BASELINE QUESTIONS IN LEGAL REASONING: THE EXAMPLE OF PROPERTY IN JOBS

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> *The liberal views of Robert Montgomery, professor of economics at the University of Texas, made him unpopular with the Texas legislature. When he was asked if he favored private property, Montgomery replied, "I do—so strongly that I want everyone in Texas to have some."*[1]
>
> —John Kenneth Galbraith

> *For ultimately, the most profound determinants of our thought are those of which we are least conscious.*[2]
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> —Robert Cover

I. INTRODUCTION

A. *Legal Theory and Baseline Analysis*

At one time, legal theorists focused their attention on the sources and boundaries of law. They asked: What is law and where does it come from? Proponents of natural law believed that law was intimately related to morality and that it established rights founded in nature or human reason. Positivists understood law as wholly distinct from morality and founded on authoritative com-

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[1] THE LITTLE, BROWN BOOK OF ANECDOTES 395 (C. Fadiman ed. 1985).

[2] Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 663 (1981).

mands of sovereign political bodies. A parallel debate addressed the process by which legal rights are defined. This second project asked a question about legal reasoning: What makes law objective? Natural rights theorists equated objectivity with *correctness*. They elaborated the limits on individual freedom necessary to protect the rights of individuals in society, starting with the premise that natural law established an objectively correct set of protections. In the alternative, they defined the procedure by which a decisionmaker could discern the society's *rational consensus* about the issue in question. Utilitarians looked instead to the *consequences* of alternative legal rules with an eye toward defining a legal regime that could maximize social utility. Promoting the general welfare appeared to be a neutral and objective standard against which to measure legal rules because it seemed both to count each individual's interests equally and to represent a social goal that would benefit everyone.

Although these debates were energetic and sometimes heated, none of the participants doubted the *possibility* of achieving objectivity in law. The legal realists changed all that. The current debate over objectivity in law has its roots in the realist deconstruction of legal formalism. The realists attacked the formalist claim that legal rules compelled the results in cases. The realists showed that the rules were uncertain and manipulable. Formalist legal analysis failed its own test of legitimacy because legal rules could not determine the outcome of cases, and formalism identified no other basis for establishing the legitimacy of those outcomes.

The realist attack left a theoretical disarray. To save the ideal of the rule of law, some realists advocated substituting social science knowledge for the discredited deductive and syllogistic reasoning. Other realists established the legal process view that as long as governmental actors stayed within their proper institutional roles, legal objectivity was ensured, not by the determinacy of rules, but by the general neutrality of the system.

These attempts to reconstruct legal reasoning have been valiant, but they have been based on a fundamental error. They are premised on the idea that there are objectively correct answers to legal questions and that we can use reason to identify those answers. These approaches justify legal rights by reference to the idea that we can identify a *process* of decisionmaking by which we could attain a rational consensus about the issue to be decided. The belief

in right answers accessible to reason assumes that we can identify criteria for judgment that will be universally acceptable, at least to right-thinking people in our culture. Whether these criteria are found in social science, substantive moral theory or neutral decision procedures, the goal is an answer that should be acceptable to everyone, if they thought about the problem long enough and in the right way.

This version of the rule of law depends on the assumption that perspective does not matter. The right answer thesis claims that we—all of us—should analyze and understand legal questions in the same way, whatever our experience, values, point of view, gender, race, place in the social structure, religion or heritage. Yet legal realism, understood correctly, placed in doubt this very claim. The critique of formalism was premised on the view that legal reasoning is not a matter of deductive logic, but is socially constructed, and that, in our society, reasonable people disagree—often fundamentally—about the specifics of justice. If this is true, then it makes no sense to adopt a view of legal reasoning that fails to pay attention to the *perspective* from which a problem is analyzed.

The relative homogeneity of the group of decisionmakers in our society coupled with the failure of legal reasoning to recognize that the perspective from which one views the world may have significant consequences for legal theory. It leads us to assume that we can see and understand everything, and in so doing, may blind us to minority or dissenting perspectives. One can assume that one has no particular angle on the world only by adopting the prevalent viewpoint—either the perspective of the majority or a perspective that supports the status quo by taking much of what is for granted. There is a grave danger, in other words, of confusing the views of the powerful with reason itself.

For example, Richard Delgado explains that white persons in our culture can live comfortably much of the time without thinking about their race; this is one of the privileges of white supremacy.[3] People of color do not have this luxury. The failure of white persons to consider the experiences of others is therefore the failure to

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[3] Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary?*, 23 HARV. C.R.-C.L. L. REV. 407 (1988).

understand their own power over others.[4] They can live in a system of white supremacy without ever seeing it. They can believe they live in a world of equality and freedom, while exercising and benefiting from illegitimate power. This is the danger of not recognizing the perspective from which one views the world: others, whose lives qualitatively depend on our regard, are blotted from our view or understood only in our own terms.[5] The assumption that one can view the world without a perspective is one of the mechanisms by which oppression operates.

This Article is, in a sense, a return to the roots of realism. As the debate over legal objectivity has gotten more abstract, it has tended to lose its focus on the operation of legal rules in the legal system. But the actual operation of the rules is the most important datum to draw on to analyze and understand the problem with traditional views of objectivity in legal decisionmaking. The realists looked at the operation of rules in the legal system and concluded that the legal rules did not determine the outcome of the cases because they were vague, they overlapped and they had exceptions. Because the rules themselves did not provide answers, there were almost always acceptable legal arguments for both sides of legal questions.

Our study of workers' rights to job security has led us to identify a different way in which the legal rules do not determine results. While it is true, as the realists established, that there are arguments for both sides of interesting legal controversies, the formation both of the problem and the arguments themselves often tilts the answer toward a set of outcomes. The starting points—or baselines—for legal argument help explain outcomes. We owe the term "baseline" to the work of Jeremy Paul, Cass Sunstein, and Duncan Kennedy.[6] Paul demonstrated that the choice of a baseline is the crucial determining factor in regulatory takings doctrine.[7] Sunstein has shown that contemporary constitutional analysis has an important feature in common with the analysis of the vilified *Lochner*

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[4] E. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (1989).

[5] Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 151 (1988).

[6] Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 410-21 (1981); Paul, *Searching for the Status Quo*, 7 CARDOZO L. REV. 743 (1986); Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

[7] Paul, *supra* note 6.

era—that constitutional analysis often starts from the unstated baseline of the rights and duties specified in the common law.[8] Kennedy demonstrated that baseline choices are crucial in economic analysis of law.[9] Our purpose is to demonstrate that common law and scholarly analysis of employment security has its own often unstated baselines, and that when the baselines are revealed, a clearer picture of the issues involved in job security is presented. Studying baselines helps us understand how some outcomes are foreclosed, not by the logic of the rules, but rather by the terms of the discourse through which arguments are made. These baselines define the normative starting points of legal analysis.

The courts have been very reluctant to recognize workers' claims to job security.[10] Various factors contribute to judicial reluctance to modify the common law and grant workers greater job security. One way to explain this reluctance is to examine the social vision implicit in judicial discussions of employment relations and the labor market. Often legal reasoning about employment-at-will proceeds from a baseline set of assumptions that heavily influences the outcome of the analysis. Our purpose in this Article is to identify these baselines and to explore the ways in which they may predetermine the result. This exploration will enable us to begin developing a form of normative argument that encourages decisionmakers to examine their fundamental assumptions and to justify choices among competing starting points. Incorporating baseline questions into the structure of moral and legal argument will both direct our attention to multiple perspectives and enable us to make choices among them.

For purposes of clarity we have identified four, somewhat overlapping, baseline categories. First, we examine the empirical as-

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[8] Sunstein, *supra* note 6.

[9] Kennedy, *supra* note 6.

[10] We focus our attention on the courts because the controversy over at-will employment has generally taken place in the courts and not in the legislature. *But see* Minda & Raab, *Time For An Unjust Dismissal Statute in New York*, 54 BROOKLYN L. REV. 1137 (1989) (arguing for unjust dismissal legislation). Further, the way courts treat workers, through interpretations of contract and property law, may affect how the legislatures perceive the legitimate interests of workers and employers, and existing ideology about employer property rights over the workplace is a big factor in preventing legislatures from seriously considering changes in the law. However, insofar as our arguments reveal moral and policy reasons in favor of job security, the arguments should persuade legislatures, as well as courts, to change the law.

sumptions made by judges and scholars when they evaluate alternative regulatory regimes. These assumptions often rest on unstated ideological premises that reflect biases about social class. These biases lead analysts to trust management and shareholders, but not workers. Second, we address the social vision embodied in the common law of property and contract. This social vision explains, in part, the empirical assumptions discussed in the first section. Further, conceptualization of the worker-management relationship in terms of the prevailing social vision leads to common law categories which resolve conflicting claims between workers and management in favor of management. Third, we examine economic analysis and explore the valuation baselines that skew the analysis in a way that is tilted against the interests of workers. These baselines cause decisionmakers to emphasize the social benefits of protecting management control and the social costs of limiting that control, and to de-emphasize the social costs of arbitrary firings and the social benefits of job security. Finally, we address arguments directed at judicial competence to change common law rules regarding job security. The prevalent baseline for such arguments assumes that legislative silence indicates approval of the status quo. This premise biases the analysis against change, yet it is based on assumptions that may not be justified by a realistic picture of the relationship between the judicial and legislative branches of government.

Our analysis of baselines severely undermines traditional conceptions of objectivity in legal argument. Baselines embody important moral and political choices, but because they are starting points for analysis, they tend to suppress discussion of these choices. They therefore have the effect of masking the political underpinnings of legal rules. By identifying these baselines and by unpacking their contents, we hope to open up the discussion to explicit consideration of the suppressed moral and political questions underlying employment-at-will. This analysis shows, moreover, the relationship between the objectivity question and the traditional "what is law" jurisprudence. Baseline analysis directs our attention toward determinants of legal discourse, such as political views, moral views and social vision, that are often thought to be outside the definition of law. In this way, our argument against traditional conceptions of objectivity in law undermines the idea that there are fixed boundaries to legal discourse.

B. Prologue to the Story of Worker Security

For most workers in the United States, job tenure is an impossible dream. Because most workers are not union members or civil servants, they are unprotected by collective bargaining agreements or statutory regulations that limit their employers' freedom to fire them. In the absence of contractual promises to the contrary, the law in most states grants private employers the legal power to fire their employees with impunity. Exceptions to this principle are narrow and applied ungenerously by judges.[11] Yet job security is a major issue for almost all workers. Losing a job, especially late in a career or during a period of high unemployment, can be catastrophic.[12] For this reason, job security is one of the first demands workers make when they become unionized,[13] and fear of job loss has become a great worry for a substantial number of workers.

Should workers be entitled to job security? Recently, some state courts have created exceptions to the rule that at-will employees may be fired at any time for any reason. Yet many states have not adopted such exceptions, and those that have done so have constrained employers' prerogatives only in limited ways.[14] Many legal scholars, on the other hand, have argued vigorously that employ-

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[11] Firings are prohibited if they are based on racial, gender or age discrimination. Civil Rights Act of 1964 § 706, 42 U.S.C. § 2000e-5 (1982 & Supp. IV 1986); Age Discrimination in Employment Act of 1967 §§ 2-16, 29 U.S.C. §§ 621-634 (1982 & Supp. IV 1986). Some states have made exceptions to the at-will rule. *See infra* notes 29-30 and accompanying text for judicial exceptions. A few states have legislated in the at-will area beyond protections against discrimination. *See* Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to -914 (1987). *See also* ARK. STAT. ANN. § 11-4-405 (1987) (providing cause of action for wrongful discharge); P.R. LAWS ANN. TIT. 29, § 185A (1985) (providing remedy against discharge without cause based on length of service). *See generally* Minda, *The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine*, 36 SYRACUSE L. REV. 939 (1985).

[12] St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 67 (1988) (noting that numerous studies document the enormous social costs associated with layoffs).

[13] Minda, *supra* note 11, at 946-49 (almost all collective bargaining agreements prohibit firing in the absence of just cause and enforce this employee right through grievance-arbitration procedures). One of the major issues in the recent Eastern Airlines strike is the employees' fear that management may be intending to dismantle the company at the cost of thousands of jobs. *See* Karr, *Uncharacteristic Solidarity Keeps Pilots from Crossing Picket Lines*, Wall St. J., Mar. 6, 1989, at A4, col. 3; McFadden, *Mechanics' Strike Virtually Shuts Eastern Airlines*, N.Y. Times Mar. 5, 1989, at 1.

[14] *See infra* notes 29-30, 57 and accompanying text.

ment-at-will should be abandoned.[15] Though far from universal,[16] this support for expansive job security rights contrasts sharply with the more grudging acceptance of job security by the courts.

The lack of job security for workers has major consequences for them and for the economy. In addition to the potentially catastrophic effects of job loss for workers, research indicates that greater job security may lead to increased productivity for companies. This evidence indicates that when workers are more secure, and when they have a greater voice in the operation of the company, they tend to view the company as "theirs" and they may devote more energy and care to the success of what they see as a common enterprise. This evidence contradicts the widely held belief that workers with job security are lazy and that managers need absolute power to fire workers to keep them productive.[17] Recently, a large number of scholars have argued that the best way to increase productivity, and compete effectively in international markets, is to alter management-labor relations radically to increase worker job security.[18] The new forms of industrial relations will increase participation by workers in the management of the common enterprise, while increasing both profit sharing and financial risk. These new cooperative strategies will necessitate significant changes in employment law and in our underlying conceptions of the workers' stake in the enterprise.[19]

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[15] *See, e.g.*, Leonard, *A New Common Law of Employment Termination*, 66 N.C.L. REV. 631 (1988); Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986); Minda, *supra* note 11; Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Tabb, *Employee Innocence and the Privileges of Power: Reappraisal of Implied Contract Rights*, 52 MO. L. REV. 803 (1987).

[16] Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

[17] *See* C. HECKSCHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION (1988); R. MARSHALL, UNHEARD VOICES: LABOR AND ECONOMIC POLICY IN A COMPETITIVE WORLD (1987); Bahrami, *Productivity Improvement Through Cooperation of Employees and Employers*, 39 LAB. L.J. 167 (1988).

[18] *See* S. BOWLES & H. GINTIS, DEMOCRACY AND CAPITALISM: PROPERTY, COMMUNITY, AND THE CONTRADICTIONS OF MODERN SOCIAL THOUGHT (1986); C. HECKSCHER, *supra* note 17; R. KUTTNER, THE LIFE OF THE PARTY: DEMOCRATIC PROSPECTS IN 1988 AND BEYOND (1987); R. MARSHALL, *supra* note 17; M. PIORE & C. SABEL, THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY (1984); R. REICH, THE NEXT DEMOCRATIC FRONTIER (1983); THE CUOMO COMMISSION REPORT 169-83 (L. Kaden & L. Smith eds. 1988); Harper, *Reconciling Collective Bargaining with Employee Supervision of Management*, 137 U. PA. L. REV. 1, 46-47 (1988).

[19] *See* Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy*

Yet if courts resist even modest changes to at-will employment, how will they react to these much more fundamental shifts in employment law? Outdated conceptions of job entitlements may frustrate these promising advances in industrial management. It is therefore essential to figure out why courts have so firmly resisted granting job security to employees.

In what follows, we critique at-will employment by focusing on the baselines that underlie the analysis. Our ultimate goal is to develop persuasive arguments to move courts and businesses to provide greater job security for workers. One possible reason the courts have been so reluctant to change employment law is that judges analyze job security issues from the standpoint of a series of baselines which have the effect of creating a presumption against job security that is almost impossible to overcome. These baseline assumptions effectively place the burden of proof on advocates of job security.

Judges fail to recognize that these baseline questions exist, the extent to which choice of a baseline may predetermine the outcome of policy analysis and legal reasoning, and the moral and political character of choices among alternative baselines. Moreover, prevailing baseline asumptions have the effect of privileging the status quo, especially the existing distribution of power in the marketplace. The failure to analyze and justify baselines therefore has a political import. Prevalent baselines make managerial power seem natural and inevitable while job security appears to be a meddlesome interference in the free market; rather than a correctable social problem, workers' insecurity is seen as a necessary cost of progress and freedom. Thus, judges who would otherwise be sympathetic with workers' claims feel unnecessarily constrained to rule against them. Alternative baselines implicate competing visions of the good society. To do justice to workers' claims to job security, we must confront directly the value choices involved in alternative baselines and the social visions they embody.

II. Empirical Assumptions Underlying Employment-at-Will

Common law reasoning contains many different strands. Empirical assumptions, arguments from precedent, cost-benefit analysis,

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Perspective, 23 Harv. C.R.-C.L. L. Rev. 39 (1988).

institutional role arguments, and moral and political claims coexist and often run together. In this section, we isolate and question some of the empirical assumptions that are used to justify the continued validity of the employment-at-will doctrine. These assumptions represent claims about the social world, including assertions about the motivations and competencies of social actors and the nature of the labor market. Our goal is not to refute these assumptions by offering definitive contradictory evidence. Rather, we have the more modest aim of establishing that the empirical assumptions may not be true and that they are best characterized as reified conceptions of the social world, constructed, rather than discovered, by the decisionmaker.[20] It would be difficult to test these assumptions empirically to find out whether or not they are justified. Yet those who favor employment-at-will believe them. This belief rests, not on a foundation of careful observation, but rather on a set of moral convictions about what the employment relationship should be like. We elaborate on that social vision in the next section.

A. The Common Law of Employment-At-Will

The development of the at-will rule has been chronicled many times and will only be recounted here briefly to provide background for what follows. Before the late nineteenth century, employment was presumed to be for a fixed term. If no term was specified by contract, it was presumed that a long-term agreement (usually one year) was intended. The presumption of a one year contract could be rebutted by evidence that the parties intended the contract to last for a shorter period, such as an established trade custom; periodic wage payments were considered as evidence of the parties' intent, but were insufficient to rebut the presumption alone. Dismissal without notice was permitted only for "cause," and there was a rule requiring employers to give reasonable notice before displacing workers. If the employee ended the contract before the term had ended, he was denied recovery for services rendered, as the contract was viewed as a single entity, making the breach of one part a breach of the entire agreement.[21]

In the late nineteenth century, Horace Gray Wood published his

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[20] *See* Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985).

[21] Minda, *supra* note 11, at 967 & nn.110 & 112, 968 & n.113.

treatise on the law of master and servant, in which he stated (falsely)[22] that the rule in America was that unless a term was contractually specified, employment was presumed to be at will.[23] The reasons for this change are not altogether clear, but it has been suggested that the at-will rule was designed to grant employees the freedom to leave their jobs before the end of a year without forfeiting accrued pay.[24] It may also have been intended to give employers greater freedom to control the workplace.[25] Wood's Rule, as the at-will rule is known, became law throughout the United States.

From the employee's perspective, Wood's Rule corrected several major defects in the prior law. First, the new rule of employment-at-will gave employees the freedom to quit at any time. The master-servant relationship had come to be seen as an illegitimate holdover from feudalism and workers were no longer bound to the employer for a year. Second, the new rule gave employees a certain amount of financial security they had not previously possessed. It allowed them to recover wages for work already performed even if they did not stay with the employer for the traditional year-long relationship.[26]

However, the new regime also had its costs to employees. In exchange for these new rights, workers gave up their job security because now the employee could be fired at any time for any reason.[27] Thus, the workers' new freedom was coupled with a new vulnerability. Moreover, workers gave up other rights as well. Under the old law the master was burdened with specific obligations to care for the servant and treat her fairly; in the brave new world of employment-at-will, the employer owed no obligations of any kind to the employee other than those explicitly assumed by contract.

