

# The “American Rule” that Swallows the Exceptions

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## I. Introduction

When protests broke out across France last year over a proposal that would have allowed employers to fire younger workers in their first two years of employment without having to show

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good cause, many Americans were perplexed.<sup>2</sup> The rule that employers may fire employees for almost any reason, and without having to give a justification, seems natural and perhaps necessary in American culture. On the other hand, the U.S. has a long tradition of exceptions to this rule. Making it illegal to fire employees for certain reasons, for example their race or union sympathies, now also seems natural and necessary. It is a law school truism that every legal rule has exceptions. But it is a significant problem if a rule, through its substance or underlying assumptions, vitiates what are meant to be important exceptions to the rule. The “American” rule of employment at-will creates such a problem. The at-will rule, a common law doctrine from the late nineteenth century, is crippling the effectiveness of the two most important exceptions to that doctrine, Title VII of the Civil Rights Act of 1964<sup>3</sup> and the National Labor Relations Act (NLRA),<sup>4</sup> two of the most significant federal statutes of the twentieth century. At-will doctrine has long been debated on its own merits, and it is often cited as an area in which exceptions are swallowing the rule.<sup>5</sup> But scholars have largely ignored the opposite effect the

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<sup>2</sup>For a good discussion of these events in France, see William Pfaff, *France: The Children’s Hour*, The New York Review of Books, Vol. LIII, No. 8, (May 11, 2006), at 40.

<sup>3</sup>Title VII of the Civil Rights Act of 1964, 29 U.S.C. § 2000e-2000e-15 (2005).

<sup>4</sup>29 U.S. C. § 151, *et seq.*, 49 Stat. 449 (1935).

<sup>5</sup>“Since 1985, at least two hundred articles have critiqued some aspect of employment at will,” Robert Bird, *Rethinking Wrongful Discharge, a Continuum Approach*, 73 U. CIN. L. REV. 517, 517 (2004). Calls to abolish the at-will rule on its own merits have been made for decades. See, e.g., David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment At Will Versus Job Security*, 146 U. PA. L. REV. 975, 993 (1998); Kenneth Sprang, *Beware the Toothless Tiger: a Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 872 (1994) (employment at-will “is a lumbering dinosaur that can no longer be rationally defended”); Clyde Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Lawrence Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967). For defenses of the rule, see, e.g., J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term*

rule has of swallowing hard-won exceptions to it. In fact, the at-will rule is inherently destructive of rights widely viewed as fundamental, and this must be considered in debates about employment discrimination law, labor law, and the future of employment at-will itself.

While the NLRA and Title VII have recently celebrated their 70<sup>th</sup> and 40<sup>th</sup> anniversaries respectively, these two laws, the most far-reaching attempts to provide rights to employees at the workplace in U.S. history, are in crisis and have been for some time. The titles alone of law review articles in major journals reflect this view: labor law has “ossified”;<sup>6</sup> American workers have “lost the right to strike” and other significant rights.<sup>7</sup> And the numbers are discouraging: union density in the private sector is now under 10 percent, down from a high of nearly 35 percent decades ago.<sup>8</sup> Views of Title VII are often equally grim. Scholars lament that the law has been “ineffective in combating employment discrimination,”<sup>9</sup> and that the hopes that it

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*Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837 (the rule is ftlinejustified because the parties know what they are contracting for); Richard Epstein, *In Defense of the Contract At-Will* 51 U. CHI. L. REV. 947 (1984) (at-will is based on freedom of contract principles); Richard Power, *A Defense of the Employment At Will Rule*, 27 ST. LOUIS U. L.J. 881 (1983).

<sup>6</sup>Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

<sup>7</sup>James Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004).

<sup>8</sup>Joseph Slater, *Homeland Security vs. Workers' Rights? What the Federal Government Should Learn from History and Experience, and Why* 6 U. PA. J. LAB. & EMP. LAW 295, 300 & n. 11 (2004).

<sup>9</sup>Ann McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1444-45 (1996).

initially inspired have been “significantly unrealized.”<sup>10</sup> Again, the numbers are discouraging: plaintiffs in employment discrimination cases fare less well than plaintiffs in nearly any other category of civil litigation.<sup>11</sup>

There are various diagnoses for these ailments and some prescriptions for improvements, but these generally focus on factors specific to either labor or employment discrimination law doctrines. Labor law scholars have criticized questionable court interpretations of the NLRA and decried the weak remedies for employer unfair labor practices (ULPs), notably for the ULP of firing employees for supporting a union organizing drive.<sup>12</sup> Title VII scholars complain that the burden-shifting procedural structure of individual disparate treatment discrimination cases is unnecessarily complex and confusing at best, and inherently anti-plaintiff at worst.<sup>13</sup> They also doubt whether current legal doctrines can cope with unconscious bias or with deeply-imbedded structural discrimination.<sup>14</sup>

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<sup>10</sup>Michelle Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH & LEE L. REV. 3, 5 (2005).

