

10-1-1993

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Recommended Citation

Schwab, Stewart J., "Life-Cycle Justice: Accommodating Just Cause and Employment at Will" (1993). *Cornell Law Faculty Publications*. Paper 522.

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LIFE-CYCLE JUSTICE: ACCOMMODATING JUST CAUSE AND EMPLOYMENT AT WILL

*Stewart J. Schwab**

"You're fired!" Most American workers hearing these words have no legal recourse under traditional employment law. Unless they have specific protection in a contract — and few nonunion workers do — or evidence that the firing violates a specific antidiscrimination statute, workers are treated at will. Under this traditional view, an employer can fire them for a good reason, a bad reason, or no reason at all.¹

Yet, as any employer who has recently tried to fire a worker will complain, the traditional doctrine is now full of holes. In the past decade or two, courts increasingly have become receptive to worker claims of unjust dismissal. Still, the protections remain patchwork and the trend uneven. No state court has proclaimed a general right of employees against arbitrary dismissal, although the Montana court has come close.² Indeed, the Supreme Courts of California and Michigan, long considered to be among the leading innovators in this area, have recently issued major decisions signaling hesitation with ever-expanding protections for employees.³ On the legislative side, only

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1. The classic statement of the at-will doctrine comes from the Supreme Court of Tennessee in *Payne v. Western & Atl. R.R.*, 81 Tenn. 507 (1884):

All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong. . . . The sufficient and conclusive answer to the many plausible arguments to the contrary, portraying the evil to workmen and to others from the exercise of such authority by the great and strong, is: They have the right to discharge their employees. The law cannot compel them to employ workmen, nor to keep them employed.

81 Tenn. at 519-20.

2. See *Crenshaw v. Bozeman Deaconess Hosp.*, 693 P.2d 487, 492 (Mont. 1984) ("Employers can still terminate untenured employees at-will and without notice [but] simply may not do so in bad faith or unfairly . . .").

3. *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988) (denying tort remedies for firings that breach an implied covenant of good faith and fair dealing); *Rowe v. Montgomery Ward*

Montana, reacting to its extreme court decisions,⁴ has a statute requiring employers to have good cause before firing a worker.⁵ However, the Commissioners on Uniform State Laws have recently passed a Model Employment Termination Act that would finally abolish the at-will doctrine for most employees,⁶ and we can expect further debate over employment at will as legislatures confront the model act.

Snapshot examinations of current unjust dismissal law have led employment law commentators to see only chaos, a set of cases with little internal coherence or rationale. A view of the decisions in their historical sweep causes commentators to see evolution: in the beginning was employment at will,⁷ now chaos exists, the natural ending point will be just cause. Most commentators applaud the trend, urge its completion, and bemoan any hesitation or backsliding by the courts.⁸ Their continual refrain is that the United States lags behind

& Co., 473 N.W.2d 268 (Mich. 1991) (finding that oral statements and handbook did not create legitimate expectation that discharges would only be for cause).

4. See LeRoy H. Schramm, *Montana Employment Law and the 1987 Wrongful Discharge from Employment Act: A New Order Begins*, 51 MONT. L. REV. 94, 108-10 (1990) (noting that an association of defense lawyers and insurance companies drafted bill that eventually became the Montana Wrongful Discharge from Employment Act).

5. Montana Wrongful Discharge from Employment Act of 1987, MONT. CODE ANN. §§ 39-2-901 to -914 (1991).

6. MODEL EMPLOYMENT TERMINATION ACT OF 1991, 7A U.L.A. 66 (Supp. 1993). The Model Act was controversial even among the commissioners. They rejected an attempt to pass a uniform act that would have required the commissioners to urge their respective legislatures to adopt the law. See *id.* prefatory note, 7A U.L.A. at 69-70 (Supp. 1993).

7. Legal historians have debated whether employment at will was truly "the beginning," or whether that presumption itself was a radical departure from earlier, status-based conceptions of employment. Much of the debate has focused on whether Horace Wood "invented" employment at will in his 1870 treatise or accurately was describing legal doctrine of the nineteenth century. Compare Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976) with Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551 (1990). See also Jay M. Feinman, *The Development of the Employment-at-Will Rule Revisited*, 23 ARIZ. ST. L.J. 733 (1991).

8. The strongest prediction of the demise of employment at will comes from Professor Peck, who begins his important article by noting:

At times one is tempted, despite the hazards, to make predictions concerning the law of the future. The prediction made in this article is one of the safest that can be made. Indeed, it may be wrong to characterize what is said here as a prediction. So strong are the forces for the change that it may be only the details of an inevitable development that remain undiscovered. The prediction is that American courts will abandon the principle that, absent some consideration other than the services to be performed, a contract of employment for an indefinite term is to be considered a contract terminable at will by either party, with the consequences that an employer may discharge an employee for any cause, no cause, or even a bad cause.

Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 1 (1979); see also Alfred W. Blumrosen, *Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII*, 2 INDUS. REL. L.J. 519 (1978); Joseph Grodin, *Toward a Wrongful Termination Statute for California*, 42 HASTINGS L.J. 135 (1990); Gary Minda & Katie R. Raab, *Time for an Unjust Dismissal Statute in New York*, 54 BROOK. L. REV. 1137 (1989); Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56 (1988); Clyde Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 484 (1976) ("[T]he anachronistic legal

the rest of the world on this issue.⁹ At the other extreme, some conservatives, most prominently Richard Epstein, hearken back to the heyday of employment at will as the ideal state of employment law.¹⁰ Such observers lament every move away from a strict presumption that all employment contracts can be terminated at will by either party.

The fundamental problem with these perspectives is that they criticize current law but they do not understand or explain it, except in the crudest way. The just-cause boosters simply applaud every pro-employee decision and decry the others as backsliding responses to conservative political pressures. The at-will zealots simply cheer and boo the other way. Neither perspective appreciates the apparent vacillation of current courts, which erode the at-will presumption without rejecting it.

Current termination law does have an underlying coherence. We should recognize this coherence before we reject the contemporary common law system for either the Model Act's futuristic scheme of arbitrating just cause or a return to the heyday of employment at will. This paper attempts to articulate the coherence of current doctrine. Reacting to the almost uniform polarization on this issue, I argue both positively and normatively for an intermediate position. The current intermediate position of the common law balances two conflicting problems. A career-employment relationship faces two types of opportunism: opportunistic firings by an unfettered employer and shirking by employees with job security. An extreme legal rule can handle either problem alone, but only by ignoring the other. Thus, a legal presumption of employment at will handles the shirking problem well but gives no protection against opportunistic firings. A just-cause regime has the opposite virtue and flaw. The legal challenge is to find an intermediate rule that provides the optimal check against both dangers.

The common law has groped towards such a rule by recognizing

rule that employees can be discharged for any reason or no reason should be abandoned."); Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty To Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

9. See Samuel Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 AM. J. COMP. L. 310, 311 (1985) ("We seem to stand virtually alone among the nations of the Western industrialized world in not providing general protection against unjust discharge for private-sector employees who either cannot or do not choose unionism.").

10. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); see also Susan L. Catler, *The Case Against Proposals To Eliminate the Employment At Will Rule*, 5 INDUS. REL. L.J. 471 (1983); Larry S. Larson, *Why We Should Not Abandon the Presumption that Employment Is Terminable At-Will*, 23 IDAHO L. REV. 219, 253 (1986-1987) (any presumption other than at will "would only open a Pandora's box of new issues"); Richard W. Power, *A Defense of the Employment At Will Rule*, 33 DEF. L.J. 199 (1984).

that the relative magnitudes of the two problems vary over the life cycle of the worker. The danger of employer opportunism is greatest for late-career workers, and it is also a problem for some beginning-career employees. By contrast, the greater problem at midcareer is shirking. In response, the courts have begun to offer contract protections for workers at the beginning and end of the life cycle, while maintaining a presumption of at-will employment for midcareer employees. In arguing for the wisdom of this approach, I, like the courts, refrain from making a categorical statement that at-will or just-cause employment should never — or should always — be the governing presumption.

Let me sketch at the outset the boundaries of my inquiry. Using an internal-labor-markets model of career employment, this paper examines whether courts should presume, in the absence of any express contractual provision about job security, that an employee is at will or protected by just cause. This paper therefore skirts the fascinating contract issues involved in employee handbooks and other arguably express agreements about the standard of discharge. Nor will it evaluate the appropriate scope of tort limitations on employment at will.¹¹ The goal of this article is to articulate a coherent framework for understanding the default rules for employment termination. While most observers see chaos here, I find a certain logic in the leading cases. The courts have been boldest when job protection is most appropriate, and they have hesitated precisely when at will plays its most useful role.

An initial caveat about methodology is appropriate. When applying the model to the case law, I will not survey every termination case, or even most or many of the thousands of cases. Rather, my method is to use “leading” cases — those that may indicate trends in the law — and argue how these leading cases might fit together in a coherent structure. Leading cases rarely typify the mass of cases, and counterexamples certainly exist. Leading cases are worth studying, however, particularly in a rapidly evolving subject area, because they often give greater hints about the appropriate normative structure of law than

11. The tort of wrongful discharge in violation of public policy — applying more or less traditional concerns of tort law — attempts to protect outsiders to the employment relationship. See Stewart J. Schwab, *Tort Limitations on At-Will Employment: Searching for Third-Party Effects* (1991) (unpublished manuscript, on file with author). Protection of an employee fired for serving on jury duty provides a paradigm example. See *Nees v. Hocks*, 536 P.2d 512 (1975). By contrast, the contract law doctrines analyzed in this article regulate relations between employer and employee, regardless of whether outsiders are directly affected. Despite my sharp division between tort and contract limits on employment at will, I agree with Peter Linzer that the division is often artificial. See Peter 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).

would an exhaustive study of the hidebound mass of cases. Nevertheless, because of its reliance on leading cases, my inquiry must blend positive and normative analysis. Perhaps the question addressed here should be phrased as whether the leading employment-termination cases can fit into a coherent structure that has normative appeal.

One final caveat before we begin. One could argue that we should scrap common law litigation over employment terminations as not worth the cost of litigation.¹² Whatever rationality the current common law lines might draw, the argument goes, its advantages are swamped by the costs of deciding on what side of the line a particular employee falls. To my mind, this litigation-cost argument is the strongest argument for taking a polar position. By itself, however, it does not point clearly toward either pole. Supporters of a rigid at-will presumption emphasize that fewer employees will challenge terminations under their standard — thus saving on litigation costs.¹³ At the other pole, proponents of just cause, worried about the feasibility of courts reviewing every dismissal, typically link their proposals to arbitration rather than litigation as the method of enforcement.¹⁴ In any event, courts themselves are poor judges of the metadecision about whether to have common law enforcement of employment terms. Reacting to the cases they see, courts have attempted to create a coherent doctrine. Before rejecting their efforts on grounds of cost, one should appreciate the balance they are trying to achieve. Until now, no one has attempted to find the method behind the current madness. While the intermediate solution of the current common law inevitably will have detractors on both sides, much can be said on its behalf. The goal of this article is to present that defense.

I. EMPLOYMENT AS A RELATIONAL CONTRACT

Workers have many types of jobs and many types of relationships with employers. Younger workers typically try several jobs before beginning a long-term attachment to one employer.¹⁵ This variety of

12. For an empirical analysis of the litigation costs, see JAMES N. DERTOUZOS, *THE END OF EMPLOYMENT-AT-WILL: LEGAL AND ECONOMIC COSTS* (1988).

13. See Epstein, *supra* note 10, at 970-73 (an "enormous advantage" of the contract at will is that it is "very cheap to administer").

14. See, e.g., MODEL EMPLOYMENT TERMINATION ACT § 6 (establishing arbitration); William B. Gould IV, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885, 908-10 (arguing that arbitration should be the "first basic ingredient" of legislation to provide just cause).

15. See Robert E. Hall, *The Importance of Lifetime Jobs in the U.S. Economy*, 72 AM. ECON. REV. 716, 720, 722 tbl. 3 (1982) (noting that the average worker holds 10 jobs during lifetime; 28% of workers are currently in jobs that will last 20 years or more; 23% are in jobs that will last less than two years); see also John T. Addison & Alberto C. Castro, *The Importance of Lifetime*

relationships may in itself counsel against a uniform legal approach to employment terminations. I will return to this issue at the end of this article,¹⁶ but most of my analysis will concentrate on the career employee. Termination of the career employee provides the fact pattern for many leading cases in the erosion of employment at will.

A. *The Specific Human-Capital Story*

The key feature of the career employment relationship is that both sides are locked into it. The easiest explanation for lock-in comes from a human-capital story that emphasizes "asset specificity."¹⁷ Under the basic human-capital model, workers become more productive as they learn the ways of the firm. Because the gains exceed the costs of training, these firm-specific skills are worth learning. In contrast to general skills, however, these skills are not useful to other firms.¹⁸

The issue becomes whether the employer and employee can decide how to share the costs and benefits so that this desirable training will occur. This issue can be resolved in a number of ways. One possibility is for the employer to pay for the firm-specific training and to receive the benefits of the greater productivity by paying the worker throughout his work life a wage equal to the wage he could get outside the firm. The problem is that the worker has no incentive to stay with the firm because he earns no more than he could get elsewhere, and so the employer risks losing the employee before it can recoup its training

Jobs: Differences Between Union and Nonunion Workers, 40 INDUS. & LAB. REL. REV. 393, 402 (1987) (unionized workers have longer job tenure than nonunion workers, but nonunion workers "enjoy considerable lifetime tenure after the job shopping years").

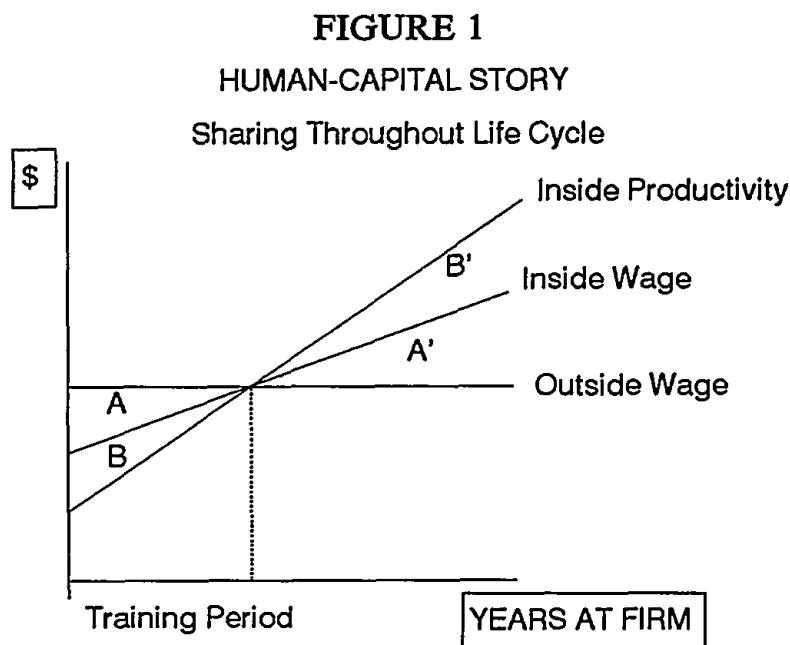
16. See *infra* Part V.

17. The term *asset specificity* comes from Oliver E. Williamson, OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 52-56 (1985), who calls asset specificity the most important dimension for transaction-cost economics — the study of the "rational economic reasons for organizing some transactions one way and other transactions another." *Id.* at 52. As Williamson puts it, "asset specificity is the big locomotive to which transaction cost economics owes much of its predictive content." *Id.* at 56; see also Douglas L. Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353, 366-67 ("The key premise of the relational contract model of labor markets is that many job skills are learned on the job and are specific to the firm. Employees work in teams, and tasks are complex.").

18. A basic conclusion of Gary Becker's classic analysis, GARY S. BECKER, *HUMAN CAPITAL* (2d ed. 1975), is that workers rather than employers will pay for general training. If employers were to pay for training that was useful to other firms, workers after training would leave for other employers who, having incurred none of the training expenses, could afford higher wages. This is most obvious for the most general training, which is called "education." Employers rarely pay to educate workers because of the difficulty of ensuring the worker will stay for a reasonable length of time. Only employers like the U.S. Army, who have better means of enforcing student promises to work for them later, will pay for general training. Workers also can pay implicitly for on-the-job general training by accepting lower wages than they would receive from a job that did not give them the training.

investment. Another possible resolution is for the worker to pay for the training, perhaps by accepting a lower wage during the training period, and for the employer to pay the worker a higher wage once trained. The mirror image of the earlier problem occurs in this situation: the firm has an incentive to underpay the worker once he is trained, and the worker has no recourse — because the training is worthless elsewhere — as long as he is paid at least the outside wage.