The change to Wood's Rule was consistent with increased concern over freedom of contract in the late nineteenth century. With the current decline in freedom of contract ideology, new justifica-

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[22] Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 125-27 (1976).

[23] H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877).

[24] *See* Larson, *Why We Should Not Abandon the Presumption That Employment is Terminable At-Will*, 23 IDAHO L. REV. 219, 227 (1986).

[25] Leonard, *supra* note 15, at 641; Feinman, *supra* note 22, at 131-35.

[26] *See* Minda, *supra* note 11, at 968 n.113.

[27] *Id.* at 967 & n.109, 968.

tions have been constructed for maintaining the at-will rule. Today, a primary justification for the at-will rule is that the contract at-will maximizes productivity by giving both employers and employees flexibility and by forcing employees to work hard to avoid being fired.[28] This combination of employer discretion and employee insecurity is thought to represent the optimal or most efficient allocation of power between the parties. The cases and commentary reflect this set of justifications, and even the commentary against the at-will rule takes these arguments as the baseline against which reforms are measured.

In many states, courts have adopted exceptions to the at-will rule, but the exceptions are narrow, and they do not, by and large, reflect a rejection of the utility-based justifications for the at-will rule. In some states, at-will employees may not be fired for activity that is favored by a strong public policy. For example, an employee in Illinois may not be fired for filing a worker's compensation claim or for reporting illegal conduct by co-workers.[29] This exception does not rest on a rejection of the empirical or moral foundation of

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[28] For example, Richard Epstein contends that the employee's flexibility is maximized under the at-will rule because the employee is free to leave at any time. He claims this has the two beneficial effects of ensuring employees the freedom to control their destinies and keeping employers in competition for employees. Employers with reputations for treating employees well will attract better employees. *See* Epstein, *supra* note 16, at 953-55, 967-68. Epstein seems to assume that if employers' right to fire were limited, similar limits would be placed on employees' right to leave. That is not necessarily so. There is no requirement that the rights of the parties be symmetrical. Disparities in power and vulnerability might lead to greater rights for workers to leave than for employers to fire.

[29] *See* Kelsay v. Motorola, 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (recognizing a cause of action, and possibility of punitive damages, for retaliatory discharge after filing a worker's compensation claim); *see also* Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (holding that an employer commits a legal wrong when he discharges an employee in retaliation for upholding public policy). Illinois and other states have applied this exception only in very narrow circumstances. In Illinois, the Supreme Court held that the public policy exception did not prohibit an employer from firing a worker for filing a claim under the health insurance policy that was provided as a benefit of employment. Price v. Carmack Datsun, Inc., 109 Ill. 2d 65, 485 N.E.2d 359 (1985). In Wisconsin, the Supreme Court has stressed the narrowness of the exception and held that a firing violates public policy only if the employee is fired for refusing to violate a "constitutional or statutory provision." Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 573, 335 N.W.2d 834, 840 (1983). The Wisconsin public policy exception is narrower than Illinois' in that the employee must be fired for refusing to violate a specific statute or constitutional provision. The Wisconsin court explicitly rejected the result in *Palmateer* because it determined that no employer should be liable just because a discharged employee's conduct was praiseworthy or beneficial to the public. *Id.* at 573-74, 335 N.W.2d at 840.

the at-will rule; rather, it rests on the assumption that society's interest in obedience to law outweighs the employer's interest in unfettered control. The increased job security for employees is thus incidental to the vindication of another public policy.

Some employees have been able to avoid the at-will rule by rebutting the presumption that employment is at-will with proof of assurances of job security made by the employer either at the time of hiring or later. In many cases, such assurances are contained in employee manuals which specify grounds and procedures for firing employees. These cases are interesting for two reasons. First, in employment-at-will cases, the courts are less generous to employees with contract and reliance norms than in other contexts. It is more difficult for employees to convince courts to enforce promises of job security than it is for parties in other contexts to convince courts to enforce other promises made with similar seriousness and with similar reliance. Second, the arguments concerning whether the promises of job security should be enforced often revolve around the issues of efficiency in the workplace. Courts are reluctant to give legal effect to assurances of job security because they think that management will be unduly burdened if the employer loses the discretion to fire for any reason.[30] Reliance and contract norms are applied more strictly against finding an enforceable promise in the employment context than in other situations because of the special solicitude courts show for employers.

In a few states, the duty of good faith and fair dealing that is imposed on all contracting parties is applied to limit firings of at-will employees. In most of these states, this duty provides a monetary remedy for workers whose firing was motivated by bad faith or malice. However, the burden is normally on the discharged worker to prove that the firing was wrongful; this duty does not affirmatively require employers to prove that they had just cause to fire the employee.[31] In the absence of an implied promise in an

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[30] *See* Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 468-69, 443 N.E.2d 441, 447, 457 N.Y.S.2d 193, 199 (1982) (Wachtler, J., dissenting) ("restricting an employer's ability to discharge an employee for unsatisfactory performance will create additional inefficiency in the workplace").

[31] *See* Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (holding that a firing resulting from sexual harassment on the job constitutes bad faith); *see also* Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977) (firing an employee to prevent him from receiving a bonus for having consummated a sale constitutes bad faith).

employment manual to fire only for cause, only one state prohibits employers from firing employees in the absence of just cause, and that legal entitlement was imposed by statute.[32] It is remarkable that so few states have implied duties of good faith into employment contracts. Contemporary contract law abounds in duties of good faith, yet hostility to workers' claims for job security has apparently kept such duties from affecting the employment relationship. Courts make it more difficult for workers to hold their employers to the duty of good faith than parties to other kinds of contracts.

We will focus on the question of whether the courts should imply into employment contracts a duty of good faith and fair dealing. Our definition of this duty would prohibit employers from firing workers without just cause. This means not only that employers could not legally fire a worker for a bad reason, but that employers must have a valid reason to fire. This obligation would apply whether or not a statute provided such an entitlement, and whether or not the employer made representations to this effect either orally or in an employment manual.[33]

B. Empirical Assumptions Underlying Common Law Cost-Benefit Analysis[34]

We all observe the world through a filter comprising experience,

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But see Howard v. Dorr Woolen Co., 120 N.H. 295, 414 A.2d 1273 (1980); Vandegrift v. American Brands Corp., 572 F. Supp. 496 (D.N.H. 1983) (both narrowing scope of *Monge*). For an analysis of cases involving unpaid but earned bonus as examples of unilateral contracts, see Pettit, *Modern Unilateral Contracts*, 63 B.U.L. REV. 551 (1983).

[32] *See* Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to -914 (1987).

[33] While we would advocate making this obligation nondisclaimable, our analysis will focus initially on the question of whether or not employment contracts that are silent on this issue should be interpreted as at-will arrangements or as including a right to job security in the absence of just cause to fire. The question is whether employment contracts should presumptively include an obligation not to fire without just cause, in the absence of a voluntary disclaimer by the employee. After addressing this question, we turn to the issues involved in making the implied duty nondisclaimable.

[34] At this point in our analysis we are sharply distinguishing between empirical arguments (arguments about how the world is or how it would be under a certain legal rule) and normative arguments (arguments about how the world should be from a moral point of view). We recognize that this distinction may, at times, be artificial because people's understanding of the world is often affected by their view of how the world should be. In fact, the point of this exercise is to illuminate the way that empirical observations are dependent on ideological baselines.

ideology and preconception. Different perspectives on the world may lead to strikingly different arguments regarding the effect of the at-will rule and possible alternatives. In this subsection, our aim is to illustrate that there are competing empirical baselines, and that, given our lack of knowledge about which picture of the world is true, each baseline is constructed on a foundation of competing social visions.

1. Management Arguments Against Job Security. In determining whether to imply into employment contracts a duty of good faith on the employer not to fire employees without just cause, courts imagine the effects such a duty would have on the labor market. Would it increase or decrease efficient management of the workplace? To answer this question, judges apply a crude efficiency criterion under which they ask whether the benefits of increased worker security would be outweighed by the costs of limiting managerial discretion over the workplace. In addressing this question, courts begin from an ideological baseline which leads them systematically to undervalue the social and economic benefits of job security, while overvaluing the benefits of managerial discretion.

In judicial opinions and scholarly articles addressing the wisdom of retaining employment-at-will, a number of arguments arise regarding the empirical effects of granting or not granting employment security to workers. These arguments address the incentives for workers to produce, the incentives for management to produce, and the ability of management to carry production plans into effect.

First, courts argue that management needs absolute power to fire employees as a necessary incentive for owners of capital to put it to productive use. Owners of capital need complete freedom to fire workers in much the same way that any landowner needs security from non-owners: the owner needs the help of workers to develop capital but will allow workers access to the capital only if the owner retains substantial control of it. If the owner cannot exclude unproductive workers from access to her property, she has no guarantee of being able to generate profit, much less to maximize her profits. The less control the owner has of the workplace, the greater her risks. And the greater her risks, the less likely it is that the owner will invest in economically viable projects. Management control is therefore necessary to encourage socially desirable in-

vestment in economic activities.

Second, managerial discretion increases worker effort and therefore maximizes worker productivity.[35] Workers know that if they do not produce they will lose their jobs. Since they are risk averse, they will produce even more than the minimum necessary to hold onto their jobs. The more insecure workers are, the harder they will work to avoid being fired. The flip side of this is that workers with tenure will not work hard. We have all heard the anecdotes about the civil service secretary who refuses to do any work and who becomes indignant when asked to type a letter. Job security is thought to be bad because workers would lose all incentives to work or would only put in minimal efforts if they are confident that their jobs are secure.

Third, the symmetrical quality of at-will employment may effectively prevent employers from firing workers arbitrarily or without good reason.[36] The at-will doctrine allows employees, as well as employers, to end the employment relationship at any time. An employer who treats her employees badly can expect some of them—and probably the best ones—to leave and find jobs elsewhere. The best employees are the ones most likely to find alternative employment. And in a competitive marketplace, where employers are competing for employees as much as employees compete for jobs, employers have great incentives not to use their firing power lightly. An employer who abuses the right to fire employees will neither attract nor keep them.

Fourth, complete freedom to fire is thought to maximize opportunities for workers generally.[37] Limits on managerial discretion will make employers more cautious about hiring people because once they are hired, it will be difficult to correct a hiring mistake. Decisionmakers reviewing firing decisions, including judges, administrators and juries, are likely to be sympathetic to claims of wrongful discharge. The cost of defending or arbitrating claims of wrongful discharge and paying damages for wrongful discharge will be substantial. These added costs will discourage employers from hiring workers. Overall employment will therefore decrease. Thus, employment-at-will not only increases employment opportunities

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[35] Epstein, *supra* note 16, at 965.

[36] *Id.* at 967-68.

[37] *Id.* at 968-69.

generally, but is especially beneficial to more productive workers, who after all are the ones who most deserve to get ahead. Good workers benefit from their employers' ability to rid the company of unproductive workers because the better the company does, the less likely a business will collapse.

Fifth, it is sometimes argued that the costs to employees of being fired—even unjustly—are low.[38] In an at-will system, employers will not take firing as a sign of malfeasance because they know that workers can be fired without cause. This fact, together with workers' ability to obtain references from past employers, means that the losses to employees from being fired are much less than the potential losses to employers saddled with incompetent or disobedient workers.[39]

2. Worker Arguments for Job Security. An alternative empirical baseline constructs a different picture of the world of labor relations. From the workers' point of view, the management arguments are flawed.[40] They overstate the costs of worker job security and the benefits of managerial discretion for employers, and they understate the costs of job insecurity and wrongful discharge for workers. They also understate the benefits of job security to workers and the economic system in general. Worker arguments favoring job security rely on different images about how workers and

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[38] *Id.* at 970. Richard Posner argues: "The employee at will can leave his job whenever he wants and go work for someone else." Posner, *Hegel and Employment at Will: A Comment*, 10 CARDOZO L. REV. 1625, 1628 (1989).

[39] *Id.*; Posner, *supra* note 38, at 1635 ("When a worker is fired with no reasons given, at least he is not stigmatized by a determination that he is a bad worker."). Some of these arguments are contradictory. Epstein argues that the consequences of being fired to employees are not really that great because there is a labor market that makes jobs available and that ignores firings, and that workers are free to, and will take the trouble to, seek employment with firms that have a reputation for not firing without cause. *Id.* at 967-68. He also argues that it would be bad to impose a for cause rule because workers and management would be engaged in constant litigation over the propriety, under a for cause standard, of any firing of a worker. These arguments are somewhat contradictory because if the consequences of firing are not so great, fired workers would presumably not bother to bring an action challenging the firing and they would not take the trouble to look for a job with a company with a better reputation regarding firing. Of course if the legal system systematically overcompensated fired workers there might be too much litigation, but that would be more of a problem with the system than with the for cause standard.

[40] We do not mean to argue that workers themselves necessarily view the world this way. *See* J.B. MILLER, TOWARD A NEW PSYCHOLOGY OF WOMEN 94 (1st ed. 1976) (arguing that oppression is most complete when the oppressed agree with the reasons for their oppression).

management behave under the at-will rule and on different predictions about how workers and employers would behave under a system with job security.

First, it may be true that owners of capital desire complete managerial control as a prerequisite to investment. Security may increase investment. But it may also be true that workers need security to develop their labor. Workers whose jobs are secure might work harder because they feel more positive about their jobs. They may also feel that the investment they make in developing their skills (which may not be fully transferable to a new job) will not be wasted by an arbitrary or unjustified firing. Fear of job loss may inhibit employees from criticizing decisions of their superiors. With a just cause requirement, workers may feel freer to make suggestions about changes in production processes that would increase productivity. This is because they know that good faith suggestions will not be taken as insubordination. Further, they may also have greater incentives to make suggestions because they stand to gain personally from improvements in productivity if they know their jobs are secure. There is some evidence that worker security and power in the workplace may increase productivity.[41] Workers may produce more if they are given the same sort of security that employers demand.

If increased job security increases productivity, then its imposition may not harm employers at all. On the contrary, a just cause requirement may actually benefit both individual employers and the economy as a whole. If this is the case, the managerial argument for employment-at-will overstates the costs of a just cause requirement for employers and understates the benefits of such a requirement.

Second, the management argument that employers need the

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[41] *See* Bahrami, *supra* note 17. An economist might ask why, if firings without cause are counter-productive, would employers desire the right to fire without cause? This might be explainable partly by agency cost problems. The individual managers enjoy the power that comes with the right to fire for any reason, and they might use it for personal reasons unrelated to the interests of the company. The employer might not be able to monitor this conduct through the market for managers or otherwise. Also, employers might be afraid of the litigation that would occur if all firings were subject to scrutiny over whether there was cause. Litigation costs, and the potential for error in litigation, might make keeping a bad employee cheaper than firing her. Finally, the supervisors who hire may be different from those who make firing decisions, and may therefore have different motivations and incentives.

freedom to fire in order to rid the company of unproductive workers implicitly assumes that management makes rational decisions in these matters, and any supervision by a court or administrative agency would be counterproductive. However, management decisions are not necessarily correct. On the contrary, as Clyde Summers explains:

> The number of arbitration cases under collective bargaining agreements in which discharged employees win reinstatement demonstrates that even when employers know their action will be reviewed, and know from experience that a wrongful discharge can be costly, their decision making processes still go astray. How many employees not protected by collective bargaining agreements are victims of abusive disciplinary action cannot be determined, for unorganized individuals deprived of adequate legal recourse cannot make known the injustices they must silently suffer.[42]

If wrongful discharges occur frequently even when workers are protected by just cause provisions in collective bargaining agreements or by their status as government employees, it may well be that they occur at even a greater rate in the sector of the labor market that is governed by employment-at-will. It is an empirical question whether and to what extent managers fire workers wrongfully.[43] Further, the people in the company who make employment decisions may not have the company's interests as their only goal. Lower level managers may put their own desires and reasons for firing ahead of the welfare of the company. The agency costs involved in monitoring the employment decisions of lower level man-

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[42] Summers, *supra* note 15, at 520. Summers' conclusion assumes that the arbitrators are doing a good job of identifying instances of discharge without cause. This conclusion rests on a baseline of trust of arbitrators and distrust of managers. Advocates of employment-at-will may draw different conclusions from Summers' data. They may believe that arbitrators, not managers, are making the mistakes.

Roughly sixty million employees are subject to employment at will. Of those, about two million are fired each year without the right to a hearing. It is estimated that 150,000 of these employees would be found to have been discharged without cause and reinstated by an impartial arbitrator. Stieber, *Recent Developments in Employment-At-Will*, 36 LAB. L.J. 557 (1985).

[43] Of course, it is also a normative question—what constitutes a *just* cause for firing workers?

agement might justify outside supervision, especially if there are third party effects, such as costs to the fired workers and their families.

Third, the assumption that the employee's right to quit sufficiently limits employers from firing employees without just cause depends on the baseline assumption that employers and employees have relatively equal power to inflict damage on one another by terminating the relationship and to recover from an unwarranted termination. It thus depends on the assumption that the employment market is competitive and that there are no barriers to the free flow of workers from one job to another. Neither of these assumptions is necessarily true.

Fourth, the management argument may underestimate the costs to employees of the insecurity of the at-will arrangement and the costs of being fired. Employees fired for no reason may not be able to find a new job easily. The local economy may not have a wide variety of job opportunities available and the employee may not be trained for the jobs that exist. She may also be unwilling or unable to move to areas that have jobs. Moreover, she may not be able to find a job that pays the same wages. There is substantial evidence that a large number of workers who lose their jobs have trouble finding new jobs, even when their job loss is attributable to cost-cutting or other economic factors rather than problems in the employee's job performance.[44] Once fired, they may lose the personal contacts necessary to find a comparable job. Moreover, discharged employees at all levels may be viewed with suspicion in the job market. Evidence indicates that many employees who lose their jobs face grave difficulties in finding new jobs with similar levels of responsibility and pay. The psychic and familial costs of unemployment, lack of income, and especially of downward mobility, are enormous.[45]

In his defense of employment-at-will, Richard Epstein advances an image of a system in which workers have a choice of employers to work for, possess the necessary basic skills to move from one job to another, are willing to move or commute to different places for work, possess sufficient information about different employers' employment and firing practices to make informed judgments about

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[44] *See* K. NEWMAN, FALLING FROM GRACE (1988).

[45] *Id.*; Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 712-20 (1988).

which employers act wrongly, and possess sufficient funds or know-how either to look for a new job while working at the old one or quit and look for new work.[46] Things may not work this way. Workers may live in a town that has a small number of major employers. Losing a job in such a situation can be a major catastrophe. Even if a community has a significant number of employers, there may be no great range of job choices available to employees, especially if a new job requires experience or training that the worker does not have and cannot easily get. The worker may not have knowledge of jobs in other cities or may be unwilling to move for social or familial reasons. The employee may not know much about working conditions at other jobs, and therefore may not be able to quit to go from a bad work environment to a good one. Moreover, in a world where unemployment is a problem, employers may be able to replace employees more easily than many employees can find new work at comparable wages.

It is a factual question whether workers' rights to quit and find another job are sufficient to deter employers from unjustified firings. The answer to this question depends on the range of alternatives available to both workers and managers. This, in turn, depends on a complex set of facts that together determine the relative bargaining power of workers and managers. It is impossible to predict, a priori, which set of rules best maximizes productive capacity at minimum cost.

3. Ideological Origins of Empirical Assumptions. Judges and commentators make confident assertions about the social effects of legal rules. Even when plausible competing predictions exist about the social effects of legal rules, they think they know which description is more accurate. But they never have sufficient evidence to back up their assertions about these effects.[47] More often than not, the only "data" supporting the decision are the judge's experiences in the world (which may reflect the experience of a particular social class) and the parties' assertions about the likely effects of a rule. If competing empirical arguments about the ef-

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[46] *See* Epstein, *supra* note 16.