<sup>11</sup>*See, e.g.*, Kevin Clermont, Theodore Eisenberg, and Stewart Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMPLOYEE RTS & EMPLOYMENT POL’Y J. 547 (2003); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?* 61 LA. L. REV. 555 (2001).

<sup>12</sup>*See, e.g.*, Robert M. Worster, III, *If It’s Hardly Worth Doing, It’s Hardly Worth Doing Right: How the NLRA’s Goals Are Defeated Through Inadequate Remedies*, 38 U. RICH. L. REV. 1073 (2004); Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1787-91 (1983); *see* Section II-B-2, *supra*.

<sup>13</sup>*See* section III-A, *infra*. “This emphasis on procedure comes at the expense of discussions of what one naively might call ‘substance.’” Deborah Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH L.REV. 2229, 2229-30 (1995).

<sup>14</sup>*See, e.g.*, Samuel Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 5-10 (2006) (discussing the “importance of unconscious and subtle bias”); Kathryn Abrams, *Cross-Dressing in the Master’s Clothes*, 109 YALE L. J. 745, 758 (2000) (Title

This article argues that beyond problems within each area of law, a common thread consistently subverts the effectiveness of both the NLRA and Title VII: at-will employment. Under the at-will doctrine, absent an applicable contractual or specific legal exception, an employer may discharge an employee for any reason, good or bad, or for no reason at all.<sup>15</sup> Sometimes called “the American rule,” it is the default rule in the U.S. but is almost unique to America.<sup>16</sup> Western European and other industrial democracies have generally abandoned it in favor of just cause discharge rules.<sup>17</sup>

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VII is unlikely to “actually alter the dominant norms of most workplaces or the kinds of roles that men and women play within them”) Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (Title VII rules do not adequately deal with subtle or unconscious stereotyping). See Section 3-A, *supra*.

<sup>15</sup>See, e.g., Ken Matheny and Marion Crain, *Disloyal Workers and the ‘Un-American’ Labor Law*, 82 N.C. L. REV. 1705, 1708 (2004); William Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 261 & n. 3, (2002) *citing, e.g.*, Rebecca Hanner White, EMPLOYMENT LAW AND EMPLOYMENT DISCRIMINATION: ESSENTIAL TERMS AND CONCEPTS 8 (1998).

<sup>16</sup>See 82 AM. JUR. 2D WRONGFUL DISCHARGE § 31 (referring to the “American rule” of at-will employment); Matthew Finkin, *Second Thoughts on a Restatement of Employment Law*, 7 U. PA. J. LAB. & EMP. L. 279, 282 (2005) (“The draft restates the at-will, or ‘American rule’”). The rule was first stated in Horace Wood, A TREATISE ON THE LAW OF MASTER & SERVANT § 134 (1877). American courts then adopted it, and the term “American rule” was used in part to distinguish it from the English common law rule that provided that the default employment contract was for a set period during which the employee could not be terminated without cause. See Jenny Clevenger, *Arizona’s Employment Protection Act: Drawing a Line in the Sand Between The Court and the Legislative*, 29 ARIZ. ST. L.J. 605, 606, n.7 (1997); section IV-A, *supra*.

<sup>17</sup>“Other countries explicitly reject the basic American rule of employment at will,” Clyde Summers, *Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries*, 70 NOTRE DAME L. REV. 1033, 1067-68 (1995); in “western Europe and nearly all other countries” workers cannot be terminated without cause. Hoyt Wheeler, Brian Klaas, and Douglas Mahony, WORKPLACE JUSTICE WITHOUT UNIONS (2004), 1. See section IV-D-3, *supra*.

This article first analyzes the most common explanations for problems with the NLRA and Title VII. It then argues that these critiques are not sufficient and that employment-at-will is a central, debilitating problem for labor and antidiscrimination law. To do so, it relies on experiences from two other areas of law. For the NLRA, this article compares *public* sector employment, where workers are organizing quite successfully (public sector union density is nearly 40 percent).<sup>18</sup> Government employees have achieved this success under state laws that contain most or all of the rules critics consider problematic in the NLRA.<sup>19</sup> But one key difference is that public workers eligible to join unions are usually not employees at-will.<sup>20</sup>

For Title VII, this article looks beyond the employment law realm and compare rules governing claims of discrimination in juror selection under the Supreme Court's decision in Batson v. Kentucky<sup>21</sup> and its progeny. Analogous to the role of at-will in Title VII law, attorneys in criminal cases, while barred from striking prospective jurors because of their race, are still allowed to strike for almost an unlimited number of reasons (no matter how silly), or no for reason at all.<sup>22</sup> The burden-shifting procedural structure for proving race discrimination in Batson cases is the same as that which the Supreme Court set out in McDonnell Douglas v. Green,<sup>23</sup> for Title VII individual disparate treatment cases (the majority of individual claims).