The best solution is for the employer and worker to share both the costs and benefits of firm-specific training. Figure 1 gives a stylized



view of the situation. The outside wage is constant, equaling productivity based on general skills.¹⁹ In the training period at the firm, the worker accepts less than the outside wage, thereby paying for some of the training, but the employer pays him more than his productivity during the training period, thereby paying for some of the training. After training, the worker receives more than the outside wage, thereby reaping some of the benefits of training, but the employer does not pay the worker for his full productivity, thereby allowing the employer to reap some of the benefits of training. The worker will agree to this arrangement if the higher post-training wages, when appropriately discounted, are at least as large as the lower training wages —

19. Outside productivity based on general skills remains constant because it is assumed that general skills remain constant over the working life. One could make the sketch more realistic by assuming that experience and maturity would increase outside productivity over time. Such complications would not further the basic insight of the model, which is that employers and workers share in both the costs and benefits of specific training, nor would it alter the specific conclusion that late-career workers receive more than the outside wage but less than their current productivity.

that is, if A' is at least as large as A . The employer will agree as long as the gains to it (B') are at least as large as its training costs (B).²⁰

In practice, these higher post-training wages take the form of seniority-based wages and late-vesting pensions, which induce workers to stay with the firm after training.²¹ Compared with the life cycle of otherwise similar workers, the model predicts that workers who receive substantial on-the-job training will receive higher pay in later years. Considerable empirical evidence supports this steep age-earnings profile of career employees and its relationship to training early in the career.²²

A critical part of this simple human-capital story is the self-enforcing feature of the relationship. Because the parties share the costs and benefits of training throughout the employee's work life, both parties want to continue the relationship. The employer pays employees less than their full value later in their career. This protects employees from discharge because a discharge would harm the employer as well. The late-career wage exceeds, however, the outside wage the employee could receive, thereby discouraging the employee from quitting.

B. *The Efficiency-Wage Story and the Potential for Opportunism*

Gary Becker's human-capital theory²³ explained why wages rise with seniority, but puzzles arose that caused commentators to question the theory that workers would receive less than their value late in their career.²⁴ One such puzzle was mandatory retirement, which covered some thirty-five percent of the workforce before it was prohibited in 1986 by amendments to the Age Discrimination in Employment Act (ADEA).²⁵ Why would an employer, who is paying older workers less than they are worth, demand that such workers retire? A related puzzle is the presence of actuarially unfair pensions, which even after the 1986 ADEA amendments lawfully encourage older workers

20. Competition among employers and employees will ensure that, in equilibrium, $A=A'$ and $B=B'$.

21. See RONALD G. EHRENBERG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS* 160-63, 410, 425-37 (4th ed. 1991).

22. See, e.g., James N. Brown, *Why Do Wages Increase with Tenure? On-the-Job Training and Life-Cycle Wage Growth Observed Within Firms*, 79 AM. ECON. REV. 971 (1989).

23. See generally BECKER, *supra* note 18.

24. For a superb account of these puzzles and their impact on human-capital theory, see Robert M. Hutchens, *Seniority, Wages and Productivity: A Turbulent Decade*, J. ECON. PERSP., Fall 1989, at 49.

25. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c)(1), 100 Stat. 3342, 3342 (codified at 29 U.S.C. § 631(a) (1988)). The mandatory retirement and actuarially unfair pension puzzles were first discussed by Edward P. Lazear, *Why Is There Mandatory Retirement?*, 87 J. POL. ECON. 1261 (1979).

to retire. The present value of many pensions declines if older workers keep working.²⁶ Again, why would an employer establish pension plans that encourage retirement if, as the human-capital model suggests, the employer makes money on older workers? A final puzzle stems from studies that suggest that workers' pay relative to others in their job grade increases with seniority but their relative productivity does not.²⁷ This evidence conflicts with Becker's hypothesis that productivity increases faster than wages. These puzzles suggest that employers want to end the relationship with late-career workers at some point, probably because employers perceive their wages as exceeding current productivity.

To explain the puzzles, economists have developed an efficiency-wage model.²⁸ The basic insight behind efficiency-wage models is that workers often work harder when the job pays more.²⁹ High "efficiency wages"³⁰ increase worker effort by making the job more valuable to the worker. Because workers want to keep the valuable job, they will work hard to avoid being dismissed. In effect, high wages increase the penalty for being dismissed — a dismissed worker forgoes the large payout. Because workers labor harder than otherwise, the firm can afford the higher compensation. An early version of the

26. For example, Lazear's study using 1980 data of large pension plans revealed that the expected present value of pension benefits was \$79,476 for a worker with a salary of \$25,000 and 40 years tenure retiring at age 65, but would have been \$158,225 if that same worker had retired 10 years earlier. Edward P. Lazear, *Pensions as Severance Pay*, in FINANCIAL ASPECTS OF THE UNITED STATES PENSION SYSTEM 57, 72 tbl. 3.3 (Zvi Bodie & John B. Shoven eds., 1983).

27. James L. Medoff & Katharine G. Abraham, *Are Those Paid More Really More Productive? The Case of Experience*, 16 J. HUM. RESOURCES 186 (1981); James L. Medoff & Katharine G. Abraham, *Experience, Performance, and Earnings*, 95 Q.J. ECON. 703 (1980).

28. The distinction between efficiency-wage and human-capital models is not as sharp as the text suggests. Variants of the human-capital model, for example, suggest that late-career workers may be paid more than their current productivity. See H. Lorne Carmichael, *Reputations in the Labor Market*, 74 AM. ECON. REV. 713 (1984). For a good discussion of the distinction between human-capital and efficiency-wage models, see Robert Hutchens, *A Test of Lazear's Theory of Delayed Payment Contracts*, 5 J. LAB. ECON. S153 (1987).

29. See EHRENBERG & SMITH, *supra* note 21, at 425-26.

30. The term *efficiency wage* refers to raising the wage above the level workers can earn elsewhere until the marginal benefit from the resulting harder work just equals the extra wage. *Id.* at 423. Economists initially applied the efficiency-wage model to developing countries. Studies showed that a higher wage could lead to greater nutrition and health, which lead to greater productivity. Since then, economists have used the efficiency-wage model to explain wage rigidity in the face of involuntary unemployment, a central feature of Keynesian macroeconomic theory. Firms will not reduce the efficiency wage even when job applicants are willing to work for less because full employment would increase shirking. See Carl M. Campbell III, *Do Firms Pay Efficiency Wages? Evidence with Data at the Firm Level*, 11 J. LAB. ECON. 442 (1993) (finding evidence confirming an efficiency-wage model in which higher wages reduce turnover as well as induce greater productivity). See generally EFFICIENCY WAGE MODELS OF THE LABOR MARKET (George A. Akerlof & Janet L. Yellen eds., 1986). But see Brown, *supra* note 22, at 971 (finding that most within-firm wage growth is attributable to productivity increases rather than to "contractual" factors).

model³¹ assumed that a firm employing this strategy³² raised wages by a constant amount throughout a worker's life cycle. One problem with the early, flat-wage version of the model is that workers nearing retirement would care less about losing their high-wage job and would therefore be less deterred from shirking.³³

Later versions of efficiency-wage models suggest that compensation will rise over a worker's career to induce effort throughout.³⁴ The implicit contract promises large payouts for senior workers, but it promises this reward only for hard-working employees.³⁵ The firm recognizes that day-to-day monitoring of a worker's effort may be difficult, but over a period of years the firm hopes to spot and weed out shirkers. The threat of being fired before the large payoff keeps employees working hard. Because employees work harder than otherwise, the firm can afford the higher compensation. Large law firms epitomize this model.

A related literature emphasizes that firms may conduct internal tournaments to induce high effort by junior and midlevel management employees.³⁶ Tournaments are especially likely when firms cannot monitor actual effort or output but can evaluate relative performance. A firm may (implicitly) tell an incoming class of workers that the best worker will win the grand prize of C.E.O. A single prize may be insufficient inducement, however, so the firm may (implicitly) offer several runner-up prizes of cushy vice-president jobs for those who try hard but fail. This model likewise suggests an implicit agreement whereby firms pay late-career employees more than their current productivity.

31. Carl Shapiro & Joseph E. Stiglitz, *Equilibrium Unemployment as a Worker Discipline Device*, 74 AM. ECON. REV. 433 (1984).

32. It has been suggested that Henry Ford's famous introduction of the five-dollar-a-day wage was an early example of an efficiency-wage strategy. On January 12, 1914, Ford Motor Company raised the wage by over 100%, from \$2.34 to \$5, while reducing work hours from nine to eight. Productivity rose so dramatically that labor costs per car rose by only 43%, material costs fell by 19%, and total costs per car fell 3.5%. See Daniel M.G. Raff & Lawrence Summers, *Did Henry Ford Pay Efficiency Wages?*, 5 J. LAB. ECON. S57 (1987). The authors reject alternative explanations for the cost reductions, such as reductions in turnover or ability to hire more productive workers as the wage rose.

33. Technically, the Shapiro-Stiglitz model avoids this difficulty by assuming an infinite working life for workers. See Shapiro & Stiglitz, *supra* note 31, at 435 n.5.

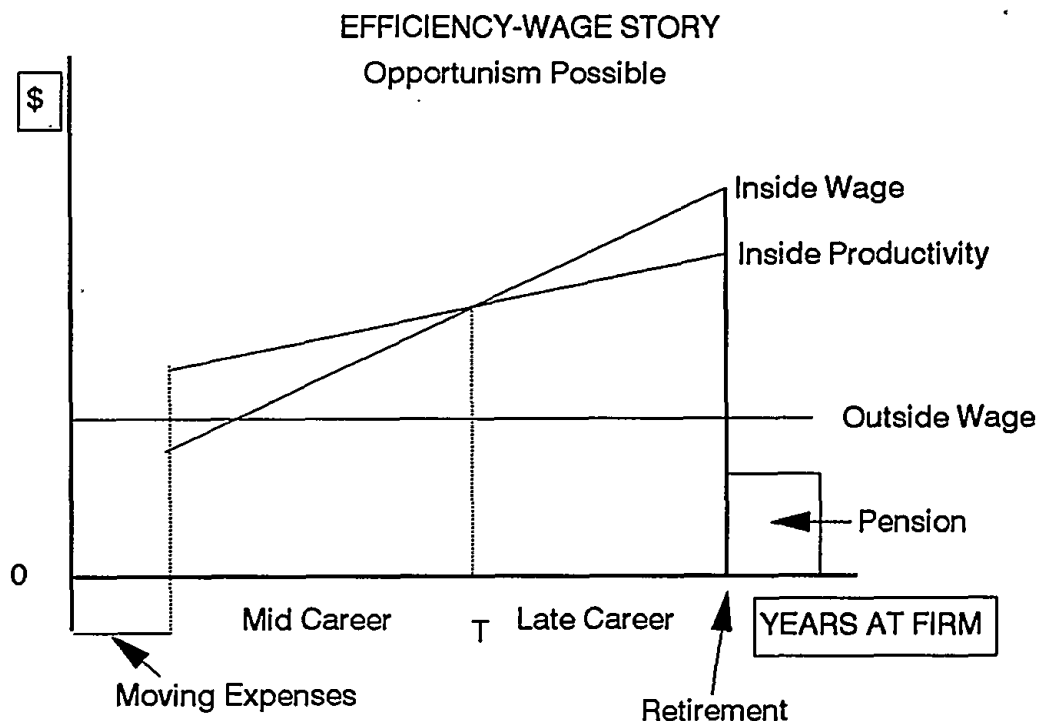
34. Considerable empirical evidence documents the incentive explanation for a life-cycle rise in earnings. See, e.g., Hutchens, *supra* note 28. See generally Hutchens, *supra* note 24.

35. For an excellent, nontechnical synthesis of the efficiency-wage and related literature, see CHRISTOPHER J. BRUCE, *ECONOMICS OF EMPLOYMENT AND EARNINGS* (1990). Bruce distinguishes between the basic efficiency-wage model, in which a firm raises wages above competitive levels for all workers, and the wage-gradation model, in which a firm initially "underpays" a worker but later in the career overpays the worker. See *id.* at 100-05.

36. See Edward P. Lazear & Sherwin Rosen, *Rank-Order Tournaments as Optimum Labor Contracts*, 89 J. POL. ECON. 841, 848-49 (1981); James M. Malcomson, *Work Incentives, Hierarchy, and Internal Labor Markets*, 92 J. POL. ECON. 486 (1984).

Figure 2 grafts the efficiency-wage story to the human-capital model. As in the human-capital story, the outside wage is flat³⁷ and

FIGURE 2



equal to outside productivity. The inside wage may be initially lower than the outside wage,³⁸ but then rises. Inside productivity rises as job-specific training occurs. Inside productivity is above outside productivity at all stages, even before much training, to emphasize the efficiency-wage story that harder work results in greater productivity throughout. Figure 2 adds two other wrinkles that will become important later. First, because I will specifically address the case law of employees who change employers, Figure 2 includes a preemployment “moving” period. In this stage, an employee quits the outside job and incurs moving expenses, thus having a negative wage. Figure 2 also explicitly illustrates a postretirement pension.

37. The flatness assumption is not critical to the story. Some writers draw the outside productivity as first increasing as the worker learns general skills and then decreasing as these skills atrophy. See Katherine V. Stone, *Employees as Stakeholders Under State Nonshareholder Constituency Statutes*, 21 STETSON L. REV. 45, 50 (1991). A flat curve is used here for simplicity. Cf. Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1362-63 (1988).

38. Under the straight human-capital story, it is critical that early in the career the inside wage be below the outside wage because this is the worker's investment in training. Under the efficiency-wage story, the inside wage could be above the outside wage throughout the career if greater effort makes inside productivity higher throughout.

The critical point of the expanded story is that the implicit contract is not always self-enforcing. As Figure 2 illustrates, after point *T*, firms pay late-career employees more than they currently produce. At this point, late-career employees become vulnerable to opportunistic firing³⁹ because the general self-interest check on arbitrary firings does not exist; firing such a worker does not hurt the employer but is instead in its immediate economic interest. One can see a role for law in improving this situation. By policing against opportunism, the law can make the employment relationship more secure for and valuable to both sides. To understand fully the role law can play, we must examine the concept of opportunism more closely.

C. Contracting Problems in Career Employment

One solution to the problem of opportunism is for the parties entering into career employment to negotiate detailed contracts, enforceable by courts, that specify appropriate behavior by both sides. Unfortunately, three contracting challenges make detailed contracts an unsatisfactory solution. First, the parties cannot easily anticipate the future contingencies, or states of the world, that will influence the relationship.⁴⁰ Will demand for the product stay strong? Will the firm shift its focus from the employee's specialty to other areas that require more general skills? While all predictions of the future are difficult, anticipating events twenty or thirty years in advance is an exceptional challenge for employers and employees.

Second, even if parties can anticipate a future event, they may have difficulty specifying in detail the appropriate contractual response,⁴¹ particularly when one party has access to relevant information that the other cannot easily observe.⁴² A key element in the employment relationship is whether the employee is working hard, or, from the em-

39. Some readers might think that a clear tipping point between profitable and unprofitable employees does not exist. Employees approaching the critical *T* are less profitable to employers than employees earlier in their careers. Why not replace these more senior workers with junior workers, even before time *T*? Readers with this objection must implicitly adopt a model (perhaps based on imperfect capital markets) in which firms are prevented from undertaking all profitable activities open to them. If firms are not so constrained, a profit-maximizing employer would retain employees until age *T* before firing them because such employees are producing more than their wage and therefore add to profits. Cf. Robert Hutchens, *Delayed Payment Contracts and a Firm's Propensity to Hire Older Workers*, 4 J. LAB. ECON. 439, 445 (1986) ("If . . . the firm faces a form of fixed costs, it will wait until the last possible moment to cheat on one worker and hire another.").

40. Goetz and Scott call this "the problem of uncertainty in relational contracts." Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1092 (1981).

41. Goetz and Scott call this "the complexity problem of relational contracting." *Id.*

42. See Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 278-79 (1992).

ployee's perspective, whether the employer is dismissing him for failure to work hard or for an unfair, opportunistic reason. When monitoring is difficult, two alternatives emerge. First, the parties may decide not to make any part of the contract contingent on difficult-to-monitor behavior. An at-will clause would accomplish this goal by making worker efforts irrelevant to the permissibility of discharge. Alternatively, the parties may write a vague "best efforts" or "good faith" clause for the contingency.⁴³ While this solution invites later court or arbitrator supervision over the meaning of the terms, that supervision may be preferable to contractual language that straitjackets parties' future options.