[47] Willborn, *Individual Employment Rights and the Standard Economic Objection: Theory and Empiricism*, 67 NEB. L. REV. 101 (1988) (explaining standard economic justifications for employment-at-will and arguing that they depend on highly specific conditions whose existence is extremely difficult to verify empirically).

fects of alternative legal regimes are plausible and we do not have sufficient evidence to choose between them, why are judges so confident in their ability to predict the consequences of legal rules? Why do they think they know? More specifically, why do judges and other policymakers tend to accept the empirical arguments in favor of employment-at-will even though contrary predictions are just as plausible?

Judges are hungry for empirical arguments because empirical arguments appear less controversial than explicitly political ones.[48] The common law method depends on empirical arguments because it has successfully suppressed almost all discussion of the moral implications of its rules. The method therefore facilitates decisionmaking based on unverified empirical assumptions. The crude efficiency judgments courts make regarding at-will employment are characteristic of the common law method.[49] Reasoning that focuses on the consequences of alternative rules allows judges to make law on the basis of cost-benefit analysis. We can measure costs and benefits of competing rules only if we can predict their consequences. Cost-benefit analysis is useful because it allows judges to make law in a way that appears to avoid controversial value choices. Fostering desirable social consequences and deterring socially harmful conduct appear to be relatively less controversial than defining the contours of just social relationships. Consequential reasoning, therefore, helps justify the judicial role in lawmaking

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[48] *See generally* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (arguing that altruistic view of substantive law questions encourages use of equitable standards in administration, while individualist view promotes use of rigid rules).

[49] These problems are not confined to pure common law decisionmaking. The judicial method in statutory and constitutional cases is often almost identical to common law decisionmaking, with the caveat that a statute or constitutional provision provides a starting point. For example, in constitutional law, the reasonableness of a search or seizure for the purposes of the fourth amendment is decided with reference to factors that are much like decisions in common law, such as the effect the possible rulings might have on police ability to conduct investigations. *See* United States v. Leon, 468 U.S. 897, 906-08 (1984) (exclusionary rule does not bar the use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a neutral magistrate ultimately found to be invalid). Similarly, the development of the concept of reasonableness under section 2 of the antitrust act has been cited as an example of statutory law that requires a method like common law reasoning. *See* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 287-88 (1985) (describing areas in which federal judges engage in common law reasoning under statutes and constitutional provisions).

by making it appear less political.

Ideology and observation combine to form empirical baselines, or starting points, against which all situations are measured. Empirical observations are thus tied to a normative vision of the world. One's social vision, as embodied in empirical baselines, allows one, in the absence of clear evidence, to evaluate competing empirical claims. Ideology affects a person's judgment about which stories to believe. Even if convinced that there are plausible empirical claims on both sides, judges still tend to opt for rules that favor management.

The actualization of the empirical baseline in analysis occurs through the employment of what Professor Gerald López has called "stock stories."[50] To deal with uncertainty, judges rely on presumptions. People in our society have come to view the world through ideological lenses that make them disbelieve claims that workers would be productive without the insecurity of the at-will rule. To paraphrase Mark Kelman, it is only through a miracle, or quirky cultural differences, that workers in the rest of the industrialized world, where the at-will rule is not in force, work at all.[51] The same ideological lenses make judges value the harm to fired workers less than the gains in increased productivity in the plant, and make judges think that it would be a terrible intrusion on the rights of the business owner to grant job security against the owner's wishes.

Judges also may accept the arguments favoring managerial discretion because they *identify* with the managers who control hiring decisions.[52] Decisionmakers trust managers and distrust workers. They believe managers who claim to need the security of the at-will system, and they may doubt workers who argue for the same sort of security. They fall back on the stock story that owners will increase investment if they have secure control of the workplace, while workers will become lazy if they have secure jobs. Decisionmakers may trust the views of managers on what constitutes good economic policy and not have confidence in workers' ability

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[50] López, *Lay Lawyering*, 32 UCLA L. REV. 1, 3 (1984).

[51] *See* Kelman, *Trashing*, 36 STAN. L. REV. 293, 318-21 (1984) (discussing the "miracle" of free discussion in other countries without judicial review of legislation).

[52] They may identify with the managers who do the firing, not the managers who are fired. Many employees who lose their jobs are lower level managers fired by higher level managers.

to make wise decisions. Thus, managers will only fire workers who "deserve it" while workers' claims that they do not deserve to be fired are not to be believed.

There is an irony in the assumption that owners and managers can be trusted to operate the business rationally while workers need insecurity to induce them to work. This differential trust fails to account for the fact that a large number—if not the majority—of plaintiffs in wrongful discharge cases are themselves managers. These cases often involve higher level managers firing lower level managers or employees whose jobs, by their very nature, vest them with a significant amount of responsibility and decisionmaking authority.[53] One reason for this may be that managers are likely to have higher salaries so that bringing a suit for damages is more likely to make sense economically. Another reason may be that discharged managers may have more trouble finding comparable employment than nonmanagers. Not only may they face problems finding jobs that involve a similar level of compensation and responsibility, but they may be rejected when they apply for lower level jobs as well, either because they are viewed as overqualified or because it is thought that they will not be able to take orders well.[54] The assumption that those doing the firing can be trusted with firing decisions while those being fired cannot be trusted to act responsibly on the job classifies those being fired as different from those doing the firing. Yet in many of these cases, the two parties come from the same social class and will have similar values. Thus, even if it were true that managers could be trusted and that workers could not be trusted to work hard and be productive, the prevailing assumptions underlying the employment-at-will doctrine fail to explain why discharged managers, as well as discharged workers, are subject to arbitrary firings.

There is also substantial evidence in recent years that our culture has failed to confront directly and honestly the problem of downward mobility.[55] A general stigma exists against the unem-

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[53] *See* Phung v. Waste Management, Inc., 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986) (relatively high-level chemist discharged for reporting illegal conduct has no cause of action against his employer); Cloutier v. Great Atl. and Pac. Tea Co., 121 N.H. 915, 436 A.2d 1140 (1981) (affording store manager cause of action for wrongful discharge when employer acted in bad faith and punished acts promoting public policy).

[54] K. NEWMAN, *supra* note 44, at 66.

[55] *See id.* at 20-41.

ployed. Most people accept the ideology of meritocracy that assumes that people who are capable and hardworking make it in our society. Discharged workers are viewed with suspicion, and large numbers of them have significant problems in finding new employment. Many may never find comparable jobs at all. Even when the evidence is overwhelming that job loss may be caused by large structural changes in the economy or the industry in question, people tend to identify those who have lost their jobs as individually responsible for their own problems. For these reasons, people who experience job loss are overwhelmed by feelings of isolation and failure, and in fact, often actually become isolated. Their network of friends may not withstand the strain of their predicament. It may be hard for judges, as for others, to understand and face this reality. This may cause judges to identify with those who do the firing rather than with those who are fired.[56] Decisionmakers may therefore sympathize more with the manager stuck with a bad employee than with the unemployed worker.[57]

Economic philosophy contributes to the formation of an empirical baseline that is biased against reforming the at-will rule. The dominant economic philosophy in the United States still starts from a laissez-faire baseline. Any reform which is perceived to lead to increased government intervention into company affairs is viewed with great suspicion. In this view, to have outsiders, especially government officials, second-guessing "private" management employment decisions smacks of tyranny and is presumptively

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[56] In describing the emotional effects of unemployment, Studs Terkel wrote:

> The suddenly-idle hands blamed themselves, rather than society. True, there were hunger marches and protestations to City Hall and Washington, but the millions experienced a private kind of shame when the pink slip came. No matter that others suffered the same fate, the inner voice whispered, "I'm a failure."

S. TERKEL, HARD TIMES: AN ORAL HISTORY OF THE GREAT DEPRESSION 19 (1970) (italics omitted).

[57] It is interesting to note that the most widespread reform of the at-will rule, the public policy exception, does not entail a rejection of the empirical foundations of the at-will rule. Under the public policy exception, as noted above, an employee fired for conduct that is protected by a strong public policy, such as reporting illegal conduct by the employer or coworker, may have a cause of action against the employer. This exception, which is among the most widely accepted of the exceptions to the at-will rule, is not founded on the fundamental shift of control over the workplace between employer and employee that a for-cause requirement might entail. It is rather a reallocation of power between the state and the employer, a privileging of state interests over employer interests.

inefficient.[58]

In sum, people evaluate competing empirical claims through the lens of ideology. These ideologies contain sets of beliefs or values, and they appear as stock stories about the way the world works. In the face of uncertainty, judges fall back on the stock stories which embody the starting place of their understanding of the world. Those stock stories favor management control by their images of competent and honorable businesspeople and lazy workers. Empirical evidence to the contrary is measured against this baseline and in many cases the stock stories win. The inability to use evidence to prove them wrong means that advocates of job security lose.

These stock stories implicate a particular social vision. What is this social vision and how is it embedded in the common law of employment relations? What alternative social vision can be drawn out of the rules in force to shift the burden of proof—or at least make the ideological choice clear?

III. Social Vision as Embodied in the Common Law of Property and Contract

Social visions are images of the proper contours of social relationships. They define both how people ordinarily deal with each other and what constitutes justice in social relationships. They are both descriptive and prescriptive.[59] One's social vision permeates and shapes all aspects of legal analysis. We have described above the way that ideology shapes empirical assumptions and observations. In this section, we elaborate crucial aspects of the social vision embodied in the employment-at-will doctrine. Because the social vision is rarely discussed in the cases, we work backwards and construct the social vision underlying employment-at-will from its effects and justifications. We also present various components of an alternative social vision and discuss how the common law would change if labor relations were viewed from this new perspective.

The common law of employment-at-will incorporates a particular normative vision of the relationship between management and

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[58] *See* Epstein, *supra* note 16, at 953-77; *see also* Casebeer, *Teaching an Old Dog Old Tricks:* Coppage v. Kansas *and At-Will Employment Revisited*, 6 Cardozo L. Rev. 765 (1985) (arguing that traditional conceptions of employment relations are based on the premise that efficiency is best attained by promoting mobility of both labor and capital).

[59] *See* Singer, *supra* note 45, at 627-28, 632-63.

workers, but discussion of the normative elements is suppressed by the embodiment of the social vision in the empirical baseline. The vision plays itself out in rules and presumptions regarding the nature of the agreement between the parties and in legal rhetoric concerning the proper role of the courts in regulating the employment relationship. That vision centers around employer control over the workplace. Control is thought to flow from the employer's property rights. The only limits to those property rights are clear contractual undertakings. Traditional free contract norms deny the applicability of altruistic duties contained in contemporary contract and property law. Workers are thought to have no property rights in the workplace or in their employment relation beyond those they have bargained for in contract negotiations.

For purposes of clarity, we divide questions regarding social vision in this section into categories of contract and property. We recognize that the categories overlap, and when the overlap is important, we note it. In what follows, we first address the social vision underlying contract law's treatment of the at-will problem. Then we turn to property law and its contribution to the social vision that supports the at-will rule. In both parts of this section, we point out alternative visions which are also available in current legal doctrine.

Choosing between these social visions has significant consequences. Each vision identifies certain aspects of current social practice and legal obligation as central and others as peripheral and exceptional. They therefore represent competing baselines or starting points for normative argument. Because they orient our thinking in this way, they allocate burdens of proof. They do so by defining presumptions that must be overcome. Recognizing the social vision implicit in current law may partially explain the continued normative force of the employment-at-will doctrine. Recognizing competing social visions is an important first step to clarifying the value choices implicit in employment law. It may therefore help us both understand the political significance of legal reasoning and possible directions for developing persuasive arguments for change.

A. Freedom of Contract Norms

1. Gap-Filling and the Reasonable Expectations of the Parties. The social vision underlying traditional contract law depends on a

normative vision of freedom of contract which bases contractual obligations on mutual assent. Two aspects of this norm are important for our purposes. First, in the absence of clear agreement about how to resolve a particular issue, the courts ordinarily appeal to the reasonable expectations of the parties to fill in gaps in contract language. To define these expectations, judges often look to social practice, especially customs in the trade.[60] Second, judges assume that market arrangements are ordinarily voluntary. Despite massive inroads on this principle in the twentieth century, it still forms the baseline in contractual disputes. The burden is always on the entity or person seeking to regulate the bargain made by the parties to justify deviating from their mutually agreed-upon arrangement. This is true whether one is challenging the existence of genuine mutual assent by pointing to unequal bargaining power or challenging the substantive terms of the contract as immoral or fundamentally unfair.

The standard contractarian version of employment-at-will thus suppresses questions of power and other moral issues regarding the proper relations between contractual partners by equating the at-will rule with the expectations of the parties. It does so even though contract doctrine is increasingly influenced by communitarian values which regulate those power relationships and which point toward greater responsibility of the employer for the welfare of the employee.[61]

The free contract baseline assumes that the employer has no duties that she has not agreed to voluntarily. The courts assume that the employer would prefer to retain as much control over the workplace as possible. The rational employer would therefore retain the absolute right to fire unless she got something in return for giving up her freedom of action. In the absence of such a quid pro quo, the employer would retain the right to fire employees at her discretion. Under this construction of the expectations of the parties, the contract is terminable at will unless the employer explicitly relinquishes that right. The burden is placed on the employee to establish that the contract between the parties restricts

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[60] "Expectations of the parties" sounds like an empirical question but it is only partly so. Normative reasoning, though usually unstated, plays an important role in constructing an acceptable set of "expectations" to protect.

[61] *See generally* H. COLLINS, THE LAW OF CONTRACT (1986).

the employer's right to fire; absent an explicit agreement to the contrary, the employer is free to fire for any reason.

By characterizing employer interests in this way, courts and commentators identify at-will employment as the free market or free contract position.[62] Courts presume that any limit on employer freedom of action would be explicitly stated. Any extra-contractual limitation on the right to fire, such as a just cause rule, is characterized as government regulation because it modifies the free contract baseline. Just as the employee is assigned the burden to prove that a contractual modification of the at-will rule has been agreed on, the proponents of a common law baseline more favorable to workers have the burden of establishing that government intervention is appropriate. In this way, employers are able to characterize their position as the free market position and the just cause standard as government regulation. The burden is always on the proponent of "regulation" to prove its necessity as a limit on "freedom."

Let us examine the assumption that the agreement most likely to accord with the intent of the parties is at-will employment. This arrangement could, in fact, be what employers and employees want or expect, or it could be what they think is the normal practice in industry, and in the absence of agreement to the contrary, it is the arrangement they prefer. A second possibility, however, is that *employers* expect freedom to fire employees with impunity, but *employees* expect to be fired only for cause. These competing expectations are an entirely plausible description of current practices. Employees may believe that it is normal practice for employers not to fire employees without good reason; they may therefore trust employers to treat them fairly, especially when employers convey positive images to attract them to the company. Employees may be aware that some workers are in fact protected by just cause requirements, including unionized workers and government employees. They may also know that many companies, including their own, make job protection claims in employment manuals. They may expect that, if they do a good job, they will not be fired without a valid business reason to terminate their employment. Moreover, they may expect that they will not be asked, as a condition of their employment, either to engage in or to tolerate illegal activi-

[62] Posner, *supra* note 38, at 1627.

ties in connection with their employment.[63]

A third scenario is that one or both parties rely on customary norms to fill in the gap in their contract. In this variation, the at-will doctrine does not reflect the parties' actual intentions; instead, we assume the parties intended to adopt whatever background presumption was in effect. However, under this third scenario, employers and employees may still have diverging expectations, since the source of their background presumptions may vary. Employers may presume that they have absolute rights to fire employees unless they contract those rights away, and may rely on existing law giving them this right. Employees, in contrast, may believe that it is normal *social* practice not to be fired without just cause, and *regardless of the presumptive legal rule*, they may trust employers to abide by this social custom.

The possibility that either of these second two scenarios is accurate in some situations means that employment-at-will cannot be justified as the free contract position. When the expectations of the parties diverge, identifying the free contract position becomes either more complicated or impossible. Under these circumstances, it is misleading to identify at-will employment as the free market position, and a just cause rule as government regulation. On the contrary, if both parties assume at the time of the contract the employer will only fire workers for cause, then the just cause rule represents the true freedom of contract position, while at-will employment constitutes officious government interference in the free market by upsetting reasonable expectations in the interests of promoting the social policy of maximizing efficiency in the labor market.

It might be argued that we should ignore social expectations and assume that the parties voluntarily adopted whatever background presumption the law supplies. However, this assumption biases the analysis in favor of sophisticated market participants, especially when the presumptive rule promotes their interests. Sophisticated market participants are the ones most likely to know about the divergence between the legal presumption and the social custom. With no duty to reveal this discrepancy to workers, employers can have their cake and eat it too. They can convey to workers the impression, at the time they hire them, that they only fire for

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[63] *See* Leonard, *supra* note 15, at 674-75.

cause, while retaining the legal right to do whatever they want later on.[64]

Presuming that the parties are aware of existing legal presumptions, and implicitly agree to them, devalues less formal understandings and expectations that are commonly protected in our legal system. The requirement that employees prove an explicit modification of the at-will rule embodies a social vision that privileges the powerful over the less powerful and the knowledgeable over the less knowledgeable. This is because parties with power in the relationship and knowledge about the law are better able to make sure that the legal relations between the parties are established on their terms.[65]

This is not the only possible social vision regarding contractual relations. In fact, it is inconsistent with the moral underpinnings of much of contemporary contract law, especially the law governing parties that are likely to have unequal power and knowledge. Contract law in the current era often requires parties to cooperate with each other[66] and forces stronger parties to look after the interests of weaker parties.[67] Contractual language is ignored in favor of the actual expectations of the less knowledgeable or weaker party.[68] The rules governing contracts of adhesion are the most striking examples of norms which deny effectiveness to the explicit terms of contracts in situations of inequality.[69] Adhesion contracts are not

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[64] *See* Morgan v. Harris Trust and Sav. Bank, 867 F.2d 1023, 1029 (7th Cir. 1989) (employee manual does not create contractual rights when promises are accompanied by disclaimers of contractual rights).

[65] *See* Phung v. Waste Management, Inc., 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986) (holding that at-will employee discharged for reporting illegal conduct has no cause of action against his employer).

[66] *See* Seaman's Direct Buying Serv., Inc. v. Standard Oil Co. of California, 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984) (holding that implied covenant of good faith requires each party to do nothing to deprive other of benefits of contract).

[67] *See generally* H. COLLINS, *supra* note 61.

[68] *See* Morin Bldg. Prods. Co. v. Baystone Constr., Inc., 717 F.2d 413 (7th Cir. 1983) (reading construction contract to allow rejection only on reasonable grounds despite contractual language giving absolute discretion over acceptance or rejection of building); C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169 (Iowa 1975) (reading insurance contract to cover burglary without evidence of break-ins on exterior of building despite contract term excluding such break-ins because term was inconsistent with reasonable expectations of insured).

[69] For a description of what constitutes a contract of adhesion, see I. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONSHIPS 445-47 (2d ed. 1978). For a discussion of the terms under which courts regulate the application of contracts of adhesion, see Patterson,

enforced because the parties are likely to have unequal bargaining power, the party promulgating the adhesion contract is likely to have superior knowledge of the meaning and legal effect of the terms and the contract is likely to be contrary to the expectations of the weaker party.