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<sup>18</sup>Slater, *Homeland Security vs. Workers' Rights?* at 300 & n. 11.

<sup>19</sup>See section II-C-1.

<sup>20</sup>See section II-C-2.

<sup>21</sup>476 U.S. 79 (1986).

<sup>22</sup>See section III-B-1.

<sup>23</sup>McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Batson rules have been so ineffective that scholars and a Supreme Court Justice have recently suggested that all juror strikes should be done for cause, the equivalent of requiring just cause for discharge from employment.<sup>24</sup>

This article then reviews the history, significance, and current utility of the at-will rule, and compares that to the history, significance, and potential utility of the NLRA and Title VII. The at-will rule is of more recent vintage than many might suspect, and from its inception, there have been many attempts to create exceptions to it. Today, numerous, small, and often unclear inroads have been made into the at-will rule. This has made the law less comprehensible and predictable, offering uncertainty to employers yet relatively scant protection to employees.

At the same time, the cost of at-will rules is the lack of an effective labor and anti-discrimination regime. The exceptions codified by the NLRA (the right to form unions and act collectively) and Title VII (the right to be free from types of employment discrimination that have placed extraordinary disadvantages on women, minorities, and other groups throughout U.S. history) express core principles that are nearly universally accepted in the legal community and society at large.<sup>25</sup> At-will rules permeate boundaries and undermine decisions society has made about fundamental rights in the workplace in a way that should not be ignored.

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<sup>24</sup>See section III-B-2.

<sup>25</sup>There are no noticeable calls for the repeal of those portions of Title VII or the NLRA that prohibit discharge on the grounds of race, sex, religion, or union sympathies. Richard Epstein, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992) (questioning the need and justification for Title VII) is notable primarily because it is such an outlier in modern legal and political thought. *See, e.g.*, Nancy Dowd, *Liberty vs. Equality: In Defense of Privileged White Males*, 34 WM. & MARY L. REV 429, 432 (1993) (“Epstein’s biggest failure is his refusal to confront and analyze scholarly work that undermines or challenges the fundamental basis of his opinion”; *FORBIDDEN GROUNDS* “is not an intellectual argument, it is a political polemic with little intellectual credibility.”)

## II. Employment At-Will Undermines Labor Law

### A. Do Americans Simply Not Want to Join Unions?

Before worrying about what ails labor law, we should first ask, how do we know anything is wrong? Does the low union density in the private sector (currently under 10 percent)<sup>26</sup> indicate the system is broken? Or is that argument just special pleading from labor representatives and sympathizers that ignores the reality that unions are simply less attractive to American workers than they used to be? Significant evidence suggests the latter explanation is, in fact, false.

First, polls consistently show that at least one-third of all nonunionized workers would vote in favor of union representation if given the chance to do so.<sup>27</sup> Indeed, surveys repeatedly find that between one-third<sup>28</sup> and one-half<sup>29</sup> of American workers not in unions say that they would like to be in one. For example, a recent article in Business Week explained that “[f]ully half of all nonunion U.S. workers say they would vote yes if a union election were held at their

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<sup>26</sup>In 1983, private sector union density was almost 16.5 percent; in 2001, it was 9.0 percent. Katherine Stone, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004), at 196.

<sup>27</sup>Kate Brofenbrenner, *et al.*, “Introduction,” in *ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES* (1998), at 3-4, *citing, e.g.*, Peter D. Hart Associates and the Mellman Group, *Summary of Opinion Research on Living Standards* (1996). Estlund, *Ossification* at 1528, notes the “representation gap” between the desire for and the supply of union representation.

<sup>28</sup>Seymore Lipset and Noah Meltz, *THE PARADOX OF AMERICAN UNIONISM: WHY AMERICANS LIKE UNIONS MORE THAN CANADIANS DO BUT JOIN MUCH LESS* (2004), at 80.