Finally, having anticipated a future problem and specified the contractual response, a party may be unable to prove a breach in court. Economists term this problem an *unverifiable contract*.⁴⁴ Unverifiability is particularly problematic when the contractual language is vague — as it will often be in relational contracts. Both employer and employee might know that the employee is not working as hard as "best efforts" require, but the employer cannot assemble sufficient objective evidence to convince a court or arbitrator of this fact. If the parties cannot turn to outside enforcement, they must develop self-enforcing mechanisms for any agreement to be effective. But, as we have seen, career-employment contracts — particularly those following the efficiency-wage model — are not fully self-enforcing.⁴⁵

D. *Potential for Opportunism*

In the absence of enforceable, detailed contracts that regulate behavior, parties to a long-term relationship become vulnerable to opportunism. They cannot easily leave the relationship because they would have to repeat the investments or forgo their value.⁴⁶ The existence of "sunk costs" for one party creates a potential for opportunistic behavior by the other side. A firm can pay workers less than they are worth or treat them more harshly than the initial agreement contem-

43. Goetz and Scott suggest that many parties in long-term relational contracts introduce vague clauses. Goetz & Scott, *supra* note 40, at 1092-93. Employment contracts rarely have such clauses, however.

44. See Schwartz, *supra* note 42, at 279-80.

45. See *supra* note 39 and accompanying text.

46. Economists have termed the gap between the gains of the relationship and the next-best activity an "appropriable quasi-rent." The gap is a "rent" because it is more than the amount necessary to keep the worker in that job. It is only a "quasi"-rent, rather than a fixed or permanent rent, because, viewed at the beginning of the employee's career, the net return including investment costs may be no greater than other job alternatives. The gap is "appropriable" because, after the firm-specific investments are made, one side can capture the gains for itself without causing the other side to leave.

plated, knowing they cannot easily move. The employees can produce less than their skills allow, knowing the employer cannot easily replace them.

The law can sometimes help monitor opportunistic behavior, thereby increasing the parties' overall gains from the relationship. If the law can enforce promises not to exploit the other side's vulnerability, the parties can more confidently invest and the relationship will be more rewarding to both sides. The law has limits, however, because the contractual language often will be general and vague, as we have seen.⁴⁷ More importantly, because both employer and employee are investing, both can be exploited. A legal rule favoring one side would leave much opportunism by the other unchecked. To curb opportunism adequately, courts must engage in difficult, case-by-case assessments or create more flexible presumptions. As we will see, courts have responded by adopting presumptions that vary with an employee's life cycle.

1. *Employer Vulnerability to Shirking*

As the human-capital model indicates, employers make heavy investments in recruiting and training workers.⁴⁸ To ensure an adequate return on their investment, employers want workers to stay and produce for them after training. Some scholars focus on employer recruitment and training costs in emphasizing employer vulnerability to employees quitting, but this is not the true problem of opportunism. The basic human-capital model suggests that employers can adopt delayed-payment schemes to discourage quitting, thus making the contract self-enforcing. Late-vesting pensions and seniority-based wages can tell workers: "If you stick around, you will do well."

The greater risk to employers comes from employee shirking. The efficiency-wage model highlights the shirking problem. Even if pensions and seniority wages discourage workers from quitting, an employer still faces problems when workers stay. Workers often do not work as hard as they would under a fully specified and monitored contract. Economists label this behavior shirking.⁴⁹ A fully specified op-

47. See *supra* note 43 and accompanying text.

48. See PAUL C. WEILER, GOVERNING THE WORKPLACE 145-47 (1990).

49. As economic labels are wont to do, the term *shirking* offends many workers, and the class of behavior economists consider as shirking is broader than the literal term shirking might imply. While goofing off or engaging in pranks would certainly be shirking, it also includes failure to think creatively about workplace problems, failure to stay current in one's area of expertise with personal reading, and the like. As Alan Hyde nicely puts it, shirking is the failure to make "[an] active contribution to improving firm productivity." Alan Hyde, *In Defense of Employee Ownership*, 67 CHI.-KENT L. REV. 159, 183 (1991).

timal contract would designate an optimal level of effort. Workers would agree to exert this effort because they prefer the higher wages that accompany it to an easier work life; the employer would agree because the greater productivity is worth the higher wages. Once hired, however, an employee may shirk from this optimal effort if employers have difficulty monitoring or replacing workers. Indeed, it is irrational for workers to work up to "optimal" levels if they prefer coasting a little. Workers know that the employer will have to spend money to catch shirkers and that, if it fires a shirker, the employer will have to recruit and train a replacement. As long as workers perform better than a rookie would — considering the costs of monitoring, recruiting, and training — the firm must accept less than optimal efforts from its workers.

Much of the debate over at-will employment addresses whether parties can write effective contracts to overcome the shirking problem. To put it bluntly, the real question is whether the threat of firing for cause is sufficient to deter substandard performance by workers. Proponents of at will emphasize the unverifiability of the performance standard in many employment contracts. The employer may know the worker is shirking but cannot convince a court or arbitrator that the conduct amounts to shirking. Oliver Williamson has emphasized the difficulty in distinguishing a consummate performance from a perfunctory performance: "Consummate cooperation is an affirmative job attitude whereby gaps are filled, initiative is taken, and judgment is exercised in an instrumental way. Perfunctory cooperation involves working to rules and in other respects performing in a minimally acceptable way."⁵⁰ One problem employers have in documenting a "perfunctory performance" is that particular instances of misconduct often seem trivial. Concluding that they add up to a significant problem requires acknowledging that the whole problem exceeds the sum of the parts. The heart of the employment-at-will argument is that proving cause under what is essentially an unverifiable agreement against shirking places too great a burden on employers, preventing them from effectively using efficiency wages to deter shirking.

Some may argue that commentators overstate this shirking problem because the employee's desire for a good reputation deters shirking. Even if shirking is possible in a just-cause world, this counterargument runs, benefits accrue to employees with a reputation for hard work. Not only may the incumbent employer reward hard work with promotions and pay raises, but employees with good repu-

50. WILLIAMSON, *supra* note 17, at 262-63.

tations are most attractive to outside employers. Nevertheless, this reputation argument, in both its inside and outside reputation forms, ignores several important facts. First, an individual worker with a good inside reputation may not reap major rewards. As we saw, employers often establish pay and promotion ladders that do not depend on current individual productivity in order to discourage quits with promises of big paydays in the future.⁵¹ In such internal labor markets, pay scales attach to jobs rather than workers, and seniority rather than merit often determines who gets the jobs.⁵² Promoting individual workers simply because of individual hard work may not be worth the disruptions in the general progression system. In these internal labor markets, then, unusually good effort may not be rewarded even though unusually bad effort is punished by firing.⁵³ Second, an employee may find it hard to acquire a good outside reputation if his skills are firm-specific. An academic whose publications are useful to many potential employers can obtain an outside reputation. Indeed, some might argue that the major inside job of the academic is to acquire an outside reputation. An engineer working on a classified defense project finds it more difficult — and therefore has less incentive — to obtain an outside reputation for hard work. The reluctance of employers to give candid references, itself a response to defamation law, exacerbates the difficulty for employees seeking to establish outside reputations.

A second response to the shirking argument involves a quick comparative law lesson. In the rest of the industrialized world, at-will employment is unknown,⁵⁴ yet workers manage to work hard without the threat of firing.⁵⁵ As Jack Beermann and Joseph Singer lament, why

51. See *supra* notes 30-31 and accompanying text.

52. This internal-labor-market model has been well depicted by Douglas Leslie: "Wage rates attach to particular jobs, and jobs, not workers, carry marginal products. Hirings occurs only at the entry level Seniority ladders control promotion, with the limitation that an employee may be punished if the firm discovers poor work habits." Leslie, *supra* note 17, at 368. For general discussions of the internal-labor-market model, see PETER B. DOERINGER & MICHAEL J. PIRE, *INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS* 13-63 (1971); Wachter & Cohen, *supra* note 37, at 1353-67; and Oliver E. Williamson et al., *Understanding the Employment Relation: The Analysis of Idiosyncratic Exchange*, 6 BELL J. ECON. & MGMT. SCI. 250 (1975).

53. Even though the employer may not reward unusually hard workers, the employer will punish unusually lax workers by kicking them off the career ladder — that is, by firing them. Unlike sudden promotions, these terminations do not disrupt the seniority ladder for the remaining workers.

54. See Estreicher, *supra* note 9, at 311; Jack Stieber, *Protection Against Unfair Dismissal: A Comparative View*, 3 COMP. LAB. L. 229 (1980).

55. The point is forcefully argued by Beermann and Singer, who state:

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

does our society assume it can trust employers not to abuse the power of arbitrary firings while it refuses to trust employees protected by just cause?⁵⁶ Of course, one can overdramatize the comparative lesson. Industrial tribunals in Europe, having found a dismissal to be unjust, usually award modest severance pay that rarely exceeds six months duration.⁵⁷ Further, commentators of "Eurosclerosis" would caution against using Europe as a model for productive labor markets.⁵⁸

Ultimately, the verifiability problem involves a question of degree, and the problem is greater for some jobs than for others. To the degree that clear contracts against shirking are difficult to write, monitor, and enforce, opportunistic behavior by employees will remain a threat.

2. Employee Vulnerability

As both the human-capital and efficiency-wage models emphasize, employees invest heavily as they pursue a career with a single employer. First, they obtain training that is more useful for their own employer than it would be elsewhere — what economists term *job-specific human capital*.⁵⁹ Second, they join the company's career path. This path, as we have seen, ties pay, promotions, and benefits to sen-

differences, that workers in the rest of the industrialized world, where the at-will rule is not in force, work at all.

Jack M. Beermann & Joseph W. Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 933 (1989).

56. As Beermann and Singer put it:

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. . . . 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.

Beermann & Singer, *supra* note 55, at 934. As I suggest in the text, the explanation is not one of class distinctions between managers and workers, but one found in the self-bonding protection against arbitrary terminations. The self-interest of employers, rather than societal faith in them, checks arbitrary firings of productive workers. There is no equivalent self-interest check that deters employee shirking in the absence of employer monitoring.

57. Ronald G. Ehrenberg, *Workers' Rights: Rethinking Protective Labor Legislation*, in RESEARCH IN LABOR ECONOMICS 285 (Ronald G. Ehrenberg ed., 1986); Stieber, *supra* note 54.

58. For an analysis of Europe's persistent unemployment problems, see Olivier J. Blanchard & Lawrence H. Summers, *Unemployment Beyond the National Rate Hypothesis*, 78 AM. ECON. REV., May 1988, at 182 (papers and proceedings); Richard B. Freeman, *Evaluating the European View that the United States Has No Employment Problem*, 100 AM. ECON. ASSN. PROC. 294 (1988). For a discussion of the term *Eurosclerosis*, see, for example, Alan Riding, *Europe in Turmoil*, N.Y. TIMES, Sept. 20, 1992, at A1; Hobart Rowen, *Germany: High-Tech Laggard*, WASH. POST, July 8, 1993, at A17.

59. See BECKER, *supra* note 18, at 18-26 (discussing specific training).

iority and generally forbids lateral entry.⁶⁰ A major cost of pursuing a career with one firm is that one forgoes other ladders and must start over at the bottom if one leaves the firm. Additionally, as they plan for a lifetime with an employer, workers put down roots, establish networks of friends in the workplace and the community, buy homes within commuting distance of the job, and build emotional ties to the community.

Losing these investments, roots, and ties can be devastating. Many studies document how even impersonal plant closings lead to increases in "cardiovascular deaths, suicides, mental breakdowns, alcoholism, ulcers, diabetes, spouse and child abuse, impaired social relationships, and various other diseases and abnormal conditions."⁶¹ Being singled out and fired may be even more devastating.⁶²

Because of these tremendous costs, no employee wants to lose his job involuntarily. Further, these investments, roots, and ties are sunk costs that trap the worker in his current firm, inhibiting him from departing voluntarily. Even if the career does not proceed as anticipated, the employee is reluctant to quit because the job remains preferable to alternative jobs. Such trapped workers are vulnerable to opportunism. The employer might pay them less than the implicit contract requires or work them harder, knowing they cannot easily quit.

By itself, this potential for opportunism does not justify a just-cause standard. Employers want such exploited workers to stay, not to leave. Only when conditions become so intolerable that the employee prefers to quit for another job might termination law come into play. In the economist's framework, this situation occurs when the employer has appropriated all the gains from the relationship, making the career no longer better than alternative jobs. Lawyers label these intolerable conditions a *constructive discharge*.

Defenders of at will contend that employer self-interest protects productive employees from discharge.⁶³ An employer hurts itself by arbitrarily terminating a productive worker or by causing him to quit

60. An early recognition in the legal literature of the significance of the ties, particularly pension and seniority protections, binding the employee to the job, is Mary Ann Glendon & Edward R. Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C. L. REV. 457, 475-83 (1979). Glendon and Lev emphasize two social trends of the late twentieth century: the strengthening of work ties over family ties, and the tendency for social standing and security to depend on workplace benefits backed up by the government rather than on family relationships. The inroads on employment at will, suggest Glendon and Lev, reflect and interact with these social trends.

61. St. Antoine, *supra* note 8, at 67.

62. *Id.* See generally KATHERINE S. NEWMAN, *FALLING FROM GRACE* (1988).

63. See, e.g., Ehrenberg, *supra* note 57, at 292-93; Epstein, *supra* note 10, at 968.

because it wastes the recruiting and training investment in the employee. To avoid its own sunk-cost losses, an employer wants to keep good workers and fire only workers who fall below the standard of new entrants. Figure 1 illustrates this self-enforcing feature. After the training period, workers' productivity exceeds their wages, and the employer would lose this gain by firing such workers.⁶⁴

While employers can make mistakes, the self-enforcing feature should minimize firing of productive workers. Employees do not need the grand and expensive apparatus of the law for further protection, claim at will's defenders. Indeed, its very expense harms employees as well as employers, for wages will inevitably fall as terminations become more expensive.

Opponents of at-will employment remain skeptical. A major concern is that an employer is not a monolith but rather a hierarchy of high-level managers and low-level supervisors. Often low-level supervisors make the decision to fire, and the factors influencing their decisions are often not perfectly aligned with the profit-maximizing interest of shareholders. Thus, while shareholders may not want employees to be fired arbitrarily, supervisors might. Personality conflicts and power trips may lead supervisors to fire valuable and productive employees.

Again, one can overstate the dangers of front-line supervisors running amok. The firm has incentives voluntarily to reduce supervisor mistakes so long as the gains in employee satisfaction outweigh the costs of supervising the supervisors. Just-cause advocates cannot make their point simply by showing that agency costs exist. They must show further that employers will not take cost-effective steps to ensure that they treat their employees fairly.

One check on such opportunism — emphasized in the efficiency-wage literature — is the employer's concern for its reputation. If word gets out that an employer routinely fires older workers, it will be harder for the employer to recruit entrants into career jobs. Perhaps more damaging than its outside reputation is its inside reputation with fellow employees when older, productive workers are fired.⁶⁵ This loss of collegiality may encourage other workers to quit. Problematically

64. Even in the training period, an employer has a profit motive to retain workers. Once training has begun, the employer will fully recoup its investment only by keeping the worker until retirement. In technical terms, once training costs have begun to be sunk, the employer earns a quasi-rent by retaining the worker.

65. Epstein persuasively argues that the greater reputational check against employer opportunism will be the demoralizing effect on the current workforce. Epstein, *supra* note 10, at 968.

for the employer, the most productive workers likely have the greatest opportunities for moving elsewhere.

In many situations, reputation is unlikely to check fully the employer's incentive to fire late-career workers. Young job entrants cannot easily assess an employer's reputation for how it handles senior workers.⁶⁶ Great problems arise in passing on knowledge of a firm's opportunistic firings between generations of workers.⁶⁷ These problems are particularly acute in small or new firms,⁶⁸ where much of the workforce works.⁶⁹ Finally, a reputation for harsh personnel policies may not greatly harm declining firms that are not hiring many new workers.⁷⁰

Because reputation is not a full check on opportunism, firms must compensate workers for the risk that the delayed bonanza may not accrue. Early-career wages, or the late-career bonuses and pensions, must be higher than they would have to be were reputations more secure. Court scrutiny of opportunistic firings may offer another method of policing long-term contracts. Such third-party scrutiny may allow employers to offer efficiency-wage contracts at lower overall cost. The danger, of course, is that court intervention will diminish the employer's flexibility in firing workers whose shirking a court can-

66. See WEILER, *supra* note 48, at 74 ("[T]he worker who is shopping for a job will find it very difficult to learn (and certainly will not want to ask) about the actual dismissal risks in the firms being interviewed."). Weiler emphasizes the psychological tendency to underestimate the dangers of low-probability, high-cost events such as being fired. *Id.*

67. See WILLIAMSON, *supra* note 17, at 406-07. For a mathematical model of the role of reputation in labor markets, suggesting that reputation by itself will not enforce efficient behavior by firms, see Carmichael, *supra* note 28.