The alternative social vision demands a more realistic inquiry into the expectations of the parties, together with more explicit attention to the moral questions raised by termination of employment.[70] Employees may not share the employers' expectation that the parties have agreed to the at-will rule because employees may not know the rule and, even if they do, they might expect that their employer will fire only for cause. Expectations contrary to law develop in numerous situations and may be protected by courts if the courts conclude that the expectations are reasonable.[71] Employees may trust employers to act fairly and may view the at-will rule, if they know about it, as designed to protect employers when they fire *with cause.*

In sum, the expectations of the employees may differ greatly from the expectations of the employers, and the choice of which expectations to protect cannot be answered by appealing to the idea of deference to the will of the parties or maintenance of the free market. Instead, we need to make political judgments about whose interests deserve protection and whose expectations are reasonable.

2. The Duty of Good Faith and Fair Dealing. Even if the free contract baseline points toward employment-at-will, it is no longer the prevailing contractual regime for regulating economic relations. The notion that employers have no obligations other than those they explicitly adopt in clear contractual language flies in the face of contemporary contract law. It is now well settled that "every contract imposes upon each party a duty of good faith and fair

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The Interpretation and Construction of Contracts, 64 COLUM. L. REV. 833, 857-59 (1964) (quoted in MACNEIL, *supra*, at 988-89).

[70] To the extent that our alternative social vision depends on empirical claims, we are aware that our own ideology leads us to accept a vision of the world that is more hospitable to workers' claims.

[71] The best example of this is the evolution of promissory estoppel as an alternative to consideration in contract law. Promissory estoppel protects noncontractual expectations even when a party relies on promises clearly unenforceable under consideration doctrine. Thus, promissory estoppel, especially in its early days, operated to legitimate expectations that were inconsistent with the prevailing legal conditions for enforceability of promises.

dealing in its performance and enforcement."[72] The Second Restatement of Contracts defines this obligation as "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness."[73] Under this current understanding of contract law, the parties to a contract presumably expect and adopt as their agreement that each party will act in accord with customary and reasonable standards governing their particular kind of social relationship. Thus, the employment-at-will doctrine, by granting employers the privilege to act arbitrarily and in bad faith, represents a narrow exception to the general rule.

When viewed in this light, the continued validity of employment-at-will appears highly problematic. Rather than asking why the courts should regulate the free agreement of the parties, we should ask why employment contracts should be treated differently from all other contracts. Why are employers exempt from the general obligation to act in accord with reasonable standards of fair dealing? Why are they entitled to a special benefit available to no other market actor? What could possibly justify the right of employers to take advantage of the trust workers place in them by firing workers without a valid business reason?

This construction of the contractual relationship shifts the baseline. Under traditional analysis, the burden is placed on the party seeking to "regulate" the market transaction by imposing a just cause requirement. The alternative model proposed here creates a new baseline constructed from the generally accepted proposition that market actors have a legal duty to act in good faith in their transactions with each other. Rather than government regulation, a just cause requirement simply enforces the customary practice of promoting trust among market participants. Protecting this trust arguably promotes market transactions. If this is true, the good faith doctrine promotes, rather than interferes with, freedom of contract. Employment-at-will represents not freedom from meddlesome government regulation, but a special exemption from the general obligation to comply with customary expectations.

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[72] RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979). *See also* U.C.C. § 1-203 (1976).

[73] RESTATEMENT (SECOND) OF CONTRACTS § 205 comment a (1979).

The social vision of cooperation and protection of weaker parties points toward a realignment of the employment relationship. This social vision is constructed from a moral view of proper social relations and from an alternative picture of the expectations of the parties. Contemporary contract law implies duties of good faith which preclude, in other contexts, the kind of advantage-taking that results when an employee who believes she will not be fired without cause is suddenly without a job for no good reason. Good faith requires contractual partners to deal fairly and honestly with each other as a moral matter and to abide by the customs and practices of the trade because those practices are thought to embody the expectations of the parties. If normal practice is to fire only with cause, then a firing without cause may violate the duty of good faith. Firing without good reason may violate the duty of good faith because the employer has not treated the employee fairly and honestly and because arbitrary firing violates customary standards of fair dealing in the trade.[74] The duty of good faith, which is a basic assumption in much of contemporary contract law, should preclude termination of employees without good reason.[75]

The duty of good faith requires parties to an economic relationship to help each other and not to unilaterally benefit at another party's expense. Under a duty of good faith, the employer's right to fire should be strictly limited to situations in which the common enterprise between the employer and the employee cannot be saved by further sacrifice by the stronger party. This duty might impose a variety of obligations. For example, the employer, before firing the employee, might be required to make reasonable efforts to save the employee from job loss, by training the employee or by finding a job for which the employee is better suited. Even if the desire to fire is motivated by economic concerns, such as a general downturn in business, the duty of good faith requires the employer to share in the losses with the employee and take the employee's losses into account before jumping to terminate the relationship. If the employee is making good faith efforts to do the job, and the

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[74] Cloutier v. Great Atl. & Pac. Tea Co., 121 N.H. 915, 436 A.2d 1140 (1981) (holding that a cause of action for wrongful discharge exists when an employer acts in bad faith and punishes acts promoting public policy).

[75] *See id.*; Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (holding that a firing resulting from sexual harassment on the job constitutes bad faith).

employer's losses are less than the potential losses to the employee from a firing, the employer should not be allowed to fire the employee unless the losses to the employee could be ameliorated, for example, by a large severance payment or sufficient notice to find a new job. Finally, the employer should be required, when termination is the only option, to make reasonable efforts to ameliorate the consequences of termination, for example, by helping the employee look for another job or other such aid.

3. Competing Contract Baselines. The social vision supporting employment-at-will relies on particular baselines that define the core norms of contract law and employment relations. It presumes that market participants have no obligations to those with whom they enter into market relationships beyond the obligations explicitly agreed upon between the parties. It presumes that employers and employees know that employment relations are normally terminable at will by either side, and that if workers wanted a right to keep their jobs in the absence of just cause to fire them, they would know that they had to bargain for such an entitlement. Finally, it promotes distrust among market participants by requiring them to look out for their own interests and to assume that the only cooperation they will get from others must be specifically bargained for and agreed upon in advance.

An alternative baseline for contract law might start with the assumption that employment contracts are to be treated like all other contracts in incorporating customary standards of good faith and fair dealing. Given this ordinary presumption, workers, as well as employers, may expect that employees will ordinarily be fired only if the employer has a valid business reason to terminate employment. In this view, employment-at-will represents an exception to the general rule and therefore requires justification. The burden should be on the employer to explain why employers need a special exemption from the duty to act in accord with the reasonable expectations of their contracting partners, a duty that applies to all other market transactions in which employers engage. Employers must also explain why the courts should interfere in the free market by interpreting their employment contracts in a way that violates the workers' reasonable expectations. In this alternative view, employment-at-will grants *employers* a right for which they did not bargain, and therefore, redistributes wealth from workers to employers by wrongfully expropriating workers' jobs in

violation of the agreement between the parties. If employers want a right to fire workers arbitrarily or without just cause, they should make this clear to workers in contract negotiations and bargain for this right.

B. *Property Rights and Control of the Workplace*

1. Employers as Owners and Workers as Non-Owners. The employment-at-will doctrine rests on a particular construction of property rights as well as contract rights. It protects employers' property rights against claims by workers that they have a right of access to employers' property.[76] The social vision underlying this scheme identifies employers as owners of property and employees as non-owners. The employer, as owner, has the power to determine the terms on which others are granted access to the employer's property. Like any landowner, the employer has the power to grant non-owners a license to enter her property. Moreover, licenses are presumed to be revocable at will.[77] If a non-owner wants continued access to property owned by another, she must purchase that right by negotiating a contract that provides for continued access, buying an easement or leasing the property. The presumption is that the owner retains the right to exclude non-owners from her property unless she explicitly gives up that right.

When courts define employers' property rights in the workplace as the baseline, workers' arguments in favor of job security are doomed before they can be made. This is because constructions of social relationships that define one party as an owner and the other party as a non-owner inevitably bias the analysis in favor of the owner. They do so by creating a presumption that owners retain whatever rights to control contested resources that they do not give away.

What alternative constructions of property rights in employment relationships would shift the baseline and constitute a social vision

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[76] *Compare* Reich, *The New Property*, 73 YALE L.J. 733 (1964) (government benefits should be considered and protected as property to prevent government control over the integrity of the individual). The courts' reluctance to move beyond traditional property rights has been noted by Cass Sunstein in his recent article, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987). For an excellent analysis of employers' property rights claims underlying labor law, see J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983).

[77] *But see* Singer, *supra* note 45, at 670-72.

favoring worker interests? We propose two alternative ways to conceptualize the employer-employee relationship. First, we argue that workers gain property rights in the workplace from their reasonable reliance on a relationship with the owner that made access to the property available in the past. This discussion has been developed elsewhere.[78] Our discussion here uses some examples from the common law to illustrate that non-owners are sometimes conceptualized as owners and granted protection against unjustified loss of access to property on which they have relied in the past. Second, we argue that jobs themselves should be recognized as legally protected property interests.

2. The Reliance Interest in the Workplace. A more communitarian social vision of property rights would start from the assumption that property rights are almost always shared, rather than unitary, and that they ordinarily are created in the context of relationships. This is true in the most important areas of social life, including the family, the workplace, and housing. It is especially true in the context of labor relations. Instead of identifying one party as the owner and the other as the non-owner, we should focus on the social relationships the workplace comprises and define the just contours of those relationships. In this view, property rights do not represent zones of autonomy for actors who control sets of social resources. Instead, they arise out of relationships of mutual dependence.[79] Under this understanding of market relationships, property rights are normally distributed between the parties to those relationships. This means that, for some purposes, it is useful to describe the "non-owner" as possessing property rights in the relationship. We should understand the employment relationship as a device for allocating control over resources between the parties. In this view, property rights in employment relations are shared and distributed among the parties to the relationship. The allocation of property rights between employers and employees is based on a variety of factors, including their contributions to the joint enterprise, their needs and the needs of others,

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[78] *Id.* at 673-78.

[79] For an elaboration of this conception of property rights arising out of relationships of mutual dependence, see *id.* at 652-701. *See also* Cornell, *Dialogic Reciprocity and the Critique of Employment at Will*, 10 CARDOZO L. REV. 1575 (1989) (arguing that employment relations should be structured to promote relations of reciprocal symmetry necessary for full development of individuals).

and notions of what kinds of labor relations are just. With a relational conception of property rights as a baseline, workers may have legitimate claims to protection from unjustified discharge.

In a variety of instances, the common law has redefined nonowners as owners. For example, mortgage law developed to protect the interests of landowners who conveyed their property to others in return for a loan. The borrower/owner conveyed title to the property to the lender, which the lender agreed to return if the borrower paid the debt by a certain day. Effectively, the owner conveyed to the lender a fee simple subject to condition subsequent, retaining a right of entry to recover the property on a particular day by repaying the loan.[80] This arrangement vested all current property interests in the lender, with the borrower retaining only a future interest. Originally, the lender exercised the right of the owner to possess the property as a way to earn rents and collect profits.[81] Later, the lender allowed the mortgagor to possess the property, although the lender retained the right to take possession at any time. If the borrower did not repay the loan on the appointed day, his future interest would be forfeited. This was an absolute rule and would apply even if the mortgagor could not find the mortgagee to pay him. If the borrower did not repay the debt, the lender would retain fee simple ownership of the entire property, even if its value far exceeded the amount of the unpaid debt.

The equity courts intervened to regulate these transactions. They allowed the borrower to recover title to the property even if he had not complied with the terms of the right of entry. By the seventeenth century, mortgagors had the right to recover both title and possession after full title had shifted to the mortgagee by tendering the amount of the unpaid debt. The mortgagee was allowed to cut off this right by foreclosure procedures. The equity courts decided that the lender's only legitimate interest in the land was as security for the debt. They therefore ignored the terms of the contractual arrangements which vested title to the property in the lender and gave the borrower the right to get the land back for the amount of the debt. The courts called the borrower's right to

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[80] G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 1.2, at 5-6 (1979) [hereinafter G. OSBORNE]; A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 242-47 (2d ed. 1986).

[81] G. OSBORNE, *supra* note 80, § 1.2, at 6-7.

buy back the land before foreclosure the "equity of redemption."[82] This equity of redemption was a new, judicially-created property right.

It is important to recognize how extraordinary this intervention in the market was. We have become so accustomed to treating mortgages in this way that we fail to appreciate the historical basis of the equity of redemption. At the time the equity courts heard the case, they had before them an owner, the lender who held title to the land, and a non-owner, the borrower and *prior owner*, who now had no legal rights *of any kind* in the land. The courts ignored entirely the parties' contractual arrangement and the current owner's legal title. They seized from the lender/owner all rights in the land other than the right to force a sale of the property to assure repayment of the loan. The courts then vested in the non-owner title to the property (if the borrower could repay the loan) which the court had appropriated from the owner/lender. If the borrower could not repay the loan, the court forced the owner to sell the property and seized the proceeds of sale above the amount of the unpaid loan from the title holder and gave it to the borrower. Thus the courts redefined the borrower/non-owner's interest as a property interest, which they called the "equity of redemption."

This arrangement recognizes property interests in the party to a relationship who, by the terms of the contractual arrangement, has no legally enforceable property interests. It divides property interests between the parties, calling the mortgagor the "equitable owner" and the mortgagee the "legal owner." It strips the mortgagee of absolute control over the property and limits the mortgagee's rights to those of a secured lender. Of the bundle of numerous rights that ordinarily accompany fee simple ownership of property, the mortgagee was allowed to retain only one—the right to sell the property to recover the unpaid loan. At the same time, the courts identified the borrower as an owner whose rights are defined in relation to those of the lender. The process of redefining property rights in this situation was so successful that the legal method of accomplishing the transaction changed to fit the new allocation of rights so that instead of absolute title, the homeowner now grants the lender an interest denominated a "mortgage." The

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[82] *Id.* § 1.3, at 7-8.

lender who holds title is not thought of as an owner at all, but merely a secured lender.

The equity of redemption protects the interests of homeowners in relying on continued access to their homes. And far from usurping the role of the legislature in creating new property rights, the courts' creation of this property right has been ratified by legislation implementing and regulating the foreclosure procedure in a manner protecting the homeowner's right to redeem the property before the foreclosure sale. This legislation regulates the contractual arrangement between the borrower and lender by making the right of redemption before foreclosure nondisclaimable. Calling this right a property right invests the borrower with the honorific title of mortgagor or "homeowner." This language of property rights expresses the moral claim of the mortgagor to exert control over property purportedly transferred to another.

Similarly, adverse possession law defines the adverse possessor, the non-owner, as the owner of property. The rules in force shift ownership from the title holder to the adverse possessor if the possession has been sufficiently open, longstanding and without the owner's permission. As with mortgage law, the rules in force transfer property from the true owner to a non-owner who has relied in the past on a relationship with the owner that made access to the property possible. As with the equity of redemption, the adverse possessor is implicitly vested with the moral or economic claim of the owner. The owner has effectively abandoned the property by not exercising her right to bring a trespass claim and the adverse possessor has acquired property interests because of longstanding use. The adverse possessor has acted in a way that would create property rights in unowned property. Despite the true owner's legal title, we shift our sympathies to the adverse possessor and conceptualize the adverse possessor as the "owner."

The rules in force treat the adverse possessor, who is in fact a *trespasser*, as the owner, because we assume the adverse possessor would experience a significant loss if the property were taken away—perhaps even a blow to her personhood. In contrast, the true owner would experience renewed possession as a windfall gain—a benefit less substantial than the harm to the adverse possessor. The courts create property rights in the non-owner because judges believe that society benefits by forcing a transfer. This benefit is based on the belief that the adverse possessor will use the

property more productively and that the adverse possessor will be harmed more than the true owner if the property is taken away. The harm to the adverse possessor is thought to be greater than the harm to the true owner because the adverse possessor, not the true owner, develops personhood interests in long use of the property.[83]

Land reform is a legislative realignment of property rights to protect individuals who need continued access to land for an affordable price. Our example is the Hawaii land reform program at issue in the Supreme Court case, *Hawaii Housing Authority v. Midkiff*.[84] In Hawaii, many homeowners leased the land on which their homes sat from a few rich and powerful landholders. Under the scheme that the Supreme Court upheld in the case, the legislature granted to the leaseholders the right to purchase the land from the owners, against the wishes of the owners. The Hawaii legislature thought that the needs of the tenants (the possessors) were more important than the property rights of the landowners. The legislature effectively treated the lessees as the owners of the property and the lessors as mere investors. As with adverse possessors and mortgagors, the tenants here were invested with the moral claims of the owner to possession of the property, while the landlord was relegated to mere compensation.

These examples all illustrate legal rules that allocate property rights between the parties to an ongoing relationship. We learn from these examples that the rules in force sometimes implement a social vision of property rights that focuses on the needs of both parties to the relationship that may go beyond and even contradict the terms of their agreement. The rules may protect the needs of the less powerful party to a relationship by guaranteeing access to property on which that person has relied in the past. This communitarian social vision of property rights is embodied in property doctrines that realign property interests in the face of contracts that apparently grant rights to stronger parties. In these cases, the law grants a weaker, more vulnerable party ownership of property

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[83] Radin, *Time, Possession, and Alienation*, 64 WASH. U.L.Q. 739, 748-50 (1986).

[84] 467 U.S. 229 (1984). Professor Williamson Chang has argued that the Hawaii land reform program actually represented a redistribution from a relatively disempowered group —native Hawaiians—to a politically powerful group. Conversations with Williamson Chang, Professor of Law, University of Hawaii School of Law (1989).

that has been contractually allocated to the stronger party.

A communitarian social vision might explain these examples in two ways. First, they may rest on the notion that property rights between the parties to an ongoing relationship are open to realignment in the social interest. Adverse possession may protect the interests of one who has made productive use of property. Homeowners are granted the equity of redemption both to encourage home ownership and to prevent the social dislocation that may occur from loss of home or family wealth. The Hawaii land reform program was intended to correct a market failure by creating a competitive market for fee simple ownership of land.

Second, property rights are subject to realignment when the interests of the parties are such that a non-owner needs the property more than the recognized owner and the relationship is such that we consider it fair to place this obligation on the owner. The homeowner, the long-term tenant, and the adverse possessor depend on access to land, and have relied on a relationship with the owner that made such access possible.[85] They depend on continued use of the property and need it more than the true owner. Their interest is likely to be personal. In contrast, the title holder's interest in these cases is likely to be merely financial, and therefore fungible.[86] In allocating control over property between the parties, the law grants a certain amount of protection to both parties. In so doing, it recognizes that the more vulnerable party may have personal interests in continued access to the property, while the true owners' interests are merely financial.

These same arguments apply to workers' interests in their jobs. These personhood and productivity arguments apply to employees as well as adverse possessors, mortgagors and long-term tenants. Employees can claim that after long tenure in a job, the employee should be granted rights to continue working. Job security induces the employee to care about the success of the common enterprise. Job security may increase productivity by promoting trust among market participants and increasing the sense of participating in a common enterprise. A long-term employee suffers more from the harm of losing a job than the owner gains from the right to fire.

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[85] This is true, for example, in the case of mortgagors who borrow money from the mortgagee to enable them to purchase the home.

[86] Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 986-91 (1982).

After a long term of employment, the worker needs continued access to employment more than the owner needs the right to exclude.[87] Employees, because of their relative inability to diversify, might be more dependent on continued access than the employer is on the ability to exclude through firing. These needs may exist regardless of the contract between the parties, and, perhaps, should overcome the contract—especially if the contract is itself the product of disparities in power.

