such as job security, productivity, and employer autonomy.

### III. THE LEGAL CONTEMPLATION OF EMPLOYMENT RELATIONS AND THE RISE OF THE AT-WILL DOCTRINE

In the early part of the twentieth century, the United States Supreme Court made several pronouncements as to the importance of freedom of contract in employment. Perhaps the most important case of the early twentieth century in defining the scope of government action is *Lochner v. New York*,<sup>33</sup> in which the Supreme Court struck down a New York statute that restricted the number of hours a baker could work to ten per day. The Court stated:

The statute necessarily interferes with the right of contract between the employer and employés, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the

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the same way, to the same extent, for the same cause or want of cause as the employer.

*Id.*

32. See *Jones v. Dunkirk Radiator Corp.*, 21 F.3d 18, 21 (2d Cir. 1994) (stating that in practice, the at-will doctrine gives an employer "a nearly unfettered right to discharge an employee").

33. 198 U.S. 45 (1905).

liberty protected by this amendment, unless there are circumstances which exclude the right.<sup>34</sup>

Shortly after *Lochner*, the Court issued another decision, *Adair v. United States*,<sup>35</sup> in which it held that federal legislation outlawing yellow-dog contracts, which are contracts in which workers agree not to engage in union activities, was invalid.<sup>36</sup> In *Adair*, the Court reasoned that employer and employee were equal, and that government interference would have the effect of placing employees in a more favorable position than their employers:

The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé . . . . In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.<sup>37</sup>

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34. *Id.* at 53 (citation omitted). *But see* *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding similar protective labor legislation when applied to women).

35. 208 U.S. 161 (1908).

36. *See id.* at 180. The Court invalidates legislation prohibiting employers from forcing employees to sign yellow-dog contracts because "it is not within the functions of government . . . to compel any person in the course of his business . . . [to] retain the personal services of another." *Id.* at 174.

37. *Id.* at 174-75. The Court's approach in *Adair* prompted these questions by Roscoe Pound:

Why, then do courts persist in the fallacy? Why do so many of them force upon legislation an academic theory of equality in the face of practical conditions of inequality? Why do we find a great and learned court [sic] in 1908 taking the long step into the past of dealing with the relation between employer and employee in railway transportation, as if the parties were individuals—as if they were farmers haggling over the sale of a horse? Why is the legal conception of the relation of employer and employee so at variance with the common knowledge of mankind?

Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1909) (citation omitted). One might argue that these questions are as apt today as they were in



Another early statement as to the contractual principles upon which the at-will doctrine is based was expressed in *Coppage v. Kansas*,<sup>38</sup> in which the Court held that state legislation outlawing yellow-dog contracts constituted an unreasonable exercise of police power and violated the private right to make contracts.<sup>39</sup> The Court stated, *inter alia*,

The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts . . . . The right is as essential to the laborer as to the capitalist, to the poor as to the rich . . . .<sup>40</sup>

These cases illustrate the Court's approach to governmental regulation of the workplace in the early part of this century. Government was not to intrude into the private bargains of individuals. The state was characterized as an "ominous police power, acting arbitrarily and clumsily overreaching its constitutional confines."<sup>41</sup> Maintaining equality between employer and employee required restricting judicial intervention. Consequently, freedom of contract became the impetus for preserving the status quo. Cass Sunstein has argued:

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1908 when Pound wrote the above passage.

38. 236 U.S. 1 (1915), *overruled by* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

39. *See id.* at 15-16.

40. *Id.* at 14; *see also* Adkins v. Children's Hosp., 261 U.S. 525, 553 (1923) ("[W]e cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances."); Muller v. Oregon, 208 U.S. 412, 421 (1908) ("It is undoubtedly true . . . that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the Fourteenth Amendment to the Federal Constitution."); Keith N. Hylton, *A Theory of Minimum Contract Terms, with Implications for Labor Law*, 74 TEX. L. REV. 1741, 1749-50 (1996) (explaining the argument in *Coppage* as follows: "[B]ecause the employer may lawfully fire an employee for any reason whatsoever in an at-will regime, it should be within an employer's rights to condition employment on any requirement.").

41. Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425, 1486. Although the author was discussing contemporary notions of the state's role in regulating hate speech, I believe that the statement is applicable to the Court's approach to other types of state regulation of private relationships, such as employment relations.

[F]or the *Lochner* Court, neutrality, understood in a particular way, was a constitutional requirement. The key concepts here are threefold: government inaction, the existing distribution of wealth and entitlements, and the baseline set by the common law. Governmental intervention was constitutionally troublesome, whereas inaction was not; and both neutrality and inaction were defined as respect for the behavior of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlements.<sup>42</sup>

“[T]he Court took as natural and inviolate a system that was legally constructed and took the status quo as the foundation from which to measure neutrality.”<sup>43</sup>

The law was not to intervene in the employment relationship. Men were left to bargain for themselves. The market was entrusted to balance the interests between employer and employee. It must be remembered, however, that during this period the free market operated in a particular manner with respect to the races and sexes. For example, it is quite obvious that economic freedom was not shared by all men, especially those who were burdened by the legacy of slavery. Yet the deference to the market shown by judges and politicians led to some extraordinarily disingenuous statements, such as the following one made by President Andrew Johnson during Reconstruction:

[The freedman’s] condition is not so bad. His labor is in demand and he can change his dwelling place if one community or state does not please him. The laws that regulate supply and demand will regulate his wages. The freedmen can protect themselves, and being free, they could be self-sustaining, capable of selecting their own employment, insisting on proper wages. . . .<sup>44</sup>

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42. Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 874 (1987).

43. *Id.* at 882.

44. W.E. BURGHARDT DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 276 (1964).

Clearly, the “benefits” of the free market did not take account of the impediments imposed through slavery and its aftermath.<sup>45</sup> Yet the law operated as though slavery was not connected to postslavery economic deprivation. Employer and employee, as long as they were male, were free to contract for whatever terms could be agreed upon.<sup>46</sup> This approach was not without its critics, however. For example, in his 1908 essay, Roscoe Pound commented on the Court’s reluctance to uphold protective labor legislation for male workers:

Legislation designed to give laborers some measure of practical independence, which, if allowed to operate, would put them in a position of reasonable equality with their masters, is said by courts, because it infringes on a theoretical equality, to be insulting to their manhood and degrading, to put them under guardianship, to create a class of statutory laborers, and to stamp them as imbeciles.<sup>47</sup>

Legislative protection for (male) workers was seen by the courts of the day to be a form of emasculation. All men are created equal. So to provide protection for only some (i.e., employees) was to threaten the concept of manhood (i.e., autonomy, independence, etc.). An emasculated man was an “imbecile.” Treating one party to an employment contract “more favorably” was stigmatized by the courts as a suggestion of inferiority.<sup>48</sup> Underlying the Court’s

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45. See MELVIN M. LEIMAN, *THE POLITICAL ECONOMY OF RACISM: A HISTORY* 42 (1993) (arguing that “formal market equality masked substantive inequality”).

46. See *Lochner v. New York*, 198 U.S. 45, 56 (1905) (“Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.”). Moreover, according to the *Lochner* Court

the real object and purpose [of the New York legislation limiting the number of hours that could be worked by bakers] were simply to regulate the hours of labor between the master and his employés . . . . Under such circumstances the freedom of master and employé to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

*Id.* at 64.

47. Pound, *supra* note 37, at 463 (citations omitted). It is doubtful that Pound was referring to the relations between Blacks and Whites. However, his statement is apt regardless of the race of the parties.

48. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE*

reluctance to promote governmental regulation of the employment relationship was the presumption of employment at-will. The government had no right to interfere in a contractual relationship between employer and employee freely entered into by both parties. Reflecting the importance of freedom of contract, the at-will rule required government "neutrality" or "inaction" in disputes involving employment dismissals.<sup>49</sup> Accordingly, the Supreme Court heightened the status of the at-will doctrine providing it near constitutional protection.

Most commentators trace the at-will rule's beginnings in the United States to the publication of a treatise written by a prominent employment scholar, Horace Wood.<sup>50</sup> According to Wood:

[w]ith us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.<sup>51</sup>

Under Wood's theory, subsequently adopted by the courts, employment contracts that are silent as to the term of employment are presumptively at-will. The party that wishes to argue otherwise has the burden of establishing that the contract is for a particular term and thus subject to breach of contract principles. Under Wood's rule, the employer need not justify or provide notice of the dismissal. Likewise, the employee was under no obligation to provide reasons for quitting, nor was notice required. Hence, employer and employee were to be treated equally, their freedom to end the employment relationship at any time without notice unburdened by any legal regulation.<sup>52</sup>

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SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 38-39 (1995) (discussing the notion of equality and suggesting that it results in disparate treatment of women).

49. See Sunstein, *supra* note 42, at 874.

50. See WOOD, *supra* note 14.

51. *Id.* at 272.

52. See Hylton, *supra* note 40, at 1752 ("[The] at-will doctrine recognizes the employer's ownership of a job slot as a form of private property: just as

This at-will rule represented a considerable divergence from English common law which had until then provided the basis for American employment regulation.<sup>53</sup> Wood's theory did not take hold in the United States until the end of the nineteenth century. Earlier in the century, American courts had more or less adopted the rules of English common law for determining the duration of employment contracts, "that an employment contract of indefinite duration was an annual hiring terminable only by notice."<sup>54</sup>

For various reasons, however, this presumption of an annual hiring was much weaker in the United States than in Britain,<sup>55</sup> and eventually the presumption was dropped in both countries. Though in Britain a notice requirement gained strength, in the United States at-will employment became the norm, defining the legal parameters of governmental involvement in the employment relationship. The rule was to be based on the notion that parties to an employment contract are equal to each other, regardless of race, class, or gender, and are to be given equal opportunity to abandon the employment relationship without legal inquiry into their motivation. Late in the twentieth century criticism of the at-will doctrine became widespread. With this criticism, however, has come a spirited defense of the doctrine articulated in the law and economics literature.

#### IV. THE DILATORY DECLINE OF THE AT-WILL DOCTRINE

Since the early years of the at-will doctrine, the courts have articulated several justifications for its continued use,<sup>56</sup> few of which

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the owner of a parcel of land could exclude others from that parcel for any reason whatsoever, so too could an employer exclude a worker from a job slot.").

53. On the other hand, American courts continued to follow the English common-law rules for enforcing employment contracts of fixed duration. These contracts could not be broken off prematurely except for cause. See Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, COMP. LAB. L., Winter 1992, at 85, 103.

54. *Id.* at 95.

55. *See id.* at 104.

56. The rule was justified as supporting freedom of contract, an important public policy underlying employment relationships. Moreover, contract principles such as consideration and mutuality have also been cited as essential to the rule's foundation. See, e.g., *Nguyen v. CNA Corp.*, 44 F.3d 234, 237 (4th Cir. 1995); *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 448-49 (7th Cir. 1987); *Franklin v. Consol. Edison Co.*, No. 98 CIV. 2286 (WHP), 1999 WL

have been left unquestioned. Yet, although the origin of and rationale for the doctrine has generated controversy,<sup>57</sup> the rule as it was articulated by Wood continues to animate employment regulation throughout the United States despite regular criticism from academics and many members of the judiciary.<sup>58</sup> Some have argued, for example, that the rule is flawed since it fails to adhere to rudimentary contract principles.<sup>59</sup> Others have questioned the doctrinal foundation of the rule, suggesting that widespread acceptance of the rule was based on misleading and unfounded assertions about its origin by Wood.<sup>60</sup> Still others have argued that the adherence to the at-will doctrine in the United States is incongruent with the job protections available to employees in other industrialized nations.<sup>61</sup> There are

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796170, at \*15 (S.D.N.Y. Sept. 30, 1999); *St. Louis v. Mathews*, 42 S.W. 902, 904-05 (Ark. 1897); *Louisville v. Ouffutt*, 36 S.W. 181, 182-83 (Ky. 1896); *Payne v. W. & Atl. R.R.*, 13 Tenn. 507, 520 (1884).

57. See, e.g., Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 756-57 (1994) (arguing that the employment at-will rule predated the publication of Wood's treatise).

58. See, e.g., *id.* (questioning the foundation upon which the rule was based and pointing out that the precedents relied upon by Wood were of questionable authority and may have been wrongly interpreted). But see Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551, 554-56 (1990) (arguing that the precedents stood for exactly what Wood had claimed, and that they supported Wood's interpretation of the American default rule). In any case, the dispute about the origins of the rule is beyond the focus of this Article. It is generally agreed that the rule was memorialized in a treatise by Horace Wood, and that this treatise was later relied upon by the judiciary or legislature in almost every state as black letter law governing employment contracts.

59. See Note, *supra* note 9, at 1833.

60. See Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 125-27 (1976) (stating that Wood's statement of the employment at-will doctrine was ill-supported); Jacoby, *supra* note 53, at 111-13; Shapiro & Tune, *supra* note 2, at 341-43.

61. See, e.g., William B. Gould IV, *Job Security in the United States: Some Reflections on Unfair Dismissal and Plant Closure Legislation from a Comparative Perspective*, 67 NEB. L. REV. 28, 50-54 (1988) (stating that in the United States an employer's right to dismiss an employee is granted more protection than in nations such as Britain, Sweden, France, Germany, and Japan); Joseph Grodin, *Toward a Wrongful Termination Statute for California*, 42 HASTINGS L.J. 135 (1990) (arguing that the at-will rule is inconsistent with collective bargaining and legal regulation of the workplace); Jack Stieber, *Protection Against Unfair Dismissal: A Comparative View*, 3 COMP. LAB. L.

those who assert that the at-will rule has made ineffective antidiscrimination legislation and other wrongful discharge protections.<sup>62</sup> In addition, the rule's underlying presumption of equality has generated much criticism from judges and legal scholars alike. Most critics argue that the rule results in harsh treatment of employees who seldom have the ability to negotiate over terms of an employment contract and whose termination from work often has harmful consequences.

Consistent with this scholarly criticism has been a change in perception over the last several decades about the nature of work and appropriate regulation of the workplace. Courts and legislatures have begun to recognize that the public has an interest in regulation of the workplace. So, for example, beginning with the New Deal, legislation has been introduced to protect workers from discharge for a whole host of reasons—legislation that earlier would have been deemed unduly intrusive in the bargaining power of men.<sup>63</sup> Collective bargaining protections were enacted, as were several other pieces of legislation regulating the workplace.<sup>64</sup> And, significantly,

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229 (1979) (addressing statutes in Sweden, Norway, and Denmark, and advocating legislation in the United States of a similar force); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 519-31 (1976) (proposing a statute providing legal protection to employees against unjust dismissal based upon the then existing arbitration system); Clyde W. Summers, *Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries*, 70 NOTRE DAME L. REV. 1033 (1995) [hereinafter Summers, *Worker Dislocation*] (comparing the United States to the United Kingdom, Germany, Sweden, and Japan).

62. See, e.g., Estlund, *supra* note 17, at 1657 (arguing that wrongful discharge laws have not gotten rid of the at-will doctrine); McGinley, *supra* note 27, at 1445 (stating that despite increased legislation, employees have even less job security).

63. See, e.g., Labor Management Relations Act (LMRA) of 1947, 29 U.S.C. §§ 141-197 (1994) (prescribing rights of employers and employees in their relations affecting commerce); National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (1994) (providing the right of employees to organize collectively); Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 201-219 (1994) (addressing labor conditions that are detrimental to the maintenance of a minimum standard of living and setting out minimum wage and overtime provisions).

64. See Fair Labor Standards Act (Equal Pay Act), 29 U.S.C. § 206(d) (1994) (guaranteeing equal pay for work of equal value); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994) (shielding workers from discrimination on the basis of age); Occupational Safety and Health Act, 29

the judiciary contributed to the erosion of the at-will rule by developing tort and contract protections against dismissal of nonunionized workers. So, for example, in several states, public policy exceptions to the at-will rule, implied and express contractual promises of job security, and implied covenants of good faith and fair dealing have softened the rule's impact on employees who have been discharged for reasons that the courts have judged to fit within one of these exceptions.<sup>65</sup> All of these developments represent some recognition that the relationship between the employer and employee is inherently unequal. Despite these growing protections, however, the at-will doctrine has continued to define the rights and responsibilities of the parties to the employment contract since the nineteenth century. The rule is intact, albeit under siege.<sup>66</sup> Moreover, it continues to operate in a social context that belies its presumption of equality between employer and employee.

#### V. MARKING THE MARGINS: INEQUALITY IN EMPLOYMENT RELATIONS

Because it is crucial for employment laws to maintain a proper balance between the interests of the employer, employee, and the

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U.S.C. §§ 651-678 (1994) (protecting workers against occupational injuries and illness); Rehabilitation Act, 29 U.S.C. §§ 710-796 (1994) (protecting workers from discrimination on the basis of disability); Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994) (shielding workers from discrimination on the basis of race, color, religion, sex, or national origin); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1995) (protecting workers from discrimination on the basis of disability).

65. For a comprehensive discussion of common-law exceptions to the at-will rule, see Peck, *supra* note 30, at 744. Peck notes that there are five categories of cases protecting workers from involuntary separations violative of public policy: "(1) discharges for refusing to violate criminal or civil laws, (2) discharges for having performed civic duties or statutory obligations, (3) discharges for asserting statutory or constitutional rights or privileges, (4) discharges for socially desirable performances not required by law, and (5) discharges for what are recognized as socially reprehensible reasons."