<sup>29</sup>Lipset and Meltz, *PARADOX OF AMERICAN UNIONISM*, at 94-95 (48.2 percent of employees not in a union said they would “definitely” or “probably” vote for one); Matheny and Crain, *Disloyal Workers*, at 1747, *citing* Richard Freeman and Joel Rogers, *WHAT WORKERS WANT* (1999), at 89.

company today, up from about 40% throughout the 1990s.”<sup>30</sup> Another study concluded that the “natural” rate of union membership in the mid-1990s – the rate if choice were not subject to undue coercion – would have been 44 percent.<sup>31</sup>

Second, as noted above, American workers in the *public* sector have a high union density (suggestively close to the ‘natural’ rate for the private sector): about 40 percent. This figure is especially striking given that the majority of government employees are covered by state and local laws which are generally not as generous as the NLRA. For example, only twenty-nine states generally allow their public workers to bargain collectively.<sup>32</sup> Rates of unionization in the public sector are thus a strong counter-argument to those who argue that Americans are simply culturally disinclined to join unions.<sup>33</sup> Unless one assumes that Americans who happen to work for a government body – from police to secretaries, from teachers to janitors – are entirely different sorts of people than Americans who happen to work for private employers, this is strong

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<sup>30</sup>Quoted in Charles Morris, *THE BLUE EAGLE: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* (2005), 209.

<sup>31</sup>Freeman and Rogers, *WHAT WORKERS WANT*, at 89.

<sup>32</sup>*See* section II-C, *supra*.

<sup>33</sup>For a sensitive articulation of the cultural argument, *see* Lipset and Meltz, *THE PARADOX OF AMERICAN UNIONISM* 6 (“the difference in culture and values between the United States and Canada . . . contributes significantly” to the different rates of unionization). Even these authors, however, argue that “a major component” of the difference in unionization rates is the “greater difficulty that Americans have in joining unions compared with Canadians”; this, in turn, is attributable to differences in labor laws and enforcement of such laws. *Id.*, 6. Lipset and Meltz simply attribute the differences in legal regimes to different cultures. *Id.*, 6, 92. Unfortunately, they discuss public sector unions in only about two pages of a book of over 200 pages. *Id.*, 127, 134-35. They do not discuss how culture can explain why janitors, secretaries, and workers in other occupations in America have organized at such a higher level of union density in the public sector than in the private.

evidence for the claim that American workers do in fact want to join unions in a much higher percentage than current private sector unionization rates reflect.

Thus it appears that the NLRA is not fulfilling its function of allowing a significant number of American workers in the private sector a free choice to join labor unions. Why not?

#### B. The Established Critiques of the NLRA

Scholars, unionists, and union sympathizers have complained about the inefficacy of the NLRA for decades. In the early 1980s, members of the Critical Legal Studies movement strongly criticized labor law doctrines.<sup>34</sup> Outside the academy, Richard Trumka, then the vice-president of the AFL-CIO said, in 1987: “I say abolish the [NLRA]. Abolish the affirmative protections of labor that it promises but does not deliver.”<sup>35</sup> In 1993, Lane Kirkland, then president of the AFL-CIO, announced that labor law was “not sufficient to ensure working people of their basic right to join a trade union. Rather, it has been perverted and has become a tool in the hands of those who would dominate and suppress working people.”<sup>36</sup> In 2002, law professor Cynthia Estlund wrote that “[l]abor law has shrunk in its reach and its significance, and is clearly ailing.”<sup>37</sup> A

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<sup>34</sup>See, e.g., Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness: 1937-1941*, 62 MINN. L. REV. 265 (1978). For a summary of various authors in the field, see Joseph Slater, *The Rise of Master-Servant and the Fall of Master Narrative: A Review of LABOR LAW IN AMERICA*, 15 BERKELEY J. EMP. & LAB. L. 141 (1994).

<sup>35</sup>Estlund, *Ossification*, at 1608, n. 334, quoting Richard L. Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 871, 881 (1987); see also “Kirkland Says Many Unions Avoiding NLRB,” 132 *Lab. Rel. Rep.* (BNA) 13 (1989) (then-AFL-CIO President Lane Kirkland would prefer no law because current labor law “forbids us to show solidarity and direct union support”).

<sup>36</sup>Quoted in Slater, *The Rise of Master-Servant*, at 142.

<sup>37</sup>Estlund, *Ossification*, at 1527-28.

recent report stresses that U.S. labor law “Fails U.S. Democratic Standards.”<sup>38</sup> Much of this criticism has focused on two factors: adverse case law that reads union rights out of the text of the NLRA, and weak remedies for employer violations.