Employment-at-will is justified by a construction of property rights that emphasizes the employer's property interests and ignores the property interests of the employee. The difference between judicial treatment of employment-at-will, on the one hand, and judicial treatment of mortgages and adverse possession, on the other hand, revolves around the concept of ownership. In the employment case, the employee is conceptualized as a non-owner while the manager is, or represents, the owner. The loss of managerial control is valued more highly than the loss of a job *partly* because the job is not conceptualized as a property interest, while control of the workplace (and of one's land) *is* conceptualized as an aspect of ownership of the workplace. The choice of a baseline may therefore significantly affect our assessment of the appropriate contours of the relationship between the parties.

3. Jobs as Property. An alternative conceptualization of a communitarian property regime might recognize property rights in the activities themselves. Under this conception, workers would not only be "part-owners" of the workplace, but would have a separate property interest in their jobs. This reconceptualization of jobs as property would be consistent with Charles Reich's landmark article, *The New Property*.[88] In that article, Reich argued that government benefits in modern society serve many of the same functions as traditional property and should therefore be recognized as property which cannot arbitrarily be taken away. It is now well settled that government jobs may be protected under the fourteenth amendment as property interests that cannot be taken without due

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[87] *See* Walzer, *Town Meetings and Worker Control: A Story for Socialists*, in RADICAL PRINCIPLES 273 (1980).

[88] *See* Reich, *supra* note 76. *See also* Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 15-16 (1988) (describing nascent conceptions of property rights in jobs).

process.[89] The same reasoning should apply to jobs in the private sector—a worker's job is likely to be her most valuable asset and the worker may depend on it for her continued ability to remain a functioning member of society.[90]

Congress recently passed a plant closing notification bill which requires reasonable notice as a prerequisite to layoffs of large groups of employees.[91] This requirement treats jobs like tenancies, which cannot be ended without notice. A notification requirement effectively treats jobs as property interests that are defeasible only on certain conditions.

Property rights in jobs could exist in a variety of forms. The narrowest definition would prohibit employers from firing employees for reasons of malice or in bad faith. A broader definition, advocated here, would adopt the just cause termination principle. Employees have the right to keep their jobs unless the employer can demonstrate just cause to fire them. Other conceptions of workers' property rights are also conceivable under which the right to fire would be as limited as the right to remove an owner from real property. This definition could grant employees an almost absolute right to continued employment. Under this construction, the employer could only sever the employment relation by buying the job back from the employee. The employer would have to pay the employee enough to induce the employee to give up the right to continued employment. The employee may forfeit the job for extreme misconduct, as for instance, real and personal property owners may forfeit property if the property is used for, or acquired with the

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[89] *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576-77 (1972) (holding that fourteenth amendment requires a hearing prior to nonrenewal of nontenured state teacher's contract if teacher can show that he was deprived of "property" interest in continued employment). *But see* Bishop v. Wood, 426 U.S. 341 (1976) (holding that existence of a property interest in continued employment depends on state law, rather than mutual understandings growing out of the employment relationship).

[90] In the public sector, the Supreme Court has recognized the new property, but only to the extent that the government benefit in question is an entitlement that is protected by law from termination or alteration. Need is not a factor in determining whether a property interest exists. This approach can be criticized for failing to recognize how important need is to Reich's analysis. *See* Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U.L. REV. 277, 301-02, 303 & n.110, 304-05 (1988).

[91] Worker Adjustment and Retraining Notification Act, 29 U.S.C.A. §§ 2101-2109 (West 1988), stating that an employer shall not order a plant closing or mass layoff until the end of a 60-day-period after the employer serves written notice thereof to affected employees.

proceeds of, distribution of illegal drugs. And perhaps abandonment or inattention could lead to forfeiture as in adverse possession.

A conception of property in jobs could grant employees the right to manage the business. This conception would treat employers like mortagees or bondholders, whose interests are generally limited to recovering a reasonable return on their investment. Employees could then exercise other property rights, including the right to manage the business. Under this redefinition of property rights, investors, like creditors or shareholders, would be granted rights sufficient to protect their legitimate interests in their investments. Indeed, our entire conception of property rights in the workplace may need radical restructuring to bring democratic values into the workplace. The separation of ideals of democracy from the marketplace in general is difficult to justify.[92]

Jobs should be conceptualized as property rights to invest employees with the moral authority of owners whose right of access to their livelihood may not be destroyed without justification. The threat of firing, and the general lack of job security, places control over important aspects of the employee's life in the employer's hands. Hierarchical social structures, such as the employer-employee relationship, deny to the parties at the lower end of the hierarchy important aspects of their personhood. Indeed, the employees' ability to try to change the workplace for the better may be hampered by the potential for management reaction against an employee who "rocks the boat" even if the employee has useful ideas.[93]

Conceptualizing jobs as property shifts the baseline for discussing what constitutes justice in employment relations. If we applied

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[92] *See* Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U.L. REV. 1 (1988).

[93] *See* K. NEWMAN, *supra* note 44, at 89-90. We are not speaking here only of the lack of employee control over matters directly involved in the workplace, although the lack of control in the work setting is certainly important. For in addition to effects on the social structure of the workplace itself, the hierarchical nature of the at-will relationship allows for domination of the worker beyond the boundaries of the workplace. Employers can punish employees out of distaste for workers' political views or lifestyle. This may lead to less vocal expression of political views and may force some workers to suppress their way of life while at the workplace and even while in the community. Management with the power to arbitrarily fire employees may use that power to threaten employees' freedom beyond the legitimate concerns of the employer and beyond the walls of the workplace.

the empirical and moral claims underlying mortgages, adverse possession, and land reform to the employment relation, our assessment of the relative costs and benefits would shift. Employees, like adverse possessors, invest their personhood in their jobs. Loss of a job is a serious blow, not only because it entails loss of possibly the largest portion of one's wealth—a steady income—but also because it entails loss of part of one's identity. Firing thus should be viewed as a significant harm. In contrast, a just cause rule would still allow employers to fire workers for cause, interfering in the employers' control of the workplace only by making their firing decisions subject to worker challenge. Viewed in this light, a just cause rule protects both the employers' and the employees' property interests, while the at-will rule ignores the employees' property interests entirely. Defining the workers' interests as property interests changes the baseline by investing those interests with the moral authority of ownership. It therefore shifts the burden of proof by forcing the proponent of employment-at-will to justify a rule that allows an employer to strip an employee of property rights arbitrarily and without just cause. Stated in this way, the argument for employment-at-will appears to be weak indeed.

IV. BASELINES IN ECONOMIC ANALYSIS

The goal of efficiency analysis is to let people do the best they can for themselves, given their circumstances.[94] Efficiency, as defined in the law and economics literature, is the result to which the parties would have agreed absent impediments to bargaining called "transaction costs."[95] This criterion advises us to enforce contracts in accordance with their terms unless we are sure that some other terms would have been agreed to if all affected parties had possessed perfect information and been able to bargain with each other. If we know that some other terms would have been adopted in a world without transaction costs, then we can increase social wealth by enforcing those terms. At the same time, efficiency theorists argue that if we are not sure what the result would have been

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[94] *See* Schwartz, *Justice and the Law of Contracts: A Case for the Traditional Approach*, 9 HARV. J.L. & PUB. POL'Y 107, 107 (1986).

[95] *See* Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1-19 (1960); A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7-10 (1983); R. POSNER, ECONOMIC ANALYSIS OF LAW 11-15 (3d ed. 1986).

if there were no impediments to bargaining, we should defer to whatever bargain was made by the parties. By enforcing the contract in accordance with its terms, we will at least be certain of giving the parties what they thought they wanted at the time they contracted.[96]

Economic analysis of common law rules has the appearance of neutrality. Efficiency theorists ask us to avoid controversial value judgments by basing legal rules on the criterion of consent.[97] Despite the apparent neutrality of this criterion, however, the results of efficiency analysis differ depending on the assumptions from which the analysis proceeds. Because the definition of a result as efficient depends on the baseline from which one starts the economic analysis, it is imperative to clarify the value choices inherent in alternative baselines.[98]

A just cause termination standard could be implemented in two different ways. First, it could fill gaps in contract language by constituting a disclaimable presumption. Under this version of the rule, an employment contract that was silent on the question of job security would be interpreted to grant the worker the right not to be fired without just cause. In Part A of this section we address several baseline questions in determining the economic effect of such a presumption both on existing contractual relations and on future employment relations.[99] Second, just cause termination could be made a nondisclaimable or compulsory term in the employment contract. In Part B, we discuss several baseline questions in determining the efficiency of making the just cause standard for discharge a compulsory term in employment contracts.

A. How Presumptions May Affect Outcomes in Contractual Relations

1. The Offer-Asking Problem.

a. Four Baselines. Efficiency theorists claim that in situations where transaction costs are low and the parties possess perfect information, it will not matter which presumption is adopted.[100] This

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[96] *See* R. POSNER, *supra* note 95, at 3-17.

[97] *See* R. POSNER, THE ECONOMICS OF JUSTICE 88-103 (1981).

[98] *See* Kennedy, *supra* note 6, at 410-21.

[99] Our analysis is not intended to be comprehensive. Baseline questions other than those we discuss here are also important to economic analysis of entitlements.

[100] *See* Schlag, *An Appreciative Comment on Coase's* The Problem of Social Cost: *A*

is because the parties will bargain around any presumption that is not in their mutual best interest. Whichever party values the entitlement most will either keep it or buy it from the other party. Whether we presume that a silent contract creates an employment-at-will relationship or a just cause termination agreement will not affect the actual result. If the right to fire is worth more to the employer than job security is to the employee, then the parties will reach this result under either presumption. If the presumption is employment-at-will, then the employee will be unable to purchase a just cause provision from the employer; the employer will refuse to sell the right to fire at will at the price offered by the employee.[101] If the presumption is the just cause standard, the employer will induce the employee to give up the protection of the provision by raising the wage offer high enough to compensate the employee for the increased risk. In either case, the efficient result will emerge.[102]

This conclusion, however, is flawed. The result may, in fact, differ depending on which presumption is chosen. To predict what the parties would have agreed to in the absence of transaction costs, we must imagine the hypothetical bargains that would take place in the absence of impediments to bargaining. Of necessity, there must be a baseline for this analysis. Bargaining cannot occur without something to bargain over. To engage in transaction cost analysis, therefore, we must define the property rights that will be available for exchange between the parties. Different distributions of property will result in different bargains. What parties agree to will differ depending on their relative bargaining power, and bargaining power in turn depends in part on which party owns whatever the parties are bargaining about.[103]

View From the Left, 1986 WIS. L. REV. 919, 927; Schwab, *A Coasean Experiment On Contract Presumptions*, 17 J. LEGAL STUD. 237, 238-39 (1988).

[101] The "price" will be a reduction in wages demanded or some other concession of equal value to the employer.

[102] Of course, adopting the presumption that will most often accord with the will of the parties may improve efficiency by obviating the need for transactions to remedy an erroneous presumption, thereby saving the costs of those corrective transactions.

[103] It is important here to distinguish between distributive and efficiency effects. The initial distribution of entitlements might affect the ultimate distribution of wealth after bargaining (distributive effects) and/or it might affect the ultimate rule the parties agree to (efficiency effects). We argue that both the distribution of wealth and the rule will be different depending on the baseline chosen. This problem has been explored through bargaining

In many situations the amount an individual would be willing to offer to buy an entitlement from another will be less than the amount that same individual would ask to sell the entitlement if she owned it. This is known as the offer/asking problem.[104] Offer prices are often likely to be lower than asking prices for several reasons, including wealth effects and psychological effects.[105] Whatever the reason, this fact of life introduces an irreducible measure of indeterminacy into efficiency analysis. The use of offer prices versus asking prices determines, to some large extent, the relative bargaining power of the parties. If we use a person's offer price, we are assigning that person less bargaining power than if we use that person's asking price. By affecting relative bargaining power, the choice between offer and asking prices may determine the bargain that would be reached in the absence of transaction costs, and hence, the efficient result.

Four alternative baselines are available for efficiency analysis. First, we can assume that the correct starting place is the status quo. All existing legal rights are defined by their current definitions and the existing distribution of wealth is taken as given. Under the *status quo baseline,* we use the asking prices of all existing entitlement holders and the offer prices of all those seeking to acquire entitlements from those owners.[106] Second, we could assume that the entitlement in question is up for grabs and ask which party would buy the entitlement in an *auction.* To make this determination, we would compare the offer price of the owner with the offer price of the non-owner. Third, we could hypotheti-

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experiments which have been used to argue that these effects do not occur. *See* Schwab, *supra* note 100, at 238 n.1. In Schwab's particular experiment, distributive differences, but not efficiency differences, were found when entitlements were reallocated in hypothetical bargaining among students. Substantial doubts have been raised regarding the validity of the hypothetical bargaining methodology, however. *See id.* at 239 n.4.

[104] *See* Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem,* 52 S. CAL. L. REV. 669, 678-85 (1979); Kennedy, *supra* note 6, at 401-21; Carlson, *Reforming The Efficiency Criterion: Comments on Some Recent Suggestions,* 8 CARDOZO L. REV. 39, 54-55 (1986).

[105] A person with little wealth may demand a much higher price to be bought out than she would be willing and able to pay to buy a right. For example, an anti-war protestor might not be able to pay a chemical manufacturer enough to stop manufacturing napalm, but her asking price if she owned the right to stop the manufacturer might be much higher than she could offer. The psychological effect is that a person might demand a higher price to sell something than she would pay to buy it because of the psychology of ownership.

[106] Kennedy calls this criterion "winners bribe losers." Kennedy, *supra* note 6, at 411-13.

cally reverse the entitlement in question, assuming that the claimant (the non-owner) owns the entitlement rather than the owner. Under this view, we compare the offer prices of existing owners with the asking prices of non-owners. This baseline asks whether the market would correct a redistribution of the entitlement from the owner to the non-owner. We can call this baseline the *redistribution baseline* because it redistributes the entitlement from the owner to the non-owner, thereby advantaging the non-owner and disadvantaging the owner. Fourth, we can compare the asking price of the owner with the asking price of the non-owner.[107] This criterion asks us to consider which party would ask the most to give up the entitlement. We can call this the *partial redistribution baseline* because it benefits the non-owner by using the non-owner's asking price without depriving the owner of the right to use her asking price. These various baselines are illustrated in Figure 1.

		Owner	
		Offer Price	*Asking Price*
Non-owner	*Offer Price*	Neither has entitlement *(auction baseline)*	Owner has entitlement *(status quo baseline)*
	Asking Price	Non-owner has entitlement *(redistribution baseline)*	Both have entitlement *(partial redistribution baseline)*

Figure 1

The most popular procedures among efficiency scholars seem to be the *status quo baseline* and the *auction baseline*.[108] The status quo baseline asks whether the benefits of change outweigh the costs; we ask whether those who benefit from change could com-

[107] This analysis becomes more complicated when we consider externalities. The interests of third parties can similarly be defined by existing entitlements or can be hypothetically reversed. Similarly, we can compare respective offer prices or respective asking prices.

[108] Few law and economic analysts seem to recognize the divergence between offer and asking prices as a serious problem.

pensate the losers and still be better off than before. The auction baseline grants the entitlement to the person "willing to pay the most for it."[109] Both of these methods place the burden on the non-owner to acquire the entitlement, either directly from the owner or in competition with the owner in an auction. Because these methods use the non-owner's offer price, they refuse to ask how the non-owner would value the entitlement if she owned it. Thus they are, relative to the other methods, biased against non-owners.[110]

By comparison to these two methods, the *redistribution baseline* and the *partial redistribution baseline* privilege the interests of the non-owner over those of the owner. These baselines refuse to take the existing distribution of entitlements for granted. We are willing to assume, temporarily, and for the purposes of analysis, that the non-owner owns the entitlement in which she is interested. Since asking prices are likely to be higher than offer prices, this baseline gives the non-owner more bargaining power in our hypothetical bargain than when we use the non-owner's offer price.

b. Adverse Possession and the Redistribution Baseline. Most law and economics scholars favor the baselines that privilege the interests of current owners. They ordinarily do so without defending, or even noting, that their choice of a baseline privileges the status quo. Yet such a bias in moral theory requires justification. The goal of efficiency theorists is to maximize wealth, which they take to be the best proxy for promoting the general welfare. But as a proxy for social utility, efficiency has problems. Using "willingness and ability to pay" as a measure of how much an entitlement is worth to an individual[111] systematically biases the analysis in favor of the interests of existing property owners—those who have the most "ability." We have no reason to believe that the rich have more refined tastes than the poor, such that the poor are content with less. A poor person is just as hungry for a meal as a rich per-

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[109] Richard Posner uses this formulation quite often. *See, e.g.*, R. POSNER, *supra* note 95.

[110] The second method is far less biased against non-owners than the first. Assuming that nobody owns the property and comparing offer prices of all interested persons puts everyone on an equal plane; it does not discriminate against non-owners as does comparing the non-owner's offer price with the owner's asking price. At the same time, the comparison of offer prices refuses to protect the interests of non-owners relative to owners, as does the method of comparing the asking price of the non-owner with the offer price of the owner.

[111] *See* R. POSNER, *supra* note 95, at 11-12.

son. The fact that the rich person may outbid the poor person does not diminish the poor person's hunger. On the contrary, the intensity of the poor person's preference may far exceed that of the rich person, but this fact will not be registered in the market once the limit of the poor person's "ability" has been reached. Because "efficiency" measures value by market demand, the interests and needs of those with less market demand—the poor and the working classes—count for less in this analysis. This feature of economic analysis is not attractive in a moral theory.[112]

The redistribution baseline alters this aspect of economic analysis by asking what exchanges would take place if specific entitlements were redistributed from current owners to non-owners. It is not uncommon to see the redistribution baseline in discussions by liberal law and economics scholars.[113] More important, it is possible to understand existing legal doctrines that protect the reliance interest in property as instances where the legal system privileges the interest of non-owners over the interests of owners. Earlier, we explained adverse possession, mortgages, and land reform as situations in which non-owners are invested with the moral claims of owners. In economic terms, these doctrines can be understood as reflecting either the redistribution baseline or the partial redistribution baseline.

We can illustrate this claim by examining in more detail the doctrine of adverse possession. Let us take as the paradigm case the situation of a mistaken boundary between neighbors. Both parties are mistaken about the "true" boundary between their lots. Because of this mutual mistake, the true owner allows the adverse possessor to occupy a strip of land along the border of their properties. The adverse possessor uses the strip either by paving a driveway or by planting grass and shrubs or building a fence or otherwise treating the strip as an integral portion of her property. Who is entitled to control the strip when the mistake is discovered? We can frame the legal issue in Hohfeldian terms: Does the true owner have an immunity from losing title to her property or are there circumstances under which a non-owner has a legal power to acquire ownership of the strip without the consent of the

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[112] *See* R. DWORKIN, LAW'S EMPIRE 276-312 (1986); R. DWORKIN, *Is Wealth A Value?*, in A MATTER OF PRINCIPLE 237-66 (1985).

[113] *See* Kennedy, *supra* note 6, at 405-07.

true owner?[114] The rules in force transfer ownership of the strip from the true owner to the adverse possessor if the use has been continuous, visible, lengthy and without the true owner's permission. If this result can be defended as efficient, what baseline is implicit in the efficiency analysis?