66. *But see* Estlund, *supra* note 17, at 1655-56 (arguing that "the legal right to fire for bad reasons has been virtually decimated" and "to judge from the current debate over at-will employment, it would seem that the once-sweeping at-will rule has been completely and happily erased to the extent of these wrongful discharge exceptions, and that it now effectively governs only discharges for good reasons, for no reasons, or for not-quite-good-enough or not-demonstrably-good reasons").



public, the at-will doctrine must be evaluated to measure its efficacy in resolving the inevitable conflict of interests between employer and employee, especially those interests that reflect differences between people of color and Whites and differences resulting from women's "gendered lives."<sup>67</sup> The perseverance of the at-will doctrine suggests that the interests of people of color and women will continue to be subordinated in legal doctrine to accommodate formalistic notions of equality that, in fact, perpetuate substantive inequality.

The at-will rule came about at a time when the labor market was very different from that of today.<sup>68</sup> The majority of women were not employed outside the home; those who were employed outside the home (i.e., poor, immigrant, or women of color) worked in other people's homes, or in poorly paid, low-skilled jobs such as factory work;<sup>69</sup> slavery had only recently been abolished; rapid industrialization was changing the nature of working relations; the courts were

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67. Martha Fineman uses the term "gendered life" to express the idea that: [A]s a socially and legally defined group, women share the potential for experiencing a variety of situations, statuses, and ideological and political impositions in which their gender is culturally relevant. These experiences, be they actual or potential, provide the occasion for women to develop an identifiable perspective that is rooted in their appreciation of, and reaction to, the gendered nature of our social world. This concept does *not* assume that women respond identically to an appreciation of gendered existence. It does presume that with gender revealed as a central social and cultural consideration, women's attention in many areas can be directed productively toward confronting and challenging the gendered implications of our lives.

FINEMAN, *supra* note 48, at 48.

68. Some have argued that the rule developed in a particular economic and political context in which the judiciary was at the mercy of the capitalist class, thus resulting in maintenance of the rule and its harsh results at the expense of the worker. These critics argue that American discourse on the supremacy of freedom of contract and individual rights and responsibilities has sustained the doctrine and that the rule is ill-suited to current economic and social realities. See Summers, *Worker Dislocation*, *supra* note 61.

69. See Ruth Feldstein, *Labor Movement*, in 1 BLACK WOMEN IN AMERICA: AN HISTORICAL ENCYCLOPEDIA 685, 685-86 (Darlene Clark Hine et al. eds., 1993) (discussing the labor movement and the fact that Black women have had to labor outside their own homes); see also TERESA L. AMOTT & JULIE A. MATTHAEI, RACE, GENDER AND WORK: A MULTICULTURAL ECONOMIC HISTORY OF WOMEN IN THE UNITED STATES 295-97 (1996) (describing employment for Blacks, Native Americans, and Chicanos as limited to domestic service, and industrial and migrant farm work).

extremely wary of labor unions; and worker organizations were weak.<sup>70</sup> Moreover, entry into the waged labor force was quite uneven among the sexes and racial-ethnic groups.<sup>71</sup> Significantly, working men and women of all races were at a stark disadvantage vis-a-vis their employers in setting the terms of employment. State and federal governments had to determine the most appropriate manner of regulating the workplace at a time of great industrial and demographic change. Governing the working relations between women and recently emancipated slaves<sup>72</sup> and their employers required special attention. The at-will doctrine, however, was ill-suited to deal with these new employees who were not generally in positions to bargain on an equal footing with employers. Nor are women and people of color on an equal footing today.<sup>73</sup> The fiction underlying judicial pronouncements championing equality of bargaining power between employer and employee is particularly inaccurate when viewed from the perspectives of workers of color and female workers. But, of course, these were not the perspectives that informed judicial opinion.

The legal treatment of working men and women, particularly women of color, has changed over time. The law has struggled to find the appropriate standard by which to assess men's and women's roles in the family and at work. John Stuart Mill contended that "the common arrangement, by which the man earns the income and the wife superintends the domestic expenditure, seems to me in general the most suitable division of labour between the two persons."<sup>74</sup>

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70. See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 158-66 (1991) (discussing the reformation of the labor movement).

71. See AMOTT & MATTHAEI, *supra* note 69, at 300-01 (showing that in the 1920s, Filipino men had the highest employment rate, while married European American women had the lowest).

72. Of course, not all Blacks at the time were former slaves. Nonetheless, constitutional protections had only recently been afforded to African American men.

73. See, e.g., *Usual Weekly Earnings of Wage and Salary Workers: First Quarter 1999*, at <ftp://146.142.4.23/pub/news.release/history/wkyeng.041599.news> (last modified Apr. 15, 1999).

74. CAROL PATEMAN, *THE SEXUAL CONTRACT* 163 (1988) (quoting John Stuart Mill, *The Subjection of Women*, in *ESSAYS ON SEX EQUALITY* 178-79 (A. S. Possi ed., 1970)).

Until quite recently, the law expressly sustained this ideal, wherein women were not to be involved in paid employment outside the home. For example, in his now famous opinion in *Bradwell v. Illinois*,<sup>75</sup> Justice Bradley explained that the law

as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.<sup>76</sup>

Thus, it was contemplated by the law of the day that women were to be in the home,<sup>77</sup> not in the workforce. This typical image of women was reflected in law reform movements of the time. For example, efforts at establishing a "family wage,"<sup>78</sup> which is defined as wages that were adequate for male workers to support their families, presupposed women's economic dependency on men and reinforced the exclusion of women from paid employment. But, contrary to these ideas about the appropriate role of women, women did work outside the home. How then was women's paid employment to be treated under the established models of freedom of contract? The at-will rule presupposes equality in bargaining power between employer and employee. Treating parties the same only makes sense when the parties enjoy equal bargaining strength. Ironically, this is the point that was made in several early U.S. Supreme Court

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75. 83 U.S. (16 Wall.) 130 (1872) (Bradley, J., concurring).

76. *Id.* at 141.

77. Of course, the courts did not generally have in mind women of color when they spoke about women's roles. However, to the extent that they did, women of color were also seen to naturally belong to the domestic sphere, albeit often employed as domestic servants. See AMOTT & MATTHAEI, *supra* note 69, at 298 (explaining that the sexual division of labor resulting from the domestic ideal of womanhood transcended differences in races and classes).

78. MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* 119 (rev. ed. 1996) (discussing the fight to raise wages from that which supports only a single person to a wage that is adequate for a man to support his family).

decisions upholding laws regulating women's work.<sup>79</sup> Differential treatment was warranted since the sexes were not the same in their ability to bargain, and these differences were biologically determined. Although in *Lochner* the Court failed to concede that worker and employer were unequal in bargaining strength if the parties were male, at about the same time it declared an exception with respect to women, rooted in the "inherent difference between the two sexes, and in the different functions in life which they perform."<sup>80</sup> These differences provided the rationale for treating women differently in the area of work, as "women's unique biological role in reproduction demanded their protection from the rigors of public life."<sup>81</sup> At the time, women workers were considerably less likely than men to belong to unions, and "female workers were often young, poor, foreign-born, transient, and easy to exploit."<sup>82</sup> Furthermore, if a husband was able-bodied, it was seen as a disgrace for his wife to work

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79. By the mid-eighteenth century, most states had passed laws regulating the hours, wages, and working conditions of women workers. See Claudia Goldin, *Understanding the Gender Gap: An Economic History of American Women*, in FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 290, 290 (John J. Donohue III ed., 1997). Goldin describes the various interpretations of protective labor legislation:

According to one view, the legislation originated in the genuine concerns of reformers about work conditions of all Americans and ultimately benefited women workers. The opposing view is that protective legislation was intended to restrict the employment of female workers and was passed under the guise of reform. Both views find support in the historical narrative.

*Id.*

80. *Muller v. Oregon*, 208 U.S. 412, 423 (1908). The *Muller* Court further stated that

The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation . . . .

*Id.* at 422.

81. FINEMAN, *supra* note 48, at 37.

82. Goldin, *supra* note 79, at 291.

outside the home for wages.<sup>83</sup> Labor legislation that offered protection for women against the inevitable tendency for men to exploit them was consistent with the social consensus of the time and clearly constitutional.<sup>84</sup> The contradictions inherent in the law's protection of women from the harms of the workplace is apparent when comparisons are made between the legal treatment of middle-class, married, White women and others. "While the law arbitrarily overprotected the married woman, it left those who lived outside a [White] family setting to their own devices."<sup>85</sup> It is doubtful that the expressed concern for women's well being<sup>86</sup> extended to poor, single, or minority women. Apparently, it was not the health of working women of color with which the Court was concerned when it declared that

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83. See AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 187 (1998) (describing it as injurious and a disgrace for a wife to work to support the family).

84. This protection, however, was only available to women in the "public" sphere, that is in the realm of paid employment outside the household. Women working within the home, either as paid servants or as unpaid housewives, were largely precluded from the law's protective labor legislation. The genesis of this different treatment came through the notion of "separate spheres." See PATEMAN, *supra* note 74, at 117. According to Pateman,

[the] domestic relations of master-slave and master-servant, relations between unequals, have given way to the relation between capitalist or employer and wage labourer or worker. . . . The wage labourer now stands as a civil equal with his employer in the public realm of the capitalist market. A (house)wife remains in the private domestic sphere, but the unequal relations of domestic life are 'naturally so' and thus do not detract from the universal equality of the public world.

*Id.*

85. Nicole Arnaud-Duc, *The Law's Contradictions*, in A HISTORY OF WOMEN IN THE WEST: EMERGING FEMINISM FROM REVOLUTION TO WORLD WAR 80, 81 (Geneviève Fraisse & Michelle Perrot eds., 1993).

86. Moreover, it is not at all clear that the only purpose of "protective labor laws" was to protect women from exploitation.

White male unions, in the late nineteenth century, fought for the passage of "protective legislation" that, by excluding women from dangerous or unhealthy jobs and from overtime work, had the effect of denying them highly paid factory jobs and confining them in lower-paying (and also hazardous) sectors such as apparel and textile manufacture.

AMOTT & MATTHAEI, *supra* note 69, at 25.

continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race.<sup>87</sup>

In fact, emancipated Black women were expected to work outside the home and failure to do so was thought to reflect laziness. Moreover, there appeared to be general agreement in the North and South that a higher value was to be placed on Black women's waged work than on their household labor.<sup>88</sup> Stanley observed:

[T]he [Freedmen's] bureau deprecated as idle the freedwoman who only did unpaid household work—who refused to turn her labor into a commodity. . . . “It is impossible for the freedman to support himself and his family by working five days a week and keeping a wife and daughter in idleness,” one [Freedmen's bureau] agent declared. “Unless something is done by the Bureau in this country to induce the freedmen to make the female members of their families work in the crops next year there will be destitution amongst them.”

. . . Planters, too, dismissed house-work as idleness while asserting claims to female labor that conflicted with the entitlements of freedmen as husbands. They appealed to the bureau to require wives to enter into labor contracts and return to the fields because men's work alone was not sufficient to raise the crop or worth enough for family subsistence.” Allow me to call your attention to the fact that most of the Freedwomen who have husbands are not at work—never having made any contract at all—Their husbands are at work, while they are as nearly idle as it is possible for them to be, pretending to spin-knit or something that really amounts to nothing. . . . “I think it would be a good thing to

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87. *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

88. See STANLEY, *supra* note 83, at 188 (stating that household labor was considered “idleness”).

put the women to work. . . . Are they not in some sort vagrants as they are living without employment?"<sup>89</sup>

Although there were vastly different societal expectations for White women, women of color, and poor women, the ideal of women's economic dependency was adopted in many communities of color as well.<sup>90</sup> For example, African American manhood was defined on the same terms as those giving definition to White men's masculinity,<sup>91</sup> that is, men were to be the breadwinners, and women were to tend to domestic matters, notwithstanding the greater participation in paid employment of women of color than of White women. In any case, the participation of women of color in paid employment did not contradict the dominant ideal of true womanhood, as women of color were not seen as true women.<sup>92</sup> Moreover, not only were women of color to be found in paid employment in numbers greater than White women,<sup>93</sup> but, often working in segregated and inferior jobs, women of color were employed in establishments where they were routinely required to work in excess of ten hours per day.<sup>94</sup> Throughout American history, women of color have always labored in and outside of the home.<sup>95</sup>

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89. *Id.* at 188-89 (citations omitted).

90. See ABRAMOVITZ, *supra* note 78, at 120-21 (examining African American attitudes about women's roles); see also AMOTT & MATTHAEI, *supra* note 69, at 300 (showing that African American women worked at a lesser rate than their male counterparts).

91. See ABRAMOVITZ, *supra* note 78, at 119 (defining a man in terms of his supremacy in the family).

92. See PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 43, 47 (1984) ("[T]he White wife was hoisted on a pedestal so high that she was beyond the sensual reach of her own husband. Black women were consigned to the other end of the scale, as mistresses, whores, or breeders.").

93. In 1920, single women were more likely to work than married women, but proportionately more married women of color worked for pay than White women. For example, married African American women worked at a rate of 32.5%; Asian American, 18.5%; Puerto Rican, 13.1%; American Indian, 8.9%; and European American, 6.5%. See AMOTT & MATTHAEI, *supra* note 69, at 299-301.

94. See JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK AND THE FAMILY, FROM SLAVERY TO PRESENT 209 (1986) (describing working conditions of Black women during the Great Depression).

95. See Feldstein, *supra* note 69, at 685-86 (explaining that "[r]acial and sexual discrimination have marginalized this workforce, relegating Black

Doubly burdened by the societal expectations of women's designated role, women who worked outside the home were also the primary caretakers and workers within the family home.<sup>96</sup> Conversion of women's labor into a market commodity created difficulties in attempts to reconcile women's traditional role as wife and mother with their new roles as wage earners. Significantly, the at-will doctrine was developed during a time when "[a] husband ha[d] a right of property in the service of his wife."<sup>97</sup> Therefore, women's work was subject to two conflicting pressures: the pressure to submit to demands made by husbands and the pressure to submit to employer demands.

At the same time, the judiciary, charged with interpreting the at-will presumption, was comprised of those same class of men as employers. Consequently, the interests of business owners were reflected in judicial opinion.<sup>98</sup> Of course, Blacks, other people of color, and women lacked representation in business, politics, and the judiciary. This fact, however, was not seen as a legitimate concern of the judiciary, or perhaps was not even within its contemplation when deciding upon the appropriate manner of governmental regulation of the workplace.<sup>99</sup>

A classic example of the way in which racially motivated dismissal was treated under the at-will doctrine is found in *Clarke v. Atlantic Stevedoring Co.*<sup>100</sup> In that case, the plaintiff was the representative of ninety-six African American men who had gone to work for the defendant after the plaintiff had received a solicitation for "200 colored longshoreman."<sup>101</sup> The men were dismissed three

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women to the bottom of the occupational hierarchy, to agricultural work and domestic service and, more recently, to the unskilled service sector").

96. See Katharine Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 8-10 (1996) (explaining that even today, full time working women spend more time taking care of children and doing housework than men).

97. STANLEY, *supra* note 83, at 175.

98. See Elizabeth Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 18 (David Kairys ed., 1982).

99. See Sunstein, *supra* note 42, at 895 ("The existing distribution of power and resources as between [B]lacks and [W]hites should be taken by courts as simply 'there'; neutrality lies in inaction; it is threatened when the Court 'takes sides' by preferring those disadvantaged.").

100. 163 F. 423 (E.D.N.Y. 1908).

101. *Id.* The letter soliciting the workers stated, *inter alia*,



months later and replaced by White workers. The plaintiff brought an action for breach of "a contract to furnish continuous employment at a reasonable rate of wages."<sup>102</sup> The court found for the defendant, stating that:

The allegation of the complaint that the colored men were replaced by white, and the date of their discharge showing that the discharges all took place at one time, indicate a complete departure from the intent or mental attitude of the defendant's superintendent, as evidenced by the statement that "we propose to keep colored men at work as long as they fulfill their part of the program." This change of purpose may have caused hardship to a number of innocent workmen, but the matter must be determined according to the parties' legal rights, and not from the standpoint of sympathy or approval of the economic questions involved, and it seems to the court that the plaintiff has shown no agreement with the defendant by which it bound itself to continue the plan of employing colored workmen longer than it might see fit to do.<sup>103</sup>

As a result of this and other examples of "racial occupational eviction,"<sup>104</sup> the employment status of African Americans and other workers of color was tenuous. White workers organized strikes and other, often violent, actions against employers who hired Black and Asian workers. The process of "racial job displacement"<sup>105</sup> was well under way across the United States during a time when judicial deference to the at-will rule was at its strongest. Prior to state and federal civil rights legislation that made it illegal to discriminate against someone on the basis of race, the employment at-will doctrine

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I have work immediately for 200 colored longshoremen, and can guarantee the above number continuous work, providing they are good men. This Company pays the usual rate of wages, namely, 30 [cents] per [hour during the] day and 45 [cents] per [hour] at night. We propose to keep colored men at work as long as they fulfill their part of the program.

*Id.* at 423-24.

102. *Id.* at 424.

103. *Id.* at 425.

104. HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW 14 (1977).

105. *Id.* at 15.

bolstered the overt discriminatory practices of employers and unions alike.

Through unionization employees have gained some protection against dismissal by the inclusion of just-cause provisions in collective bargaining agreements. Even so, many would argue that just-cause provisions by no means elevate the bargaining power of workers to that of employers, and that labor relations law only acts to reinforce uneven bargaining strength.<sup>106</sup> This may be so, but in any case, the rate of unionization in the United States has declined dramatically over the past two decades. In 1998, 13.9 % of all wage and salary workers were unionized, as compared to 20.1 % in 1983.<sup>107</sup> There are many theories as to what accounts for this downward trend.<sup>108</sup> But whatever the cause, it is clear that with current low levels of unemployment,<sup>109</sup> and the low proportion of unionization, nonunionized workers account for more of the workforce than they did even as recently as the early 1980s.<sup>110</sup>

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106. "Law does not operate neutrally but, by virtue of the pro-capital perspective which its rules embody, works in a hidden way, to promote managerial ends." Joanne Conaghan, *The Invisibility of Women in Labour Law: Gender-Neutrality in Model-Building*, in 2 FEMINIST LEGAL THEORY 345, 347 (Frances E. Olsen ed., 1995) (citing Karl Klare, *Critical Theory and Labour Relations Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 75 (David Kairys ed., 1997)).

107. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, UNION MEMBERS SUMMARY, available at <http://stats.bls.gov:80/news.release/union2.nws.htm> (last visited May 24, 1999) [hereinafter UNION MEMBERS SUMMARY].

108. See Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 643 (1992) (arguing "in favor of the view which attributed union decline to a decline in the actual and perceived effectiveness of unions").

109. See M.V. Lee Badgett, *Where the Jobs Went in the 1990-91 Downturn: Varying (Mis)Fortunes or Homogeneous Distress?*, in CIVIL RIGHTS AND RACE RELATIONS IN THE POST REAGAN-BUSH ERA 99, 99 (Samuel L. Myers, Jr. ed., 1997) (stating that the unemployment rate has dropped from 7.7% in 1992).

110. In 1998, "[u]nion membership [was] higher among men (16.1%) than women (11.4%)." Interestingly, a higher percentage of Blacks were members of unions "(17.2%) than Whites (13.5%) and Hispanics (11.9%). Among [these groups], [B]lack men continued to have the highest union membership rate (20.5%), while [W]hite and Hispanic women continued to have the lowest rates (10.9% and 10.6%, respectively)." UNION MEMBERS SUMMARY, *supra* note 107.

Moreover, statistical data suggest significant differences in employment experiences between the races and the sexes. For example, women workers earned on average seventy-six percent of men's earnings in 1998,<sup>111</sup> are less likely to belong to a union,<sup>112</sup> and are more likely to be poor than men.<sup>113</sup> Women constitute about two-thirds of the part-time workforce<sup>114</sup> and two-thirds of the temporary workforce.<sup>115</sup> Title VII of the Civil Rights Act of 1964,<sup>116</sup> predicates redress on an employer having a specified number of employees for a specified number of weeks, which often bars claims by contingent workers. Therefore, contingent workers, who are mostly women cannot rely on the antidiscrimination laws that bar these claims.<sup>117</sup> Additionally, Black and Hispanic workers, both men and women, earn less than their White counterparts<sup>118</sup> and experience poverty rates that are more than twice the rates of Whites.<sup>119</sup> Black working women have a poverty rate almost twice that of Black working men.<sup>120</sup> Reemployment rates amongst displaced workers<sup>121</sup> are also

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111. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HIGHLIGHTS OF WOMEN'S EARNINGS IN 1998, available at <http://stats.bls.gov:80/cpswom98.htm> (last visited Sept. 22, 2000) [hereinafter HIGHLIGHTS OF WOMEN'S EARNINGS].

112. See *id.*

113. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, A PROFILE OF THE WORKING POOR, 1996, available at <http://stats.bls.gov:80/cpswp96.htm> (last visited Sept. 27, 2000) [hereinafter A PROFILE OF THE WORKING POOR].

114. See Chris Tilly, *Short Hours, Short Shrift: The Causes and Consequences of Part-Time Employment*, in NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE 15, 42 (1992).

115. See Francois Carre, *Temporary Employment in the Eighties*, in NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE 15, 58 (1992).

116. 42 U.S.C. § 2000e-2 to -17 (1994).

117. See KATHARINE T. BARTLETT & ANGELA P. HARRIS, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 340 (2d ed. 1998).

118. In 1998, White workers of either gender earned more than their Black or Hispanic counterparts. The differences among women, however, were much smaller than among men. White women's earnings (\$468) were 17.0% higher than Black women's (\$400), and 38.9% higher than those for Hispanic women (\$337). In contrast, White men's earnings (\$615) were 31.4% higher than the earnings of their Black counterparts (\$468), and 57.7% greater than those of Hispanic men (\$390). See HIGHLIGHTS OF WOMEN'S EARNINGS, *supra* note 111.

119. See A PROFILE OF THE WORKING POOR, *supra* note 113.

120. See *id.*

telling. Men are more likely to find new jobs than women, and Whites are more likely to be reemployed than Blacks or Hispanics.<sup>122</sup> Moreover, women and people of color continue to face barriers to advancement once they are employed. According to the Federal Glass Ceiling Commission:

[Ninety seven] percent of the senior managers of *Fortune* 1000 Industrial and *Fortune* 500 companies are white, and 95 to 97 percent are male; in the *Fortune* 2000 industrial and service companies, only 5 percent of senior managers are women, and almost all of them are [W]hite; African American men with professional degrees earn 21 percent less than their white counterparts holding the same degrees in the same job categories. But women and African Americans are not the only ones kept down by the glass ceiling. Only 0.4 percent of managers are Hispanic, although Hispanics make up eight percent of America's workforce. Asian and Pacific Islander Americans earn less than whites in comparable positions and receive fewer promotions, despite more formal education than other groups. Generally, the lack of educational opportunity drastically reduces the available pool of American Indian candidates and CEOs rarely consider them for management jobs. These numbers are put in context by the fact that in our society, two-thirds of the population—and 57 percent of workers—are women, minorities or both.<sup>123</sup>

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121. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WORKER DISPLACEMENT, 1995-97, available at <ftp://146.142.4.23/pub/news.release/disp.htm> (last visited Sept. 22, 2000) [hereinafter WORKER DISPLACEMENT] (defining displaced workers as "persons aged 20 years or older who lost or left [their] jobs because their plant or company closed or moved, there was insufficient work for them to do, or their position or shift was abolished").

122. See *id.*

123. FED. GLASS CEILING COMM'N, A SOLID INVESTMENT: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 9-10 (1995); see also Joe R. Feagin, *Fighting White Racism: The Future of Equal Rights in the United States*, in CIVIL RIGHTS AND RACE RELATIONS IN THE POST REAGAN-BUSH ERA 29, 37 (Samuel L. Myers, Jr. ed., 1997) ("[I]n 1994 not one of the Fortune 1000 companies had an African American as its head. (There were only two White women at the helm of these companies.)"); Patricia Williams, *Disorder in the House: The New World Order and the Socioeconomic Status of Women*, in THEORIZING BLACK FEMINISMS: THE VISIONARY PRAGMATISM OF BLACK

By international standards, African Americans and Hispanics do not fare well economically:

For example, in 1993 the United Nations released a Human Development [Index (HDI)] . . . that measures overall quality of life in a country: the HDI includes measures of life expectancy, education, and income for each country and for certain racial-ethnic subgroups within certain countries. *According to the report, U.S. "Whites rank number one in the world (ahead of Japan), [B]lacks rank number 31 (next to Trinidad and Tobago), and Hispanics rank number 35 (next to Estonia)."*<sup>124</sup>

Moreover, the annual average earnings of employees by sex and sexual orientation suggest that gays and lesbians are not on par with heterosexual men and women when it comes to average earnings: heterosexual men earn on average \$28,312 per year; homosexual/bisexual men earn \$26,321; heterosexual women earn \$18,341; and homosexual/bisexual women earn \$15,056.<sup>125</sup> And, along with economic restructuring and the internationalization of the labor force, women are more likely than ever to be concentrated in undesirable service positions<sup>126</sup> requiring few skills, with poor job security. Yet, even within these low-paid service jobs, racial distinctions between workers of the same sex can occur. For example, White women are more likely to be supervisors, while women of color are more likely to be supervised.<sup>127</sup>

What are the consequences of these labor patterns to an analysis of the job security of workers employed at-will? Every economic

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WOMEN 118, 119 (Stanlie M. James & Abena P.A. Busia eds., 1993) (citing Judy Mann, *The Shatterproof Ceiling*, WASH. POST, Aug. 17, 1990, at D3).

124. Feagin, *supra* note 123, at 38 (emphasis added) (citing Carole Collins, *U.N. Report on Minorities: U.S. Not Measuring Up*, NAT'L CATH. REP., June 18, 1993, at 9).

125. See M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726, 734 (1995).

126. See WORKER DISPLACEMENT, *supra* note 121 (stating that in "service producing industries . . . a majority of employees are women").

127. See Rose M. Brewer, *Theorizing Race, Class and Gender: The New Scholarship of Black Feminist Intellectuals and Black Women's Labor*, in THEORIZING BLACK FEMINISMS: THE VISIONARY PRAGMATISM OF BLACK WOMEN 13, 21 (Stanlie M. James & Abena P.A. Busia eds., 1993) (discussing the collapse of racial and gender divisions of labor).

indicator suggests that, as a group, women and people of color are in precarious positions in the workplace vis-a-vis White men. Therefore, the question of job security is an important one. It is a serious concern for any employee who is fired for no reason without an opportunity to challenge the dismissal. In the year 2000, women and people of color constitute two-thirds of the new labor force entrants,<sup>128</sup> making the legal regulation of the workplace of primary concern to them. This concern is heightened in view of the relative ease with which domestic and multinational companies can move jobs from the United States overseas. The global labor market forces low-wage and low-skilled U.S. workers into competition with workers in poorer countries.<sup>129</sup> And again economic indicators suggest that women and people of color who are displaced from their jobs are less likely than White men to find new employment. For people of color, women, and lesbians and gay men, the at-will doctrine has a particularly pernicious effect on their job security, and thus, they are economically and socially disadvantaged vis-a-vis employers who are overwhelmingly White and male. The notion that employers and employees are equal in their capacity to bargain over terms of employment, free from economic and social privileges and constraints is no more true today than it was during the rise of the at-will doctrine more than a century ago. The sentiment that parties to the employment contract share an equality of bargaining power continues to obscure the at-will doctrine's privileging of business interests over those of the workers. To continue with a system of employment regulation that presumes equality in bargaining power between employer and employee is to contribute to the perpetuation of inequality between the majority of workers and their employers.

#### VI. DIFFERENTIAL DISCHARGE RATES, TITLE VII, AND EMPLOYMENT AT-WILL

It has been estimated that approximately sixty million employees in the private sector are subject to the at-will rule, and that 1.4 million of them are fired each year.<sup>130</sup> Estimates also indicate that at

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128. See FED. GLASS CEILING COMM'N, *supra* note 123, at 10.

129. See Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §§ 2101-2109 (1994).

130. See ROTHSTEIN & LIEBMAN, *supra* note 7, at 910.

least 140,000 discharges are “unjust.”<sup>131</sup> In addition, the volume and nature of employment discrimination litigation has shifted over the years from hiring complaints to firing complaints.<sup>132</sup> Just after Title VII came into affect, the majority of discrimination claims dealt with hirings. By 1985, however, there were six times more discharge cases filed per year than hiring cases.<sup>133</sup> This figure does not necessarily establish that there is more discrimination today than before, nor that employers are more likely to discriminate in discharges than in hiring. It may be, for example, that having overcome the most egregious barriers in the hiring process, Title VII litigants are now more likely to bring actions in order to protect their jobs. Yet, for various reasons, few studies of job terminations by race or gender have been conducted,<sup>134</sup> and of those that have looked at racial variables explicitly, most have examined public sector employment. Those that examine race explicitly (either in public or private employment) have found that Blacks are roughly twice as likely as Whites to be laid off or fired,<sup>135</sup> confirming the view that Blacks and

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131. See Jack Stieber & Michael Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REFORM 319, 324 (1983).

132. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 983-84 (1991) (demonstrating that “the volume of federal employment discrimination litigation has grown spectacularly, many times faster than the overall federal civil caseload”).

133. The “[h]iring charges outnumbered termination charges by 50% in 1966, but by 1985, the ratio had reversed by more than six to one.” *Id.* at 1015. Interestingly, the authors conclude that such a shift “actually provide[s] employers with a disincentive—perhaps even a net disincentive—to hire minorities and women.” *Id.* at 1032.

134. See Craig Zwierling & Hilary Silver, *Race and Job Dismissals in a Federal Bureaucracy*, 57 AM. SOC. REV. 651, 651 (1992) (suggesting that “documenting discrimination in firing is particularly difficult in employment at will states”). According to the authors, employment laws that regulate firing based on “race, age, gender, religion, national origin, marital status, disability, or in retaliation for union-related and other specifically protected activity . . . protect employer discretion and may result in rather arbitrary causes for dismissal, which may account for the lack of significant predictors in prior studies.” *Id.* at 658; see also Silver, *supra* note 21, at app. D-3 (stating that, “the possibility of racial discrimination in firings [is] a subject that has not been extensively examined in private employment”).

135. See Silver, *supra* note 21, at app. D-4.

other minorities are more likely than Whites to leave their jobs involuntarily.<sup>136</sup> There are, of course, possible reasons for these differences that do not necessarily involve discriminatory employment practices. For example, it may be that the results are traceable to concrete differences in the rates of absenteeism, accidents, injuries, discipline record, and length of employment. However, studies suggest that these factors are not responsible for the different dismissal rates. One study of Black and White employees in the U.S. Postal Service indicated that Blacks were more than twice as likely as Whites to be fired regardless of length of employment, job category, or personal characteristics; that the rate of accidents, injuries, or disciplinary actions were not significantly different between Blacks and Whites; that Blacks were not more likely to voluntarily terminate employment; that Blacks were less likely to have excessive absenteeism; and that Blacks were no more likely than Whites to be dismissed either during or following the probationary period.<sup>137</sup>

In 1995, the United States Office of Personnel Management undertook a comprehensive examination of discharge rates of federal employees after a statistical report revealed that, while discharge rates were low overall,<sup>138</sup> minority employees<sup>139</sup> were more likely than nonminorities<sup>140</sup> to be discharged. In the same study, findings indicated that minority employees were involuntarily discharged at a rate of ten per thousand, while nonminorities were discharged at a

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136. It appears that the rates of firing differ between racial minority groups. See *infra* notes 137-48 and accompanying text.

137. See Silver, *supra* note 21.

138. Of the 2,171,000 non-Postal executive branch civilian workforce in 1992, nearly 12,000 minority and nonminority employees were discharged, representing about one-half percent of one percent of those employed. See Silver, *supra* note 21, at app. D-6.

139. "Minority" was defined in the Central Personnel Data File ("the database maintained by the Office of Personnel Management containing demographic and job information on individual federal employees") as an "employee whose Race/National Origin Code . . . reflects Hispanic or, except in Puerto Rico, one of the following: American Indian or Alaska Native, Asian or Pacific Islander, Black (not of Hispanic origin)." U.S. OFFICE OF PERS. MGMT., FEDERAL DISCHARGE RATES apps. F, F-4 (1995).

140. "Nonminority" was defined in the Central Personnel Data File as an "employee whose Race/National Origin Code reflects White (not of Hispanic origin) or Not Hispanic in Puerto Rico." *Id.*



rate of about three per thousand.<sup>141</sup> The study found that “African American[s] and Native American[s] . . . were . . . more likely to be fired than others with comparable jobs, performance, work history, and background characteristics” and examined three samples of federal workers: “those with appeal rights, those without such rights and probationers.”<sup>142</sup> The study concluded that “being African American was among the five most important determinants of dismissal in every model examined.”<sup>143</sup> For example:

African American workers with appeal rights were 3.7 times more likely to be dismissed than Whites, Hispanics, and Asian/Pacific Islanders before other factors were taken into account, but 2.4 times more likely to be dismissed after controlling for education, age, length of service, veteran status, work schedule, hiring conditions, major occupational category, place of work, government agency, pay level, and work history.<sup>144</sup>

Although the two studies discussed above suggest racial differentials in public sector firing, there is no reason to think that the results would be better in private employment. In fact, there is reason to believe that the racial differences in the rates of involuntary terminations in private employment may be even more dramatic. In Zwerling and Silver’s study of U.S. Postal workers, the authors suggest that “if racial discrimination exists in government employment, it is likely to be even more common in nonpublic sectors of the labor market.”<sup>145</sup> The reasons are somewhat intuitive.<sup>146</sup> Government has provided disproportionately more jobs for Blacks and other minorities, more high- and middle-level occupations, greater opportunity and job security, good chances for advancement, and higher wages.<sup>147</sup> Moreover, federal and state governments are subject to strict Equal Employment Opportunity, civil service, and union

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141. See Silver, *supra* note 21, at app. D-4.

142. *Id.* at app. D-2.

143. *Id.*

144. *Id.*

145. Zwerling & Silver, *supra* note 134, at 653.

146. See Silver, *supra* note 21, at app. D-3 (showing indirect evidence that suggests that minorities consider government to be more equitable than private employment).

147. See Zwerling & Silver, *supra* note 134, at 652-53.

regulations. Federal employment figures suggest that in contrast with the private sector, public sector employment offers African Americans equal opportunity for advancement and higher, if not always equal wages in return for identical human capital. This is not to say that African American government workers do not experience discrimination nor that their opportunities have not fluctuated over time. However, there is reason to believe that the obstacles to equal opportunity are even greater in the private sector.<sup>148</sup>

Therefore, we would expect that minorities and Whites are more likely to be treated equally with respect to dismissals in the public sector than in the private sector.<sup>149</sup> If this is so, then it seems likely that dismissals of workers of color fall into at least four categories: first, those that are completely unrelated to discriminatory motives or employer practices; second, those that are due to discriminatory employer motives or practices, but are not easily identifiable as such; third, those that clearly stem from discriminatory motives or practice; and finally, a combination of the first three types.<sup>150</sup> Unfortunately, no comprehensive examination of the reasons for dismissing at-will employees in the private sector has ever been undertaken. Moreover, given the nature of at-will employment, it seems unlikely that such a study can be done since, by definition, employers are not compelled to state any reasons for the discharge.