### 1. The Canon of Problematic Cases

For over two decades, scholars have pointed to a list of now nearly canonical court decisions that both seriously undermined union rights and seemed at odds with the statutory language of the NLRA. For example, in 1983, James Atleson’s Values and Assumptions in American Labor Law<sup>39</sup> analyzed a series of such cases (discussed in more detail below), including Fansteel Metallurgical Corp. v. NLRB,<sup>40</sup> First National Maintenance Corp. v NLRB,<sup>41</sup> NLRB v. Mackay Radio & Telegraph Co.,<sup>42</sup> Textile Workers of America v. Darlington Mfg. Co.,<sup>43</sup> and Babcock & Wilcox Co. v. NLRB.<sup>44</sup> In 2004, James Pope critiqued these same cases, except that Babcock was replaced by a more recent case on the same sub-topic of labor law,

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<sup>38</sup>Gorden Lafer, “Free and Fair? How Labor Law fails U.S. Democratic Election Standards,” (American Rights at Work, June 2005), available at <http://araw.org/docUploads/FreeandFair%20FINAL%2Epdf>, at 9. Lafer describes employers’ superior rights of access to employees; lack of protections against economic coercion by employers; lack of guarantees that the will of voters in union representation elections will be implemented on a reasonable schedule, and no meaningful enforcement for violators of election procedures.

<sup>39</sup>James Atleson, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983).

<sup>40</sup>306 U.S. 240 (1939).

<sup>41</sup>452 U.S. 666 (1981).

<sup>42</sup>304 U.S. 333 (1938).

<sup>43</sup>380 U.S. 263 (1965).

<sup>44</sup>351 U.S. 105 (1956). Atleson, Values and Assumptions, at 234-35 lists the pages on which each of these cases is discussed.

Lechmere, Inc. v. NLRB.<sup>45</sup> Also in 2004, Ken Matheny and Marion Crain discussed, among others, MacKay Radio, Fansteel, Darlington Mfg., First National Maintenance, and Lechmere.<sup>46</sup>

These court decisions are seen as so crucial to modern labor relations that many articles focus on finding a theme that would explain how these devastating and seemingly incorrectly decided cases could have come out the way they did. Did Courts “deradicalize” the NLRA, as Karl Klare argued over twenty-five years ago?<sup>47</sup> Did the Court import “values and assumptions” from common law master-servant rules to undercut NLRA rules, as Atleson wrote? Is it, as Matheny and Marion Crain say, that courts read in an employee “duty of loyalty” that eviscerates worker rights in various contexts?<sup>48</sup> Or, as Pope contends, did the Supreme Court implicitly constitutionalize property rights of employers that then trumped the NLRA?<sup>49</sup>

While all these authors make convincing points, the purpose here is not to explain these cases, but rather to understand the effect they have and to weigh that along side the effect of at-will rules. Although the results of these cases were questionable and the rules they created were indeed problematic, most of these same rules exist in the public sector, where unions are doing much better. Therefore, the legal rules most often cited as creating the biggest problems for labor are not, in themselves, a sufficient explanation for private sector labor’s troubles.

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<sup>45</sup> Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992)

<sup>46</sup> Matheny and Crain, *Disloyal Workers*, at 1721 & nn. 119 & 121, 1723-24.

<sup>47</sup> Klare, *Judicial Deradicalization of the Wagner Act*, 62 MINN. L. REV. 265, 265-70 (1978).

<sup>48</sup> Matheny and Crain, *Disloyal Workers*, e.g. at 1726-30.

<sup>49</sup> See, e.g., Pope, *How American Workers Lost the Right to Strike*, 529-33 (explaining that 5<sup>th</sup> Amendment concerns lay behind the Court’s decision in MacKay Radio).

MacKay Radio, a central case in the canon, allows employers to “permanently replace” workers who participate in a legal strike over “economic” issues.<sup>50</sup> Economic issues are matters regarding wages, hours, and working conditions.<sup>51</sup> Thus, strikes designed to win what most workers join unions to get (better compensation, more reasonable hours) often result in strikers losing their jobs to permanent replacements. Critics of MacKay point to NLRA language stating that “[n]othing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.”<sup>52</sup> Also, NLRA §7 lists striking as a protected activity, and NLRA §8(a)(1) bars employer interference with protected activities. A recent article concluded that this case, “which came close to making a mockery of the statute’s bold language about the right to strike, neither explained its rationale nor justified its result.”<sup>53</sup>

Still, the rule remains that while an employer may not *fire* employees for taking part in a legal strike, it may permanently replace them: a distinction with (for most workers) only a hollow, technical difference.<sup>54</sup> Due to this rule, employers increasingly see strikes as

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<sup>50</sup>304 U.S. 333, 345-46.

<sup>51</sup>Workers who strike because the employer has committed a ULP generally are entitled to reinstatement after making an unconditional offer to return to work. Douglas Ray, Calvin Sharpe, and Robert Strassfeld, *UNDERSTANDING LABOR LAW* (2d ed., 2005) 222-31.

<sup>52</sup>NLRA, ch. 372, §13, 49 Stat. 449, 457 (1935), quoted in Pope, *How American Workers Lost the Right to Strike*, 525, 529; 29 U.S.C. §163 (2005).