68. For an argument linking firm size to reputation, see Donald Parsons, *The Employment Relationship: Job Attachment, Work Effort, and the Nature of Contracts*, in 2 HANDBOOK OF LABOR ECONOMICS 789, 800-01 (Orley Ashenfelter & Richard Layard eds., 1986). The basic point is that even a "bad" small firm may have too few terminations for an outsider to detect a general pattern.

69. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1992, at 526, tbl. 837 (112th ed. 1992) (indicating that 24% of workers — excluding government, railroad, self-employed, and other categories — work for firms of fewer than 20 workers, and that another 26.8% work for firms of 20 to 99 workers); see also Nancy E. Dowd, *Maternity Leave: Taking Sex Differences into Account*, 54 FORDHAM L. REV. 699, 711 (1986) (indicating that almost 40% of all employees work for businesses with fewer than 50 employees).

70. Some have argued that new management coming in after a corporate takeover might breach implicit contracts with impunity, doing such things as terminating pension plans that were the prize for working hard early in the life cycle. See John C. Coffee, Jr., *Unstable Coalitions: Corporate Governance as a Multi-Player Game*, 78 GEO. L.J. 1495, 1521-28 (1990); Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, in CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 33 (Alan J. Auerback ed., 1988). This possibility is a further risk employees take in relying on reputation to ensure employers will not behave opportunistically at the end of the life cycle. The empirical importance of this motive in corporate takeovers has been questioned by Roberta Romano, *A Guide to Takeovers: Theory, Evidence, and Regulation*, 9 YALE J. ON REG. 119 (1992).

not verify. The question is whether court intervention can be limited to opportunistic firings, rather than to a broader supervision against unfair firings in general.

II. AN (INCONCLUSIVE) APPEAL TO EMPIRICISM

We see, then, that both the employer and employee are vulnerable to opportunism. Which is the greater problem — shirking or unjust firings? Or, more precisely, what legal rule can best reduce the problems? The choice is highly political. Those sympathetic to workers will feel their exploitation is the greater problem and favor just-cause. Others who instinctively rely on private markets may see a greater need to curb worker shirking and so favor at will.

Some scholars have looked at actual practices to help resolve the debate.⁷¹ It is useful to sketch these appeals to empiricism before rejecting them as inconclusive and moving to the life-cycle theory of career employment.

A. *The Pervasiveness of At-Will Employment*

Certainly, at-will employment is the legal norm for the vast majority of American workers. As a long-repeated practice by many players negotiating many contracts, at-will employment is a plausible candidate for being the optimal arrangement, in the sense that the overall gains, which primarily accrue to the employer, outweigh the costs of potentially arbitrary firings, which are borne primarily by employees. Both sides can share this net gain by increasing the wage to compensate workers for the risk of firing. Richard Epstein uses this empirical observation to bolster his argument for the desirability of at-will employment: "The survival of the contract at will, and the frequency of its use in private markets, might well be taken as a sign of its suitability for employment relations."⁷²

The empirical claim that most private employees are at will is rarely disputed.⁷³ One needs some faith in the efficiency of labor markets, however, to infer that this proves that at-will employment is effi-

71. An extensive inquiry by Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097 (1989), concludes that a mandatory tenure system is less efficient than an at-will rule.

72. Epstein, *supra* note 10, at 948. Epstein concedes that employment at will has been in retreat in the common law but does not suggest that this weakens his empirical claim that survival implies suitability.

73. One recent survey of employment practices suggests, however, that perhaps 20% of non-union employers offer grievance procedures leading to arbitration. JOHN DELANEY ET AL., HUMAN RESOURCE POLICIES AND PRACTICES IN AMERICAN FIRMS tbl. 26 (1989). Certainly, many employee handbooks contain limitations on at-will dismissal, and the courts are increasingly enforcing these handbooks. Thus, while clearly true until recently, the blanket statement

cient, in the sense that the costs to employers from a switch to just cause would outweigh the gains to workers. Unequal-bargaining-power theorists are unlikely to have such faith.

The noted institutional economist John Commons put it well long ago in disputing the claim that the employer and the at-will employee have equal freedom to quit the relationship:

If the corporation has 10,000 employees it loses only one ten thousandth part of its working force if it chooses to not-employ the man, and cannot find an alternative man. But the man loses 100 per cent of his job if he chooses to not-work and cannot find an alternative employer.⁷⁴

Commons's observation envisions an employer with market power, perhaps a monopsonist or even a company town. Even a monopsonist, however, would not insist on at-will employment if it harmed employees more than it helped the monopsonist. A monopsonist can increase its profits by offering cost-effective fringe benefits because employees would agree to work for a lower wage.⁷⁵ If employers had unlimited bargaining power, an employer would only pay workers a subsistence wage.⁷⁶ This does not accord with the reality of the labor market for most American workers.

In any event, the monopsony model is inapt. Most employees today have alternative job options,⁷⁷ at least at the beginning of a relationship, which limits the monopsony power of employers. If at will presents a serious danger of exploitation and beginning employees see the danger, they will require higher wages before they accept the danger. Refusing to concede that workers will receive benefits for which

that private nonunion employees overwhelmingly are subject to dismissal at will needs some qualifications today.

74. JOHN R. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 72 (1924).

75. This argument breaks down for workers near the minimum wage, who legally cannot agree to work for lower wages even if they would receive greater job security in return.

76. Epstein makes a similar argument. He writes:

Indeed if such an inequality did govern the employment relationship, we should expect to see conditions that exist in no labor market. Wages should be driven to zero, for no matter what their previous level, the employer could use his (inexhaustible) bargaining power to reduce them further, until the zero level was reached. Similarly, inequality of bargaining power implies that the employee will be bound for a term while the employer (who can pay the peppercorn consideration) retains the power to terminate at will. Yet in practice we observe both positive wages and employees with the right to quit at will.

Epstein, *supra* note 10, at 973. Peter Linzer makes a nice rebuttal to Epstein's point. "That workers got some of the greatly enlarged pie . . . is hardly proof that they would not have got more if they had had a stronger bargaining position. That they are not reduced to slavery or starvation is no proof that they are not exploited." Linzer, *supra* note 11, at 415. Still, Linzer refuses to make operational his concept of unequal bargaining power with a coherent theory of what it means, and in particular what its limits are, arguing instead that Epstein's theory can fall of its own weight because it is "based on fantasy or unproved assumptions." *Id.*

77. See EHRENBERG & SMITH, *supra* note 21, at 78 ("Examples of pure monopsony in the labor market are difficult to cite . . ."). Ehrenberg and Smith cite articles suggesting that the market for nurses in a small town with one hospital may be partially monopsonized. *Id.*

they are willing to pay, unequal-bargaining-power enthusiasts shift their argument away from the existence of a monopoly to the absence of real bargaining. Even if workers have several entry-level job options, the argument runs, workers have no real choice because every employer offers at-will employment on a take-it-or-leave-it basis. Duncan Kennedy, hardly an unabashed enthusiast of the economics vision, provides the best response to this argument.⁷⁸ As Kennedy realizes, one cannot test whether buyers as a class influence compensation packages by studying whether individuals dicker over terms.⁷⁹ The analogous argument would be that consumers have no influence over breakfast cereals because they cannot bargain with the grocery store manager over the terms of sale.⁸⁰

Of course, as I have been emphasizing, both employer and employee gain more from the long-term relationship than they would by starting over with others. This relationship surplus must be divided between them. There is no clear theory or evidence about how the parties should divide the surplus.⁸¹ Importantly, though, even an employer who captures most of the surplus has an incentive to promise just-cause terminations if that is the efficient promise. The fact that we virtually never see employers make such promises is some indication that at will is the efficient relationship, especially when at will is supported by a plausible model of its efficiency.

B. *The Unionized Just-Cause Standard as Counterfact*

Rather than resort to inequality of bargaining power to refute the

78. Duncan Kennedy provides the best general critique on inequality of bargaining power as a coherent justification for market intervention. Recognizing that unequal bargaining power is a phrase of many meanings, Kennedy finds several subtests:

[T]he industry is "public"; the terms were drafted by the seller and offered on a take-it-or-leave-it basis; the seller is a bigger entity than the buyer; the sellers have monopoly power in the relevant market; the commodity in question is a necessity; and there is a shortage which permits sellers to exploit buyers.

Duncan 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, 616 (1982). Kennedy finds all of these subtests inadequate, even if the goal behind them is to help the weak at the expense of the strong. In the text I concentrate on the monopoly power and take-it-or-leave-it subtests.

79. As Kennedy explains:

There may be no bargaining because bargaining is expensive, and buyers as a group are unwilling to pay the increased cost of individualized transactions. Further, in a truly competitive market, no one gets to negotiate terms with anyone else. You can't argue that market power skews bargains and then object in those very situations where, because of competition, no one gets any individualized say at all.

Kennedy, *supra* note 78, at 616.

80. See WEILER, *supra* note 48, at 17.

81. Epstein gives several arguments to explain why either the employer or the employee might obtain most of the surplus. Epstein suspects that the surplus would be divided more or less evenly. Epstein, *supra* note 10, at 975-76.

significance of at will's pervasiveness, a weightier rebuttal⁸² emphasizes that the just-cause standard always governs terminations among unionized workers.⁸³ Free-market proponents might attempt a quick dismissal of this fact by saying that unions distort the market; one cannot expect the unionized market to reflect efficiency.⁸⁴ But this response is too hasty.

The competitive market may reflect the preferences of marginal workers, but it does not necessarily reflect the wishes of inframarginal workers.⁸⁵ In a competitive labor market, employers learn how to structure their employment package from the ease with which they fill positions. They rely, in other words, on signals from workers they are trying to recruit, or workers who are deciding whether to quit. If these workers do not reflect the interests of inframarginal workers, the competitive market will not reach an efficient result.

The inframarginal workers — the career employees upon whom we have been focusing — are locked in. They have made significant investments in the workplace and cannot easily leave. In a competitive market that relies on exit and entry to register preferences, locked-in employees will not be included in the calculus. This is not a problem unless their preferences differ in some dimension from the preferences of marginal workers less tied to the firm. It is quite plausible, however, that the average worker has significantly greater preference for job security than does the marginal worker. The marginal worker is typically young and in the process of trying out several jobs before

82. Professor Weiler makes an excellent argument against at-will employment along these lines. WEILER, *supra* note 48, at 71-78.

83. Another major sector in which just-cause protection is the norm is the public sector. One explanation for this phenomenon might be the greater need of public employees for protection from arbitrary dismissal because the usual self-monitoring features against firing productive workers are muted for government employers. As public choice theorists emphasize, the goal of government employers may not be productive workers but workers willing to use the power of government to favor the latest election winners. Another explanation for just-cause protection of public employees is that, when political factors make it difficult for government employers to give highly visible wage increases, they increase compensation less obviously through fringe benefits, including job protection.

The other major area in which just cause is the predominant standard is for the university. A possible explanation for the existence of tenured university employees is the divergence between the overall social good in promoting a vigorous debate on ideas — which requires some debaters with wacky, unpopular, or unpleasant views, and often the personalities to match — and the local institutional goals that include not only college prestige but also collegiality. By granting tenure, the college binds itself to ignore the local costs in unpleasantness from tolerating an employee pursuing unpopular, unpleasant views. Colleges can afford to take this larger view of the common good because they are either nonprofit organizations or publicly subsidized.

84. This approach is reflected in Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 1000 (1984) ("Although some empirical support has been marshaled for this productivity-enhancement theory of unionization, the theory is extremely hard to accept.").

85. See WEILER, *supra* note 48, at 76; Leslie, *supra* note 17, at 358.

finally settling on a firm with which to establish a career.⁸⁶ This marginal worker may not recognize or value fully the firm's reputation for job security and may not realize that he may one day be locked into a career with this firm.⁸⁷

In short, termination standards from the nonunion market, responding largely to the exit of young workers, may not reflect the aggregate costs and benefits as well as the union collective-choice mechanism, which reflects the preferences of average workers. On the other hand, also unwarranted is the bolder statement that the collective choice outcome is clearly a superior way of toting up the costs and benefits. As with many analyses, showing the flaws of a market mechanism does not, by itself, demonstrate the superiority of other solutions. In this case the problems with union median-voter solutions are well known.⁸⁸

Ultimately, then, an appeal to empiricism cannot provide a universal answer to whether at will or just cause is the optimal standard. Each standard has costs and benefits, and the balance may shift depending on the situation. Those who debate the issue too frequently ask whether at will or just cause should be the presumption in all employment relationships. A universal answer cannot be found. The next section attempts to break down the inquiry into parts of the life cycle, and to explain the inherent logic of the common law solution.

III. LEGAL SUPERVISION OF OPPORTUNISTIC FIRINGS

It is time to examine the employment termination cases. In explaining the common law approach, I will first show that courts have attempted to police opportunistic firings by employers. I will then attempt to fit their efforts into the efficiency-wage framework.

A. *Ad Hoc Judicial Scrutiny of Employer Opportunism*

A party to a long-term relationship is most vulnerable to opportunism when the party has substantially performed while the other side has not.⁸⁹ The other side, having received most of its benefit, has an

86. See Hall, *supra* note 15, for evidence that young workers try out several jobs and then tend to have a long relationship with one employer.

87. See WEILER, *supra* note 48, at 75-76.

88. See BARRY T. HIRSCH & JOHN T. ADDISON, *THE ECONOMIC ANALYSIS OF UNIONS* 23-29 (1986), for a discussion that the median-voter solution may not provide a more efficient outcome than a competitive-market solution, even when average and marginal workers differ in their preferences for job security.

89. As Epstein writes:

[C]ontract at will works only where performance on both sides takes place in lockstep progression. This condition will be satisfied where neither side has performed or where the

incentive to terminate the relationship to avoid paying out its side of the bargain. Contract doctrine generally imposes a duty of good faith upon parties, in part to protect against such opportunistic behavior. Section 1-203 of the Uniform Commercial Code (U.C.C.), for example, mandates good faith in commercial transactions.⁹⁰ While good faith defies simple definition,⁹¹ for our purposes an appropriate meaning is that a party to the contract cannot deprive the other party of the benefit of the bargain.⁹²

Courts have hesitated in imposing a generalized good-faith standard upon at-will employment relationships. The courts fear that a nebulous legal standard will make the delicate relationship too rigid or legalistic.⁹³ Nevertheless, some courts have made good-faith inroads

worker's past performance has been matched by appropriate payment from the employer. . . . Where the sequence of performance requires one side to perform in full before the other side begins performance, this bonding mechanism will break down because there are no longer two unperformed promises of roughly equal value to stand as security for each other.

Epstein, *supra* note 10, at 979.

90. U.C.C. § 1-203, 1 U.L.A. 109 (1989) states: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." U.C.C. § 1-102(3), 1 U.L.A. 12 (1989), while generally allowing the parties to waive U.C.C. provisions, forbids parties from disclaiming the obligation of good faith, although it allows the parties to determine the standards by which to measure good faith, if "not manifestly unreasonable."

91. Professor Robert Summers insists that good faith cannot be defined. As he writes: [To ask what good faith means] misconceives good faith. Good faith, as judges generally use the term in matters contractual, is best understood as an "excluder" — a phrase with no general meaning or meanings of its own. Instead, it functions to rule out many different forms of bad faith. It is hard to get this point across to persons used to thinking that every word must have one or more general meanings of its own — must be either univocal or ambiguous.

. . . . In most cases the party acting in bad faith frustrates the justified expectations of another. . . . [T]he ways in which he may do this are numerous and radically diverse. Moreover, whether an aggrieved party's expectations are justified must inevitably vary with attendant circumstances. For these reasons it is not fruitful to try to generalize further. It is easy enough to formulate examples of bad faith and work from them. Besides, any general definition of good faith, if not vacuous, is sure to be unduly restrictive, especially if cast in statutory form.

Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 262-63 (1968).

92. Cf. 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.17a (1990) (detailing the history of attempts to define "good faith" and offering alternatives to the definition in the text). Professor Lillard has described the benefit-of-the-bargain definition as the most popular definition of good faith in employment law cases. See Monique C. Lillard, *Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context*, 57 MO. L. REV. 1233, 1249 (1992).

93. See, e.g., *Magnan v. Anaconda Indus.*, 479 A.2d 781, 789 (Conn. 1984) ("We decline the invitation of plaintiff to transform the requirement of good faith into an implied condition that an employee be dismissed only for good cause. To hold otherwise would render the court a bargaining agent for every employee not protected by statute or collective bargaining agreement."); *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 629 (Haw. 1982) (implying "a duty to terminate in good faith would seem to subject each discharge to judicial incursions into the amorphous concept of good faith. We are not persuaded that protection of employees requires such an intrusion on the employment relationship or such an imposition on the courts."); *Moriss v. Cole-*

on at-will employment. Although the courts rarely articulate it in these terms, they tend to make these inroads when investment asymmetries make the employee particularly vulnerable to opportunistic firings.