On the other hand, if the different rates of termination are due to discriminatory termination practices, one hopes that Blacks and other people of color, as the intended beneficiaries of antidiscrimination statutes, may find remedies in the courts and administrative agencies that administer these statutes. In fact, one might argue that the "true" at-will employee is the white, male worker who cannot argue that he has been discriminated against on the basis of race or sex since the myriad of civil rights laws set up to protect minorities and women

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148. Silver, *supra* note 21, at app. D-3.

149. See Zwerling & Silver, *supra* note 134, at 653.

150. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42, 258 (1989) (holding that Title VII prohibits employment decisions resulting from a mixture of legitimate and illegitimate motives).

are unavailable to him.<sup>151</sup> He must rely solely on common-law exceptions to the at-will rule.<sup>152</sup> However, it is unlikely that his discharge is the result of immaterial gender or racial considerations. Moreover, it is common to hear self-congratulatory statements about the progress made in providing equal employment opportunity to everyone, and to declare that the multitude of antidiscrimination laws are signs that we have achieved both racial and gender equality. These statements reflect beliefs that discrimination against people of color and women today is no longer a serious problem.<sup>153</sup> Furthermore, there is the belief that any remaining discrimination or hostility directed at minorities and women is evidence only of the isolated, aberrant, or deviant behavior of a few, and that in the unlikely event that an employee has been discriminated against, she can always rely on the law to address the problem. Yet, closer examination of race and gender in employment suggests otherwise. For example, in 1999, race-based discrimination charges comprised the highest percentage of charges filed with the EEOC: African American men and women accounted for eighty-six percent of the more than 30,000 race-based discrimination charges filed with the EEOC in 1995,<sup>154</sup>

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151. See Estlund, *supra* note 17, at 1679. According to Estlund:

[T]he superimposition of the antidiscrimination laws on top of an at-will background . . . may . . . contribute to . . . divisive tensions between the members of "protected groups," such as women and minorities, and other employees. While the latter normally have no recourse at all against an unfair employment action, including discharge, the former may have a potential remedy *if* they plausibly claim discrimination.

*Id.*

152. See *id.* (arguing that the contrast between the laws available to women and minorities and White men may lead White men "exposed to the full brunt of the at-will regime, to see 'special treatment' of women and minorities when there may in fact be only an inadequate remedy for discrimination and superficial efforts by the employer to avoid litigation and liability").

153. See Feagin, *supra* note 123, at 29, 30-32 (citing the results of several studies that suggest that a majority of Whites refuse to view racial discrimination as a major barrier to people of color).

154. See U.S. EQUAL OPPORTUNITY COMM'N, CHARGE STATISTICS FY 1992 THROUGH FY 1999, available at <http://www.eeoc.gov/stats/charges.html> (last visited Apr. 1, 1999) [hereinafter CHARGE STATISTICS]; see also Feagin, *supra* note 123, at 32-35 (citing studies that suggest that there are perhaps millions of serious cases of employment discrimination that go unreported in the United States).

and sex discrimination charges comprised the second highest percentage.<sup>155</sup> As discussed above, it appears that African Americans and other minorities are subject to a higher rate of involuntary dismissal than Whites.<sup>156</sup> Clearly race and gender discrimination in employment remains a serious problem. Yet, middle-class women and people of color are often offered as “examples of the success of equal opportunity and affirmative action programs.”<sup>157</sup> And, with the advent of Title VII of the Civil Rights Act of 1964 and other antidiscrimination legislation, many believe that the vestiges of employment discrimination can be addressed by resort to statutory mechanisms.<sup>158</sup> Nonetheless, even with the buildup of antidiscrimination laws since the mid-1960s, for many reasons race and gender discrimination continue to evade legal sanction.

The reasons abound. First, even with the proliferation of anti-discrimination laws or perhaps because of them, employers have become more sophisticated in concealing racially discriminatory motivations and practices. Management consultants and lawyers have found fertile ground in industrial relations advising companies as to the best ways to avoid charges of discrimination.<sup>159</sup> Therefore, direct evidence of discrimination is less available to plaintiffs now than in the past.<sup>160</sup> Moreover, “the flagrant and obvious violations of the pre-Title VII era—systemic refusal to hire women or minorities for certain jobs, gross disparities in pay for identical jobs, segregated work place facilities—were much more likely to produce plaintiff victories than the subtler and less-frequent forms of discrimination

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155. See CHARGE STATISTICS, *supra* note 154 (sex discrimination charges accounted for 30.9% of charges in 1999).

156. See *supra* notes 134-46 and accompanying text.

157. JOE R. FEAGAN & MELVIN SIKES, *LIVING WITH RACISM* viii (1994).

158. Of course, discrimination against individuals or groups based on “un-protected” characteristics like sexual orientation is particularly troublesome because of the dearth of legal safeguards.

159. See Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice*, 26 FLA. ST. U. L. REV. 959 (1999) (examining the strategies of management attorneys to safeguard employers against discrimination and employment-related litigation).

160. See Estlund, *supra* note 17, at 1680 (“It is . . . increasingly rare to find ‘smoking gun’ evidence of discrimination, or to find an employer who does not have some evidence . . . of some other reason for an allegedly discriminatory firing or refusal to hire or to promote.”).

practiced today.”<sup>161</sup> Employers are more sophisticated and are less likely to engage in the type of discriminatory behavior that is most easily addressed by existing antidiscrimination laws.

Second, the demanding process of filing a charge of discrimination with the EEOC may be a deterrent to many employees who, for various reasons, do not file charges.<sup>162</sup> Title VII and other federal antidiscrimination statutes rely primarily on the willingness and ability of private individuals to “identify violations, report them to the authorities, and participate in enforcement proceedings . . . .”<sup>163</sup> If workers are unable to bring suit because of lack of resources or information, the effectiveness of Title VII is reduced. In the Donohue and Siegelman study, the authors suggest that “[t]he propensity of a rejected worker to sue will typically be a positive function of the wage in the job from which she is rejected. Holding other things . . . constant, an increase in the wage rate will increase the expected benefits of litigation . . . .”<sup>164</sup> Their hypothesis seems born out with figures that show “nonwhite plaintiffs . . . were far more likely to be managerial/professional workers or technical/sales workers than nonwhite workers nationally. Conversely, the relatively low-paid service and agricultural workers were substantially under-represented in the sample of nonwhite employment discrimination plaintiffs.”<sup>165</sup> As in other areas of civil litigation, wealth does seem to play an important role in decisions to pursue litigation.

Moreover, if an employee’s salary level determines willingness to bring suit under Title VII, then wages surely influence a worker’s

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161. Donohue & Siegelman, *supra* note 132, at 1032.

162. See McGinley, *supra* note 27, at 1454 (suggesting several reasons, including the length of time to process a charge and take it to trial; the great cost associated with intensive discovery; and the amount of emotional turmoil, thus leaving many workers to leave litigation to wealthier plaintiffs).

163. Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, in FOUNDATIONS OF EMPLOYMENT DISCRIMINATION LAW 240-41 (John Donohue III ed., 1997).

164. Donohue & Siegelman, *supra* note 132, at 1006-07. The authors offer these factors as reasons for the increase in Title VII litigation even though they believe that the overall amount of discrimination has decreased since the enactment of Title VII. Nonetheless, their figures indicate that low-paid workers are substantially less likely to bring suit under Title VII than their higher paid counterparts.

165. *Id.* at 1008.

decision to bring a wrongful discharge claim. In fact, there is reason to suspect that minority employees are even worse off litigating wrongful discharge claims than Title VII or other antidiscrimination claims.<sup>166</sup> Professor Clyde Summers provides interesting evidence that litigating wrongful discharge claims is rarely advantageous to employees.

[M]ore than half of those discharged employees whose cases are judicially resolved obtain nothing . . . . One survey estimated that 95 percent of the cases are settled [before adjudication] . . . . Overall, plaintiffs probably recover substantially less than half as much if the case is settled than if it goes to court and is won . . . . Relatively few plaintiffs are hourly wage or clerical workers; the large majority are professional employees or are in middle and upper management.<sup>167</sup>

Since the rate of Title VII and wrongful discharge litigation depends to some extent on wages, then so long as women and people of color are concentrated in low-paying positions, they are not likely to bring suit to address perceived unfair or discriminatory discharges.

Third, there is some evidence that noneconomic factors play an important role when deciding whether or not to litigate. Studies suggest that victims of employment discrimination are less likely to pursue their claims in court than are persons involved in contract or landlord-tenant disputes.<sup>168</sup> Kristin Bumiller suggests that the

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166. Gay and lesbian plaintiffs who have been discharged because of their sexual orientation confront a somewhat different problem when trying to invoke public policy exceptions to at-will via wrongful discharge claims. With respect to wrongful discharge claims, courts have taken different approaches as to the method for discerning the public policy. Most jurisdictions that recognize public policy exceptions to at-will employment look to specific statutory language expressing the public interest. However, "without an anti-discrimination law in place in that jurisdiction [prohibiting discrimination based on sexual orientation], the courts find that there is no evidence that public policy frowns upon such firings." WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER AND THE LAW* 953 (1997). Moreover, in those few states that provide protections against sexual orientation discrimination, "few plaintiffs will base their case on an exception to the at will doctrine when their chances of success are usually greater under a statute." *Id.*

167. Clyde Summers, *Effective Remedies For Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 465-67 (1992).

168. See Bumiller, *supra* note 163, at 240-41 (stating that antidiscrimination

elimination of legal barriers in civil rights laws is insufficient to achieve equality. Victims of discrimination are reluctant to assert the worthiness of their equality interests and see defeat as inevitable. Bumiller offers three explanations why this may be so:

First, the bonds between the perpetrator and the discrimination victim drive the conflict to self-destructive or explosive reactions. Second, these individuals are guided by an ethic of survival that encourages self-sacrifice rather than action. And third, the potential for legal remedies is diminished by a view of the law that engenders fear of legal intervention. Injured persons reluctantly employ the label of discrimination because they shun the role of the victim, and they fear legal intervention will disrupt the delicate balance of power between themselves and their opponents.<sup>169</sup>

A fourth factor making discrimination difficult to establish stems from the failure of the law, and of society in general, to properly conceptualize racism, sexism, and discrimination. The widespread belief that racism, sexism, or homophobia is the result of individualized, aberrant, and intentional behavior determines the way in which discrimination is understood in law. Antidiscrimination laws are designed in part to deter or punish wrongdoers. The focus on the wrongdoer is perhaps the most fundamental obstacle to addressing discriminatory behavior in which there is no wrongdoer per se.<sup>170</sup> Systemic racism is not easily identified. The fact that in the

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laws rely on the victim to report violations and those groups subject to discrimination are unlikely to report it for legal protection).

169. *Id.* at 244.

170. See Allan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053-54 (1978) (criticizing courts for adopting the "perpetrator's perspective" by focusing on the intent of individual wrongdoers, thus obscuring systemic or structural discrimination against minorities); see also McGinley, *supra* note 27, at 1464. McGinley argues that

the law requires . . . a moral culprit. To the extent the plaintiff cannot prove discriminatory intent, the law presumes that no discrimination has occurred; the individual employer and the rest of society are relieved of moral culpability for the discrimination. Where there is sufficient proof that the employer intentionally discriminated against the employee, society has found its sinner and can acquit itself of responsibility for racism or sexism. This paradigm encourages an extremely narrow definition of racism, exonerating any racism that occurs out-

federal sector African American employees are more likely to be discharged than Whites suggests discrimination, but does not enable one to detect individualized acts of discrimination. Instead, it appears that the problem is institutional rather than individual. Even so, there are studies that suggest that on an individual level, Whites, consciously or unconsciously, harbor racist beliefs about Blacks.<sup>171</sup> For example, in a 1991 survey of Whites' attitudes about Blacks, significant numbers of Whites reported anti-Black attitudes. For example, 46.6% of Whites thought Blacks tended to be lazy; 58.9% thought Blacks preferred welfare; 53.7% thought that Blacks were prone to violence; and 30.7% believed that Blacks were unintelligent.<sup>172</sup> If these attitudes are present at random in the general population, then they certainly are part of employers' decisions when dealing with Blacks.

More difficult in some respects are the discriminatory actions of employers who are unaware of their own racism. Existing civil rights laws are not designed to address unconscious racism. As Professor Lawrence contends,

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side of the narrow confines of an individual's invidious intent.  
*Id.*; see also Neil Gotanda, *A Critique of "Our Constitution is Color Blind"*, 44 STAN. L. REV. 1, 44 (1991). Gotanda argues that

[d]espite the fact that personal racial prejudices have social origins, racism is considered [to be] an individual and personal trait. Society's racism is then viewed as merely the collection, or extension, of personal prejudices. In the extreme, racism could come to be defined as a mental illness. These extremely individualized views of racism exclude an understanding [of the fact] that race has institutional or structural dimensions beyond the formal racial classification.

*Id.*

171. See generally David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993) (examining data on racism demonstrating that discrimination is negligent and not intentional). See also WILLIAM WEI, *THE ASIAN AMERICAN MOVEMENT* 47-54 (Sucheng Chan ed., 1993) (discussing various anti-Asian stereotypes).

172. See ROBERT C. SMITH, *RACISM IN THE POST-CIVIL RIGHTS ERA: NOW YOU SEE IT, NOW YOU DON'T* 39 (John Howard & Robert C. Smith eds., 1995) (citing *The National Opinion Research Center 1991 General Social Survey* and explaining that figures are higher than figures in a 1978 study surveying White racist attitudes about Blacks); see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1167 (1995) (discussing the distinction between the "real reason/phony reason" of disparate treatment).



Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decision-maker's beliefs, desires, and wishes.<sup>173</sup>

Consequently, the courts have been unable to properly address the “unconscious” component of racism. Professor Krieger discusses certain statements made by judges that highlight the problem:

Unlike race discrimination, age discrimination may simply arise from an *unconscious* application of stereotyped notions of ability rather than a deliberate desire to remove older employees from the workforce: “Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. Those discriminations result in nonemployment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older jobseeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance.”<sup>174</sup>

The suppositions of such an analysis are significant. Age discrimination is unconscious; race discrimination, on the other hand, is the consequence of an overt, conscious desire to act on one's stereotyped notion of a particular group rather than an unconscious tendency to attach significance to group membership based on perceived differences between the races.

Title VII jurisprudence is informed by these very notions, and even today, at the end of the twentieth century, it appears that at-will employment continues to play a role in the discriminatory discharge of workers of color. If employers are making decisions based on unconscious stereotypes of people of color and women, then even a legal requirement that they provide cause for dismissal will not capture

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173. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

174. Krieger, *supra* note 172, at 1169 (citing *Syvocek v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 155 (7th Cir. 1981) (quoting 113 CONG. REC. 34,742 (1967) (remarks of Rep. Burke))).

the true reasons for the discharge. Moreover, since direct evidence of discrimination is unlikely in most cases, default to the at-will presumption and managerial prerogative makes it difficult for plaintiffs to win discrimination claims with circumstantial evidence alone. Studies indicate that in at-will settings, employers use such subjective job qualifications as "getting along" with customers and "fitting in" with coworkers to reduce the chances that Blacks will be hired.<sup>175</sup> There may be similar subjective reasons used to justify firing.<sup>176</sup> For example, in earlier research done on this subject, in both reported labor arbitration decisions and in Canadian human rights decisions, the reason often given by employers for disciplining or discharging workers of color who had retaliated against customers or coworkers who subjected them to racist name-calling was that the minority employee was unable to "get along" with customers or coworkers.<sup>177</sup> In each case, given the difficulty of proving discrimination, it was evident that had the employees been employed at-will, they likely would have had no recourse even though their race may have played a role in their termination. As Regina Austin explains, workers are expected to react with "passivity, not insubordination and resistance . . . . If [abuse] is intolerable, they should quit and move on to another job."<sup>178</sup> If the abuse to which the employee is subjected stems from customer or coworker hostility to the employee's race, then so be it. Peter Fitzpatrick explains:

The unsurpassed aptness of a rejected applicant is not evidence of racial discrimination because she or he may have

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175. See Joleen Kirschenman & Kathryn Neckerman, "We'd Love to Hire Them, But . . .": *The Meaning of Race for Employers*, in THE URBAN UNDERCLASS 203, 208-21 (Christopher Jencks & Paul E. Peterson eds., 1991).

176. See Zwerling & Silver, *supra* note 134, at 658.

177. See Donna Young & Katherine Liao, *The Treatment of Race at Arbitration*, in LABOUR ARBITRATION YEARBOOK 57, 66 (William Kaplan et al. eds., 1992) (describing several cases in which complainants, after being subjected to racist utterances by clients, management, or fellow workers, were fired for allegedly failing to meet the requirements of the job, including charges of abrupt and unhelpful behavior towards clients, poor attendance, and other behavior which arguably stemmed from being the target of racist remarks); see also Memorandum from Donna Young, to Anti-Racism Committee, Ontario Human Rights Commission (Oct. 23, 1992) (on file with author).

178. Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 2 (1988).

been rejected on other grounds. And such grounds, as tribunals repeatedly recognise, can include the most vague and the most irrational. Constantly, tribunals uphold employers' purported rejection of applicants in such terms as demeanour, personality, ability to fit in and even in terms of favouritism on the part of the employer. Obviously, racially-based decisions can be thus justified or obscured with ease . . . . [Moreover, tribunals assert] that such decisions are the prerogative of the employer, that they have to accept the employer's assessment and even the terms in which it is made. As a matter of course the impermeability of the employer's power is affirmed.<sup>179</sup>

Accent discrimination cases present unique problems for courts and are another example of the way in which antidiscrimination laws fail to protect people of color from discriminatory employment practices. For the most part, the courts have refused to recognize accent discrimination as a basis for liability under Title VII. The complexity of this problem has spawned some troubling judicial opinions. Professor Mari Matsuda explains:

The puzzle in accent cases is that accent is often derivative of race and national origin. Only Filipino people speak with Filipino accents. Yet, within the range of employer prerogatives, it is reasonable to require communication skills of employees. The claim that accent impedes job ability is often made with both sincerity and economic rationality.<sup>180</sup>

After studying the problem, Professor Matsuda concluded that "accent discrimination is commonplace, natural, and socially acceptable."<sup>181</sup> She cites to a Government Accounting Office report that found "widespread discrimination against 'foreign-sounding' job applicants as a result of the Immigration Reform and Control Act of

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179. Peter Fitzpatrick, *Racism and the Innocence of Law*, 14 J.L. SOC'Y 119, 124 (1987).

180. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1348 (1991) (setting out a compelling critique of the courts' dispositions of accent discrimination suits).

181. *Id.*

1986.”<sup>182</sup> For example, “the GAO found that 46% of employers treated ‘foreign-sounding’ applicants differently. These findings were hardly surprising, given the additional survey data showing that employers, by their own admission, discriminate against ‘foreign-sounding’ and ‘foreign-looking’ applicants.”<sup>183</sup> Although accent discrimination is common, courts have had difficulty determining when and whether it stems from motivations unlawful under Title VII.

In order to succeed in Title VII claims, employees must establish either that their employers were motivated by illegitimate discriminatory factors, or that the employment practice of hiring or retaining only those with “standard English” accents had a discriminatory impact on a racial group or a group of a different national origin. However, in those instances where employers successfully argue that there are business reasons for the discrimination, employees are left with no form of legal redress, even though the real reason for the discrimination may have been racial or based on national origin. Again, existing antidiscrimination laws are blunt instruments. They are not effective in parsing the subtle ways in which employers unlawfully discriminate.

Lamentably, U.S. Supreme Court jurisprudence is not of much use in cases in which the reasons for discharge do not fit nicely within the current Title VII models. Indeed, as some have argued, “with the exception of some prominent sex discrimination cases, the Supreme Court has taught us little in the past twenty-five years about what discrimination is, how pervasive it is, and how we are to recognize it in the world.”<sup>184</sup> A recent example of this problem is memorialized in *St. Mary's Honor Center v. Hicks*,<sup>185</sup> a case widely criticized for making it difficult for plaintiffs to establish discrimination under the disparate treatment framework.

In *Hicks*, the African American plaintiff had filed suit arguing that his discipline and subsequent discharge were based on his race

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182. *Id.* at 1347 (citing Pub. L. No. 99-603, 100 Stat. 3359 (1989)).

183. *Id.* (citing U.S. GEN. ACCOUNTING OFFICE, EMPLOYER SANCTIONS: COMMENTS ON H.R. 3362—EMPLOYER SANCTIONS IMPROVEMENT ACT § GGD 90-62 (1990)).

184. Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2230 (1995).

185. 509 U.S. 502 (1993).

in violation of Title VII.<sup>186</sup> After Hicks had presented evidence sufficient to establish a prima facie case, the burden shifted to his employer to articulate a legitimate nondiscriminatory reason for the discharge.<sup>187</sup> The employer presented evidence that Hicks was discharged for repeated rule violations and a poor disciplinary record.<sup>188</sup> Even though the District Court found that the employer's reasons were pretextual, the Supreme Court held that the case should be remanded in order for the jury to decide whether Hicks had met his burden of proving that the real reason for the discharge had been discriminatory.<sup>189</sup> Under the *Hicks* analysis then, the plaintiff needs to show evidence that the employer's explanation was not just pretextual, but that it was a pretext for discrimination.<sup>190</sup> With the Court's elaboration of the proof required in Title VII litigation, plaintiffs will no doubt find it much more difficult to succeed if the discrimination is indirect or too subtle to be detected by the Title VII framework.<sup>191</sup> If this is so, then it appears that the only other alternative would be to try to fit one's claim into a judicially recognized exception to the at-will rule. This alternative, however, is fraught with problems.

#### VII. THE DOCTRINE'S APPEAL TO FORMAL EQUALITY: BARGAINING UNDER ASYMETRIC INFORMATION AND OPPORTUNITY

Justice consists in treating equals equally and unequals unequally but in proportion to their relevant differences. This involves, first, the idea of impartiality; the honest judge considers only the features of the case that are relevant in law. Justice is no respecter of persons; wealth or

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186. *See id.*

187. *See id.*

188. *See id.* at 505, 508.

189. *See id.* at 524-25.

190. *See id.* at 515, 524.

191. *See* McGinley, *supra* note 27, at 1462, 1482-90 (discussing the various factors making courts unreceptive to the claims of Title VII litigants). *But see* Ruth Gana Okediji, *Status Rules: Doctrine as Discrimination in a Post-Hicks Environment*, 26 FLA. ST. U. L. REV. 49, 84 (1998). Okediji argues that the Supreme Court was not incorrect in the *Hicks* decision, but that the *res ipsa loquitur* procedural framework provides a viable alternative for Title VII cases. "Where a plaintiff proves the prima facie case and demonstrates that the defendant's proffered reason is pretextual, these facts, in a sense, speak for themselves." *Id.*

status will influence judgement only if it makes a difference in law . . . . Impartiality implies a kind of equality—not that all cases should be treated alike but that the onus rests on whoever would treat them differently to distinguish them in relevant ways.<sup>192</sup>

The above passage exemplifies the theoretical foundation upon which the law judges the relative equality of persons given the assumptions of formal equality. Differences that are considered “irrelevant” to a case must not intrude upon objective judicial decision making. People are to be seen as featureless or morally indistinguishable, divorced from social context and therefore formally equal. To this end, absent fraud, duress, or incapacity, the law will protect a bargain entered into by the parties to a contract so long as they are deemed “equal.” The at-will doctrine dictates that either party to an indefinite employment relationship be free to end the relationship at any time, for any reason, good or bad, or for no reason at all.

Intuitively, however, one suspects that employer and employee are unequal in their free capacity to bargain over the terms and conditions of employment, and that this inequality is a product of the difference in the meaning of the worker’s labor to each party. If personhood is defined through work, then the person who controls work defines personhood.<sup>193</sup> An involuntary separation from work has a significant impact on one’s personhood. On the other hand, when an employee voluntarily quits employment, there is no symmetrical blow to the employer’s personhood. Only the personhood of the worker is made vulnerable at the point of separation. Therefore, if the law gives an employer the right to dismiss the worker, it puts the employer in a superior position—one which enables the employer to define another’s personhood.<sup>194</sup> The employer controls the terms of employment, while the employee adheres to those terms.

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192. Stanley I. Benn, *Justice*, in 4 THE ENCYCLOPEDIA OF PHILOSOPHY 299 (Paul Edwards ed., 1967); see also Peter Halewood, *Law’s Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 IOWA L. REV. 1331, 1346 (1996) (“By definition, liberal subjects are featureless and thus morally indistinguishable, divorced from all external context so as to be formally equal. The subject’s featurelessness is the foundation of liberal, formal equality.”).

193. See Cornell, *supra* note 4.

194. See *id.* at 1614-15, 1620.

Moreover, consistent with contract law in general, the at-will doctrine ignores the bargaining endowments of the parties. The law does not demand substantive parity of bargaining strength in the making of contracts.<sup>195</sup> The at-will doctrine does not take account of the different life situations that result in bargaining under asymmetric information and opportunities. The rule's underlying presumption of equality between worker and employer must be challenged because rarely are individual employees in the same economic and political position to bargain freely as the employers that employ them.<sup>196</sup> This observation is not far fetched. Even though the law generally holds that applicants and employees have no rights to a specific job, there is a wealth of statutory protections sheltering them from certain employer treatment. These statutory protections stem from the almost universally accepted notion that employees require some governmental regulation of the workplace to protect them from employer abuse and exploitation. In fact, it is not uncommon nowadays to see the kind of sentiments expressed in the following judicial statement:

I can think of no relationship in which one party, the employee, places more reliance upon the other, is more dependent upon the other, or is more vulnerable to abuse by the other, than the relationship between employer and employee. And, ironically, the relative imbalance of economic power between employer and employee tends to increase rather than diminish the longer that relationship continues. Whatever bargaining strength and marketability the employee may have at the moment of hiring, diminishes rapidly thereafter. Marketplace? What market is there for the factory worker laid-off after 25 years of labor in the same

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195. Letter from Dianne Avery, Vice Dean for Academic Affairs and Professor of Law, to Harold Dubroff 4 (Jan. 23, 2001) [hereinafter Letter from Dianne Avery] (on file with author).

196. To be sure, there are others who argue that the at-will rule makes the most sense given current economic trends and policies. See, e.g., Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947, 949-50 (1984) (discussing the adherence to the at-will rule when considering the economic system); Morriss, *supra* note 57, at 746-56 (analyzing the influence of economic and legal conditions on the at-will doctrine).

plant, or for the middle-aged executive fired after 25 years with the same firm?<sup>197</sup>

Yet, although many would agree that employees are in a weaker bargaining position than employers, the at-will rule continues to operate as though this were not the case. It is behind this veil of equality that the at-will doctrine does the most harm, since the impact of job termination is not similarly felt by employer and employee. After termination, the business continues to run, the dismissed employee is replaced, and any disruption of production eventually passes. The at-will doctrine's adherence to a formalistic approach to equality fails to take account of economic and social inequality and operates in a context in which civil rights laws cannot provide the necessary protection against discriminatory discharge. If people of color are disproportionately more likely to be involuntarily dismissed from their jobs, then they disproportionately require protection against dismissals.

Of course, there exists the possibility that racial differences in discharge rates reflect not discrimination but more subtle or unmeasured factors. However, data showing that Blacks are being fired at higher rates than Whites suggests that race is a factor in job terminations even where race is not identified as a factor by employer or employee. Under these circumstances, what would be better is an employment law regime that would at least partially compensate the employee for the involuntary dismissal, by requiring notice—or pay in lieu of notice—even if discrimination has not been proven to be the basis for the discharge.<sup>198</sup> Because workers of color are at a disproportionate risk of being fired than Whites, it is in their interests that there be a default rule requiring employers to provide notice—or pay in lieu of notice—in order to protect them from the full impact of

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197. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 718, 765 P.2d 373, 414-15, 254 Cal. Rptr. 211, 253 (1988) (Kaufman, J., dissenting). Justice Kaufman is responding to the majority's suggestion that the employee is in a relatively superior bargaining position vis-a-vis the employer than an insured is to an insurer. This is allegedly so because the employee has the opportunity to seek employment elsewhere after a breach in the employment contract, whereas an insured "cannot turn to the marketplace" to find another insurance company willing to pay for the loss already incurred.

198. This is the model followed in Canada and other common-law countries. See INNIS CHRISTIE, *EMPLOYMENT LAW IN CANADA* 338 (1980).



termination. The at-will default, on the other hand, does not guard against the free fall that is job termination.

Laws regulating one's ability to work are of fundamental importance. In light of this, the question of how the law should address claims of undeserved dismissal must be reconsidered. Innovative approaches that respond to the complexities of employment dismissal cases are necessary given the failure of the at-will doctrine to adequately deal with such complexity. So, for example, where the at-will doctrine requires that employers and employees be given the same opportunity to quit the employment relationship, an approach based on substantive equality principles would recognize that the inherently unequal relationship between employer and employee requires different treatment, i.e., one in which only employees be given protection against dismissal.

I argue that this would require that employers give notice or pay in lieu of notice of dismissal, while no such reciprocal notice requirement be demanded of employees in exercising their right to quit. This lack of reciprocity is required if the law is to take account of the asymmetry in bargaining parity. This approach is not without precedent. Canadian equality jurisprudence has recognized that in certain cases, treating people the same results in unequal treatment. In order for the law to correct the imbalance, therefore, it must allow for differential treatment.

#### VIII. A COMPARATIVE ANALYSIS OF JOB TERMINATION: CANADIAN LAW AND "SUBSTANTIVE EQUALITY"

The persistence of the at-will doctrine in defining the nature of the employment relationship for most private sector employees<sup>199</sup> in the United States remains an important factor distinguishing U.S. employment relations law from the law of other industrialized nations.<sup>200</sup> The manner in which a country regulates employment relations reveals much about the social and economic values it places on

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199. *But see* MONT. CODE ANN. §§ 39-2-901 to -913 (2000). Montana is the only state that has adopted legislation establishing a just-cause standard for private sector employees.

200. *See* Summers, *Worker Dislocation*, *supra* note 61, at 1039-53, 1058-59 (explaining that the default rule in many European countries provides better protections against arbitrary dismissal than does the at-will doctrine).

one's capacity to work.<sup>201</sup> As is often the case, United States courts would do well to examine legal developments in other countries. But, because employment at-will is so deeply imbedded in U.S. common law, it is perhaps difficult to foresee its demise as a result of the legal paradigms of other countries. It has generally been the case that American courts are reluctant to cross national borders to seek foreign or international models. There are some who defend this internal focus. For example, Professors Freed and Polsby contend that those who call for the abolition of employment at-will based on the experiences of foreign law depend upon dubious assumptions, and that "[n]o other countries have a job security scheme that is worth emulating in the United States".<sup>202</sup>

The foreign experience is obviously foreign. Even if it were true that another country's scheme was worth emulating in America, such a scheme probably would not survive transplantation . . . . The entire purpose and meaning of work, and of the coordination mechanisms that make work possible, are culturally determined. Moreover, the meaning of justice, and perhaps of efficiency, is culturally loaded . . . . It is illogical to use data from a foreign culture to formulate prescriptive statements about organization in the United States. For this reason, any statement may be dismissed that states: "Because Japan does X, it follows that the United States should do X."<sup>203</sup>

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201. See SECRETARIAT, COMM'N FOR LABOR COOPERATION, PRELIMINARY REPORT TO THE MINISTERIAL COUNCIL ON LABOR AND INDUSTRIAL RELATIONS LAW IN CANADA, THE UNITED STATES, AND MEXICO 2-3 (1996) ("The individual employment relationship is critical in establishing the framework for development of collective labor rights . . . . How a country formulates its job security system reflects the relative value accorded to employment stability for workers versus responsiveness to market conditions for employers.").

202. Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1140 n.58 (1989). But see Samuel Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 AM. J. COMP. L. 310, 317 (1985) (noting that "in many ways, post-World War II labor law in Japan began with the American model, and thus the Japanese experience should teach us something about the role of socio-cultural variables").

203. Freed & Polsby, *supra* note 202, at 1140-42.

In like manner, one might argue that the unique history and circumstances of the United States makes it ill-suited for ready comparisons with legal developments in other countries. Professor Estreicher cautions us against the wholesale adoption of a foreign employment scheme, pointing out that differences in language and sociocultural differences in foreign countries may create difficulties in transferring different models to the American context. Despite these difficulties, however, he suggests that we pursue comparative studies in order to "reexamine deeply embedded assumptions about our own employment law system."<sup>204</sup> I fully appreciate the potential problems associated with comparative approaches to domestic law. Nonetheless, the reluctance to take account of foreign models is frustrating when international models provide compelling alternatives.<sup>205</sup> It is fitting to have a more global vision of law so as to encourage American lawmakers to design the best possible system of workplace regulation. United States lawmakers would do well to keep abreast of employment law in Canada, for example. Of all the legal systems in the world, Canada's employment law is the most appropriate for American emulation.<sup>206</sup> Canada's similar cultural determinations about the meaning of work, justice, equality, and efficiency may assuage those who are concerned about problems of transplantability.

This is not to say that we should turn a blind eye to legal developments in countries other than Canada, for there is real value in putting into comparative context the uniquely American presumption of employment at-will. Compared to industrial models in other nations, the United States' regulatory scheme governing nonunionized employees' privileges economic or property interests over the social

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204. Estreicher, *supra* note 202, at 311.

205. In fact, as is the case with other aspects of U.S. labor law, the at-will rule has influenced employment law principles in Canada and elsewhere. With one important modification, Canadian law has also applied the at-will doctrine's durational basis for defining employment contracts. That is, an employment contract of indefinite duration is one which is terminable by either party. However, a notice requirement has been implemented, including monetary compensation in lieu of notice for terminations undertaken absent just-cause. In most Canadian provinces, a dismissed worker is entitled to one month notice or pay in lieu of notice for every year worked.

206. *See id.* (stating that similarities in legal culture and collective bargaining systems make Canada a promising comparison).

interests of continued employment. “[W]e seem to stand virtually alone among the nations of the western industrialized world in not providing general protection against unjust discharge for private-sector employees who either cannot or do not choose unionism.”<sup>207</sup> In contrast, international/foreign models that recognize the importance of protecting workers from unjust or arbitrary dismissals abound. For example, the International Labor Organization’s Termination of Employment Convention of 1982 recognizes that “[t]he employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.”<sup>208</sup> Mexico’s constitution and labor laws require employers to discharge only for “just-cause” regardless of whether workers belong to a labor union.<sup>209</sup> Germany’s dismissal statute is premised upon the notion that a person has a right to continued employment and that dismissals that are “socially unjustified” are legally void.<sup>210</sup> Great Britain’s system provides statutory protections from unfair dismissals for virtually every employee and requires employers to show legitimate reasons for dismissal, “such as lack of competence, misconduct or ‘some other substantial reason of a kind to justify’ dismissal.”<sup>211</sup> The Swedish system is

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207. *Id.*

208. 3 INT’L LABOUR ORG., INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1977-1995, at art. 4 (1982) (stating that only twenty-seven countries have ratified this convention, not including the United States or Canada); see also *id.* at art. 5 (outlining invalid reasons for termination such as union membership, seeking office or acting in the capacity of a workers representative, discrimination on the basis of race, color, sex, marital status, etc.).