Law and economics explanations of adverse possession assume that, in most cases of long use, the adverse possessor will value the property more than the true owner.[115] This assumption appears plausible for two reasons. First, the adverse possessor may have come to rely on access to the property and may have developed personal interest in the strip. It has become a fixture in the adverse possessor's life, and she has come to identify herself and her range of possibilities with reference to such a property interest. The true owner, on the other hand, has lost any personal interest she may have had in access to the strip.[116] The true owner has not seen fit to protect her interests in the strip by discovering her right to control it; moreover, she has acquiesced in its use by another for a substantial period of time. Over time, the adverse possessor's interest in the property has grown stronger, while the true owner's interest has become weaker. When the mistake is discovered, the parties have developed a relationship with each other that has led to vastly different expectations regarding access to the strip. The

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[114] *See* Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). There are four possible ways to resolve the conflicting claims to the strip of property. First, the true owner may retain ownership no matter what happens. Under this rule, the description in the deed prevails, as long as it does not conflict with the description in any other deed. In most cases, this rule would approximate the rule that the first possessor wins. The first possessor is likely to have performed the survey necessary to provide the description in the deed. Second, the "possessor" or user of the property may prevail. Under this rule, we would need to define what acts constitute possession for the purposes of transferring ownership from the true owner to the possessor. Third, the person whose use is most socially valuable may prevail. Under this rule, we would need to do case by case analysis to determine which of the contending parties would best use the property. Fourth, the user may prevail only if the use has continued for a sufficiently long period of time. Lying behind all these possible rules is the question of whether or not permission constitutes an absolute or partial defense to adverse possession. Compare adverse possession and prescriptive easements (in which permission is a defense) with easements by estoppel and necessity (in which permission to use the property is an element of the claim itself).

[115] *See* R. POSNER, *supra* note 95, at 70. These explanations also assume that whichever result is chosen will have little or no effect on third parties; thus, it is unnecessary to consider externalities.

[116] *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476-77 (1897); Radin, *supra* note 83, at 748-50.

adverse possessor has come to rely on the true owner's acquiescence in the adverse use, while the true owner has learned to live without access to the strip. The adverse possessor has relied on a relationship with the true owner that made access to the strip possible; at the same time, the true owner lacks any reliance on a relationship making access to the strip possible.[117]

Second, all other things being equal,[118] harms are often experienced more seriously than unexpected gains. Perhaps this is because of the "decreasing marginal utility of money": a decrease in wealth will cause a greater loss of utility than an increase in wealth will cause an increase in utility.[119] Or perhaps it is simply a bias in favor of the status quo: people have a right to maintenance of things as they are as a minimum—they have a right to maintain their existing standard of living—but no right to having things be better than they are. Whatever the reason, this appears to be a widespread intuition. If the adverse possessor were to lose access at this point, she would experience a loss of wealth. On the other hand, if the true owner were to acquire access at this point, she would experience an unforeseen increase in wealth—a windfall. Assuming that the wealth of the parties is equal, we seem to presume that the loss to the adverse possessor would exceed the windfall gain to the true owner.

If these empirical claims are correct, we can increase efficiency by giving the adverse possessor the legal power to acquire legal title to the strip after long use. But is this conclusion equally likely under all four baselines? The answer is no. If our factual intuitions are correct, we can be *fairly* confident that the adverse possessor would refuse to sell the strip to the true owner when the mistake is discovered (the redistribution baseline). But, *even if our empirical claims are correct*, we cannot be equally confident that the adverse possessor would buy the strip from the true owner (the status quo baseline) or that the adverse possessor would outbid the true owner in an auction (the auction baseline). This is because the adverse possessor's offer price is likely to be lower, and may be much lower, than her asking price. The adverse possessor may not be

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[117] *See* Radin, *supra* note 83, at 748-50.

[118] This is the heroic *ceteris paribus* clause that should remind the reader of the economist joke that ends with the punch line: "Assume a can-opener."

[119] *See* R. POSNER, *supra* note 95, at 434-35.

able to come up with $10,000 in cash, or be willing to borrow $10,000 to buy the strip, but may be very willing to keep the strip rather than sell it to the true owner for the same price. Because of the difference between offer and asking prices, the result may differ depending on which party is declared the owner of the disputed strip. If this happens, the efficiency criterion is indeterminate because the identification of the most valued user, the efficient result, varies depending on which baseline we use to determine the relative value of the property.

If we believe that the adverse possessor is the most valued user, we must be using the definition of efficiency that starts from the redistribution baseline: a transfer of ownership to the adverse possessor is unlikely to be corrected by a subsequent transaction. By transferring title to the adverse possessor, the legal system favors the adverse possessor in any actual bargaining that might take place between the parties to reallocate ownership of the strip. This is because any correction of this result would be measured by the true owner's offer price and the adverse possessor's asking price. Our factual and moral intuitions about the adverse possessor's reliance interests and the relative impact of losses and gains cause us to invest the adverse possessor with the moral authority of the owner. Because of our intuitions about the just result, we want to grant the adverse possessor greater bargaining power in any subsequent bargaining about the strip. In the face of conflicting definitions of efficiency, the rules in force choose the definition of efficiency that privileges the interests of the non-owner, the adverse possessor, over the interests of the owner.

2. The Effect of Legal Changes on Existing Contractual Relations.

a. The Offer/Asking Problem. A change in the law of contract interpretation may have three different effects on existing contractual relations. First, if the parties did not think about the issue at all, and did not have any preferences regarding it, the change in the law simply fills in the gap in their contractual arrangement by defining their obligations toward each other. Second, if the new presumption accurately reflects the intent of the parties, it will have the effect of promoting freedom of contract and security of transactions by enforcing the agreement the parties thought they were adopting. In contrast, the old presumption would have upset their expectations, giving one party a windfall gain. Third, if the

new presumption conflicts with the expectations of the parties, either because they relied on existing law to fill in the gaps in their contract or because the new interpretation otherwise surprises them, it will directly redistribute wealth from one party to the other.

The new presumption redistributes wealth in several ways. First, the legal change grants one of the parties a right for which she did not bargain, and does so for free. In the employment context, a change from a presumption of employment-at-will to a presumption of just cause termination strips the employer of the right to fire at will and vests the worker with a conditional right to job security. This change in entitlements directly redistributes a property right from the employer to the employee without compensation. By giving the employee a right she did not bargain for, the legal change benefits her at the expense of the employer. Second, if this is not the efficient result, the employer will have to bribe the employee to give up this new entitlement to tenure. In contrast, under the old rule, the employer would have retained the right to fire at will without having to pay anything to the employee.[120] The distribution of wealth between the parties is therefore quite different than it was under the previous rule. For both these reasons, the legal change immediately redistributes wealth from one contracting party (the owner) to the other (the non-owner).

The change redistributes wealth in a third way. If the new definition of their relationship is not satisfactory to the employer (the owner of the right who lost it to the employee), she may negotiate with the employee to attempt to correct the judicial mistake. Under the old rules, if the employee wanted a right to job tenure, she had to induce the employer to agree to give up the managerial prerogative of firing discretion. In such a bargain, the employer would have the advantage of her asking price while the employee would be relegated to her offer price. When the presumption is reversed, however, the employer will have to induce the employee to give up her newly acquired right to job security. This allocation of entitlements creates a distribution of bargaining power that bene-

[120] The employer would not have to pay anything *new* to the employee. If the parties had perfect information and understood what the existing presumption was at the time of the initial contract, the employer may have raised the wage offer to compensate the employee for agreeing to the risk of an arbitrary firing.

fits the interests of the employee over the interests of the employer. It does so because the employee is now the owner of the entitlement and the employer is the non-owner. The bargain will therefore be based on the employee's asking price and the employer's offer price. In contrast, under the old rules, the employee who wanted job security would have had to offer the employer enough to induce the employer to give up the right to absolute managerial control over firing decisions.

The change in which party is buying and which party is selling may affect the outcome. It may be helpful to illustrate this point with a numerical example. Assume that the employee would offer $2000 per year for job security but would demand $5000 per year to give it up and that the employer would demand $4000 per year to waive the right to fire without cause but would offer only $3000 to buy the right to fire from the employee. In this simple case, we see that if the court retained the presumption that employment was at-will, the employer would retain the right to fire because the employee would offer $2000 and the employer would demand $4000. The efficient result would be employment-at-will. If the court adopts a just cause termination presumption, however, the results would be different. In that case, the employee would demand $5000 to give up the just cause provision of the employment contract while the employer would offer only $3000. The employee would retain the right to job security. Thus, the new presumption redistributes wealth from the owner to the non-owner by shifting the baseline from the status quo to a redistribution baseline.

If the result of bargaining would differ depending on which presumption is in effect, efficiency analysis is indeterminate. Economic analysis alone cannot decide which result maximizes social welfare. The answer depends on a normative justification of which baseline is appropriate in this context.

b. The Holdout Problem. It is often argued that the results of bargaining may be inefficient because of holdout problems. The owner of the entitlement may be mistaken about how much the other party wants the entitlement; in other words, the owner may overestimate the non-owner's offer price (the highest amount the non-owner will offer to buy the entitlement). Because of this gap in the owner's information, the owner may hold out for an amount greater than the owner's true asking price (the lowest price at which the owner would prefer to sell than to keep the entitlement).

Similarly, the non-owner may be mistaken about the owner's true asking price and hold out by offering less than the non-owner's true offer price (the amount the non-owner is truly willing to go up to purchase the entitlement). If either of these mistakes is present and one of the parties holds out in an effort to induce the other party to give in, the deal that should happen may not.

If holdout problems are present, the efficient result may be achieved only if we allocate the entitlement to the party that would end up with it after bargaining untainted by holdout problems. It thus may matter what legal rule we promulgate. For example, if it is true that workers value job security more than employers value the right to fire, and if it is true that holdout problems are likely to be present, we can increase social wealth by giving the entitlement to the employees. This presumption ensures that the overall efficient result will emerge, while the opposite presumption may create an inefficient outcome.

The holdout problem presents us with a choice of baselines. An example will help illustrate the nature of this choice. Assume that a homeowner owns a house on the boardwalk in Atlantic City, New Jersey. A casino company buys up all the land around the house, including the lots on both sides of the house facing the boardwalk and the lot behind it. The casino hopes to buy the house to create a large casino on the four lots. The expected profits of the casino are enormous, in the hundreds of millions of dollars. However, the homeowner refuses to sell. She was born in that house, she says, and so were her father and grandmother, and when she dies it is going to go to her children. The casino offers the homeowner $5 million for the house, and the owner still refuses to sell. Money is not the point, she says. Effectively, the homeowner's asking price appears to be infinite.

The first baseline presumes that the holdout problems are likely to be widespread and constitute the most convenient explanation of the failure to deal. This baseline assumes that everyone has their price. The homeowner is merely holding out for more money—perhaps $10 million. The casino refuses to offer more on the mistaken belief that the owner will eventually agree to the $5 million deal. Although it would be worth it to the casino to agree to pay even $10 million, the deal that should go through fails because each party miscalculates the price of the other party. The casino is the holdout here because it mistakenly believes that the

homeowner will accept $5 million and therefore does not offer its true price of $10 million. If the homeowner actually would sell the home for $5 million but refuses the offer in the hope or belief that the casino would go higher, then she would also be holding out. Analysts who make arguments of this sort often assume that the deal has been blocked by holdout problems because they find the refusal to sell for $5 million incomprehensible and irrational. They therefore attribute the failure to sell to strategic bargaining by the owner, rather than acknowledge that the asking price for a piece of property that is viewed as personal rather than fungible may be infinite.

Analysts who understand this deal to be blocked by holdout problems may unconsciously adopt a redistribution or an auction baseline in analyzing the relative worth of the property to the casino and the homeowner. They realize that the casino would almost certainly outbid the homeowner in an auction, and that the homeowner would almost certainly be unable to buy the property from the casino if the casino owned it. By valuing the property through these baselines, the analyst ignores that under the status quo baseline the property may actually be worth more to the homeowner than it is to the casino. Moreover, the analyst may assume that although property may have a special sentimental value to a particular owner, that added value cannot be too far different from the general market value (the price that most owners would accept for the property). This assumption implicitly appeals to general market value as a baseline to determine the efficient result and identifies aberrant results as caused by information or holdout problems.

The second baseline for analysis of this case would proceed from two assumptions. We would adopt the status quo baseline, rather than the auction or redistribution baseline, and we would proceed on the assumption that holdout analysis is fatally flawed. If the deal is not blocked by holdout problems, then it really is the case that the homeowner's asking price exceeds the casino's offer price. If we adopt the status quo baseline, the efficient result is for the homeowner to retain ownership of his house. Why might the holdout analysis be flawed?

Holdout analysis is flawed because it is impossible to distinguish holdout problems from justified failures to agree. Assuming rationality, a party cannot indefinitely hold out for a certain price when

the other party does not give in. If the homeowner still holds out while the casino builds an odd-shaped structure around him, it is almost certainly the case that the parties failed to agree because, given the allocation of entitlements between them, there really was no price that was mutually advantageous. If the homeowner really were willing to sell for $5 million, there is some point at which she would agree to the offer. Otherwise, she would fail to maximize her utility. It would be irrational for the parties to insist *permanently* on the original offer and asking prices if there is a common meeting ground.

Economists insist that their basic assumption is that people are rational in maximizing their utility. Of course, the homeowner can be mistaken about the possibility of getting a better price, but there is only so long such a mistake can go on. After a certain amount of time, each side winds up decreasing their utility by refusing to compromise. If there really is a price at which both parties will benefit from an exchange, there will come a time when one of the parties will give in and an exchange will happen.[121]

Even if holdout problems exist, holdout analysis is problematic because we will never have sufficient evidence of holdout problems to determine whether or not a deal would be mutually advantageous. Under efficiency analysis, we are not supposed to make moral judgments about what the parties really want or what they should want. If we accept this definition of efficiency, it would be presumptuous of us to make a judgment that one of the parties is holding out. If the homeowner "holds out" for $10 million, who are we to say that she really is willing to sell for only $5 million? There is no way the analyst will ever have sufficient information to answer this question (to know what the "real" or final offer and asking prices are). If neither party gives in, we have substantial evidence that the owner did not want to sell for the price offered by the non-owner. Thus, efficiency is served by leaving the property where it is. The casino preferred building around the house to pay-

[121] Of course, if the parties act irrationally, this may not happen. If we assume that people may act irrationally, then the entire project of economic analysis must be substantially altered. Most definitions of rational conduct used by law and economics writers are tautological, however, and cannot be falsified. Richard Posner argues that we find out what people want by seeing what they do. If they fail to buy, then they must prefer holding out to buying. It may be true that, if the parties had perfect information, they would reach a deal. However, the court will never have sufficient information to answer this question.

ing more than $5 million. It does not aid the analysis to say that it was unwilling to pay the extra $5 million for strategic reasons. The reasons the casino may have for setting its offer price can be of various sorts. When it makes a judgment to go no higher, an economist has no reason to say that it really was willing to offer more. We can only tell what people are willing to do by observing what they in fact do.[122] It would be paternalistic to claim that the buyer or seller really wanted to do something other than what they did. This is because the analyst has to claim to have privileged knowledge of each party's true interests that cannot be derived from their observed conduct.

Reliance on the general market value of the property to determine whether the homeowner is holding out also wrongly fails to acknowledge that personal property may command an infinite asking price. The market is not a perfect mirror of everyone's preferences. By using the market as the benchmark for determining whether a party is holding out, economic analysis is turned from a system for maximizing individual preferences into a method of social control in which all economic actors are assumed to act irrationally if their conduct deviates significantly from market norms.

The holdout problem therefore presents us with several baseline choices. We can assume that holdout problems are serious and widespread, or we can assume that they are unimportant. In making this choice, we can proceed from a status quo baseline or we can appeal to the auction or redistribution baseline. We can also presume that personal interests in property rights may generate large premiums in value (asking prices much higher than what we hypothesize to be the "fair market value") or we could presume that such premiums are unlikely to be significant. Each of these baseline choices will affect our determination of the efficient result.

c. The Transaction Cost Definition Problem. To determine the agreement the parties would have made in the absence of transaction costs, we must identify which impediments to bargaining count as transaction costs and which do not.[123] Answering this question requires us to choose among competing baselines from which the analysis will proceed. We could presume, for example,

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[122] *See, e.g.*, R. POSNER, *supra* note 95.

[123] This argument is elaborated in Singer, *Legal Realism Now*, 76 CALIF. L. REV. 467, 522-25 (1988).

that imperfect information is an impediment to bargaining because it leads market participants to engage in transactions that are not utility-maximizing. Enforcing the terms the parties would have adopted if they had perfect information therefore increases efficiency by perfecting the process of exchange. On the other hand, we could treat information as a constituent element of wealth that is itself exchanged in the market. If we assume that the parties have whatever information they are willing and able to pay for, then we will decrease efficiency if we fail to enforce contracts in accordance with their terms just because the parties were mistaken about some aspect of their transaction.

The problem of defining what is and is not a transaction cost presents the analyst with crucial baseline choices. Should we treat bargaining power as a transaction cost? Perhaps we should. Unequal bargaining power represents an impediment to the "free" flow of resources because it allows one party to use her market power to coerce the other party to agree to unfavorable terms. Perhaps economic analysis should start by identifying a just distribution of wealth such that all market participants would have relatively equal bargaining power. We could then proceed to ask what bargains would be made in a world of relatively equal bargaining power. But law and economics analysts refuse to treat bargaining power as a transaction cost. They do so because regulating bargaining power appears political, and the whole point of efficiency analysis is to avoid making politically controversial judgments. Nonetheless, the failure to count bargaining power as a transaction cost has a political effect. Since owners have greater bargaining power than non-owners, the definition of efficiency that excludes bargaining power from transaction cost analysis effectively privileges the interests of owners over the interests of non-owners. Counting bargaining power as a transaction cost is relatively more favorable to non-owners.

3. The Effect of Presumptions on Future Contracts.

a. Why a Change in the Presumption May Have No Effect on Future Contracts. A change in a legal rule will affect the relative bargaining power of the parties only if it gives one of the parties something that the other party needs. For example, a rule that grants the adverse possessor title to a disputed strip of land increases her wealth by giving her property rights she did not previously possess. It also gives her the benefit of her asking price

rather than her offer price in subsequent bargaining. Legislation that grants tax benefits to employers who provide job training to unskilled workers changes the relative bargaining power of the parties by giving unskilled workers some control over something the employer wants. In other words, the employer can only take advantage of the tax reduction if the prospective employee agrees to work for the employer. In the previous section, we argued that employees who already have jobs at the time the court creates a just cause presumption are given something of value they did not have before that the employer wants—continued access to the employer's property. Adopting the just cause presumption therefore alters the relative bargaining power of the parties.