<sup>53</sup>Julius Getman and F. Ray Marshall, *The Continuing Assault on the Right to Strike*, 79 *TEX L. REV.* 703, 717 (2001).

<sup>54</sup>Being “permanently replaced” is not exactly the same thing as being fired, but it has the same practical result in at least many cases, and in nearly all cases in which the employer desires that result. A “permanently replaced” employee has no right to be reinstated after a strike if the employer has filled the worker’s position with a permanent replacement. Only if the job is unfilled after the strike or if the position later becomes open and the employee is still available — factors outside the employee’s control — does the employee have the right to return to her job,

opportunities to break unions. In recent years, employers have been more likely to threaten permanent replacements than unions have been to threaten strikes.<sup>55</sup>

Fansteel Metallurgical Corp. held that sit-down strikes were illegal, even where the employer had committed a number of serious ULPs. The strikers could not be reinstated, even though their strike would not have occurred but for the employer's violation of the law. Here too, the rule – employers may fire workers for engaging in slow-downs and other partial strike activities – was arguably contrary to the text and intent of the NLRA.<sup>56</sup> Pope argues the Court wrongly allowed the employer's property rights to trump the statutory rights of the workers.<sup>57</sup>

Darlington Mfg. held that it did not violate the NLRA for an employer to close its shop purely out of anti-union bias.<sup>58</sup> This rule is also arguably contrary to the meaning and intent of the NLRA. In addition to §8(a)(1), which bars interference with §7 rights such as organizing, NLRA §8(a)(3) bars employers from discriminating against employees based on their attitudes toward unions.<sup>59</sup> Darlington explained that courts could not force an employer to remain in

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Laidlaw Corp., 171 NLRB 1366, 1368-70 (1968), enfd, 414 F.2d 99 (7th Cir. 1969), *cert. den.*, 397 U.S. 920 (1970).

<sup>55</sup>Pope, *How American Workers Lost the Right to Strike*, at 527-528. The MacKay Court did not give what has become the latter-day justification for this rule: that employers being struck need to attract replacement workers by offering them permanent positions. *Id.*, at 529.

<sup>56</sup>See Pope, *How American Workers Lost the Right to Strike*, 526.

<sup>57</sup>Pope, *How American Workers Lost the Right to Strike*, 520-21.

<sup>58</sup>380 U.S. 263, 269-73. The case added a subsidiary rule, that “partial” plant closings can sometimes violate the NLRA. 380 U.S. at 274-76. But closing a single plant unrelated to other businesses of the owner is clearly legal.

<sup>59</sup>See Pope, *How American Workers Lost the Right to Strike*, 545-50, offering his own critique and quoting labor law scholar Clyde Summers describing the decision as “inherently incredible.”

business,<sup>60</sup> which is true but hardly persuasive. Money damages are available in a wide variety of legal actions against corporations (and sometimes corporate officers) even if the corporation goes out of business. There is no reason such damages could not be available for employers who close their businesses for reasons the NLRA seemingly should prohibit.

First National Maintenance held that unions had no right to bargain over an employer's decision to close a plant, despite language in the NLRA obligating employers and unions to negotiate over "wages, hours, and conditions of work."<sup>61</sup> The Court nonetheless deemed certain topics merely "permissive" subjects of bargaining (a term that appears nowhere in the NLRA's text). Unions, the Court held, cannot insist on bargaining over "permissive" subjects, and the subject of plant closing, despite its actual, obvious, destructive impact on wages, hours, and working conditions, was held to be merely permissive.<sup>62</sup>

Lechmere limited access of union organizers to workers. It upheld the employer's right to exclude non-employee union organizers from its property in practically, if not literally, all cases.<sup>63</sup> Again, this interpretation seems contrary to statutory language, which grants §7

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<sup>60</sup>380 U.S. at 270, rejecting the "proposition that a single businessman cannot choose to go out of business if he wants. . . ."

<sup>61</sup>NLRA §§ 8(d) and 8(a)(5), 49 Stat. 452, 29 U. S. C. §§ 158(d) and 158 (a)(5).

<sup>62</sup>452 U.S. 666, 677-87.