209. This just-cause requirement is just one of several minimum conditions legally available to Mexican workers. However, as strong as Mexico’s worker protections are, they are often not enforced against unscrupulous business owners and multinational corporations that set up production in Mexico to take advantage of trade benefits and the government’s lax enforcement of labor laws. Therefore, any social value placed on job security by Mexican law is undermined by Mexico’s terrible record of enforcement.

210. See Summers, *Worker Dislocation*, *supra* note 61, at 1043 (discussing the fact that in Germany job security is provided for by statute and not by collective agreement); see also Estreicher, *supra* note 202, at 314-15 (explaining that “socially unwarranted dismissals . . . [are] not based on reasons connected with the person or [his or her conduct] . . . or on urgent social needs that preclude [his or her] continued employment”).

211. Estreicher, *supra* note 202, at 313; see also Summers, *Worker Disloca-*

based on the policy that employers have a social responsibility for employees, and that employees cannot be dismissed absent "objective cause."<sup>212</sup> Italy entitles terminated employees severance pay and advance notice of termination.<sup>213</sup> Finally, Japan's constitution declares the right to work a fundamental human right, thereby placing upon the government the burden of finding work for those willing to work.<sup>214</sup>

It would be refreshing if U.S. law were to come to reflect some of the principles enunciated in these foreign systems of employment relations.<sup>215</sup> With respect to the at-will doctrine, the ability to discharge an employee is, with some notable exceptions, unimpeded. Unfortunately, given the historical reluctance on the part of Congress and of the judiciary to cross national borders for models of law reform, it is doubtful that this will change despite regional labor law schemes, such as NAFTA, that offer a more integrated approach. Given the global integration of regional and world markets, the

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*tion, supra* note 61, at 1039 (stating that the United Kingdom has forgone the common-law doctrine of employment at-will in favor of a statutory system requiring fairness).

212. Summers, *Worker Dislocation, supra* note 61, at 1048 (stating that the statutory provisions in Sweden afford more protection to workers than "just-cause" clauses).

213. See Estreicher, *supra* note 202, at 316.

214. See Summers, *Worker Dislocation, supra* note 61, at 1053.

215. However, this is not to say that any one country has necessarily "gotten it right." Women the world over are more likely than men to suffer in poverty. Racial, ethnic, religious minorities, and indigenous people across the globe are subject to discrimination, oppression, and persecution. Nowhere have progressive labor protections brought these groups out of their subordinate roles in society. Mexico is a good example: the law on the books reflects a progressive vision of employment relations, yet in practice, workers there are worse off than those in countries where labor laws are not as substantively protective but are more widely enforced. For example, in Mexico, complaints about sexual harassment, pregnancy discrimination, and other forms of sex discrimination are often interpreted by government agencies in a way which perpetuates the discriminatory treatment of female workers. See HUMAN RIGHTS WATCH, MEXICO: A JOB OR YOUR RIGHTS: CONTINUED SEX DISCRIMINATION IN MEXICO'S MAQUILADORA SECTOR, available at <http://www.hrw.org/hrw/reports98/women2/maqui98d-01.htm> (last visited Sept. 22, 2000). Nevertheless, my purpose here is not to point out the myriad ways in which different countries' legal systems are designed and implemented so as to perpetuate oppression and subordination, but merely to suggest that there may be better legal models than our own for achieving fair and just employment relations.

United States would benefit from a comparative approach to its domestic labor and employment scheme. That is why it is incumbent on labor activists, academics, and lawyers to inform ourselves about foreign and international legal approaches, and to work toward reforming American employment regulation.

Canadian employment law, an obvious but neglected source of information for American courts, lawyers, and legal scholars, offers an interesting and compelling comparison. Given Canada's geographic proximity, its mutual economic dependency, its similar labor and immigration histories, and the centrality of the common law in the two countries, it would appear that Canadian and U.S. lawyers would benefit from more comprehensive study of each other's legal systems.<sup>216</sup> Canadian and United States labor and employment laws derive from the same common-law roots. Like the U.S. at-will doctrine, employment contracts in Canada are defined according to the duration of the employment contract. In both the United States and Canada, if an employment contract is one of *definite* duration, then an employer, public or private, in order to avoid a breach of contract claim must dismiss the employee only for cause.

Yet, the common law in the two countries relating to employment contracts of *indefinite* duration has taken divergent paths. Canada developed a system of employment law that favored giving notice to dismissed employees.<sup>217</sup> In Canada, an employment contract

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216. As compared to the United States Supreme Court, the Supreme Court of Canada has been much more willing to refer to international and foreign laws when engaging in constitutional interpretation. For example, Justice La Forest, a former justice on the Supreme Court of Canada, acknowledged the influence that foreign models have had on Charter interpretation, allowing the court to interpret equality issues from a multidimensional perspective. See Gérard La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211, 212-13 (1994) (explaining that Canada has a "sincere outward-looking interest in the views of other societies, especially those with traditions similar to ours").

217. Canadian labor law is regulated by each province individually, or in the case of federal employees, by the federal government. So, each jurisdiction is free to provide different degrees of protection. The Canadian government and two of its provinces have established legislation protecting nonunion workers from unjust or wrongful discharge. Typically, though, an employer must provide minimum notice or pay in lieu of notice. The length of notice is determined by custom, but failure to give proper notice constitutes wrongful dismissal. Findings of wrongful dismissal are generally addressed through

for an *indefinite* period—defining an at-will contract in the United States—is terminable without cause only upon *reasonable* notice, absent express contractual language to the contrary.<sup>218</sup> The reasonable notice requirement is to be implied as a contractual term in the absence of evidence to the contrary. Therefore, unlike the American rule, where the presumption is in favor of at-will employment, the Canadian rule favors a presumption of *reasonable* notice, rebuttable if the employment contract specifies, either expressly or impliedly, some other period of notice.<sup>219</sup> What constitutes reasonable notice varies depending on the circumstances of each case.<sup>220</sup>

In addition to the Canadian common-law, each province has its own legislation covering notice requirements in involuntary dismissals. Therefore, the requirement that an employer give notice to a discharged worker is derived from both Canadian common law and provincial legislation. For example, in Ontario, the Employment Standards Act<sup>221</sup> provides for mandatory minimum notice periods.<sup>222</sup>

judicial orders requiring payment, not reinstatement. *See supra* note 189 and accompanying text.

218. *See* Carter v. Bell & Sons Ltd., [1936] O.R. 290 (Can.).

219. *See* Machtinger v. HOJ Indus. Ltd., [1992] S.C.R. 986, 987 (Can.); *see also* CHRISTIE, *supra* note 198, at 347 (stating that almost all Canadian jurisdictions have a minimum notice period); M.R. FREEDLAND, THE CONTRACT OF EMPLOYMENT 153 (1976) (“the pattern of contract now generally accepted and applied by the courts in the absence of evidence to the contrary is one of employment for an indefinite period terminable by either party upon reasonable notice, but only upon reasonable notice”).

220. *See* Bardal v. Globe & Mail Ltd., [1960] D.L.R.2d 140 (Can.). *Bardal* holds that there can be no catalogue laid down as to what is reasonable notice in any particular case. According to the court, the “[r]easonableness of the notice must be determined in each case by reference to the character of the employment, the length of service, the age of the employee and the availability of similar employment, having regard to the experience, training and qualifications of the servant.” *Id.*

221. Employment Standards Act, R.S.O., ch. E-14 (1990) (Can.).

222. Section 57(14) states that

[w]here the employment of an employee is terminated contrary to this section, (a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his or her regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which the employee is entitled.

*Id.* § 57(14). Section 57(1) states:

No employer shall terminate the employment of an employee who has

In general, notice of termination will be given to workers who have been employed for three months or more. Notice is not required in most jurisdictions, however, for employees who have been laid off temporarily, or for those who have been dismissed for cause. Interestingly, under the common law, professional and managerial employees usually command longer notice periods than workers with fewer skills or responsibility.<sup>223</sup> Consequently, to the extent that employment standards legislation departs from this common-law norm, it has the effect of expanding protections unavailable to blue-collar or low-skilled workers under the common law. Nonetheless, the notice periods under the provincial acts may be and often are shorter than those available under the common law where flexibility has been built into the definition of "reasonable." Statutory notice provisions are minimum requirements only, allowing for the common law presumption of "reasonable notice" to be incorporated into the Act through judicial interpretation.<sup>224</sup> As a consequence, interesting

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been employed for three months or more unless the employer gives, (a) one weeks notice in writing to the employee if his or her period of employment is less than one year; (b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years; (c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years; (d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years; (e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years; (f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years; (g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years; (h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more, and such notice has expired.

*See id.* § 57(1).

223. *See* HUMAN RES. DEV. CAN., TERMINATION OF EMPLOYMENT, available at <http://labour-travail.hrdc-drhc.gc.ca/policy/leg/e/stand11-e1.html> (last visited Sept. 22, 2000).

224. [T]he minimum notice periods set out in the Act do not operate to displace the presumption at common law of reasonable notice. Section 6 of the Act states that the Act does not affect the right of an employee to seek a civil remedy from his or her employer. Section 4(2) states that a "right, benefit, term or condition of employment under a contract" that provides a greater benefit to an employee than the standards set out in the Act shall prevail over the standards in the Act. I have no



questions are raised about the manner in which the law should treat employment contracts that provide for notice periods shorter than the statutory minimum. Should effect be given to the parties' intentions, to provincial legislation, or to common law norms?

These were the questions raised in *Machtinger v. HOJ Industries*,<sup>225</sup> in which the Supreme Court of Canada held that where an employment contract stipulates a period of notice less than that required by the Ontario Act, an employee who is discharged without cause is entitled to reasonable notice of termination pursuant to common law, not the shorter notice requirement contained in the Act.<sup>226</sup> The case involved the involuntary discharge of two employees who had entered into written agreements with their employers.<sup>227</sup> The agreements provided for zero and two weeks notice for each employee respectively.<sup>228</sup> The Ontario Employment Standards Act would have required at least four weeks notice for each,<sup>229</sup> while the common law would have required "reasonable" notice—in this case seven or more months.<sup>230</sup>

Interestingly, the court chose to make the employee's perspective central to its analysis of the problem. The court acknowledged the importance of job termination and expressed a concern for the "economic and psychological" welfare of employees:

The law governing termination of employment is obviously of significant importance to an individual worker, for the degree of job security which he is assured depends upon the ease with which the law allows his employer to terminate his employment. Discharge has serious financial

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difficulty in concluding that the common law presumption of reasonable notice is a "benefit", [sic] which, if the period of notice required by the common law is greater than that required by the Act, will, if otherwise applicable, prevail over the notice period set out in the Act. Any possible doubt on this question is dispelled by s. 4(1) of the Act, which expressly deems the employment standards set out in the Act to be minimum requirements only.

*Machtinger v. HOJ Indus. Ltd.*, [1992] S.C.R. 986, 999-1000 (Can.).

225. [1992] S.C.R. 986 (Can.).

226. *See id.* at 1004.

227. *See id.* at 986, 991.

228. *See id.* at 1007.

229. *See* Employment Standards Act, R.S.O., ch. 137, § 40(1)(c) (1980) (Can.).

230. *See Machtinger*, [1992] S.C.R. at 1007.

ramifications for the individual in that it puts an end to remuneration, as well as to less quantifiable economic benefits such as accrued seniority. Discharge can have ongoing financial effects, as well, for the reason given for termination (if any) may affect accessibility to future jobs as well as entitlement to government benefits such as unemployment insurance. The psychological effects of discharge are also important, because of the disruption in the individual's life caused by seeking new employment and establishing himself in a new environment.<sup>231</sup>

This approach accomplishes several things: it makes clear that the purpose behind regulation of the employment relationship is to protect workers; it acknowledges that the manner in which employment comes to an end affects the worker's economic and psychological interests; and it recognizes the relative asymmetry in bargaining power between employer and employee. This last point is crucial in understanding the different theoretical baselines in Canadian and U.S. employment regulation. Where the at-will doctrine presumes equality in bargain, the Canadian notice requirement presumes *inequality* in freedom to bargain between employer and employee. As the courts stated,

The objective of the Act is to protect the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination . . . . The harm which the Act seeks to remedy is that individual employees, and in particular non-unionized employees, *are often in an unequal bargaining position in relation to their employers.*<sup>232</sup>

Moreover, "most individual employees are unaware of their legal rights, or unwilling or unable to go to the trouble and expense of having them vindicated. Employers can rely on the fact that many employees will not challenge contractual notice provisions which are in fact contrary to employment standards legislation."<sup>233</sup>

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231. *Id.* at 991 (quoting Katherine Swinton, *Contract Law and the Employment Relationship: The Proper Forum for Reform*, in *STUDIES IN CONTRACT LAW* 357, 360-61 (Barry J. Reiter & John Swan eds., 1980)).

232. *Id.* at 1003 (emphasis added).

233. *Id.* at 1004.

This approach is quite different from the approach taken in the United States. The employment at-will doctrine requires employee and employer to be treated as equals in their decisions to end the employment relationship. However, the Supreme Court of Canada suggests that, for the most part, employees are not "equal" to employers in terms of bargaining strength and therefore should be spared the burden of establishing whether there has been an unjust separation. In other words, the Canadian default rule presupposes *inequality* in bargaining power and requires employers to compensate discharged workers. Accordingly, the Canadian Supreme Court's interpretation of employment contracts of indefinite duration provides more protection for workers than does the at-will doctrine. However, is the Canadian approach fairer? In order to answer this question, one must grapple with different conceptions of equality, namely, how are employer and employee to be treated in order to treat them equally? In the United States, the at-will doctrine requires similarity in treatment: employers and employees must be given the same opportunity to quit the relationship at any time, without reason or notice. Canadian equality jurisprudence provides a different model, one which requires an analysis of the employment relationship based on principles of substantive equality.<sup>234</sup>

The Canadian Supreme Court radically departs from the U.S. Supreme Court's approach to "equality" and has the potential to achieve the appropriate balance between the interests of employers and employees. The at-will doctrine reinforces existing power imbalances by superimposing formal equality onto a relationship that is substantively unequal. In contrast, the Canadian approach has a redistributive purpose, one that explicitly requires notice only from employers. No such requirement is imposed upon workers.<sup>235</sup> In order to quell fears by employers that employees will leave as soon as

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234. This approach is not uniquely Canadian. In fact, the substantive equality approach has been advocated by several prominent American legal academics. For example, Professor Neil Gotanda argues that the Supreme Court has lost sight of the context or "social reality" in which racial classification is analyzed. *See* Gotanda, *supra* note 170.

235. Only after an employer has given the employee notice must the employee provide some notice if he/she intends to quit before the notice period has expired. *See, e.g.*, Employment Standards Act, R.S.O., ch. E-14, § 57(15) (1990) (Can.).

they receive notice, the Ontario Employment Standards Act, for example, requires employees to provide notice only after having been given notice of termination.<sup>236</sup> This approach clearly recognizes that a formally equal treatment of employer and employee would offend the very equality principles that the Supreme Court of Canada has so painstakingly set out to distinguish itself from the American formal equality approach.

In its first major decision interpreting the equality provisions of the Canadian Charter of Rights and Freedoms,<sup>237</sup> the Supreme Court of Canada, in *Andrews v. Law Society of British Columbia*,<sup>238</sup> examined the validity of an analytical approach that defines conventional equality law as stemming from a theory of formal equality originating from the Aristotelian concept that “[e]quality consists in the same treatment of similar persons.”<sup>239</sup>

Under the influence of Aristotle, equality as such in law has come to mean treating likes alike and unalikes unlike. If one is the same, one is to be treated the same; if one is different, one is to be treated differently. The concept is

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236. The Act states:

An employee to whom notice has been given under subsection (2) shall not terminate his or her employment until after the expiry of, (a) one week notice in writing to the employer if the period of employment is less than two years; or (b) two weeks notice in writing to the employer if the period of employment is two years or more, unless the employer has been guilty of a breach of the terms and conditions of employment.

*Id.*

237. The equality guarantees of the Charter are contained in section 15:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged . . . because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15.

238. [1989] S.C.R. 143 (Can.).

239. ARISTOTLE'S POLITICS 307 (Benjamin Jowett trans., 1943).

empirical (how one *ought* to be treated is based on the way one *is*) . . . .<sup>240</sup>

In striking down provincial legislation that required Canadian citizenship for entry into the legal profession, the Supreme Court in *Andrews* recognized that in order to treat different people equally, the law sometimes had to treat them differently. The court stated that the Aristotelian principle of equality was “seriously deficient”<sup>241</sup> and that “mere equality of application to similarly situated groups or individuals does not afford a realistic test for violation of equality rights.”<sup>242</sup> Further, the court stated that not every distinction made by law would constitute discrimination as contemplated by the Charter of Rights and Freedoms. Discrimination was defined as

a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages to other members of society.<sup>243</sup>

Of great significance is that the focus of the inquiry, rights of citizenship, was not a ground that was enumerated in the Charter. The court had no problem interpreting the significance of this right since citizenship was considered to be *analogous* to the grounds enumerated in the Charter. The court reasoned that, “[t]he grounds of discrimination enumerated in s. 15(1) are not exhaustive. Grounds *analogous* to those enumerated are also covered and the section may be even broader than that . . . .”<sup>244</sup> The “analogous grounds” doctrine has enabled the court to expand its constitutional reach beyond what is possible in the United States. Moreover, although the *Andrews* decision discussed equality in the context of a discrimination case, the court has been quite willing to discuss equality in a number of other contexts, adding support to the claim that equality principles

240. CATHARINE A. MACKINNON, *SEX EQUALITY* 4 (1999).

241. *Andrews*, [1989] S.C.R. at 166 (McIntyre, J., dissenting in part).

242. *Id.* at 167.

243. *Id.* at 174.