A leading example of a good-faith inroad is *Fortune v. National Cash Register Co.*,⁹⁴ in which the court imposed a good-faith limitation on an employer's ability to fire a salesperson about to receive a commission. Orville Fortune was a salesperson under a written at-will contract that entitled him to a bonus for equipment orders placed in his territory and an additional bonus when the equipment was installed in his territory. One day after Fortune signed a \$5 million order, National Cash Register (NCR) fired him, depriving him of the installation part of the commission.⁹⁵ The Massachusetts Supreme Judicial Court, in upholding a jury verdict for Fortune, recognized that NCR had paid Fortune all the bonus to which he was entitled under the express contract. The court found NCR had breached, however, an implied covenant to act in good faith.⁹⁶

Richard Epstein has attacked the *Fortune* decision as "wrong in principle."⁹⁷ He points to the important fact that NCR did not keep the disputed commission for itself, but rather paid it to an installations employee.⁹⁸ Epstein argues, therefore, that "[t]he case is not simply one where a strategically timed firing allowed the company to deprive a dismissed employee of the benefits due him upon completion of per-

man, 738 P.2d 841, 851 (Kan. 1987) ("[T]he principle of law stated in Restatement (Second) of Contracts § 2-5, that every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement, is overly broad and should not be applicable to employment-at-will contracts); Melnick v. State Farm Mut. Ins. Co., 749 P.2d 1105, 1111 (N.M.) ("Employers are entitled to be motivated by and serve their own legitimate business interests Protection of employees does not require such a restriction on an employer's discretion in managing his work force or such an imposition on the courts."), *cert. denied*, 488 U.S. 822 (1988); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1086-67 (Wash. 1984) (arguing that a good-faith exception would result in unwarranted judicial intrusion into each discharge decision and that "such an intrusion into the employment relationship is merely a judicial substitute for collective bargaining which is more appropriately left to the legislative process"). For an excellent 50-state survey of good-faith employment-termination cases, see Lillard, *supra* note 92.

94. 364 N.E.2d 1251 (Mass. 1977). For an analysis of the *Fortune* case similar to mine, see WEILER, *supra* note 48, at 67.

95. 364 N.E.2d at 1254. After discussing the "firing" with his branch manager, Fortune was allowed to stay in a "sales support" position until the employer ultimately fired him 18 months later. Fortune received his order bonus commission for machines delivered over the next 18 months, but he was denied the delivery bonus. He received neither the order or delivery bonus for machines delivered after his ultimate firing. While these developments after the initial "firing" complicate the story, the basic point remains true that NCR fired Fortune after he had done the work on the sale but before he could reap the full commission for his efforts.

96. 364 N.E.2d at 1255-56.

97. Epstein, *supra* note 10, at 981-82.

98. *Id.* at 981. The court, but not Epstein, notes that paying an installations employee departed from NCR's usual policy of paying bonuses only to salespeople. 364 N.E.2d at 1254.

formance.”⁹⁹ Rather, “[t]he contractual provisions concerning commissions represent a rough effort to match payment with performance where the labor of more than one individual was necessary to close the sale.”¹⁰⁰

We should heed Epstein’s warning against applying the good-faith principle without carefully considering the incentive and bonding devices the parties have created. Perhaps the *Fortune* decision is wrong in application. By paying all of the commission to some employee or other, the company avoided the temptation of an opportunistic termination. But the *Fortune* case is not wrong in principle. The valid principle, for which *Fortune* is usually read to stand, is that courts should scrutinize opportunistic firings in which the employee has largely performed his side of the bargain but has yet to reap his reward. Salespeople on commission are classic examples of persons who can find themselves in that situation.

Another classic example of a good-faith analysis occurs when an employer fires an employee shortly before he qualifies for a pension. Again, the usual self-interest check on an employer’s decision to fire a productive employee is missing. An employer can save itself considerable money by exercising its at-will discretion just before a pension vests. A routine practice of firing all employees before their pensions vest might have severe reputation costs. But the occasional firing for this reason might be less damaging. The issue arose in *Ingersoll-Rand Co. v. McClendon*,¹⁰¹ in which an employee with nine and three-quarters years of service was fired four months before his pension was to vest. Such a firing clearly violates the good-faith notion that an employer must give the employee the benefit of the bargained-for pension. The Texas Supreme Court allowed a common law tort action for wrongful discharge in violation of public policy. The U.S. Supreme Court did not disagree with the underlying rationale but reversed the Texas Supreme Court. It held that the employee must bring this claim under section 510 of the Employee Retirement Income Security Act (ERISA), which clearly prohibits an employer from discharging a worker “for the purpose of interfering with the attainment of any right to which [the worker] may become entitled under the [pension] plan.”¹⁰²

99. Epstein, *supra* note 10, at 981.

100. *Id.*

101. 111 S. Ct. 478 (1990).

102. 29 U.S.C. § 1140 (1988), *quoted in* 111 S. Ct. at 485; *see also* Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1707 (1993) (to “fire an employee in order to prevent his pension benefits from vesting . . . is actionable under § 510 of ERISA”).

Employer opportunism can occasionally surface when a worker quits rather than is fired. Again, the law must decide whether to regulate opportunism. An example is *Jordan v. Duff and Phelps, Inc.*,¹⁰³ a well-known case due to the disagreement between two law-and-economics-oriented judges about the application of the good-faith duty to employment at will. The majority opinion by Judge Easterbrook emphasized that courts should scrutinize situations in which opportunism is a danger. Jordan was an at-will employee of a close corporation who acquired one percent of the company's stock as part of his compensation plan. When Jordan resigned, he sold his stock for book value, as required under the plan. The company's chairman accepted his resignation without telling him of a possible merger that would increase his share's value from \$23,000 to over \$600,000. When Jordan learned of the merger, he filed a 10b-5 action alleging fraud in the purchase of corporate securities.¹⁰⁴ The majority opinion by Judge Easterbrook reversed a summary judgment for the employer, distinguishing between an employer who is "thoughtless, nasty, and mistaken" from one who engages in "[a]vowedly opportunistic conduct."¹⁰⁵ While the employer perhaps could have fired Jordan for any reason,¹⁰⁶ reasoned Judge Easterbrook, it could not cash out the stock option on the eve of its appreciation.¹⁰⁷ Judge Posner, in dissent, noted that "the possibility that corporations will exploit their junior executives . . . may well be the least urgent problem facing our nation."¹⁰⁸ Judge Posner argued that business executives would rather rely on their employer's good will and interest in reputation, and on their own bargaining power, than "pay for contract rights that are difficult and costly to enforce."¹⁰⁹

Although leading examples of recent trends, the cases discussed so far do not illustrate the general hesitancy of courts to adopt an across-

103. 815 F.2d 429 (7th Cir. 1987).

104. 815 F.2d at 432-33.

105. 815 F.2d at 438.

106. In the actual case, Jordan resigned rather than was fired. The issue was whether a close corporation owes a duty to inform a shareholder-employee of the possible merger. But, if the closely held corporation-employer could fire Jordan for any reason, including a desire to capture the pending price rise on stock owned by Jordan, then it would have no duty to inform Jordan of the possible merger. The pivotal issue in the case thus becomes whether Jordan could be fired for this reason.

107. Judge Easterbrook imagined a little note from the employer: "There will be a lucrative merger tomorrow. You have been a wonderful employee, but in order to keep the proceeds of the merger for ourselves, we are letting you go, effective this instant. Here is the \$23,000 for your shares." Judge Easterbrook said the court did not "suppose for a second" that the firm could fire an employee for this reason. 815 F.2d at 439.

108. 815 F.2d at 449 (Posner, J., dissenting).

109. 815 F.2d at 448.

the-board good-faith standard for termination of employment. This hesitancy is clearest in New York, where the highest court has declared that any good-faith requirement is inconsistent with employment at will. In *Murphy v. American Home Products Corp.*,¹¹⁰ a company fired an accountant after he told top management that corporate officers had illegally manipulated the accounts of secret pension reserves. Conceding he was an at-will employee, Murphy complained that the employer breached the covenant of good faith by firing him simply for doing his job — which was, after all, to disclose accounting improprieties. The court of appeals rejected his claim, reasoning that the good-faith covenant was inconsistent with the employer's unfettered right to terminate employment at any time.¹¹¹

The *Murphy* holding is consistent with the asymmetric-investment rationale for policing terminations. Admittedly, Murphy was between a rock and a hard place: be fired for being a poor internal auditor or be fired for being a vigorous internal auditor. The firing seems arbitrary and unfair, but it is not an example of employer opportunism.¹¹² The company will suffer if it wrongly chooses to smooth internal politics at the cost of chilling vigorous internal audits. Society suffers no injury other than that borne by the company.¹¹³ Because the dangers of contract opportunism and third-party effects are absent, courts do not need to police the situation. To intervene in a situation like *Murphy* would leave no room for employment at will.

Even in Massachusetts, from which the seminal *Fortune*¹¹⁴ case on good faith originated, courts have been careful to limit good-faith protection to situations of asymmetric investments. An employee has no

110. 448 N.E.2d 86 (N.Y. 1983).

111. 448 N.E.2d at 89-90.

112. The court recounted in the facts that Murphy had 23 years of service and was 59 years old when fired. 488 N.E.2d at 87. As I explain below, *infra* section III.B.1, courts should be sensitive to the exploitation claims of long-term employees. But the *Murphy* court nowhere used the length of tenure in its analysis of his age discrimination claim, although it reversed the lower court's dismissal on statute of limitation grounds. 488 N.E.2d at 93. Gary Minda reports that Murphy lost his age discrimination claim after a 10 day jury trial in 1988. A decade after his firing he was still in litigation. See Gary Minda, *Employment Law*, 42 SYRACUSE L. REV. 491, 493 n.8 (1991).

113. Murphy also brought a tort claim of wrongful discharge in violation of public policy. 488 N.E.2d at 90-91. The court emphatically denied the existence of such a cause of action. Such an extreme view is, in my judgment, unwise because the tort action is needed to control third-party effects of terminations. See Schwab, *supra* note 11. My point here is that the good-faith rationale, which requires one to allow the other party the benefit of the bargain, does not help Murphy. Other courts have equated the good-faith obligation with the tort of wrongful discharge in violation of public policy. See, e.g., *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 840-41 (Wis. 1983). This is likewise an unwise limitation on the good-faith doctrine. The tort claim focuses on third-party effects, but the good-faith claim regulates opportunistic conduct between the parties, even if no one other than the employer and employee are directly affected.

114. 364 N.E.2d 1251 (Mass. 1977).

claim for a "bad faith" termination unless the employer intended "to benefit financially at the [employee's] expense, such as for the purpose of retaining for itself sales commissions or pension benefits which would otherwise be due to the [employee]." ¹¹⁵ For example, in one case employees sued when the employer changed its evaluation policy to a "Bell Curve," thus assuring that some employees would receive low ratings and be constructively discharged. ¹¹⁶ The Supreme Judicial Court found no violation of the good-faith standard, reasoning that the employees were merely complaining they had lost the opportunity for "future compensation for future services" ¹¹⁷ rather than being denied compensation "specifically related to a particular past service." ¹¹⁸ Only the latter termination is a form of opportunism, whereby the employer is firing an employee who has largely performed his side of the bargain without receiving benefits.

B. *Regulating Opportunism Over the Life Cycle*

These cases represent classic but ad hoc examples of courts protecting employees against opportunistic terminations. In *Fortune* an employee was fired before a commission came due. In *Ingersoll-Rand* an employee was fired before a pension vested. In *Jordan* an employer repurchased a terminated employee's stock just before it enormously increased in value. One can easily justify legal intervention on good-faith grounds. Employees can invest in the relationship more freely, making the relationship more valuable to both sides, when courts are available to ensure that employers will not exploit their investments. Likewise, *Murphy* illustrates the limits of a good-faith analysis. Without the potential for opportunism, courts should be reluctant to intercede in the relationship.

Unfortunately, an ad hoc "opportunism" test is unsatisfying for several reasons. Courts may have difficulty identifying opportunism when they see it. Even if courts can identify opportunism after the fact, an ad hoc test gives limited prospective guidance to employers and employees. Finally, the amorphous nature of an ad hoc opportu-

115. *Siles v. Travenol Lab., Inc.*, 433 N.E.2d 103, 106 (Mass. App. Ct. 1982) (affirming judgment for employer notwithstanding jury verdict for \$250,000). The court also declared that a "bad faith" termination claim would arise if the employer's reason for the discharge was contrary to public policy. *Siles*, 433 N.E.2d at 106. Such public policy claims are essentially based on tort principles. As stated earlier, they are beyond the scope of this article. See *supra* text accompanying note 11.

116. *McCone v. New Eng. Tel. & Tel. Co.*, 471 N.E.2d 47 (Mass. 1984).

117. *McCone*, 471 N.E.2d at 50 (quoting *Gram v. Liberty Mut. Ins. Co.*, 461 N.E.2d 796, 798 (Mass. 1984)).

118. *McCone*, 471 N.E.2d at 50.

nism test may mean it becomes so broadly applied that it is indistinguishable from a just-cause requirement for all terminations. This would weaken the deterrence of employee shirking — the prime rationale for employment at will.

If we recall the life cycle of the career employee, we can identify a more systematic pattern of legal intervention. Over the life cycle of a career employee, a sequence of possibilities for opportunism exists. A career employee is particularly vulnerable to opportunism at the beginning and end of his career. By contrast, employers are especially vulnerable to opportunism at the employee's midcareer. The cases suggest that courts are sensitive to this life cycle. Courts are most likely to scrutinize firings at the beginning and end of the life cycle. Courts do not get involved during midcareer unless they see an obvious case of particular opportunism, such as a firing before a pension vests or a sales commission is due.

1. *Beginning-Career Opportunism*

Employees face a risk of opportunistic termination at the beginning of the life cycle. The risk arises because employees commit irretrievable investments to the relationship before the employer does.¹¹⁹ Usually the beginning-career cases involve employees who have moved to take a job or quit another job in reliance on a job offer.

*Grouse v. Group Health Plan, Inc.*¹²⁰ provides an example of a court protecting a beginning-career employee from opportunistic termination. A drugstore pharmacist resigned with two weeks notice in reliance on a job offer from a health clinic. When he called to begin work at the clinic, however, the employer told him that it had filled the position. The pharmacist was unemployed for some time. The court allowed the employee to recover under a promissory estoppel theory.¹²¹ It determined that the employee had reasonably relied on the job offer and that justice required that the court hold the employer to its promise. The employer had argued it would be incongruous to

119. Figure 2 illustrates how early-career employees may make investments before the employer does. An employee starting his career may incur relocation costs. Further, the beginning wage may be lower than the wage he could get elsewhere and lower than his productivity, which is another form of asymmetric investment by the employee. I should note that a beginning wage below the alternative wage is not an essential feature of the efficiency-wage model and is often contrary to fact.

120. 306 N.W.2d 114 (Minn. 1981).

121. The court explicitly relied on § 90 of the *Restatement of Contracts*, which states: "A promise which the promisor should reasonably expect to induce action or forbearance . . . on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *RESTATEMENT OF CONTRACTS* § 90 (1932), quoted in *Grouse*, 306 N.W.2d at 116.

provide a remedy for firing someone the day before work begins when the employee, being at will, would have no remedy for being fired the day after work began. The court agreed that such a result would be incongruous, but it resolved this contradiction by suggesting that an employee might also have a reliance claim if the employer fired him shortly after beginning work.

Other courts have used a theory of additional consideration to give employees who moved to a new job a reasonable time to recoup their investment before being arbitrarily dismissed. While many courts hold that merely working is insufficient consideration to make a just-cause promise enforceable, some additional detriment to the employee or benefit to the employer may lead to an enforceable promise. In *Veno v. Meredith*,¹²² for example, a newspaper fired an editor eight years after he quit a prior job and moved from Newark to Pennsylvania to accept a position. The court, citing *Corbin on Contracts*,¹²³ declared that an employer could not arbitrarily discharge an employee for a reasonable time commensurate with the hardship the employee had endured.¹²⁴ The court upheld a directed verdict against the employee, however, declaring that after eight years the reasonable length of time "ha[d] surely passed."¹²⁵ In denying the employee's claim, the court distinguished a prior case that upheld an employee's verdict for breach of a "permanent" employment contract when he was fired three days into a job after moving from New York to Philadelphia.¹²⁶

Some courts have held that relocating or leaving secure jobs is evidence that the parties must have agreed on a fixed-term contract rather than at-will employment. In *Lanier v. Alenco*,¹²⁷ a worker "with a wife and four children[] left a secure and well-paying position with General Electric, a position that he had held for eleven years," to

122. 515 A.2d 571 (Pa. Super. Ct. 1986), *appeal denied*, 616 A.2d 986 (Pa. 1992).