<sup>63</sup>502 U.S. 527 at 532-39. The exception is for situations in which "the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through usual channels," 502 U.S. at 537. This has been interpreted extremely narrowly and is used very rarely. Ray, Sharpe, and Strassfeld, *UNDERSTANDING LABOR LAW*, at 71.

organizing rights to “employees” generally, and is not limited to employees of a particular employer being organized (professional union organizers are, after all, employees of the union).<sup>64</sup>

More recent cases could be added. Perhaps one of the poorest pieces of statutory interpretation in the Supreme Court’s recent history was CWA v. Beck.<sup>65</sup> Beck and its progeny<sup>66</sup> established burdensome requirements for allowing members of union bargaining units to have refunded to them that portion of their dues money collected pursuant to union security clauses that their union spent on activities “not related to collective bargaining” (mainly politics and most organizing activities).<sup>67</sup> While this may or may not be good public policy, it flies directly in the face of explicit statutory language *and* was contrary to the interpretation of the National Labor Relations Board (NLRB), the agency charged with interpreting the NLRA.<sup>68</sup>

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<sup>64</sup>See Pope, *How American Workers Lost the Right to Strike*, 541-44, for a more detailed critique of the reasoning in Lechmere.

<sup>65</sup>487 U.S. 735 (1988).

<sup>66</sup>See, e.g. *California Saw & Knife Works*, 320 NLRB 224 (1995), *enf’d sub. non.* Int’l Ass’n of Machinists v. NLRB, 133 F.3d 1012 (7<sup>th</sup> Cir 1998) (detailing requirements for dues-rebate calculations, rebates, and challenges to those processes).

<sup>67</sup>Estlund, *Ossification*, 1585-86 contrasts the Supreme Court’s priorities in Beck and Lechmere: “The right of objectors to refrain from supporting unions and most union organizing is so important that it justifies imposing onerous procedural burdens on the union, while the right of unions and their members to organize is so unimportant that . . . it does not justify imposing the trivial burden on employer's property rights that is entailed by granting organizers access to a parking lot.”

<sup>68</sup>NLRA § 8(a)(3) states that “nothing” in the NLRA “shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein.” Section 8(a)(3) then gives the following specific exceptions to this general rule: employers cannot discriminate against employees for nonmembership in a union *if* “membership was denied or terminated for reasons *other than* the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership” (emphasis supplied). Thus, as the dissent in Beck explained, the “plain language” of these provisions “permits an employer and union to enter into an agreement

Linden Lumber Div., Summer & Co. v. NLRB<sup>69</sup> also limits union rights in a way apparently inconsistent with statutory language. It held that even if a majority of employees in an appropriate bargaining unit sign cards stating that they wish to be represented by a union and present such cards to their employer, the employer is not required to recognize the union. Instead, employers can reject this “card check” procedure and can force unions to use the NLRB’s election procedure, a process often fraught with delays and employer abuses.<sup>70</sup> Yet no part of the NLRA states that an election is required or is even a preferred way of workers choosing whether to be represented by workers. Section 9(a) of the statute states: “representatives designated or selected for the purposes of collective bargaining by the majority of employees . . . shall be the exclusive representative of all the employees.” The “designate or select” language does not mandate elections if an employer wants one, and card check would seem an acceptable way a union could be “designated or selected.”

Also, in NLRB v. Kentucky River Community Care, Inc.,<sup>71</sup> the Supreme Court again interpreted the NLRA in a way contrary to union interests by reading the term “supervisor” quite

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requiring all employees, as a condition of continued employment, to pay uniform periodic dues.” 487 U.S. 735, 765 (Blackmun, J. dissenting). Further, the Court rejected the NLRB’s interpretation of §8(a)(3), which had adopted this plain meaning interpretation. As the dissent correctly noted, “were there any ambiguity in the meaning of § 8(a)(3) – which there is not – the Court would be constrained to defer” to the NLRB’s interpretation of the NLRA; it was at minimum a reasonable interpretation. 487 U.S. at 769, n.6 (Blackmun, J. dissenting).

<sup>69</sup>419 U.S. 301, 309-10 (1974).

<sup>70</sup>Union election campaigns “regularly feature employers’ exercise of their lawful yet disproportionate authority to help shape election results, as well as employers’ use of their power to affect outcomes unlawfully but with relative impunity.” James Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 825 (2005).

<sup>71</sup>532 U.S. 706, 713-16 (2001).

expansively. This hurt unions because the NLRA excludes supervisors from its coverage.<sup>72</sup> Thus, if an employee is deemed to be a “supervisor,” not only can she not join a union, she can be dismissed legally for supporting a union (or, for that matter, for not opposing a union). Worth noting here, that is true because supervisors are at-will and are no longer protected by NLRA rules. Kentucky River ensured that a greater percentage of employees would be supervisors through a questionably broad interpretation of the rule that an employee is a supervisor if she exercises “independent judgment” in directing the work of another employee.<sup>73</sup>

## 2. Weak Remedies

Scholars and union advocates often claim that the NLRA provides inadequate responses to employer ULPs, especially for employers simply firing union supporters.<sup>74</sup> Studies confirm that private sector employers routinely fire or discipline workers for supporting unions. A recent report estimated that one in three employers in the U.S. faced with union organizing drives engages in this practice.<sup>75</sup> This replicates an earlier study, which found that from 1992-95, more than a third of employers fired workers for union activity during NLRB elections.<sup>76</sup> Another

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<sup>72</sup>29 U.S.C. § 152(12).