244. *Id.* at 145 (emphasis added).

must be elaborated and developed in judicial application of employment at-will.<sup>245</sup>

Ironically, the closest equivalent to American-style at-will employment in Canadian law is found in regulation of certain civil service positions, not in regulation of the private sector workforce. Those who are employed "at the pleasure" of the Crown, as defined in federal and provincial legislation, are not afforded common-law or legislative notice protections against unjustified dismissal. The result is that some nonunionized government employees are worse off than their unionized or private sector counterparts. Interestingly, this differential treatment has been attacked on the theory that the equality provisions in the Charter were meant to protect against differential treatment based on *employment status*. In *Leyte v. Newfoundland*,<sup>246</sup> the Supreme Court of Newfoundland took its cue from Supreme Court of Canada equality jurisprudence and held that legislation allowing for the hiring of civil servants at pleasure was unconstitutional since it violated employees' equality rights.<sup>247</sup>

Over a twenty-eight year period, the plaintiff in *Leyte* had held several positions with the Ministry of Social Services.<sup>248</sup> At the time of his dismissal he was district manager in one of the Ministry's branch offices.<sup>249</sup> He was given reasons for his dismissal even though he was employed "at pleasure," which meant that the defendant need not provide notice or reasons for dismissal.<sup>250</sup> He argued that as a result of his dismissal, the legislation upon which the Ministry had relied had allowed it to allege improprieties on the part of the plaintiff, "eradicat[ed]" his employability, denied him severance benefits, and restricted his opportunity to obtain pension benefits.<sup>251</sup> In addition, he argued that the at-pleasure doctrine was "antiquated,

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245. See also *Machtiger v. HOJ Indus. Ltd.*, [1992] S.C.R. 986, 1002-05 (Can.) (discussing policy considerations including equality principles in employment contracts).

246. [1997] D.L.R.4th 739 (Can.), *overruled on different grounds by Newfoundland (Minister of Social Services) v. Leyte*, [1998] C.R.R.2d 114 (Can.).

247. See *id.* at 762.

248. See *id.* at 742.

249. See *id.*

250. See *id.*

251. See *id.* at 745.

anachronistic and unfair"<sup>252</sup> and that it violated the equality provisions of the Charter. The Newfoundland Supreme Court agreed. It held that the characteristic of being employed at pleasure constitutes a ground of discrimination within the ambit and purview of the equality provisions of the Charter.

[D]iscrimination on the basis of employment at pleasure affects the essential dignity and self-esteem or worth of an individual in the same way as do other recognized grounds of distinction which violate recognized standards of human rights. It affects an individual's right to bargain freely with the employer in an effort to ameliorate working conditions and places him or her completely under the dominance and control of the employer, taking away the right to proof of just cause or due notice. The rights given to others or negotiated by others working with the same employer is denied to the person employed "at pleasure."<sup>253</sup>

The court in *Leyte* accomplished at least three things. It held that employment status constitutes a ground analogous to those enumerated in the equality provisions of the Charter; it elevated the just-cause and notice requirement to the level of a "right"; and it held that the at-pleasure delineation constitutes discrimination under the Charter.<sup>254</sup>

These points are important. *Leyte* and *Machtinger* recognize the inherent inequality in bargaining power between employee and employer, elevate the issue of employment status to constitutional dimensions, provide an alternative model and rationale for replacing employment at-will, encourage us to see employment in the context of a history of inequality between parties, and urge the state to take a more active role in protecting employees, thereby "casting the state in the benevolent role of attempting to ensure a society in which the vulnerable as well as the powerful can be free."<sup>255</sup> Moreover, the cases offer a different view of governmental intrusion, one that dismisses the viewpoint that any regulation is an exercise of illegitimate

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252. *Id.*

253. *Id.* at 754.

254. *See id.* at 762.

255. Moran, *supra* note 41, at 1486.

favoritism, and argues rather that governmental action is necessary to assure respect for human dignity and equality.

Examining the way in which Canadian courts treat employment contracts of indefinite duration is fruitful. Canada's notice requirements confer upon Canadian workers a substantial benefit not enjoyed by their counterparts in the United States. Not only does Canada follow a common-law tradition of providing notice to employees with indefinite term contracts, but provincial legislation adds to that protection by mandating minimum notice requirements. The fact that the Canadian and U.S. common-law of employment relations developed in different ways is interesting. The existence of an alternative approach in a society very much like the United States, with a similar history, culture, economic system, and common-law tradition, is a strong indication that there is nothing inevitable about the employment at-will doctrine. To the extent that at-will dismissals may have a disproportionate impact on people of color and women, the Canadian requirement of notice provides at least some economic compensation for dismissals that are not otherwise recognized by the crude tools available for discerning discrimination in American anti-discrimination law.

#### IX. EFFICIENCY, RATIONALITY, FUNGIBILITY, AND JUST-CAUSE: THE CASE FOR MANDATORY NOTICE

What then should be the law's objective in regulating the employment relationship? Much debate has arisen with respect to that question. On one side are those who argue for minimal legal interference in the private relationship between employer and employee; on the other side are those who believe that state intervention is necessary to protect employees from labor markets that are inhospitable to worker interests like job security.<sup>256</sup>

Arguments in favor of the at-will rule are often found in the law and economics literature exemplified in the work of Richard Epstein,<sup>257</sup> Richard Posner,<sup>258</sup> and others.<sup>259</sup> Lamentably, the

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256. See Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 *FORDHAM L. REV.* 1082, 1108 (1984) (emphasizing that the contract of employment should be the central focus of labor law).

257. Perhaps the best known proponent of the law and economics approach



emergence of the law and economics literature, with its emphasis on the economic basis of employment at-will, has obscured the more fundamental human and personal interests at stake in the loss of employment. Nonetheless, the law and economics movement has had an impact on judicial opinion in this area and therefore should be addressed. Much of the law and economics scholarship claims that employers will not dismiss good workers without good reason because to do so is inefficient. The costs associated with finding, selecting, and training replacement workers are said to deter discharges based upon irrational factors or upon the personal whims of managers. For example, Epstein argues that workers are not fungible and that unjustified dismissal is therefore inefficient:

The reason why these contracts at will are effective is precisely that the employer must always pay an implicit price when he exercises his right to fire. He no longer has the right to compel the employee's service, as the employee can enter the market to find another job. The costs of the employer's decision therefore are borne in large measure by the employer himself, creating an implicit system of co-insurance between employer and employee against employer abuse. Nor, it must be stressed, are the costs to the employer light. It is true that employees who work within a firm acquire specific knowledge about its operation and

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to employment regulation is Richard Epstein. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 59-78 (1992) (arguing for the elimination of antidiscrimination laws because some discrimination is rational and can result in more efficient work places); Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 *YALE L.J.* 1357, 1357 (1983) (arguing that labor legislation should be abandoned in favor of common law); Epstein, *supra* note 196, at 947 (asserting a defense of the at-will doctrine).

258. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 358-59 (5th ed. 1998) (arguing, inter alia, that job security is not really efficient).

259. See, e.g., Freed & Polsby, *supra* note 202, at 1097-98 (arguing that despite some erosion the at-will rule still applies); Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 *U. PA. L. REV.* 1913, 1915-17 (1996) (comparing the "norm of discharge" for cause with the legal rule "employment at will" and considering whether society should enforce the norm or the law); Verkerke, *supra* note 16, at 838 (advocating a reaffirmation of the at-will doctrine by the courts and abandoning termination for good cause).

upon dismissal can transfer only a portion of that knowledge to the new job. Nonetheless, the problem is roughly symmetrical, as the employer must find, select, and train a replacement worker who may not turn out to be better than the first employee. Workers are not fungible, and sorting them out may be difficult: resumes can be misleading, if not fraudulent; references may be only too eager to unload an unsuitable employee; training is expensive; and the new worker may not like the job or may be forced to move out of town. In any case, firms must bear the costs of voluntary turnover by workers who quit, which gives them a frequent reminder of the need to avoid self-inflicted losses. The institutional stability of employment contracts at will can now be explained in part by their legal fragility. The right to fire is exercised only infrequently because the threat of firing is effective.<sup>260</sup>

If one assesses Epstein's argument from the perspective of people of color and women, then the fallacy of Epstein's assertions, that "workers are not fungible" and that the cost of training effectively deters irrational firings, is made apparent. One must look at the entire labor market to see where women and minorities are concentrated. Fungibility is a function of the type of work performed. Skilled and semiskilled positions involve higher training costs than low-skilled positions. It is well documented that White men are concentrated in the skilled and semiskilled jobs and that women and men of color are disproportionately represented in the unskilled areas. In the jobs that are likely to be held by women and minorities, little training is provided and the cost of replacing a fired worker is low. Therefore, it is precisely in jobs with high concentrations of men of color and women that employees are indeed fungible. For these vulnerable workers, at-will employment does not deter unjustified dismissals.<sup>261</sup>

There is also the rather circular suggestion in the law and economics literature that suggests that at-will employment is efficient

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260. Epstein, *supra* note 196, at 973-74.

261. See Cornell, *supra* note 4, at 1616 (arguing that with respect to unskilled positions, employers are not deterred from abusing the employment at-will doctrine).

because it is “the usual form of labor contract in the United States.”<sup>262</sup> Its prevalence is taken as evidence of its mutual desirability since both employees and employers freely assent to at-will arrangements. Thus, as Richard Posner suggests, most workers would not benefit from a system that required the employer to provide good reasons for discharge:

[I]f the requirement were optimal it would be negotiated voluntarily. These are not the . . . information problems that might defeat transactions over workplace safety . . . for discharges are not such rare events that workers can't be expected to evaluate the risk rationally. If such a requirement is not negotiated voluntarily, presumably this is because the cost to the employer of showing good cause for getting rid of an incompetent employee is greater than the benefit to the worker of being thus insured against unjust discharge beyond the insurance provided by his firm-specific human capital. The extra cost of an employment contract is a labor cost and will thus reduce the amount that the employer . . . [can] pay in wages, in just the same way that increasing the employer's social security tax will reduce the wage the employer is willing to pay.<sup>263</sup>

Thus, the status quo becomes the benchmark measure of efficiency. Even those who defend the at-will rule would concede, however, that if employees do suffer from information deficits at the time of employment, then they are not likely to try to negotiate for better contractual terms.<sup>264</sup> Therefore, the fact that at-will contracts are prevalent does not necessarily establish efficiency. Professor Pauline

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262. POSNER, *supra* note 258, at 358 (arguing that “[a]nother bit of evidence that job security is not really efficient is that outside of the unionized sector . . . and government employment . . . employment at will is the usual form of labor contract in the United States”); *see also* Epstein, *supra* note 196, at 955 (stating that “employers and employees know the footing on which they have contracted: the phrase ‘at will’ is two words long and has the convenient virtue of meaning just what it says, no more and no less”).

263. POSNER, *supra* note 258, at 359.

264. *See* J. Hoult Verkerke, *Employment Contract Law*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 47, 52 (Peter Newman ed., 1998) (stating that “[i]f employees are so poorly informed about the legal rules governing employment terminations, then it is much harder to argue that they will accurately determine the value of contractual just cause protection”).

Kim conducted two important empirical studies of workers' knowledge of their legal rights. Kim demonstrated that workers typically but "erroneously believe that the law affords them protection akin to a just-cause contract, when in fact, they can be dismissed" without notice or explanation.<sup>265</sup> The widespread misunderstanding among employees of their legal rights undermines the law and economics defense of the at-will rule that assumes employers and employees understand the nature of the at-will presumption.<sup>266</sup> Interestingly, Kim found that

virtually none of the factors that would be predicted, under a rational actor model, to influence workers' legal knowledge proved significant. . . . [F]actors such as past union representation, prior responsibility for hiring and firing other employees, the experience of being fired, and general work force experience did not appear to influence the level of a respondent's legal knowledge.<sup>267</sup>

Perhaps even more interesting, in the context of my argument about the at-will rule's impact on disadvantaged groups, is Professor Kim's further finding that Blacks are more likely than Whites to

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265. Kim, *supra* note 22, at 447; see also Pauline T. Kim, *Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997) (evidencing the fact that workers are unaware of the legal rules applicable to the employment relationship).

266. See Kim, *supra* note 22, at 450. Kim explains that defenders of the at-will rule erroneously believe that

the [at-will] presumption merely operates as a default term, filling a contractual gap in the face of the parties' silence. Thus, they take the prevalence of at-will employment in the real world as evidence of its desirability, noting that both employers and employees freely assent to these arrangements in the vast majority of cases.

*Id.*

267. *Id.* at 452. Kim explains that the consistency of the mistaken understanding of the law's protections may be explained by the theory that

workers fail to distinguish norms and law. Holding strong beliefs about fair play in the context of the employment relationship, they mistakenly assume that these fairness norms governing employee discharges coincide with legally enforceable rules. This confusion of norms and law accounts for both the content and the persistence of workers' mistaken beliefs about the law.

*Id.*

think that they have greater job protection than they do.<sup>268</sup> This is of fundamental importance in a society in which African Americans as a group are more likely than Whites to be fired from employment. Therefore, it is reasonable to assume that African Americans are even less likely than Whites to try to negotiate over the terms of employment and bargain in their own best interests. The result is a systemic denial of the right to choose the type of employment relationship that safeguards them from unjust dismissal.

Professors Epstein, Verkerke, Posner, and others have argued that, for the most part, at-will employment reflects the parties' desires. That is, since there are no real impediments to vigorously negotiating out of the at-will presumption, then both employer and employee enter into the employment relationship with the intention of it being at-will. Aside from Professor Kim's compelling evidence that employees lack full knowledge about the legal rules governing employment, there are other reasons that this assumption may not necessarily be valid. As Professor Issacharoff explains, "[t]o a large extent, then, whether the at-will rule evidences the desire of bargaining parties must turn on the absence of structural barriers to robust negotiation."<sup>269</sup> In the face of structural obstacles to "robust negotiation," the intention of the parties may not be discernable from the fact that they "choose" the at-will model. Professor Issacharoff offers an apt analogy:

[T]he hiring stage is most like a first date between a polygamist and a monogamist. The employer has entered into a number of contemporaneous courtships such that there is a diversification of the risk associated with any individual affair. By contrast, the employee in a stable working relationship is restricted to faithful monogamy; . . . [t]he employer is protected against employee shirking not only by the capacity to discharge any particular employee, but by the diminution of the consequences of any individual shirking in a broader pool of employees. By contrast, the employee's decision to accept one primary employment

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268. See *id.* at 476-77 (discussing how race was a significant factor in how one understood the at-will rule).

269. Samuel Issacharoff, *Contracting For Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1794 (1996).

forecloses the ability to earn service credits with other employers. Moreover, the employer generally is able to dictate terms of employment and has unilateral access to information about the long-term financial condition of the firm. The employee has only a limited capacity to directly address her concern about long-term prospects with the firm without signalling [sic] concern that she may be a laggard.<sup>270</sup>

Several scholars have convincingly argued that replacing the at-will presumption with a just-cause default rule is more fair and therefore desirable. Justifications for a just-cause standard fall along a spectrum, but most involve the understanding that so long as employees perform their duties satisfactorily, they should not be dismissed unless there is just cause for termination.<sup>271</sup> The importance of job security is illustrated by the fact that virtually all collective bargaining agreements provide for some sort of protection against arbitrary dismissals, and even when they do not, judges have been willing to read just-cause principles into the agreement.

From the perspective of the employer, a just-cause standard in employment relations may actually safeguard companies from the personal biases and whims of its managers. It may be that some of those in positions to dismiss employees are not always motivated by concern for the company or the well-being of other employees. Retention of good workers ultimately benefits the company. Requiring managers to justify the termination would discourage them from dismissing good workers for irrational reasons without unduly hampering the company's ability to rid itself of poor employees. Given the time, expense, and emotional toil of bringing an action against a company, the hope is that a poorly performing employee would recognize her culpability in the discharge and end the matter without engaging in time consuming arbitration or expensive litigation. On the other hand, a company may be more likely to settle a claim if it

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270. *Id.* at 1795.

271. *See* Abrams & Nolan, *supra* note 27, at 601 (explaining that just cause "embodies the idea that the employee is entitled to continued employment, provided he attends work regularly, obeys work rules, performs at some reasonable level of quality and quantity, and refrains from interfering with his employer's business by his activities on or off the job").

were discovered that the firing was done unfairly. Undoubtedly, some employees will use the administrative or judicial system to bring vexatious suits for wrongful dismissal, but many of these suits will be settled early on by attorneys who determine that the suit lacks merit or through other mechanisms of dispute resolution. Given the inherently unequal positions of employee and employer, the greater injustice would be to deprive a good worker of the opportunity to defend her position because of the expense of bringing an action or lack of informational and economic resources.

In contrast to those who see the employment relationship as fundamentally an economic one, I believe that the law must provide protection against unjust or arbitrary termination in recognition of the personal and psychological significance of work for the employee. As Professor Cornell has explained,

[t]o force the employer to give me reasons for my termination is to force him or her to recognize me as a human being whose identity is fundamentally tied up with my work. The personal humiliation caused by individual firing is well-documented. An essential aspect of the humiliation is one's feelings of being erased as an individual.<sup>272</sup>

Requiring reasons, therefore, does something to address the psychic damage of the dismissal.<sup>273</sup> When the dismissal is ultimately precipitated by the employee's race or gender, then a just-cause requirement provides a level of protection to working people of color and women who might otherwise be left without redress.

Having outlined the arguments for a "just-cause" standard, the argument set forth in this Article differs from these traditional arguments.<sup>274</sup> Placing the experience of groups disadvantaged by race or

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272. Cornell, *supra* note 4, at 1620.

273. According to Cornell:

Of course, to merely give reasons for the firing cannot completely take away that harm. What it does is recognize just how important work is to personality. It demands that a firing be seen as the serious assault on personality that it is. To impose this harm without reasons is to belittle the damage done.