123. 3A ARTHUR A. CORBIN, CORBIN ON CONTRACTS § 684 (1960).

124. In the words of the court:

When sufficient additional consideration is present, an employee should not be subject to discharge without just cause for a reasonable time. The length of time during which it would be unreasonable to terminate, without just cause, an employee who has given additional consideration should be commensurate with the hardship the employee has endured or the benefit he has bestowed.

515 A.2d at 580 (citations omitted).

125. 515 A.2d at 580 n.4.

126. *Lucacher v. Kerson*, 45 A.2d 245 (Pa. Super. Ct.), *affd.*, 48 A.2d 857 (Pa. 1946). *Lucacher* found a breach of a valid "permanent" contract of employment. *Veno* suggested the *Lucacher* court should have found the promise of permanent employment to be too vague to be a valid contract. Instead, said the *Veno* court, the *Lucacher* court should have "inferred a contract for a reasonable length of time based solely on the sufficient additional consideration." 515 A.2d at 580 n.4.

127. 459 F.2d 689 (5th Cir. 1972) (applying Louisiana law).

take a new job.¹²⁸ The court found it “unlikely” that the worker would have left without substantial assurances of job security, and it held that this fact corroborated evidence of a fixed one-year contract.¹²⁹

Similarly, in *Miller v. Community Discount Centers, Inc.*,¹³⁰ a worker left his family in Toledo and moved to Chicago after he received a letter from his new employer stating he had “a rewarding and satisfying career ahead of [him]” and confirming the employer would pay one-half of his moving expenses immediately and the balance after one year.¹³¹ The employer dismissed the worker after three months. The court upheld his claim for breach of a definite one-year contract, finding it “inconceivable that a man of plaintiff’s age would leave his home to come to Chicago for the mere possibility that he would have a permanent position.”¹³²

We see, then, that courts sometimes allow claims by beginning-career employees who are arbitrarily fired after moving or quitting a prior job.¹³³ Some courts use a promissory estoppel or reliance theory, some find an implied contract for a reasonable time to allow the employee to recoup his expenses, and some simply use the decision to move or to quit as evidence of an actual definite-term agreement. Regardless of the theory for recovery, one can explain these cases as attempts to regulate opportunistic firings early in the life cycle. Employers have not yet invested in the relationship and thus are not hurt if they arbitrarily dismiss the new employee. This means that the relationship is not self-enforcing, as it is when both parties have incurred sunk costs.

Nevertheless, protection for beginning-career employees is far from universal. Many or even most courts refuse to find that reliance on an at-will job offer is reasonable.¹³⁴ In these cases, an employee

128. 459 F.2d at 692.

129. Louisiana is one of the few states without a statute of frauds requirement that contracts that cannot be completed within a year must be in writing. Instead, Louisiana requires that oral contracts with greater than \$500 value be proved by corroborating circumstances. The issue in *Lanier* was whether quitting the prior job could be a corroborating circumstance.

130. 228 N.E.2d 113 (Ill. App. Ct. 1967).

131. 228 N.E.2d at 114-15.

132. 228 N.E.2d at 115. The opinion never reveals the employee’s age.

133. In addition to the cases discussed in text, see *Cashdollar v. Mercy Hosp.*, 595 A.2d 70 (Pa. Super. Ct. 1991) (holding that a professional moving his pregnant wife and child to a different state and leaving a job paying \$82,000 annually creates sufficient hardship to protect against at-will firing).

134. Representative examples of cases refusing to uphold opportunism claims of early-career employees include: *Ferreya v. E.&J. Gallo Winery*, 41 Cal. Rptr. 819 (Ct. App. 1964); *Schoen v. Caterpillar Tractor Co.*, 243 N.E.2d 31 (Ill. App. Ct. 1968); and *Romack v. Public Serv. Co.*, 499 N.E.2d 768 (Ind. Ct. App. 1986), *revd.*, 511 N.E.2d 1024 (Ind. 1987). In *Ferreya*, an

quits another job or moves to a new job at his own risk.

The ambivalence of courts in this area is understandable. For at least three reasons, the opportunistic termination rationale for protecting employees is weaker in these beginning-career cases than it is later in the life cycle. First, very often the employer also makes substantial investments early in the relationship. Recruiting and training new employees can be a major cost to many firms. As Paul Weiler describes recruiting costs:

The recruiting process itself imposes significant costs on the firm; not merely on the personnel department, which must do the initial advertising and screening, but also on the operating divisions, which must interview and judge the suitability of candidates. The magnitude of these costs can vary widely, depending on the nature of the job, the skills required, the number of applicants, and so on, but on occasion they can be substantial indeed.¹³⁵

One study estimated that a typical firm spends 160 hours in hiring and training a new worker in the first three months on the job, and that these costs are nearly thirty percent of the value of an experienced coworker during the three-month period.¹³⁶ If the employer as well as the employee sustain heavy early costs, the risk of opportunistic termination is smaller. An employer that arbitrarily or unjustifiably fires an employee hurts itself as well, for it wastes the expenses of recruiting.

Second, even if recruiting costs are insignificant — as they will be in many cases — so that arbitrarily firing the employee does not penalize the employer, the employer gains nothing from firing a person early in his career. Thus, while employees often suffer no penalty from an arbitrary beginning-career firing, they gain no benefit from them either. This fact distinguishes beginning-career from late-career firings, in which the employer can gain from firing employees whom it pays more than their current output.

Argentinian worker gave up his job and moved his family to the United States to become a crew boss of a Gallo pruning and irrigation crew. The court held this was not sufficient consideration to protect against firing without cause. In *Schoen*, Caterpillar told the employee he must quit his present job to work for Caterpillar. The court held that the employee might still be fired at will because his quitting did not create sufficient consideration to make the new employment contract binding. Finally, in *Romack*, a police captain with 25 years of experience left a permanent position to take a job as a security manager. He also sold his old house to buy a new one within the community at his new employer's request. The court held that the captain was not protected against at-will firing.

135. WEILER, *supra* note 48, at 146. Weiler cites a study by Daniel J.B. Mitchell & Larry J. Kimbell, *Labor Market Contracts and Inflation*, in *WORKERS, JOBS, AND INFLATION* (Martin N. Baily ed., 1982), which reports that a 1979 survey of Los Angeles employers found that recruitment and initial training costs ranged from over \$2000 for each office worker to over \$3500 for production workers to over \$10,000 for salary-exempt workers. WEILER, *supra* note 41, at 146 n.26.

136. See EHRENBERG & SMITH, *supra* note 21, at 142-44 (citing sources).

A final problem with job protection for new employees is that employers often need a probationary period to sort out hiring mistakes, wherein they can fire employees without explanation or extensive documentation of their reasons. Relevant here is the fact that competitive firms, largely responding to the entry and exit of early-career employees, virtually always contract for at-will dismissal.¹³⁷ Even the Model Employment Termination Act, which calls for general good-cause protection for employees, refuses to protect employees with less than a year of service.¹³⁸

In sum, in many situations employer opportunism against beginning employees is either a trivial threat or outweighed by legitimate needs to maintain employer flexibility. In these situations, courts do not scrutinize the sudden termination. Still, the potential for opportunistic employer offers is real. An employer engages in opportunistic behavior when it hires a better person before training anyone but after the first job applicant has relied on the offer. Courts protect beginning employees from such opportunism.

2. *Late-Career Opportunism*

Late-career employees face the greatest danger of opportunistic firings. At the end of their life cycle, they often earn more than their current productivity. If they do, the employer has a financial incentive to terminate them, even if it violates an implicit promise to allow the employee to reap the rewards of hard work earlier in his career.

The Age Discrimination in Employment Act provides one check against late-career opportunism. By prohibiting employers from firing workers above the age of forty because of their age, the ADEA protects older workers from discharges based upon stereotypes that lead employers to underestimate their productivity. "We need new blood" and "Doe is slowing down a notch" are classic statements that create age discrimination lawsuits.

However, the ADEA may offer only limited protection against the central concern of the life-cycle model — opportunistic firings when salary and forthcoming benefits outweigh current productivity. In *Hazen Paper Co. v. Biggins*,¹³⁹ the Supreme Court unanimously held that an employer did not violate the ADEA when it fired a sixty-two-

137. See *supra* Part II.

138. Section 3(b) of the Model Employment Termination Act states that the good-cause protections "appl[y] only to an employee who has been employed by the same employer for a total period of one year or more and has worked for the employer for at least 520 hours during the 26 weeks next preceding the termination." MODEL EMPLOYMENT TERMINATION ACT, 7A U.L.A. 74 (Supp. 1993).

139. 113 S. Ct. 1701 (1993).

year-old employee just before his tenth anniversary with the company in order to keep his pension benefits from vesting. Although the Court agreed that the firing was actionable under section 510 of ERISA, it held "that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employee's years of service."¹⁴⁰ Justice O'Connor, writing for the Court, emphasized that age is not the same as years of service.¹⁴¹ "The ADEA only requires an employer to ignore an employee's age; it does not specify *further* characteristics that an employer must also ignore."¹⁴² Under the life-cycle model, the employee becomes vulnerable to opportunism with years of service, not with age. The ADEA is therefore of little help.

A recent Second Circuit case, consistent with but not cited in *Hazen Paper*, shows even more clearly the limitations of the ADEA in protecting workers from late-career opportunistic firings. In *Bay v. Times Mirror Magazines, Inc.*,¹⁴³ a fifty-four-year-old publisher who made nearly \$200,000 per year brought an ADEA claim after being fired from his position at *Field and Stream*. The employee thought he had a "smoking gun" when he produced an internal memorandum from the company's chairman stating that the employee's salary alone mandated his dismissal. The employee asserted the memo established his "high salary was a critical factor in the decision," and that the high salary was "a direct function of his longevity, experience, seniority or periodic salary raises."¹⁴⁴ The Second Circuit, without disputing these assertions, affirmed summary judgment for the employer. Conceding that "high salary and age may be related," the court declared that "nothing in the ADEA . . . prohibits an employer from making employment decisions that relate an employee's salary to contemporaneous market conditions . . . and concluding that a particular employee's salary is too high."¹⁴⁵

Other cases interpret the ADEA more expansively. In *Metz v. Transit Mix, Inc.*,¹⁴⁶ for example, the Seventh Circuit reversed a trial court judgment for an employer who had replaced a fifty-four-year-old, highly paid manager with a younger, cheaper colleague. The court emphasized that an employer cannot assess the costs of employ-

140. *Hazen*, 113 S. Ct. at 1707-08.

141. 113 S. Ct. at 1707.

142. 113 S. Ct. at 1707.

143. 936 F.2d 112 (2d Cir. 1991).

144. 936 F.2d at 117.

145. 936 F.2d at 117.

146. 828 F.2d 1202 (7th Cir. 1987).

ing an older worker when deciding whom to terminate because pay is a "proxy" for age."¹⁴⁷ Under this interpretation, which received an enigmatic citation from the Supreme Court in *Hazen*,¹⁴⁸ the ADEA protects older workers fired because their salary exceeds current productivity. Because of the close connection between a worker's age and time he spends with the company, the ADEA indirectly protects late-career employees as well.

Greater protection may come from common law courts, which in recent years have begun policing opportunistic firings of late-career employees.¹⁴⁹ The leading case is *Pugh v. See's Candies, Inc.*,¹⁵⁰ in which a thirty-two-year employee was abruptly fired after working his way up from dishwasher to corporate vice president. The employee never had a clear agreement about job security, although managers had given him encouraging evaluations over the years.¹⁵¹ The court held that this career pattern, including the length of service and the policies and practices of the company, could establish an implied-in-fact promise against arbitrary dismissal.¹⁵² *Pugh* epitomizes the effi-

147. 828 F.2d at 1208. Judge Easterbrook, in dissent, emphasized that pay is only a rough proxy for age except in the rare cases in which a firm uses a lock-step compensation system based on age. 828 F.2d at 1220. Easterbrook noted that another situation in which pay could differ from current productivity was with firms using life-cycle implicit contracts whereby employees would be paid less than productivity early in their career and more than current productivity late in their career. 828 F.2d at 1220-21. This is precisely the model analyzed in this article. Easterbrook recognized the potential for employer opportunism in this situation and suggested the ADEA might provide a remedy based on a disparate impact approach. 828 F.2d at 1221.

148. In *Hazen*, the Supreme Court did not preclude the possibility that the ADEA protects workers from an employer who fires workers with a certain pension status as a "proxy" for age, in the sense that the employer may suppose a correlation between the two factors and act on the basis of pension status to get at age. The court then gave a "cf." citation to *Metz*, saying that the case used "'proxy' to mean statutory equivalence." *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1707 (1993). It is unclear what degree of support this signals for the *Metz* case.

149. For an excellent discussion of the various legal theories by which courts uphold job security based on longevity of service, see Linzer, *supra* note 11, at 354-68, 383-86.

150. 171 Cal. Rptr. 917 (Ct. App. 1981).

151. As the court described it:

When Pugh first went to work for See's, Ed Peck, then president and general manager, frequently told him: "if you are loyal to (See's) and do a good job, your future is secure." [The company's president] had a practice of not terminating administrative personnel except for good cause During the entire period of his employment, there had been no formal or written criticism of Pugh's work.

171 Cal. Rptr. at 919. Some read these statements as amounting to a company policy of just cause and categorize the case that way. See Linzer, *supra* note 11, at 345-55. I find the statements so general that almost any long-term employee could supply proof of similar assurances. The critical feature of *Pugh* is not these assurances, but the longevity of his tenure. Linzer does not disagree. *Id.* at 367.

152. The appellate court therefore reversed the trial court's dismissal at the end of the plaintiff's case and remanded for a second trial. At the second trial, the jury found for the employer, and the judgment was upheld on appeal. *Pugh v. See's Candies, Inc.*, 250 Cal. Rptr. 195 (Ct. App. 1988). Thus, the employee whose case symbolizes court protection of late-career workers himself ultimately was fired without legal protection.

ciency-wage story and its end-game dangers. Pugh committed himself to a single firm, worked hard to gain promotions to the promised easy life, but then was terminated. *Pugh* also demonstrates the effect of the arrival of new management on job security. In *Pugh*, new management arrived a year before Pugh's firing. Such major corporate changes may diminish the reputational check on firings of late-career employees.

Length of service is the key element that motivates courts to scrutinize a late-career firing. Most opinions, like *Pugh*, also examine oral statements and the company's general procedures. But a Montana case, *Flanigan v. Prudential Federal Savings & Loan Association*,¹⁵³ starkly illustrates the centrality of longevity. In that case, a bank fired Mildred Flanigan without notice or a hearing after twenty-eight years of service. The Montana Supreme Court affirmed a nearly \$1.5 million judgment for Flanigan, declaring that her "28 years of employment by Prudential gave her a secure and objective basis for believing that, if her work was satisfactorily performed, her employment would continue."¹⁵⁴ In its decision, the court quoted extensively from a California appellate case, *Cleary v. American Airlines, Inc.*,¹⁵⁵ which also emphasized longevity of service as a key element of a bad faith claim. In *Cleary*, the court upheld a claim brought by an employee dismissed without cause after eighteen years of service. The court declared that "[t]ermination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts including employment contracts."¹⁵⁶

Occasionally, an employee faces the danger of beginning-career and late-career opportunism at the same time. This situation occurs when a long-time employee agrees to a job transfer. A prominent example is *Foley v. Community Oil Co.*,¹⁵⁷ in which a thirty-year employee was fired three years after accepting a job transfer to another state. The court's explicit rationale in finding the employee had stated a claim tracks the life-cycle theory. The court first noted that "uprooting and moving a family" could give rise to a contractual claim.¹⁵⁸ The court then declared that "[l]ongevity of service can also give rise to an implied contract right."¹⁵⁹ Tracking the lock-in problem with

153. 720 P.2d 257 (Mont. 1986).

154. 720 P.2d at 262.

155. 168 Cal. Rptr. 722 (Ct. App. 1980).

156. 168 Cal. Rptr. at 729.

157. 64 F.R.D. 561 (D.N.H. 1974) (applying New Hampshire law).

158. 64 F.R.D. at 563.

159. 64 F.R.D. at 563.

which we have wrestled, the court explained that “[t]he employee, in providing long-term employment to a single employer substantially diminishes his economic mobility.”¹⁶⁰

In sum, one can explain these cases as attempts to monitor and enforce the implicit life-cycle employment contract. Late in an employee’s career, the usual checks against opportunistic firings unravel. Courts enter to monitor the bargain. The bargain does not give late-career employees complete job security. They can be dismissed for cause, because otherwise the shirking problems would be immense, but the employer does not prove cause simply by proving that salary exceeds current productivity. That is the typical life-cycle pattern that both sides to career employment anticipate and, *ex ante*, it is in the interests of both sides.