In contrast, while a change in a disclaimable presumption may have an enormous effect on existing contractual relations, it is arguable that it may have little, if any, effect on future contractual relations. This is because a change in the presumption does not directly redistribute wealth from employers to employees. It does not give prospective employees anything of value that employers might want and it does not increase their skills or their property rights. The employer who is interested in managerial discretion in firing decisions may therefore simply ask the worker to disclaim the right to the protection of the just cause standard. The fact that the prospective employee *would* have the right to job security if she were already employed by the employer does not help a person who is seeking a job with the employer. The right not to be fired without just cause does nothing to increase the non-employee's bargaining power with the prospective employer. If the parties can easily bargain around whatever presumption is in effect, it does not matter which presumption is chosen. In that case, the choice of a presumption will have no effects on allocative efficiency.

b. Why a Change in the Presumption May Affect the Outcome of Future Contracts.

i. Indifference. Despite the surface plausibility of the argument that presumptions do not affect future contracts, there are several reasons why a change in the presumption may affect the results of future employment contracts. The first reason is that the parties may be unaware of what the rules are or may not pay attention to them. In other words, at the time of contracting, the parties may simply not consider the issue, either because they do not care about it or because they simply did not plan ahead. Employers, for

example, may simply be willing to live with whatever terms the law supplies to flesh out their employment contract. If the parties enter the employment relation without considering the question of how much freedom the employer will have to fire the employee, the choice of a worker-protecting standard will have a significant effect on the result of any later dispute. It will protect the worker from unjustified job loss by granting the employee either a right of reinstatement or damages for wrongful discharge. Adopting a job security presumption in this kind of case may improve efficiency by giving workers something they want without interfering with any interests or expectations of the employer.

ii. Imperfect Information. If the parties to the employment contract mistakenly believe that the law entitles the employer to fire the employee at will, and therefore assume that such a term need not be explicitly negotiated and put in writing, the just cause presumption will affect the result by overriding the expectations of the parties. Different presumptions may therefore change results of disputes arising out of future contracts because of imperfect information about existing law. Further, even if the parties understand that a just cause presumption is in effect, the employer may underestimate the difficulty of firing someone under this standard by failing to understand what constitutes a "just cause" or by failing to take into account the costs of litigating wrongful discharge claims. The employer may therefore fail to bargain for a right to fire at will because of imperfect information about the consequences of deferring to the existing presumption.

Enforcing a term that violates the expectations of the parties may decrease efficiency by enforcing an agreement that is different from the one the parties wanted. This decrease in efficiency may be justified by the moral argument that it is simply unjust for the parties to create an employment relation that grants the employer such arbitrary discretion over the employee's livelihood. However, enforcing the just cause standard in this situation may also increase efficiency if the parties are mistaken about the value of job security. The employee may underestimate the chances of being fired and the benefits of a just cause requirement, while the employer may fail to recognize that job security may increase productivity and therefore be in her financial interest. If the parties would agree to a just cause standard if they had perfect information, and if the parties are mistaken about the existing law, we can

improve efficiency by choosing the just cause standard as the presumptive term.

iii. Social and Psychological Effects of Different Baselines. Another reason a change in the presumption may affect the outcome of future contracts is that changes in legal rules may change what people want. It may do this in several ways. First, the fact that current law grants the right to the employer when there is no explicit agreement means that the parties may not even discuss job security during negotiations. If employers have more knowledge of the law than employees, the employers might realize that it is in their best interests not to raise the issue at all. Once discussions on job security start, it might be difficult to convince a potential employee to take a job without job security. This would be especially important when the employee is taking a risk with the new job by leaving another job or passing up other opportunities. Further, employees may fear raising job security as a demand—just bringing the subject up may put the employer off. These and other factors concerning the structure of the market could stand in the way of an agreement reflecting the parties' true valuations of job security or the right to fire without cause.

Second, the definition of an entitlement as a presumptive legal right may increase its value in the eyes of its beneficiaries. A presumption of job security requires employers to ask employees to waive the benefits of the entitlement. It therefore requires dissemination of information about the possibility of entering an employment relationship that provides such security.

For this reason, bargaining under a just cause presumption may be affected by the offer-asking problem. Prospective employees may view the just cause rule as an entitlement[124] and may demand more compensation to give it up than they would have offered to buy it under an at-will regime. Likewise, employers may offer less to buy the right to fire from the employee than they would demand to grant a just-cause provision in a contract under the at-will rule. Therefore, making firing only for cause the default rule may increase the likelihood that firing for cause will be the outcome of

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[124] The change in the legal rule may thus change people's preferences, here by increasing workers' preference for protection from dismissal without cause. *Cf.* J. ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY (1985); Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986) (both discussing adaptive preferences).

bargaining over job security.

Further, the structure of the market for jobs may be affected by changing to a for-cause presumption. Employees who are instructed that they are presumptively entitled to job security whenever they apply for a job may begin to wonder whether there are jobs out there that provide such security. This may increase their incentive to search for employers who do not ask workers to waive the right.

At the same time, a just cause presumption sends a message to employers that they have a moral obligation to compensate employees for the loss of this entitlement. By asking employees to waive the entitlement, they are taking from the employee a presumed benefit thought to attach to the employment relationship. If it is presumptively unjust to fire someone arbitrarily, and to hire them on the assumption that one will be able to do so, then the employer may understand that workers should be compensated for this increased risk. It does no good to insist that workers are already compensated for the risks of arbitrary firing—we could only be confident of this fact if the market worked perfectly, or if desires were completely exogenous and unaffected by changes in social custom or law. A just cause presumption serves an educative function for employers as well as employees. It tells them that they should take this need of workers seriously.

A just cause presumption may also affect the terms of future contracts by changing the burden of requesting a deviation from the default rule. It may be socially unacceptable for employers to ask employees to waive just cause termination protection, even though it may be perfectly acceptable to place the onus on workers to demand job security under an at-will regime. It may be the case that the employment-at-will presumption is accepted because the employer's right to control access to his property is conceptualized as a property right, and because employees are free to bargain for just cause protection. Moreover, the fact that unions bargain for just cause protection may back up the claim that employees who want job security can get it.

On the other hand, if the courts or the legislature were to change the presumption to a just cause standard, it is not clear that it would be socially acceptable for employers to ask employees to waive that right. This is especially true if the courts or the legislature were to require the employer to explain clearly to the em-

ployee what the employee was giving up. To make sure the employee's waiver was voluntary and based on full information, the state could require the employer who wanted the employee to waive just cause protection to read and sign a prepared statement—like a *Miranda* statement. Such a statement would explain to the employee that if she signed the waiver, she could be fired at any time, without notice, for no reason, even if she is doing an excellent job. She would be *agreeing* that the employer could fire her for any reason, including a bad reason. She would be *agreeing* that the employer had the right to fire her arbitrarily, unjustly and unfairly. She would be *agreeing* that the employer could fire her for refusing to break the law. She would be *agreeing* that she could be fired for making useful suggestions about how to operate the business. The state could require the employer to read the statement out loud, and hand it to the employee to read, with the operative language printed in bold letters. Such a statement, although a true description of employer rights under an employment-at-will contract, is an embarrassing litany. Not only may employees hesitate to sign it, but more to the point, employers may neglect to ask them to sign it.

For these reasons, a just cause presumption may affect the outcome, not only of current employment relations, but of future employment contracts, even though the parties are free to contract around it. This may be the case where the parties are indifferent, or possess imperfect information, or if the presumptive right to job security changes what either the employer or employees want. In these cases, the terms agreed to by the parties might differ depending on which presumption is in effect. The presumption is the baseline we choose to govern employment relations. Once again, the choice of the baseline matters.

B. Baselines in Efficiency Analysis of Compulsory Terms

Our discussion of baselines in economic analysis has thus far focused on the efficiency of creating a presumption of job tenure in the absence of just cause to fire. We now briefly address several baseline questions that affect the choice of whether to make the just cause standard nonwaivable. Duncan Kennedy has analyzed

compulsory contract terms in detail.[125] Our discussion builds on his careful analysis. Baseline choices in this context represent competing sets of assumptions on which economic analysis of compulsory terms should proceed. We will examine assumptions about externalities, distribution and bargaining power, binary choices versus industrial policy, and paternalism.

1. Externalities. Employment relationships do not affect only the parties to the contract. By structuring our work life and our system of production and distribution, they determine, to a substantial extent, our form of social life. We are a market society, and we are therefore interdependent. Our mutual dependence makes it inevitable that employment relations will cause significant externalities, both positive and negative. Moreover, it is now settled economic wisdom that transaction costs may impede mutually beneficial transactions among the large numbers of persons affected by employment relations. We therefore have reason to doubt that private maximization of profits maximizes the social welfare.

The existence of externalities confronts us with a baseline choice. Conservative free market theorists who oppose "government regulation" argue that we should generally not worry about externalities. They argue against regulating employment contracts on several grounds. Sometimes they argue that these contracts have *no* negative externalities, or at least that any negative externalities are overwhelmed by the positive externalities of enforcing contracts in accordance with their terms. As Richard Epstein argues:

> But what one can say pretty confidently is that if you are looking at an agreement in which there is only a transfer of goods and services and money between two parties, both of whom will be left better off than before, then to the extent to which you increase the wealth of stock of the two parties to the transaction, the anticipated external effects are going to be positive when taken in the aggregate.[126]

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[125] *See* Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference To Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982). *See also* Kennedy, *supra* note 6.

[126] Epstein, *Discussion: The Classical Theory of Law*, 73 CORNELL L. REV. 310, 312-13

Epstein solves the externalities problem by *assuming* that it does not exist, and he goes on to justify the entire regime of freedom of contract on the *assumption* that externalities do not exist.

> There is now more wealth to go around, and thus the velocity of voluntary transactions can increase. Once one understands these points the regime of freedom of contract becomes pretty powerful on a social welfare ground, modernistically understood. We know that there are gains between parties, and that there are gains with respect to strangers, so it is very hard to figure out the losers under this general regime.[127]

Sometimes the conservatives argue that both positive and negative externalities are likely to be low. The persons most affected by the contract are almost always the parties to it, and the effects on others are minimal. Sometimes they argue that the interests of others are taken into account in the contract itself. Positive externalities are taken into account by the company's profits; negative externalities caused by risks to workers of unemployment are taken care of by wages that compensate workers for this risk. Sometimes they argue that externalities are both positive and negative and that, in the long run, these cancel each other out. Sometimes they argue that, even if externalities are extensive, government officials will almost never have sufficient information to determine which contract terms maximize social wealth. Because the market is decentralized and self-adjusting, it is almost always a better mechanism for allocating risks and determining the appropriate content of market relations than government fiat.

The assumption that negative externalities are low is based on a social vision that treats individuals as autonomous entities. It fails to recognize that individuals are situated in relationships to others and that individual decisions therefore *necessarily* have social consequences. And the assumption that externalities are low or positive or that they cancel out means that the analyst need never worry about them. This premise predetermines the result of efficiency analysis. If we assume that both parties benefit from the exchange or they would not engage in it, and that externalities are

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(1988).

[127] *Id.*

not significant, then we will always maximize the general welfare by enforcing contracts, no matter what their terms.

An alternative baseline would ask us to understand individuals as situated in relationships with others. This perspective recognizes that we must make judgments about the external effects of alternative employment systems. The fact that we will never have adequate information to judge the extent of both positive and negative externalities of competing employment policies does not mean that we can assume that the labor market takes them into account even close to perfectly. If we have insufficient information to judge whether a compulsory term will improve the situation, we also have insufficient information to conclude that existing employment policies of companies maximize the general welfare.

The refusal to consider the problem of externalities to be important has a Panglossian air about it. Everything that can be done, has been done. Yet we have reason to doubt that this is so. The fact that job security is one of the first demands made by employees when they become unionized indicates that the vast majority of employees are not getting what they want out of the marketplace. This systematic failure of the market to protect fundamental interests of workers cannot be devoid of social consequences. The alternative baseline asks us not to turn away from this fact. We have a duty to consider what those consequences might be.

2. Distributional Questions. Efficiency theorists, with no exceptions that we are aware of, take the existing distribution of wealth for granted. They ask: Given the existing distribution of wealth, what bargains would people make in the absence of transaction costs? This is a powerful version of the status quo baseline. It is clear, and they agree, that a different distribution of wealth would result in very different patterns of allocation and distribution. Efficiency judgments are a function of distributive judgments. Yet, as we argued earlier, the status quo baseline must be justified for efficiency analysis to constitute a convincing normative theory. Moreover, if there is something wrong with the existing distribution of wealth—if it is disgracefully unjust—then efficiency analysis will lead to perverse results. This means that economic analysis cannot constitute a legitimate moral theory, or provide helpful information for making social policy decisions, unless it is combined with judgments about the distribution of costs and benefits.

Justice O'Connor recognized this fact in *Hawaii Housing Au-*

thority v. Midkiff.[128] In that case, the Supreme Court upheld a land reform statute that authorized forced transfers of real property from landlords to tenants through means of the eminent domain power. In holding that the statute complied with the constitutional public use requirement, Justice O'Connor noted that the islands of the state of Hawaii were owned by a very small group of persons and that the statute was intended to correct the market failures associated with oligopoly in the market for fee simple ownership of land and buildings. In describing that market failure, O'Connor wrote: "The Act presumes that when a sufficiently large number of persons declare that they are willing but unable to buy lots at fair prices the land market is malfunctioning."[129]

This is an interesting statement. Under efficiency analysis, we ask only whether it is possible to conceive of bargains that would make both parties better off, or in which the winners could compensate the losers. In the absence of externalities, the only situation that satisfies this criterion is a voluntary bargain, which requires both a seller and a buyer.[130] If there is a willing buyer, but no willing seller, then the buyer's offer price is less than the seller's asking price. Forcing a transaction in this situation would create losses that exceed the gains if we measure losses by the seller's asking price and gains by the buyer's offer price. Such a forced transaction would therefore decrease social wealth.

Justice O'Connor, on the other hand, asks whether there are willing buyers and recalcitrant sellers, who *should*, for some reason, accept the buyers' offers. Why should the seller have accepted an offer the seller in fact rejected? Justice O'Connor says that the price offered by the buyer is fair. But how does she know this? If the benefits of transfer exceed the costs, wouldn't the seller have agreed to sell the property? If we use a status quo baseline, measuring the costs of transfer by the seller's asking price and the benefits of transfer by the buyer's offer price, then forcing the transfer

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[128] 467 U.S. 229 (1984).

[129] *Id.* Justice O'Connor also gives an argument based on externalities. The real estate market is an oligopoly. Breaking up the oligopoly will create a competitive market with its attendant social benefits—maximum production of goods at their minimum cost. Thus, the forced transfer is justified to combat the negative social effects of oligopoly. *See id.* at 241-43.

[130] This assumes no impediments to bargaining like imperfect information or holdout problems.

would decrease rather than increase social wealth. *Justice O'Connor must be using some other baseline.*

That alternative baseline is redistributive. One version of the redistribution baseline asks us to reverse offer and asking prices. Instead of asking whether the winners from change could compensate the losers, we ask whether a forced transfer of property from landlords to tenants would be subsequently corrected by the market. This baseline asks us to compare the tenant's asking price (the non-owner) to the landlord's offer price (the owner).

A second version of the redistribution baseline asks us to consider the result the parties would agree to if they had relatively equal bargaining power. To make this determination, we hypothesize what system of land ownership would emerge from the market if we had a more equal distribution of ownership. This baseline explicitly incorporates into the efficiency analysis a moral conception of the just distribution of wealth. Justice O'Connor suggests that the unequal distribution of property on the island makes bargaining power so unequal that we do not consider the failure to contract voluntary on the part of the tenants. If one person owns a disproportionate share of valued resources, she can effectively dictate the terms on which others get access to those resources. In that case, we have, not a free market, but dictatorship.

This redistribution baseline is captured in Justice O'Connor's notion that sellers refuse to sell for fair prices. By using the rhetoric of "fair price," Justice O'Connor employs market rhetoric to justify greater social control by government. But why are the prices demanded by the sellers unfair? They are unfair because the unequal distribution of land ownership makes the landowners too powerful. Non-owners are too poor, relative to the landowners, to get what they want. Under this view, relatively equal distribution of property, or at least relatively dispersed ownership, is necessary for the free market to operate at all, or at least to operate justly. This baseline recognizes explicitly that efficiency judgments, of necessity, include within them judgments about the distribution of wealth. To call an outcome efficient privileges the interests of owners over the interests of non-owners, given whatever distribution of entitlements is assumed under the analysis. Thus, a status quo baseline and a redistribution baseline will generate conflicting definitions of what results are efficient and what results reflect market failure.

3. Binary Choices versus Industrial Policy. It is always possible that legal intervention to benefit the workers could backfire. If the entitlement to job security is allocated to the employee, the employer could insist on a disclaimer that would contractually put the employee back under the at-will rule. If the right to job security were non-disclaimable, employers might try to bargain around it by changing other terms of the contract, say by reducing wages or making workers produce more. Workers, as a class, might be made worse off with the legal right than without it, especially if the employee would prefer to trade away the right to job security for higher wages or better working conditions.[131]

We could take two different attitudes toward this possibility. The first response assumes a baseline of *binary choices*. In a baseline of binary choices, we hold everything constant, other than the particular legal question we are considering.[132] This baseline is biased toward the status quo because it only allows us to consider one issue at a time. It assumes "either/or thinking" about the problem. Because everything else must be taken for granted, it is impossible to discuss changes in the *institutional structure* within which market transactions occur.

An alternative baseline would ask us to recognize that it might be necessary, to really help the employees, to redefine other aspects of the employer-employee relationship, and of the economic system more generally, to ensure that the employees are truly helped by the change in rules. We can call this baseline *industrial policy*. This approach enables us to consider whether other remedial legal responses might respond to any negative effects of a just cause rule. It allows us to consider what constellations of legal changes might be necessary both to promote justice and social welfare. This baseline is less status quo oriented than the binary choices baseline because it takes less for granted. It therefore enables us to respond to social problems in a way that does not unconsciously privilege the interests of owners over the interests of non-owners.

4. Paternalism: Protecting People from their Mistakes. The free market theorists argue that individuals are the best judges of their

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[131] Whether increased costs could be passed on would depend on the elasticity of the market and other factors.

[132] *See* Kennedy, *supra* note 6, at 438-44.

own interests, and that it is almost never legitimate to regulate contracts on the grounds that, at the time they contracted, the parties were mistaken about what course of action was in their best interest. This *free contract baseline* assumes that when people agree to contracts, they get what they want. Any regulation of the terms of the contract is a paternalistic interference with individual autonomy. This set of assumptions constitutes a baseline because it prevents the analyst from even considering the question of whether it is appropriate to protect someone when they make a mistake.

An alternative baseline acknowledges both the problematic character of paternalism and the reasons why it is sometimes appropriate. Employees may systematically undervalue job security. Both employees and employers may misunderstand the social consequences of employment instability. Employees may not understand the agreement they are making when they take a job. Even if the agreement is explained clearly, they may not understand the consequences of being fired. Even if they do understand, society may find it unjust to organize itself such that people take the risks inherent in at-will employment. We have reasons to protect employees from their failure to protect themselves by failing to contract for job security. Those reasons include compassion and empathy. This baseline assumes that it is sometimes appropriate to protect people from decisions they will later regret.

Employers may also need protection from a mistaken belief that at-will employment enhances their wealth. It may be that the evidence regarding increased productivity with job security is convincing, and employers need protection from mistakes about these matters. Further, companies may need protection from lower level managers who, unknown to the companies, use the power to fire for their own, as opposed to the companies', purposes. Society might wish to intervene against employer false consciousness regarding the power to fire.

V. Baselines in Judicial Role Arguments

Baselines not only affect substantive law, but are important to the structure of the legal system. Judicial role arguments, or arguments concerning the proper distribution of power between courts and legislatures, provide an opportunity for us to think about how structural arguments, like substantive arguments, depend on base-

line choices. In this section, we examine familiar judicial role arguments that are often deployed against changing the at-will rule, and we discuss how the initial rule, together with the initial allocation of power to change the rule, might affect the legal system's decision regarding employment-at-will.

A. *Who Makes Law?*

One argument often made by judges against changing the at-will rule is that "such a significant change in [the] law is best left to the Legislature."[133] Judges prefer legislative action partly because they view the legislature as the democratic branch of government. They also often argue that the legislature is institutionally better equipped to gather and evaluate the evidence regarding the policy considerations surrounding job security.