*Id.* at 1614-15.

274. See Abrams & Nolan, *supra* note 27; Estlund, *supra* note 17, at 1667-68 (stating that at-will employment has a large disparity in the amount of bargaining power between the parties); Kim, *supra* note 22, at 506-07 (basing her

sex at the center of the discussion, I suggest that since the rule erroneously presumes equality in employer and employee bargaining strength, since people of color are more likely than Whites to be involuntarily released from their jobs, since women are more likely than men to be employed at-will, and since the harsh effects of the rule are reinforced by the failure of antidiscrimination laws to address most instances of employment discrimination, the at-will rule must be replaced by a default rule that requires the employer to provide notice or pay in lieu of notice before discharging an employee. This Article disagrees with those who suggest that a just-cause standard is sufficiently protective of employee interests. A just-cause standard has not provided sufficient protection against involuntary separations for African American and indigenous workers in the federal sector. Moreover, after the *Hicks*<sup>275</sup> decision, defensible reasons for discharging an employee are almost always available to an employer. Thus, it is not clear how requiring just-cause for discharge will ultimately protect workers who have been discriminated against in ways not detectable by the law.

The courts' continued adherence to the at-will rule reflects assumptions that employees and employers are equal in bargaining power and that employers in general do not make irrational or inefficient employment decisions or discriminatory decisions based on classifications such as race, sex, or sexual orientation. If this were so, then perhaps a system that treats both employer and employee equally would not be problematic. Making these assumptions, and given my suggestion that discharge must be preceded by a period of notice, it follows that an employee would likewise be obligated to give notice to an employer upon the employee's voluntary termination of employment. However, if one "de-marginalizes" the employment experience of people of color and women and places these at the center of one's analysis, one sees that there is widespread discrimination with which antidiscrimination law is ill-equipped to deal. Consequently, abandoning the at-will doctrine in favor of a requirement that employers provide notice would alleviate at least some of

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conclusion on workers' understandings of what the law should be); McGinley, *supra* note 27; Schwab, *supra* note 27; Summers, *Worker Dislocation*, *supra* note 61.

275. *St. Mary's Honor Court v. Hicks*, 509 U.S. 502 (1993).



the harsh consequences of at-will employment. If this is the case, then a theory of employment that treats the decisions of employer and employee the same is suspect. In other words, symmetrical treatment of employer and employee decisions to abandon the employment relationship would perpetuate inequality. Therefore, only the employer should be required to provide notice. Many models or approaches are available to state legislatures, but at the very least, a notice requirement is warranted if only to provide marginally more monetary protection against discriminatory dismissals of workers of color.

An elaboration of the precise workings of a notice system must by necessity be left for legislatures to determine. However, using Canadian legislation as a model, it should be recommended that for every month of service, the employee is due a legislatively determined period of notice or amount of pay in lieu of notice—for example, one month's notice for each year of employment. Since subordinated groups are less likely to be long-term employees entitled to substantial periods of notice, the amount of notice should perhaps be linked to factors in addition to length of employment. For example, courts should offer protection to early career workers who have incurred some substantial cost in accepting a new job.<sup>276</sup> This requirement would extend to all public and private employers employing a certain minimum number of employees—for example, fifteen employees as per Title VII.<sup>277</sup> This minimum number requirement protects very small businesses. In order not to adversely effect "start-up"<sup>278</sup> companies, the requirement of notice may kick in after a certain amount of time, for example, after six months of continuous employment. Employers would still be free to dismiss workers for good cause, and what constitutes good cause should be legislatively defined. It might be objected that requiring notice in cases where there is no cause for discharge may itself create an incentive for employers to lie about the reasons for discharge. If an employer knows that it is liable to pay wages in lieu of notice any time it

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276. THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW: EMPLOYMENT CONTRACT LAW 49 (Peter Newman ed., 1998).

277. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 to -17 (1994).

278. See Alan Hyde, *Employment Law After the Death of Employment*, U. PA. J. LAB. & EMP. L., Spring 1998, at 99, 108 (defining start-up companies).

discharges an employee without reason, then it will be beneficial for the employer to fabricate reasons for the discharge so as to avoid the requirement of paying wages in lieu of notice. To counter this objection, the notice requirement must be accompanied by a mechanism that curbs the employer's incentive to manufacture reasons for dismissal. Therefore, an administrative system that allows employees to complain about an employer's failure to provide sufficient notice would have to place on the employer the burden of establishing reasons for dismissal.<sup>279</sup>

This Article would not go so far as to require employers to justify the discharge of an employee *before* an employee can be discharged.<sup>280</sup> Perhaps requiring an employer to submit reasons to a government agency using a standard form or requiring employers to keep on file the reasons for discharge would, though only a minor burden on the employer, nonetheless discourage fabrication of reasons for discharge. The state departments of labor would then have a means of studying discharge rates providing relevant data on dismissals. Individual acts of discrimination might not be detected, but a pattern of dismissals that affects groups on the basis of racial or gender characterizations might be found. There are some models for these record-keeping requirements that can be assessed and fashioned for this particular purpose. Much of this information is already required by state and federal employment statutes.<sup>281</sup> The ultimate goal of such a system, however, is not to punish employers, but to protect workers from frivolous or discriminatory dismissals.

Obviously, a legislative scheme would have to be developed in more detail than can be offered in this Article. However, several factors must be addressed in any legislative proposal requiring employers to provide notice. First, under this scheme, the workplace would be subject to more governmental scrutiny, and employers will resist this. However, providing notice to employees may in fact

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279. See Issacharoff, *supra* note 269, at 1808 (arguing for a no-fault severance scheme in which an administrative tribunal would decide whether the employer meets its burden of establishing the grounds for termination that "justify the discharge based on incompetence or shirking").

280. See *id.* at 1809 (stating that this requirement exists in some European countries).

281. For example, under the FLSA, Title VII, and OSHA, employers are required to keep records of wages and hours, hazardous conditions, etc.

result in fewer discrimination charges being brought against employers, thus reducing employers' cost of defending themselves against discrimination charges. In fact, law and economic scholars who are generally in favor of preserving at-will employment may find a mandatory notice scheme desirable. As Dianne Avery has explained, even though government intervention in the market is generally anathema to law and economics scholars, [mandatory notice] might have some appeal to them. . . . For example, a mandatory notice rule would have certain efficiencies because it would reduce transaction costs in bargaining for severance pay. Because the psychological and other personal harms of involuntary separation are so difficult to quantify, and are generally not taken into account in discharges, a mandatory notice rule would internalize these costs in a regular and predictable way that could be passed on to consumers.<sup>282</sup>

Second, the relationship between mandatory notice and state unemployment schemes would have to be examined. For the most part, unemployment legislation is not designed to fully compensate workers. A notice requirement would supplement the existing unemployment scheme. Again, Canada may provide an appropriate model since its unemployment scheme was developed alongside its common-law notice requirement. Third, employers' right to discharge for shirking or misconduct must be preserved. A system that would require employers to retain poor workers is obviously not desirable, but neither is the current system that allows for the discriminatory discharge of workers of color under the guise of employment at-will. And finally, there is a danger that antidiscrimination law might be undermined if discharged employees fail to challenge discriminatory or mixed motive discharges because they are mollified by the notice or pay that they receive.<sup>283</sup> One would hope, however, that those who are victims of unlawful discrimination are sufficiently motivated to bring actions. In fact, since income has much to do with whether individuals file discrimination charges in the first place, it may be that with the money they receive from mandatory notice periods,

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282. Letter from Dianne Avery, *supra* note 195, at 4.

283. *See id.* at 3.

discharged employees are more financially capable of pursuing discrimination charges under a mandatory notice scheme. Clearly, a mandatory notice scheme must never be designed to replace our antidiscrimination laws. What is needed, however, is a simultaneous strengthening of antidiscrimination laws to identify and address discriminatory practices that have so far eluded enforcement.

### X. CONCLUSION

The employment at-will doctrine is part of a legal system which tolerates overconsumption by the wealthy and dire poverty<sup>284</sup> even among working men and women,<sup>285</sup> betraying the American promise of social equality.<sup>286</sup> In the United States, conspicuous inequality is the norm.<sup>287</sup> Inequality between rich and poor,<sup>288</sup> men and women,

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284. See A PROFILE OF THE WORKING POOR, *supra* note 113 (“In 1996, 36.5 million persons, 13.7 percent of the population, lived at or below the official poverty level.”)

285. In 1996, “7.4 million people were classified as ‘working poor,’” defined as

individuals who spent at least 27 weeks in the labor force (working or looking for work), but whose income fell below the official poverty threshold . . . . In 1996, nearly 4.1 million families lived below the poverty level despite having at least one member in the labor market for 27 weeks or more.

*Id.*

286. See *id.* Moreover, in 1996,

[a]lthough nearly three-fourths of the working poor were [W]hite workers, [B]lack and Hispanic workers continued to experience poverty rates that were more than twice the rates of [W]hites. White working women and men in the labor force . . . were about equally likely to be poor. By contrast, [B]lack working women had a poverty rate of 14.2 percent—almost twice the rate of [B]lack working men (8.6 percent).

*Id.*

287. See MACKINNON, *supra* note 240, at 1. According to MacKinnon: equality among human beings is commonly affirmed but rarely practiced. As a principle, it can be fiercely loved, passionately sought, highly vaunted, sentimentally assumed, complacently taken for granted, and legally guaranteed. Its open detractors are few. Yet despite general consensus on equality as a value, no society is organized on equality principles. As a result, few lives are lived in equality, even in democracies. As a fact, social equality is hard to find anywhere. Social inequality, by contrast, is seldom defined but widely practiced.

people of color and Whites—not only economic inequality, but also inequality of access to education, health and dependant care, and to safe and healthy work environments—contradicts the commitment to individualism and social equality in American legal culture as reflected in the at-will doctrine. The at-will doctrine was developed at a time when the law tolerated—and in some cases required—discriminatory treatment based on race and gender. Today, the law requires a gender- or color-blind approach. Yet, the doctrine persists in its failure to address the systemic reality of subordination and economic exploitation. A fairer approach to employment relations is needed.

This Article contributes to the at-will critique by arguing for the wholesale rejection of the doctrine in favor of a notice requirement. This argument is informed by a critique of “formal equality” developed in feminist jurisprudence, critical race theory, and Canadian Supreme Court jurisprudence, which recognize that the parties to an employment contract are seldom “equal.” By examining employment at-will in light of this critique, one must conclude that its formal equality underpinnings produce unfair or unequal treatment of most workers and, in particular, place women, people of color, gays, and lesbians in an even weaker bargaining power vis-à-vis employers.

In employment at-will arrangements, the ever-present possibility of discharge undermines the sense of security that employees hope to gain from employment.<sup>289</sup> The decline in the rate of unionization has meant that “state courts and legislatures have become the protectors

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*Id.*

288. See AMOTT & MATTHEI, *supra* note 69, at 23. According to Amott and Matthei,

In 1986, the super-rich (the richest one-half of one percent of the households) owned 35% of the total wealth in our country, over seventy times the share they would have had if wealth were equally distributed. The richest tenth of all households owned 72% of all wealth, over seven times their fair share. At the other end of the hierarchy, in 1986, the poorest 90% of households owned only 28% of total wealth, and had to send at least one household member out to work for the household's survival.

*Id.*

289. This anxiety is especially pronounced in situations of long-term employment.

of the individual employee.”<sup>290</sup> Recognizing the growing complexity of employment related issues, state legislatures and courts have enhanced protections for individual workers against discriminatory or retaliatory discharge. The harshness of the at-will rule is further softened by common-law remedies available under tort and contract theories. However, the costs of litigating “wrongful discharge” cases are often prohibitive for both employee and employer.<sup>291</sup> It is even more so for women and people of color who are already disadvantaged vis-a-vis nonminority employees and employers. Furthermore, in some states, for example in New York, the tort of wrongful discharge has not been judicially recognized and successful litigation under breach of contract is difficult to achieve. The common law in such states offers very little practical protection against arbitrary dismissal for an at-will employee.

Nonetheless, there are those who suggest that it is precisely because the United States provides fewer protections for its workers than do other countries that it is able to maintain its economic and political superiority throughout the world. Thomas Friedman, for example, argues that Europe is less technologically advanced than the United States because of Europe’s liberal labor laws and because of the relative conservatism of the U.S. approach to labor relations. He says, “the Europeans have moved slower because their rigid labor laws make it very hard, or very costly, to lay off workers. And if you have to pay for a new computer and the wages of an old worker, you are much less likely to buy the new computer.”<sup>292</sup> It follows then, on

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290. Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 591 (1992).

291. See Summers, *Worker Dislocation*, *supra* note 61, at 1039 (stating that employees bear the burden of costs associated with loss of jobs, whereas employers bear little or no cost).

292. Thomas L. Friedman, *An American in Paris*, N.Y. TIMES, Aug. 20, 1999, at A21. In addition, Friedman argues:

The most important thing Mr. Reagan did was break the 1981 air traffic controllers’ strike, which helped break the hold of organized labor over the U.S. economy. That was critically important for spurring the information revolution in America. How so? Ask yourself this: Why is it that the Europeans have lots of money and the same access to technology as Americans do, yet most of them have been slow to absorb computers and info-technologies? Answer: U.S. companies are

his analysis, that any increased job security protections for workers in the United States would result in a decline in American technological superiority. Similarly, some might argue that this proposal that the default rule be changed from the at-will presumption to a notice requirement would exacerbate the flight of American jobs to developing countries in a "race to the bottom."<sup>293</sup> The fear is that if American workers are given more protections against dismissal, then American corporations will be more likely to open shop in nations with fewer job protections for workers.<sup>294</sup>

My proposal that the at-will rule should be abolished requires defending in light of these fears. I believe that job security ought to be strengthened for American workers so as to bring U.S. industrial regulation in line with protections offered in other industrialized nations. Replacing the at-will rule with a legislative scheme requiring notice of termination, would probably have a negligible effect on the corporation's decisions to relocate outside the United States. Recent scholarship suggests that raising productivity in order to compete effectively in international markets requires increasing job security.<sup>295</sup> In an era of globalization wherein corporate interests often result in

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quick to absorb new, more productive technologies because they can easily absorb the cost of the new investment by laying off the workers who used to perform that task. And as the overall economy becomes more productive, those workers get rehired elsewhere.

*Id.*

293. Mark Barenberg, *Law and Labor in the New Global Economy: Through the Lens of United States Federalism*, 33 COLUM. J. TRANSNAT'L L. 445, 448 (1995) (defining the race to the bottom as "movement of capital from high-wage economies to low-wage economies"); see also Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 992 (1995) (explaining that globalization increases "the flight of capital to areas with lower regulatory standards").

294. See Van Wezel Stone, *supra* note 290, at 585 (noting that the more successful unions are making legislative changes, the more likely companies are to move out of the country).

295. See, e.g., Michael C. Harper, *Reconciling Collective Bargaining with Employee Supervision of Management*, 137 U. PA. L. REV. 1, 46-47 (1988) (indicating that to the extent employees have a say in an organization, they are more likely to invest in its future); Karl E. Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39, 57-60 (1988) (suggesting that workplace cooperation benefits employers and employees).

moving production to developing countries in search of conditions that maximize profits, American workers are perhaps more vulnerable to summary discharge than ever before. But perhaps the most formidable problem with the at-will presumption is that it masks the many illegitimate reasons for discharging an employee, including racism, sexism, and homophobia. This is all the more troubling in light of studies suggesting disproportionate rates of firing of workers of color.

With declining rates of unionization, the globalization of capital and production, and the rise of arbitration agreements taking away the individual worker's right to pursue discrimination claims in state and federal courts, American workers are vulnerable to employer tactics used to undermine employee bargaining strength. This is so despite the judicial erosion of the at-will rule, recent plant closing legislation, and preventative procedures and practices introduced by companies in response to the possibility of wrongful discharge and Title VII liability. Corporate due process mechanisms provide insufficient protection to employees at-will since they usually fail to provide impartial resolution of grievances and, more importantly, fail to guarantee that dismissals will be for cause only.<sup>296</sup> Moreover, exceptions to the at-will rule are only that—exceptions. Most legal developments protecting employees from arbitrary dismissal have arisen through a piecemeal assortment of judicial pronouncements on individual cases and through narrowly focused pieces of legislation. The rule itself is inherently unworkable and should therefore be abandoned.

This Article has deliberately focused on involuntary separation. Discharge from employment is perhaps the most obvious harm that the at-will doctrine does to workers. However, the doctrine inserts itself into almost every aspect of the employment relationship, through managerial prerogative and freedom of contract. At-will employers are not typically required to provide employment benefits such as sick leave, vacations, holidays, or medical insurance<sup>297</sup> and, for the most part, individual workers simply do not have the power to influence the terms of the employment contract. This is not to say

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296. See Estlund, *supra* note 17, at 1690.

297. See Summers, *supra* note 23, at 505.



that employers have no incentives to provide certain benefits and protections. For example, some have argued that employers who treat their employees fairly will attract and retain better, more loyal employees. However, that argument is based on the often erroneous premise that employees have access to relevant information about a prospective employer before entering into an employment relationship. Doing away with the at-will presumption would have the effect of establishing a different ethical and legal baseline for the treatment of employees throughout the employment relationship. Its demise would require that the law adopt a different framework for individual contracts of employment. Given the declining rate of unionization, it is prudent to provide greater job security for all workers since all workers are entitled to protection from arbitrary, involuntary separation. And because antidiscrimination laws cannot be relied upon to redress the myriad subtle, unconscious, or systemic discrimination that people of color, women, and gays, and lesbians continue to experience, an employment law model that provides for notice or pay in lieu of notice at the very least sends the message that human dignity is worth protecting and that our law will not tolerate pretextual discrimination in the guise of freedom of contract.