3. *Midcareer Shirking*

Once the employer has begun to make substantial, asset-specific investments in an employee, the risk of arbitrary firing diminishes. The greater danger of opportunistic behavior — at least, behavior that an appropriate dismissal standard could limit — comes from the employee’s side. Because the employer does not want to repeat recruiting and training costs with another employee, the incumbent employee has an opportunity to shirk without fear of dismissal. Shirking at mid-career can occur even if the employer has the right to dismiss at will, but the shirking problem can be exacerbated if the employer must also surmount the hurdle of proving just cause.

This is not to say that the employer cannot exploit the midcareer employee. Indeed, as I emphasized above,¹⁶¹ being trapped by investments in firm-specific capital and in community roots can make a mid-career employee ripe for exploitation. But the exploitation will not take the form of firing because the employer is making money from the relationship. Rather than fire a midcareer employee, an employer may pay him less than would be called for under a fair division of the gains from the long-term relationship or make his workload or working conditions more onerous. Just cause cannot protect the midcareer employee from these abuses. Better, then, for the law to focus on something it can handle, which is deterrence of shirking by midcareer employees.

The courts seem to have intuited this fact by refusing, in general, to create contract protections against arbitrary terminations for mid-

160. 64 F.R.D. at 563.

161. *See supra* notes 59-60 and accompanying text.

career workers. Midcareer employees have made the fewest contributions to the doctrinal erosion of at-will employment.¹⁶²

The most detailed data on wrongful termination plaintiffs come from a Rand study¹⁶³ of 120 California jury trials¹⁶⁴ in the early 1980s. Over half the plaintiffs in this sample were early-career employees, with five or fewer years of job tenure.¹⁶⁵ Nearly a quarter of the plaintiffs had over fifteen years of tenure,¹⁶⁶ with the remaining quarter of the plaintiffs being midcareer employees with six to fifteen years tenure.¹⁶⁷ This sample of jury trials suggests that midcareer employees are a minority of wrongful termination plaintiffs, and many of these may be bringing public policy and other tort claims not inconsistent with the life-cycle model.¹⁶⁸

The leading cases also suggest to some extent the courts' reluctance to protect midcareer employees. One case that typifies this hesitation is *Rowe v. Montgomery Ward & Co.*¹⁶⁹ The case is especially significant because Michigan courts have been leaders in eroding the at-will presumption. In *Rowe*, a salesperson with eight-years tenure was fired for leaving the store one day without explanation. The employee sued, claiming she had been orally told she would have a job as long as she met her sales quota, and pointing out that when she was hired she had signed a "Rules of Personal Conduct" that enumerated only four reasons — all involving theft, dishonesty, or immorality —

162. Of course, it is hard to demonstrate convincingly a negative statement like "cases of this type rarely occur," especially when the methodology is to examine "leading" cases rather than systematically to examine all reported cases. Counterexamples do exist. In the text I discuss *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988), the most prominent counterexample. Still, I remain convinced as a positive matter that courts are not inclined to scrutinize terminations of midcareer employees, and the life-cycle model suggests the wisdom of their hesitation as a normative matter.

163. See generally JAMES N. DERTOUZOS ET AL., *THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION* (1988).

164. The sample of 120 wrongful termination jury trials in California between 1980 and the first quarter of 1986 includes perhaps 65 to 70% of all wrongful termination trials in California during that time. *Id.* at 19 & n.1. One must use extreme caution in extrapolating from facts about tried cases to statements about all cases, including settled cases. Tried cases are likely to be a biased sample of all cases. See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988).

165. Some 18.2% of all plaintiffs had under one year of tenure, and another 34.2% had one to five years of tenure. DERTOUZOS ET AL., *supra* note 163, at 21 tbl. 4.

166. *Id.* (the precise number is 23.1%).

167. Some 15.7% of the plaintiffs had 6 to 10 years of tenure, and only 8.3% of the plaintiffs had 11 to 15 years of tenure. *Id.*

168. By contrast, according to the 1980 census, only 14.5% of workers had worked 15 or more years in their current jobs, while 60.1% had worked five or fewer years. See Robert E. Hall, *The Importance of Lifetime Jobs in the U.S. Economy*, 22 AM. ECON. REV. 716, 717 (1982).

169. 473 N.W.2d 268 (Mich. 1991).

for immediate discharge. The Michigan Supreme Court denied her claim,¹⁷⁰ emphasizing that the words of assurance were “more akin to stating a policy”¹⁷¹ than offering an express contract, and noting that nothing in Montgomery Ward’s “Rules of Personal Conduct” suggested that the enumerated conduct was the only basis for dismissal.¹⁷² The *Rowe* court distinguished *Toussaint v. Blue Cross & Blue Shield*,¹⁷³ a leading employee-rights case, by emphasizing that *Toussaint* involved actual negotiations over job security by high-level employees.¹⁷⁴ *Rowe* evoked a spirited dissent by the author of *Toussaint*, who insisted that an enforceable promise was equally present for the low-level salesperson.¹⁷⁵

The Court in *Rowe* did not rely heavily on her moderate job tenure but simply disallowed her claim because it found the circumstances were insufficient to infer an implied-in-fact contract.¹⁷⁶ One can only speculate that the court would have viewed Rowe’s claim more sympathetically if she had thirty-years tenure rather than eight. Under the life-cycle model, the case would be dramatically different if Rowe had been a late-career employee.

The most prominent counterexample to my claim about midcareer employees not receiving protection is *Foley v. Interactive Data Corp.*,¹⁷⁷ in which the California Supreme Court upheld an implied-in-fact contract claim as well as an implied-in-law breach of good-faith claim brought by an employee who served the company just six years and nine months before he was terminated. The *Foley* case is remarkable for at least two reasons. First, and ironically, most commentators view the decision as a dramatic cutback on employee rights because the court refused to grant tort damages for employees claiming a breach of the covenant of good faith. Second, and more pertinent to our analysis, *Foley* pushes the limits for defining a “late-career” employee. Basing an employee’s just-cause claim on less than seven years of service cannot realistically be viewed as an attempt to deter opportunistic firing of late-career employees whose seniority-based earnings outrun their current productivity.¹⁷⁸ Indeed, the court recognized

170. The Court reversed a trial court judgment on a jury verdict of \$86,500 plus interest. 473 N.W.2d at 281.

171. 473 N.W.2d at 275.

172. 473 N.W.2d at 275.

173. 292 N.W.2d 880 (Mich. 1980).

174. 473 N.W.2d at 274.

175. 473 N.W.2d at 289-308 (Levin, J., dissenting).

176. 473 N.W.2d 273-75.

177. 765 P.2d 373 (Cal. 1988).

178. When discharged in 1983, Foley was a branch manager in a Los Angeles subsidiary of

that short tenure might weaken Foley's implied contract claim.¹⁷⁹ It emphasized, however, three additional factors: (1) Foley alleged (rather vague) oral assurances of job security and consistent promotions and salary increases;¹⁸⁰ (2) Foley alleged breach of written "Termination Guidelines" that suggested self-imposed limitations on the employer's right to terminate employees;¹⁸¹ and, (3) unlike Pugh, Foley had "supplied the company valuable and separate consideration" by signing a promise not to compete against the employer for one year after termination.¹⁸² Many employees can allege the first two factors. The third factor is less common, although far from unique. Perhaps these other elements explain why *Foley* is not consistent with the general claim that courts rely on longevity of service and scrutinize only late-career terminations for opportunism. More realistically, *Foley* probably reflects a general move in California toward a good-faith standard for all terminations.¹⁸³

In summary, my argument is that the general pattern of good-faith and implied-contract cases reflects an intuitive understanding by the courts that employees are subject to opportunistic discharge at the end, and less consistently at the beginning, of the life cycle. Courts are reluctant, however, to give general protection against arbitrary dismissal to midcareer employees. The economic self-interest of employers should keep such dismissals in check. The greater concern is with employee shirking.

To clarify the distinction I draw between scrutinizing opportunistic late-career terminations and scrutinizing all employment decisions under a just-cause standard, let me return to the facts of *Murphy v. American Home Products*.¹⁸⁴ Murphy, like the California Foley, was an internal whistleblower who reported to upper management wrongdoing by immediate supervisors.¹⁸⁵ While bucking the corporate hier-

Chase Manhattan Bank that markets computer-based decision-support services, making an annual salary of \$56,164. In addition, as the court points out, he received a \$6762 merit bonus two days before his discharge. 765 P.2d at 375. The court's opinion never mentions Foley's age. Based on these characteristics, it seems hard to characterize Foley as anything but a midcareer employee.

179. 765 P.2d at 377-78.

180. 765 P.2d at 383, 388.

181. 765 P.2d at 388.

182. 765 P.2d at 388.

183. The court several times declared that it was not disturbing the general at-will presumption, *see, e.g.*, 765 P.2d at 384, which indeed is codified in CAL. LAB. CODE § 2922 (West 1989). It simply held that the parties had reached a contrary implied agreement in this case. 765 P.2d at 383.

184. 448 N.E.2d 86 (N.Y. 1983).

185. Foley had informed a company vice president that Foley's immediate supervisor was under investigation by the FBI for embezzling from his prior employer. After Foley was fired,

archy often gets employees into trouble, courts are hesitant to referee the resulting turf fights.¹⁸⁶ Internal whistleblowing resembles too closely legitimate, but practically unverifiable, concerns that an employee is not a team player or that an employee creates difficulty in the office. Legal limning of these situations is probably not worth the costs.

Thus, I would have greater sympathy for Murphy if he claimed that he was fired after twenty-three years of service¹⁸⁷ because he was no longer pulling his weight or earning his salary. Unless the parties have clearly agreed to at-will dismissals throughout the life cycle, such a firing smacks of an employer opportunistically firing an employee who has committed the best years of his life and should reap, based on the norms of seniority, the benefits of a career commitment to the employer. In fact, Murphy did claim age discrimination — a claim that was still being litigated a decade after his discharge.¹⁸⁸ But a legitimate defense might be that opportunism had nothing to do with the termination; he was fired because he attempted to buck the corporate system. Of course, when an employer fires an older worker allegedly for such a reason, the proof problems in sorting out the real reason for discharge are enormous. This dilemma quite likely will make employers wary of firing older workers. My point, in short, is that just-cause protection should be limited to an inquiry into whether the employee was fired in breach of the life-cycle commitment to pay seniority-based wages and benefits or for other opportunistic reasons.

IV. DEFAULT RULES

“Aren’t we done now?” the dear reader might ask. Not quite. We have seen that a life-cycle rule may be the best way for employer and employee to minimize the dangers of opportunism on each side of the employment relationship. One might still argue, however, that parties seeking this arrangement should put an explicit life-cycle rule in the contract. If they do not, courts should presume the contract is at will

the supervisor pled guilty in federal court to a felony count of embezzlement. 765 P.2d at 375 n.13.

186. I do see a valid role for legal scrutiny, in a tort guise, of terminations that may adversely affect public policy. Firing a whistleblower of illegal corporate acts often fits this category. See Schwab & Eisenberg, *supra* note 164.

187. The court in *Murphy* recounts in the facts that he had 23 years of service with his employer, 448 N.E.2d at 87, but nowhere uses his longevity in its analysis. The court also notes that Murphy was 59 years old when he was discharged and overturns the lower court’s dismissal, on statute of limitations grounds, of his age discrimination claim. 448 N.E.2d at 92-93.

188. See Minda, *supra* note 112, at 493 n.8 (indicating that, although Murphy lost a subsequent trial on the age discrimination claim, the case was reversed and remanded upon appeal and is awaiting retrial).

or just cause. The final step in my argument, then, explains why the life-cycle rule should be the default rule for courts, even though the parties could choose any rule by explicit contract.

A. *Minimizing Transaction Costs*

The traditional law-and-economics literature on default rules suggests that courts do and should choose rules that minimize transaction costs. Two sometimes conflicting tests come from this approach. First and most prominent is the “mimic the market” or “would have wanted” test, whereby courts supply the default contract term that most parties would put in the contract were they bargaining without costs and with full information. This test saves most parties from the costs of acquiring information and bargaining over the term. The trick in applying this test is to determine which rule maximizes joint gains by helping one party more than it hurts the other. In general, a complex default rule is likely to “mimic the market” better than a simple rule, in that parties who were bargaining costlessly would probably agree to share risk and minimize opportunism on both side. The second test, the “improve bargaining that occurs” approach, urges a default rule that lowers costs for those who must bargain rather than allows most parties to avoid bargaining.¹⁸⁹ A simple, clear default rule may be easier for the parties to bargain around, and it may thus lower transaction costs for parties who will actually bargain over the particular term.¹⁹⁰

Luckily, in our situation both tests point in the same direction.¹⁹¹

189. See Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1 (1982).

190. Mark Kelman has noted this ambivalence in law and economics between rules that lower bargaining costs and rules that mimic the market. He finds that clear rules are generally favored under the first criterion and complex rules under the second. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 123-24 (1987).

191. Scholars recently have proposed an alternative criterion for default rules. Labeled “penalty default” rules or “information-forcing” default rules, these default rules are designed to be so onerous that one party will want to write around it, in the process revealing information that allows for a superior bargain. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989); Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992); Lucian A. Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of Hadley v. Baxendale*, 7 J.L. ECON. & ORGANIZATION 284 (1991); Melvin A. Eisenberg, *The Principle of Hadley v. Baxendale*, 80 CAL. L. REV. 563 (1992); Jason S. Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990). Applied to our context, unfortunately, the penalty default model does not point definitely to either just cause or at will, and the model does not work at all when a third alternative such as a life-cycle default is possible. For example, suppose that at will is the efficient contract for most workers. The few job applicants for whom just cause is appropriate cannot risk being labeled a shirker by requesting just cause. The model might suggest that just cause should be the default, forcing employers — who arguably are not penalized by being labeled an arbitrary, unfair employer — to insist on an at-will clause. But because employers probably are penalized by a reputation for unfairness, an at-will default might be needed to keep

First, under the would-have-wanted default test, our previous analysis suggests that a life-cycle termination standard would be optimal for most career employees; by minimizing opportunism on both sides, it allows for the most productive relationship. Because it maximizes the overall gains to the relationship, most parties bargaining under low transaction costs would opt for the life-cycle rule.

Second, the lower-bargaining-costs approach also favors a life-cycle default rule because it is easier for parties to bargain away from than toward the life-cycle rule. At-will clauses are easy to compose.¹⁹² Just-cause clauses are also straightforward to write, although the phrase “just cause” is a rich and complex term of art in labor arbitration.¹⁹³ In Professor Rose’s marvelous terminology, these are “crystal” rules.¹⁹⁴ By contrast, a life-cycle rule would be hard to draft because it would be difficult to specify at the outset of a relationship exactly when the relative vulnerability switches from employer to employee. Rose would call the life cycle a “muddy” rule.¹⁹⁵ The parties cannot easily articulate at the time of initial hire the proper governing structure for their future relationship. They may prefer to rely on courts’ often bumbling and instinctive judgment about relative vulnerabilities. Under the life-cycle default, parties can simply say nothing too explicit in the contract and count on courts to apply the life-cycle approach. In short, the parties can easily draft away from a life-cycle default if they choose, but they cannot easily draft away from an at-will or just-cause presumption toward a life-cycle rule.

Indeed, the ambiguity in the timing of a life-cycle default rule may be itself desirable. Suppose a contract explicitly called for at-will em-

“good” at-will employers from being lumped together with bad ones. The formal penalty default model requires that a majority of contracts clearly favor one rule. See Bebachuk & Shavell, *supra*, at 292 & n.22 (emphasizing that the fraction of high valuation buyers determines whether limited or unlimited liability is the optimal rule). As discussed *supra* in Part II, it is unclear whether the optimal termination clause in most cases would be at will or just cause. Indeed, the argument of this article is that the optimal clause shifts back and forth over the career of each worker. Because of the problems with the penalty default model in this context, the discussion of it is relegated to a footnote.

192. Richard Epstein puts it succinctly: “the phrase ‘at will’ is two words long and has the convenient virtue of meaning just what it says, no more and no less.” Epstein, *supra* note 10, at 955.

193. See generally Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of “Just Cause” in Employee Discipline Cases*, 1985 DUKE L.J. 594.

194. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577-78 (1988) (defining as “crystalline” those often arbitrary property law rules that attempt to delimit rights in unambiguous terms, so as to create clear expectations in those who are subject to the rules — for example, the rule allowing a subsequent real estate purchaser to take property free of any unrecorded preexisting claim).

195. *Id.* at 578 (defining as “mud” amorphous legal doctrines that make it difficult for parties to know their rights in advance — for example, nuisance law).

ployment for the first fifteen years of the relationship but just cause thereafter. The employer would have a strategic incentive to review an employee at fourteen years and eleven months and terminate if forecasts of future performance were not rosy, even if current performance were adequate. The costs of termination to an employee after nearly fifteen years are tremendous.¹⁹⁶ But under the more malleable life-cycle default, the strategic doomsday evaporates. An employer, unsure when the at-will standard changes to just cause, is more likely to act in good faith.