We find the judicial role arguments in favor of maintaining the at-will rule disingenuous. The argument for deference to the legislature oversimplifies the problem of determining the proper distribution of power between the courts and the legislature. Even if one accepts the idea that judges should apply law, not make it (a controversial proposition at best), the question of what it means to defer to the legislature cannot be answered simply by appealing to the idea of judicial restraint. Judges who appeal to this principle that only the legislature should change the law pretend that the structure of democratic lawmaking is much simpler than it is in fact. When judges appeal to the notion that judges do not make law or change it, they misstate their own convictions about the proper role of judges in a democratic society.

It is ironic for judges to appeal to the legislature as the proper lawmaking body in the context of the employment-at-will doctrine. To our knowledge, only one state legislature (California) has ever clearly adopted this principle.[134] Moreover, this codification is an

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[133] Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 300-01, 448 N.E.2d 86, 89, 461 N.Y.S.2d 232, 235 (1983) (holding that there is no cause of action for abusive discharge and no implied obligation of good faith in at-will employment contract).

[134] CAL. LAB. CODE § 2922 (West Supp. 1989) ("An employment, having no specified term, may be terminated at the will of either party on notice to the other."). The only other statutes relevant to this issue have cut back on employment-at-will by adopting exceptions to the principle that employers may fire at will. These statutes have often followed court decisions adopting limits to the at-will rule, thereby ratifying the actions of the courts in shaping the employment relationship. They do not codify the at-will rule. *See* Cover, *supra*

exception that proves the rule; despite a clear statute mandating employment-at-will in the absence of agreement to the contrary, the California courts have interpreted the statute to not allow firings contrary to public policy or in violation of a duty of good faith.[135] Indeed, the courts were solely responsible for reversing the common law presumption that employment was for a specific term—usually a year—during which workers could only be fired for cause. At-will employment was a judicial innovation. There may have been good reasons for the judges to abandon the old rules, but this does not change the fact that it was the courts, and not the legislature, that modernized employment law to accord with contemporary notions of justice and social policy. It is hard to see why it is more democratic to enforce a rule adopted by judges in the nineteenth century in accord with then prevalent notions of fairness and expediency than for judges to change the law in a way that promotes contemporary standards.

Nor does it make sense to appeal to the superior institutional capabilities of the legislature to determine the wisdom of abandoning employment-at-will. Judicial passivists argue that the fact-finding capabilities of the legislature are necessary to sort through the policy questions about whether to abandon the at-will rule.[136] One response to this argument is that the policy issues regarding the at-will rule are not more complicated than the policy issues in other areas where the courts have already changed the law without legislation.[137] A further response is that the courts did not let the lack of knowledge stop them from making the at-will rule in the first place. In fact, if courts do not have the expertise to decide whether the rule should be changed, then they also do not have the expertise to decide to maintain the rule. By claiming not to have the expertise to evaluate whether the rule should be changed, the courts admit that they do not know the consequences of the rule

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note 2.

[135] *See* Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

[136] *See* Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 576, 335 N.W.2d 834, 841-42 (1983) (relying on superior legislative competence to recognize only narrow public policy exception to the at-will rule).

[137] *E.g.*, the privity rule in products liability. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (holding that automobiles are so dangerous that, to prevent injury from defect, manufacturers owe duty to inspect to any user, not just immediate vendee).

they are enforcing.

The argument for judicial restraint rests on an inaccurate and confused baseline. It presumes either that the rules in force were promulgated or approved in some way by the legislature, or that they simply exist in the law of nature, waiting to be discovered by human beings. If either of these propositions is true, then judges are not responsible for the existing rules. Yet both of these propositions are clearly false. The at-will doctrine is a judicially created rule and it makes no sense to argue that judges should not make law in this context. They already have made law. Nor does it make sense to argue that only the legislature should change the law. The judges already changed the law. There is no baseline of legislative authority or natural law for the judges to fall back on in this context. We should be honest about the character of the baseline: employment-at-will is *judicial* legislation.

One might admit that judges invented the employment-at-will doctrine, but argue that once judges have adopted a common law rule, it should remain in effect until changed by the legislature. It is implausible to claim that the proper role of judges in a democracy is to enforce old rules forever, regardless of how the rest of the law has changed or how social values and circumstances have changed since the rules were first promulgated. There are so many examples of judges making new common law rules or changing old ones that judicial role arguments should not be taken seriously, at least insofar as they rest purely on abstract and acontextual considerations of the distribution of power between the legislature and the courts. It is the courts that have adopted the implied duty of good faith into all contracts,[138] although they may have been influenced in this direction by the widespread adoption of the Uniform Commercial Code.[139] The employment context is one of the few

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[138] *See, e.g.*, Weinberg v. Farmers State Bank, 752 P.2d 719 (Mont. 1988) (holding that defendant bank breached implied covenant of good faith and fair dealing by refusing to extend credit in accord with agreement with plaintiff); Sarchett v. Blue Shield, 43 Cal. 3d 1, 729 P.2d 267, 233 Cal. Rptr. 76 (1987) (holding that insurer violated duty of good faith by denying insured's claims while not informing him of his contractual right to review of disputed claims); Smith v. American Family Mut. Ins. Co., 294 N.W.2d 751 (N.D. 1980) (holding that alleged failure of insurer to defend insured is sufficient to state cause of action for breaching implied covenant of good faith and fair dealing).

[139] U.C.C. § 1-203 (1978). *See, e.g.*, Noonan v. First Bank, 740 P.2d 631 (Mont. 1987) (allowing recovery for both breach of implied covenant of good faith and statutory duty of good faith under UCC).

types of contracts that are *not* subject to the good faith obligation. It is odd to emphasize the undemocratic nature of courts in the context of employment but to ignore the fact that, in other contexts, courts presume that the parties agree to comply with reasonable standards of fair dealing in the trade.

The deeper problem is that it is not clear what it means to apply the existing law or to change it. Legal rules derive their meaning from the context in which they are formulated and applied. A rule that allows property owners to exclude non-owners from their property looks very different if a restaurant is excluding someone who is drunk or disorderly than when the restaurant is excluding someone because of their race. This is settled wisdom. But the argument for judicial restraint pretends that it is possible for judges to apply existing rules mechanically regardless of changed context. Yet the employment-at-will rule had a different social meaning when it was adopted than it does now. It is now an isolated exception to the general obligation to perform contracts in good faith. The structure of the labor market and the expectations and needs of workers are different now than they were in 1890. When the social and legal context in which a rule operates changes, it is no longer possible to simply "apply" the law. If applying a rule means something different than it did in an earlier era, then the courts are doing something different than they did in the past. It is no longer possible to apply the old rule because the social meaning of the rule will have changed. The courts have no choice but to make law.

In a recently translated excerpt from his 1933 work, *Präjudizienrecht und Rechtsprechung in Amerika*, Karl Llewellyn explained that doubt may arise about whether a new case fits within an existing rule, either because the case is factually different in some significant way from prior cases decided under the rule or because "social conditions may have fundamentally changed."[140]

> Insofar as [the cases encompassed by a rule] were known to the lawmaker before the rule was laid down, and insofar as circumstances have remained unchanged since that time, one can work with the rule deductively. But once the possibility of doubt arises, from that point on the sit-

[140] Llewellyn, *The Case Law System in America*, 88 COLUM. L. REV. 989, 1007-08 (1988).

> uation is different. The issue is no longer what the existing content of the rule is, but whether the rule will or will not contain the doubtful case. If doubt is really present, the boundary of the rule in relation to the instant case will be unknown until a judicial decision has been rendered. Thus, the task of the judge is to *re*formulate the rule so that from then on the rule *un*doubtedly includes the case or undoubtedly excludes it. "To apply the rule" is thus a misnomer. Rather one *expands* a rule or *contracts* it. One can only "apply" a rule *after* first freely choosing to include the instant case within it or to exclude the case from it.[141]

To decide a case when the social and legal context changes, "decisional law will need to reformulate the rule."[142]

The argument for judicial restraint depends on a mythological baseline: judges should apply old rules until the legislature changes the law. This baseline fails to recognize that when the social and legal context changes, applying the old rule means something different. Because law derives its social meaning from its context, when the context changes, new laws must be made. The injunction not to change the law makes no sense. It assumes a baseline that does not exist.

The baselines on the baseball field are made of lime dust. With a small breeze, the baseline blows away. The argument that judges should not change the law has a similar quality. It starts out fuzzy around the edges, and on the slightest examination, it disappears.

B. The Problem of the First Actor

The initial assignment of control over a legal question to the judiciary or the legislature (or seizure of such control by either branch) may have profound effects similar to the initial allocation of entitlements for purposes of economic bargaining. It may make a difference on which branch the burden is placed to change the law. In the current situation, the courts have chosen the at-will rule, and legislatures have not changed it. This may mean that the legislature approves of the rule promulgated by the courts. But it

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[141] *Id.* at 1005-06 (emphasis in original).

[142] *Id.* at 1007-08.

may not mean this at all. It may mean that the legislature is content to leave this area of the law to elaboration by the courts.[143] The fact that the legislature has not imposed a just cause rule does not necessarily mean that the legislature opposes such a rule. It may be the case that the legislature would not pass just cause termination legislation, but at the same time *would not re-impose the at-will rule if the courts were to abolish it by common law rulemaking.*[144]

This point can be illustrated with an example. The Congress of the United States has not adopted comparable worth as a component of federal legislation prohibiting sex discrimination.[145] We could interpret this to mean that the democratically elected representatives of the people *oppose* comparative worth, and that if the courts were to interpret current federal law to include a comparable worth requirement, they would be overstepping their institutional bounds and acting undemocratically by making law. On the other hand, if Justice Kennedy had interpreted federal law to include a comparable worth requirement,[146] and if several other courts had gone along with it, *the burden would have been placed on Congress to amend the federal statute.* The fact that Congress did not pass a comparable worth provision *does not necessarily mean* that such amendatory legislation would pass. The proponents of such legislation would argue that the court decision interfered with the market. But the opponents would say that the whole point about sex discrimination law is to interfere with free market decisions that discriminate against women, and they would portray the proponents as favoring a policy that would have the effect of systematically subjecting women to lower wages in the workforce than are generally paid to men—on the average, roughly 30% less.[147] If the courts adopted comparable worth, to repeal it

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[143] Johnson v. Transportation Agency, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting) (positing this possibility as one of a number of criticisms of the "the legislature hasn't changed the judicial interpretation so it must be what they meant" argument).

[144] Further, we do not know what rule state legislatures might have arrived at if the courts had not initially created the at-will rule.

[145] *See* 42 U.S.C. §§ 2000e-2000e-17 (1982 & Supp. IV 1986) (comparable worth omitted from employment discrimination statutes).

[146] Justice Kennedy in fact rejected such an interpretation while serving on the United States Court of Appeals for the Ninth Circuit. *See* American Fed'n of State, County, and Mun. Employees v. Washington, 770 F.2d 1401 (9th Cir. 1985).

[147] *See* K. NEWMAN, *supra* note 44, at 203.

Congress would have the burden of justifying unequal pay for comparable work to the American public. Because the burden of proof would shift, we cannot predict with any degree of certainty that Congress would repeal a comparable worth court decision, even if we know that the chances of Congress initially passing such legislation are low.

It is no answer to say that there are substantial institutional impediments to repeal of a bad court decision. If this is true, it also means that there are substantial impediments to passing comparable worth legislation *in the first place*. This argument therefore gives us reason to doubt the democratic legitimacy of the initial interpretation of the statute which excluded comparable worth.

Another example of the importance of baselines in determining the proper role of the courts in lawmaking can be found in the judicial application of the clear statement principle in interpreting controversial legislation. For example, in *Thompson v. Oklahoma*,[148] the Supreme Court addressed the constitutionality of the death penalty as applied to juveniles. In a concurring opinion, Justice O'Connor argued that it was not clear that the Oklahoma legislature had made a considered decision to apply the death penalty to fifteen-year-old defendants.[149] The general death penalty statute had no age limit in it, and a separate statute enabled some fifteen-year-olds to be tried as adults. The literal terms of these statutes made the death penalty applicable to fifteen-year-olds. Nonetheless, Justice O'Connor argued that

> there is a considerable risk that the Oklahoma legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility.[150]

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[148] 108 S. Ct. 2687 (1988). This discussion also applies to the clear statement principle that the Supreme Court applies to Congress' power to override the eleventh amendment. *See* Edelman v. Jordan, 415 U.S. 651 (1974); *see also* Jackson, *The Supreme Court, The Eleventh Amendment, and Sovereign Immunity*, 98 YALE L.J. 1 (1988) (arguing that even without eleventh amendment bar, a clear statement principle should be applied to congressional legislation making states suable in federal court).

[149] *Thompson*, 108 S. Ct. at 2711 (O'Connor, J., concurring in the judgment).

[150] *Id.*

Under those circumstance, Justice O'Connor concluded that the statute could not be constitutionally applied to a fifteen-year-old.

Justice O'Connor's argument depended on the choice of a particular baseline: she assumed that application of the death penalty to juveniles was sufficiently controversial as a constitutional matter that a legislature which intended to accomplish this result should be forced to say so explicitly. An alternative baseline was chosen by the dissenters; Justice Scalia argued that a general death penalty statute that had no exceptions was intended to apply to juveniles. Moreover, Scalia noted that O'Connor's requirement that states explicitly choose to execute juveniles would make it less likely that the legislation would pass. "It is difficult to pass a law saying explicitly '15-year-olds can be executed,' just as it would be difficult to pass a law saying explicitly 'blind people can be executed,' or 'white-haired grandmothers can be executed,' or 'mothers of two-year-olds can be executed.' "[151] Scalia concluded that the Court cannot tell the legislature the form that legislation should take.

The fact that it may be more difficult to pass a death penalty statute directed specifically at juveniles than to include this result as an implied part of general legislation means that determination of the actual intent of the legislature is inherently complicated. If the legislature would pass a general statute that allows execution of juveniles by implication, but would refuse to pass a statute explicitly authorizing execution of juveniles, what is the legislative intent? Thus, it is the judge's baseline, not the will of the legislature, that determines the effect of the general statute.

We argued above that the offer/asking problem teaches us that Coase's theorem might not always work, and that bargaining might not change an initial allocation of entitlements to either party. Just as the initial allocation of property rights affects bargaining between parties, any judicial decision regarding employment security, regardless of the substance of the rule, might create significant resistance to legislative change. In other words, the legislature might not change the courts' rule about job security no matter what the courts decide.[152]

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[151] *Id.* at 2721 (Scalia, J., dissenting).

[152] *See* Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988). "It takes less political support to block a law than to get one passed. The struc-

Some states have adopted specific statutes limiting employment-at-will in certain instances.[153] For example, some states have adopted whistleblower legislation to protect workers who report to government officials or the public illegal or socially harmful activities of their employers.[154] Others protect the right of employees to seek workers' compensation benefits.[155] These statutes followed court decisions in those or other states that created these exceptions to employment-at-will judicially. These statutes could be interpreted in two ways. One could argue that they demonstrate that the legislature is in favor only of narrow exceptions to employment-at-will. After all, like the state of Montana, they could have adopted a general just cause requirement if they wanted to do so. A different interpretation, however, is that the legislature is taking the issue one step at a time. After being convinced by the courts to limit employment-at-will in the context of whistleblowing, workers' compensation or sexual harassment, the legislature adopted legislation to ratify the courts' decisions. This means that what the courts do influences what the legislature does.

All this adds up to the proposition that the principle of majority rule or legislative supremacy is indeterminate. What the courts do influences both public opinion and legislative action. Moreover, there may be impediments to legislative repeal of whatever common law rule is in effect. Thus, identifying the will of the majority is more complicated than it first appears. The legislature is free to correct a judicial mistake, yet there may be impediments to its doing so.

The courts therefore have little choice but to do the best they can to decide the issue wisely, promulgating what they view as the best rule of law. In the absence of clear evidence of legislative op-

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tural features of government make legislation hard." *Id.* at 427.

[153] For a proposal for a general just cause dismissal statute, see Comment, *Unjust Discharge: Why Nonunion Employees Need a Just Cause Statute*, 25 WILLAMETTE L. REV. 135 (1989).

[154] *See, e.g.*, Whistleblowers' Protection Act, MICH. COMP. LAWS ANN. §§ 15.361-.369 (West 1981).

[155] *See, e.g.*, CONN. GEN. STAT. ANN. § 31-290a (West 1987) (forbidding discharge of or discrimination against employee filing workers' compensation claim); ILL. ANN. STAT. ch. 48, para. 138.4(h) (Smith-Hurd 1986) (forbidding interference with or discrimination against worker exercising rights and remedies granted by workers' compensation); TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon 1967 & Supp. 1989) (forbidding discharge or discrimination against an employee filing a good faith workers' compensation claim).

position to a just cause termination doctrine, it is dangerous to place much stock in arguments that judges should defer to the legislature as the only appropriate branch of government to change the law.

VI. CONCLUSION

Judges sometimes recognize the importance of baselines, or initial perspectives, to legal decisions. In a recent case about whether a local social service agency's failure to prevent child abuse violated the Constitution, Justice Brennan commented on the importance of baselines to understanding the differences between the majority and dissenting positions. In his dissent from the Court's refusal to recognize a constitutional right to competent services from state child welfare agencies, Justice Brennan stated:

> In a constitutional setting that distinguishes sharply between action and inaction, one's characterization of the misconduct alleged under § 1983 may effectively decide the case. Thus, by leading off with a discussion (and rejection) of the idea that the Constitution imposes on the States an affirmative duty to take basic care of their citizens, the Court foreshadows—perhaps even preordains—its conclusion that no duty existed even on the specific facts before us. This initial discussion establishes the baseline from which the Court assesses the DeShaneys' claim that, when a state has . . . announced an intention to protect a certain class of citizens and has before it facts that would trigger the applicable state law, the Constitution imposes upon the State an affirmative duty of protection.
>
> The Court's baseline is the absence of positive rights in the Constitution and a concomitant suspicion of any claim that seems to depend on such rights. From this perspective, the DeShaneys' claim is first and foremost about inaction . . . and only tangentially about action . . . . I would focus first on the action that Wisconsin *has* taken with respect to Joshua and children like him, rather than on the actions that the State failed to take.[156]

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[156] DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1008 (1989)

By allocating burdens of proof and defining issues, baselines have a significant effect on legal reasoning and normative argument. We may reach different results from different baselines. If this is the case, then we need to reexamine our confidence in many of our conclusions, and we need to engage in a discussion of why and how our analysis proceeds the way it does. We need to understand the influences that shape our perception of the world. To accomplish this, we should make our moral arguments explicit and we should try to understand how our moral viewpoints shape our entire approach to problems.

The common law analysis has not led to significantly greater worker security partly because of its pro-management starting points. These pro-management baselines appear in arguments about the consequences of the legal rules, the principles of property and contract underlying the free market, economic analysis, and judicial role arguments. In each of these types of considerations, the initial baseline is all important to the outcome of the analysis. The baseline shapes the structure of argument by determining which side has hurdles to overcome and which side has a smooth path. Bringing competing baselines to the forefront of the analysis allows us to highlight the moral and political choices implicit in choices among competing rules. It therefore will help us make better decisions by clarifying the value choices involved in the decision.

The struggle between employers and employees over job security is an example of the larger struggle over property rights in a society in which owners are often allowed to exercise their rights without regard for the interests of others. Our attempts to analyze questions concerning the propriety of conduct regarding property and contract are colored by our moral views concerning the conduct. Workers have a strong moral claim to job security. The argument over job security is, at bottom, an argument about morals, security, human dignity and the proper distribution of power in the workplace. The discourse suffers if it does not address these concerns.

(Brennan, J., dissenting) (emphasis added).