Under either approach, then, a life-cycle default rule is optimal. To reiterate, under a life-cycle default, the court presumes that mid-career employees have an at-will relationship with their employer because that contractual structure best deters opportunistic behavior by the parties. Late-career employees, by contrast, are ripe for opportunistic termination, and so courts require good cause for terminating such employees. The optimal standard for new employees is more nuanced. On the one hand, employees who have quit other jobs or who have significant moving expenses perhaps should have a reliance damages default. On the other hand, employers often need a probationary period to sort out poor matches. Perhaps a default probationary period should be presumed, absent unusual reliance expenditures by the beginning employees.

B. *Relational Contract Default Rules*

Recently, the literature on default rules has examined long-term relational contracts. The debate centers on whether simple or complex rules are better able to deter opportunistic behavior in the relationship. Some have argued that complex default rules that consider the particular circumstances of the parties better control the strategic behavior problems of relational contracts.¹⁹⁷ Certainly the life-cycle default, which is premised on the fact that both employer and employee can exploit the other's sunk costs, attempts to control strategic behavior on both sides. In this way it is a complex default rule.

In contrast, Robert Scott has noted that most default rules in commercial relational contracts tend to be simple, categorical, and winner-

196. We do see contracts, particularly collective bargaining contracts, that explicitly call for a switch from at will to just cause after a probationary period. As I have suggested, these probationary periods create an incentive to review the employee immediately before just cause vests. Almost invariably, however, probationary periods are short — three months, six months, one year — and thus regulate beginning employees. The short time horizon limits the sunk costs the employee has at stake.

197. Clayton P. Gillette, *Commercial Relationships and the Selection of Default Rules for Remote Risks*, 19 J. LEGAL STUD. 535 (1990).

take-all.¹⁹⁸ Scott cautions that these prevailing default rules may have normative force, so that concocting a complex default may be a misguided attempt to control strategic behavior.¹⁹⁹ As he emphasizes, legal rules “are both a threat and a temptation.”²⁰⁰ Legal attempts to prevent opportunism by one side invite evasive responses from the other side. Certainly this is true for employment relations. Preventing employer opportunism by a just-cause standard invites increased employee shirking. Scott concludes by emphasizing that legal sanctions are not the only control on opportunism.²⁰¹ Social forces of reciprocity and honesty, particularly when benefits accrue to a good reputation, are powerful deterrents. Rather than legally enshrining these social norms, which may destroy the informality that makes them so effective, the optimal structure may rely on clear, harsh, legal defaults combined with social sanctions against failure to cooperate.

Scott’s argument against complex, contextualized defaults is powerful in the commercial context in which he uses it, but its lessons may justify a life-cycle default here. First, the life-cycle default may not fall on the complex side of Scott’s spectrum. Although parties could not easily agree on the tipping points, the life-cycle default does call for a categorical legal winner at every point in the relationship. In that sense, the default is clearer than a default rule that calls for sharing. Second, to the extent a life-cycle default is complex, its complexity arises from the common law, albeit still in embryonic form; Scott objects to complex default rules that the common law has ignored or rejected. Thus, like Scott, I am using the common law to provide both a positive description and a normative base for a life-cycle default rule. Finally, Scott’s argument focuses on commercial relationships of indefinite or permanent length. The opportunism can come at any time by either side, usually in response to exogenous shocks to the relationship. While random shocks can also disturb employment relationships, the inevitable life cycle of the employment relationship presents clear end-game and beginning-game problems, in which the employer’s potential for opportunism becomes predictable and one-sided. In midcycle, by contrast, the self-interest of the employer in not firing productive workers provides a nonlegal check on arbitrary firings, so the law should focus on the possible opportunism by employees. Given this predictable cycle, the legal default rule for employment ter-

198. Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 J. LEGAL STUD. 597 (1990).

199. *Id.* at 611.

200. *Id.* at 613.

201. *Id.* at 615.

minations can focus more precisely on opportunistic threats than can a default rule in the usual commercial relationship.

V. THE VARIETY OF EMPLOYMENT RELATIONSHIPS

A. *Who Are the Life-Cycle Workers?*

At the beginning of this article, I noted the great variety of employment relationships. In subsequent sections, I concentrated on the career employment relationship with two defining characteristics: (1) both sides invest heavily in the relationship in ways that will be lost if the relationship is severed prematurely;²⁰² and (2) contracting problems prevent easy monitoring of work performance or verification of poor performance to outsiders. It is time to consider what workers fit the life-cycle model. Table 1 provides the framework.²⁰³

TABLE 1
TYPES OF EMPLOYMENT RELATIONSHIPS
AND OPTIMAL TERMINATION STANDARDS

	General Investments	Specific Investments
Verification Easy	(1) Standard Unimportant	(3) Just Cause
Verification Hard	(2) At Will	(4) Life Cycle

We must determine whether just cause or at will is the preferable standard for a particular type of job. The employer's perspective depends on which row of the table applies. When verification is easy (top row), a just-cause presumption does not harm employers. An employer can simply show a court or arbitrator it has just cause for firing a shirking worker. By contrast, when verification is hard (bottom row), a just-cause standard makes employers vulnerable to opportunism by shirking workers because the employer cannot verify to a court or arbitrator the reasons it suspects shirking.

202. These asset-specific investments can themselves be of two types. They may be skills that are valuable only to the particular employer, as modeled in Gary Becker's human-capital model, *see supra* note 18, and illustrated in Figure 1. They can also be the employee's decision to climb the career ladder, whereby hard work, even using general skills, is rewarded by late-career perks and bonuses. This is the efficiency-wage model as depicted in Figure 2.

203. Oliver Williamson presents a similar table in WILLIAMSON, *supra* note 17, at 247, but he uses it to reach more general conclusions about employment-governance structures.

The employee's perspective depends on which column applies. When workers have made only general investments (left column), their skills are transferable to another firm. Even if they are terminated from one firm, they are not hurt greatly because other firms are willing to pay them comparable wages. Because terminations are less costly to employees in this column, at-will protection is adequate. By contrast, when workers have made firm-specific investments, which include entering an individual firm's career ladder (right column), they suffer greatly from termination.

These observations lead to easy conclusions for the off-diagonal boxes (2) and (3). The employer and employee perspectives clash more directly in boxes (1) and (4). In box (1), neither party is vulnerable, so the discharge standard is less important. I have spent the bulk of the article addressing box (4) and will simply reiterate that a life-cycle rule best accommodates the mutual vulnerability.

The more challenging task is pigeonholing a worker or job in a particular box. One dichotomy is between general investments and specific investments. Jobs in which both sides have made only general investments are nearly an empty set among workers with more than a few years' experience. Importantly, investments are broader than job skills. Many, perhaps most, workers have skills that many firms value and are thus general. These general skills make them less vulnerable to opportunism. But most workers develop specific ties to their workplace — familiar faces and routines — that they will lose if they leave. Often, workers enter a career job ladder with a particular firm, assuming that hard work will lead to promotions and future rewards. If one defines workers with specific investments as workers who will suffer from job loss, most experienced workers fall into this category.²⁰⁴

It is harder to draw the line that separates jobs in which acceptable job performance is easy to monitor and verify from jobs in which monitoring and verification is hard. Perhaps common law courts can draw the line — as they draw so many others — on an intuitive, case-by-case basis. This approach would be acceptable if the courts kept the function of the line in mind. The line is supposed to separate jobs in which a just-cause requirement will not create severe shirking problems from jobs in which an employer cannot easily prove objectionable employee behavior to a court and so employers cannot credibly threaten to fire shirking employees.

Some have suggested that high-level as opposed to low-level jobs

204. Construction workers, with their transient job sites, are perhaps an exception.

present such a dichotomy. An employer may only have an unprovable sense that a high-level worker is not performing adequately. Such jobs have many intangible characteristics, such as the ability to motivate and work with others. By contrast, low-level jobs usually involve the performance of tangible and verifiable tasks. Even such a staunch and eloquent advocate of just cause as Professor St. Antoine has suggested that high-level employees should be exempt from a comprehensive just-cause scheme.²⁰⁵ He has suggested that we should draw an indirect line excluding from just-cause protection employees entitled to a pension above a certain amount or employees who have fixed-term contracts of two years or more.²⁰⁶

One must be careful of class myopia in making such proposals. Most jobs, even the most unskilled or menial, require complex mental states to perform them well. Boredom, frustration, and low morale can impair performance on any job. While sometimes this fact manifests itself in objective, verifiable ways, many times it does not. Certainly job status and job complexity do not correlate well. Nevertheless, a duality exists between jobs requiring simple, repetitive tasks and those requiring complex, varied tasks. If the tasks are simple and repetitive, "successful job performance is relatively easy to define and measure in ways that virtually every reasonable person would consider fair, accurate, thorough, and objective."²⁰⁷

Courts and commentators have thoroughly debated the analogous issue in employment discrimination law; few tests for job applicants have survived a challenge of bias. If objective tests cannot be found to evaluate job applicants, we should not expect employers to be able to provide objective evidence of cause when they fire a worker for not performing adequately. Mark Kelman has noted this tension.²⁰⁸ In advocating a near ban on employment testing for applicants because objective criteria for hiring cannot be found, he recognizes that employers must be given greater leeway in dismissing workers who do not live up to the admittedly subjective standards of the job.²⁰⁹ In

205. See St. Antoine, *supra* note 8, at 72 ("In the higher ranges of management, one official's evaluation of another's business judgment may become so intertwined with questions of fair personal treatment that the two cannot be separated."). Interestingly, the management advisors to the Model Employment Termination Act (META), for which Professor St. Antoine was the reporter, wanted high-level workers to be covered in order to get the advantage of displacing common law actions. Under the META they are covered.

206. *Id.*

207. Barbara Lerner, *Washington v. Davis: Quantity, Quality and Equality in Employment Testing*, 1976 SUP. CT. REV. 263, 280-81.

208. Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1157 (1991).

209. Kelman, *supra* note 208, at 1233 (the main problem in abolishing screening tests is that

other words, the law cannot simultaneously squeeze both the hiring and firing decisions.

I have noted already that unionized employees are universally governed by a just-cause standard while nonunionized private employees generally are not.²¹⁰ One explanation for this difference is that unionized jobs are typically more routine or repetitive, thus making objective measures of performance easier and lowering the burden of showing cause. On the other hand, unions may demand regulation and rules precisely to facilitate objective evaluation of workers.²¹¹ If objective evaluation is feasible, the problem of unverifiable shirking is reduced and the just-cause requirement becomes less burdensome for employers.

Finally, in considering what jobs fit the life-cycle model, we must recognize that the model may apply differently to female workers than to male workers because the career-employment pattern differs. For many women, the end of the life cycle is not the period of greatest vulnerability. Rather, their time of concern is the middle period, when many women leave the workforce temporarily to have children. A common employment pattern is for women to “prove themselves” by working hard early in their career in exchange for implicit promises that the employer will give them greater flexibility in early child-rearing years. Having performed their end of the bargain, women face the danger that an employer will behave opportunistically by dismissing them rather than giving them the promised flexibility. The law regulates these opportunistic firings under Title VII and other antidiscrimination laws. Although our general analysis against opportunistic firings applies to this situation, the common law rules we have analyzed apply more often and more cleanly to “traditional,” that is male, life-cycle patterns.²¹² Certainly, men have brought most of the leading life-cycle wrongful discharge cases.

B. *The Rise (and Fall?) of Career Employment*

If legal intervention at the end of the life cycle is so wise, a critical

there “would be pressure to loosen controls on discharge . . . as a practical response to the needs of the employer”).

210. See *supra* Part II.

211. See Leslie, *supra* note 17, at 369-70.

212. See generally Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1221 (1989) (workplace norms “reflect their history as institutions shaped by and for men”); Martha Minow, *The Supreme Court, 1986 Term — Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 41 (1987) (asking whether pregnancy leave violates equal treatment because it “treat[s] men as the norm and presume[s] a workplace designed for men (or nonpregnant persons)”).

reader might ask, why did it take courts so long to get it? Or, alternatively, one might ask whether this sudden judicial rush to protect some workers suggests an unwise departure from the wisdom of the past. In response, I would emphasize that career employment is relatively recent in our economy, becoming common only after World War II. Thus, only in the last decade or two have employers and workers played out the end game of career employment. Therefore, courts have only recently had the opportunity to respond to opportunistic behavior at the end of the life cycle.

Certainly, career employment was less prominent fifty or seventy-five years ago. Henry Ford introduced his five-dollar-per-day pay in 1914 in large part to counter the phenomenal turnover in his River Rouge factory, which exceeded 2000% per year.²¹³ Much of the rise in career employment can be attributed to the growth of firm size and the increasing costs of employee turnover and lack of discipline.²¹⁴ Immigration and reverse migration before the 1920s delayed a sense of community and roots among workers, diminishing a desire for job security.²¹⁵ Not until after World War II did pensions — a key bonding feature of career employment — become prevalent. In short, until the last few decades few workers spent their lives in a single career employment.

Because of the recent rise in career employment, I need not dispute Richard Epstein's claim that at will was the optimal rule to regulate the employment relationship for much of this century.²¹⁶ Whether it was or not, times have changed, and the common law has changed with it. With the rise of career employment has come the life-cycle doctrine in employment law.

Some commentators suggest that career employment is becoming a thing of the past.²¹⁷ One bit of evidence for this claim is the decline in

213. See ALLAN NEVINS, *FORD: THE TIMES, THE MAN, THE COMPANY* 512-41 (1954); *supra* note 32.

214. See DOERINGER & PIORE, *supra* note 52; Victor P. Goldberg, *A Relational Exchange Perspective on the Employment Relationship*, in *FIRMS, ORGANIZATION AND LABOUR* 127 (Frank H. Stephen ed., 1984).

215. See Sanford M. Jacoby, *Industrial Labor Mobility in Historical Perspective*, 22 *INDUS. REL.* 261, 267 (1983) (between 1920 and 1950, workers gradually "became more attached to their employers" and "employers became more committed to their workforce"); Sanford M. Jacoby, *The New Institutionalism: What Can It Learn from the Old?*, 29 *INDUS. REL.* 316, 327 (1990) ("Workers born in the U.S. were more likely than mobile immigrants to value attachments to particular employers and communities.").

216. See Epstein, *supra* note 10.

217. See BENNETT HARRISON & BARRY BLUESTONE, *THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA* (1988); RICHARD S. BELOUS, *THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE* (1989).

pension coverage in the 1980s.²¹⁸ If life-cycle contracts decline in importance, one might expect parties to call on courts less frequently to enforce perceived opportunism. As career employment ebbs, so too may lawsuits ebb whose underlying theories rest on a breach of a long-term relationship.

CONCLUSION

The argument of this article has a classic form — it puts court decisions in an area of law into a framework and thereby declares them to have some coherence. In this case, the declaration is that courts, with their embryonic life-cycle doctrine, are reacting wisely to the issues litigants present to them. The life-cycle framework that courts have developed provides the parties in a career employment relationship a legal structure that checks opportunistic behavior. Its fundamental premise is that both employer and employees can act opportunistically. Consequently, a life-cycle analysis does not categorically condemn or celebrate employment at will. It supports, in broad outline, the contract law inroads that have been made on the at-will doctrine, particularly at the beginning and the end of an employee's career, and it explains the continued vitality of the at-will rule for mid-career employees. The current position of the courts is superior to a dogmatic insistence on the old at-will regime, which creates an excessive risk of opportunistic terminations for long-term, and sometimes beginning-career workers. Moreover, the current hesitant, intermediate position may also be superior to a general just-cause standard, which would lead to excessive shirking by midcareer workers.

The life-cycle framework therefore makes coherent the seemingly schizophrenic behavior by courts in employment termination cases. Within the framework, courts will protect employees when the danger of employer opportunism is high, but they will retain the at-will presumption when the employer is more vulnerable. One can thus argue that the courts are reacting appropriately to the employment-termination cases they encounter.

This coherence in the common law is internal to the system. In particular, it assumes that common law litigation is the chosen method of resolving these disputes, and that the courts largely do not consider the systemic costs of litigation. It may be preferable, all things considered, to opt for an administrative or arbitration system that requires just cause for all employment terminations. But it is unfair, in arguing

218. See David E. Bloom & Richard B. Freeman, *The Fall in Private Pension Coverage in the United States*, 82 AM. ECON. REV., May 1992, at 539 (papers and proceedings documenting decline in pension coverage in 1980s).

for such a change, to portray the current common law as hopeless chaos. Far from being chaotic, the current common law provides optimal rules for regulating employment terminations.