<sup>73</sup>The case involved certain nurses, whom the NLRB had held were not supervisors. The NLRB reasoned that the application of “ordinary professional or technical judgment in directing less-skilled employees to deliver services” was not “independent judgment” for the purpose of the supervisory exclusion. The Court disagreed, thus removing many workers from the NLRA’s protections. 532 U.S. 706, 713-16; Estlund, *Ossification*, at 1560 & n. 137.

<sup>74</sup> Paul Weiler, *Promises to Keep*, at 1787-91 (1983); Worster, III, *If it’s Hardly Worth Doing*, at 1083; *see note 11 infra*.

<sup>75</sup>Chirag Mehta and Nik Theodore, “Undermining the Right To Organize: Employer Behavior During Union Representation Campaigns,” (2005), available at <http://www.americanrightsatwork.org/docUploads/UROCUEdcompressedfullreport%2Epdf>

<sup>76</sup>Brofenbrenner, *et al.*, “Introduction,” 5.

report found that one of four employers illegally fires workers for union activity during organizing campaigns, and on average, these employers fire four workers per election campaign.<sup>77</sup> A study in the late 1990s concluded that employers illegally fire or otherwise retaliate against one of every eighteen private sector workers who support a union during a union organizing campaign.<sup>78</sup> Employees get the message: a poll found that 79 percent of workers thought it was either “somewhat” or “very” likely that employees “will get fired if they try to organize a union.”<sup>79</sup>

Of course, it violates the NLRA to fire an employee for supporting a union.<sup>80</sup> But usually the only relief wrongfully discharged employees can receive is reinstatement and back-pay, minus whatever the employee earned or should have earned after being illegally fired.<sup>81</sup> No emotional or punitive damages are available, as there are in Title VII cases of disparate treatment,<sup>82</sup> nor are there double damages, as the Fair Labor Standards Act provides,<sup>83</sup> nor do

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<sup>77</sup>Kate Brofenbrenner and Tom Juravich, “It Takes More Than House Calls: Organizing to Win with a Comprehensive Union Building Strategy,” in Brofenbrenner, *et al.*, eds., ORGANIZING TO WIN, at 22, 28.

<sup>78</sup>Charles Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMPLOYEE RTS. & EMP. POL’Y J. 317, 330 (1998).

<sup>79</sup>Richard Freeman and Joel Rogers, “Who Speaks for Us? Employee Representation in a Nonunion Labor Market,” in Bruce Kaufman and Morris Kleiner, eds., EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS (1993), 29.

<sup>80</sup>See NLRA §§ 7, 8(a)(1) (giving employees the right to organize unions and making it an employer ULP to coerce, interfere, or restrain employees in exercising that right).

<sup>81</sup>Worster, III, *If it’s Hardly Worth Doing*, at 1083.

<sup>82</sup>In the Civil Rights Act of 1991, Congress amended 42 U.S.C. §1981A(a)(1) to allow punitive damages in Title VII claims of intentional discrimination. Under the NLRA, punitive damages are not even available for repeat violators. See Lafer, “Free and Fair” at 25.

successful plaintiffs receive attorneys' fees, as they typically do in these and other types of employment law cases.<sup>84</sup> Under the NLRA, it is possible, but in practice quite difficult, to get injunctions against employer discrimination during organizing campaigns. Beyond that, the only remedies are cease and desist orders and orders that employers post notices that they have violated the NLRA.<sup>85</sup> This is an unnecessarily cramped interpretation of statutory language that authorizes the NLRB to "take such affirmative action, *including* reinstatement of employees with or without back pay, as will effectuate the policies of" the NLRA.<sup>86</sup> Some of the oft-criticized canonical cases that hurt labor are cases that involve limitations on remedies.<sup>87</sup>

Not only are remedies weak, but they are often seriously delayed.<sup>88</sup> In 2003, the median wait for a ULP case pending an NLRB ruling was nearly three years from the filing of a charge,

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<sup>83</sup>FLSA § 216(b), 29 U.S.C. § 216(b).

<sup>84</sup>29 U.S.C. § 216(b) and 29 U.S.C. §2000e-6(k) require attorneys' fees for successful plaintiffs under the FLSA and Title VII, respectively. Because the NLRA litigates what it finds to be meritorious ULP charges, attorneys' fees are less of a cost item for workers in such cases than in individual employment law cases, which plaintiffs typically file in court. But unions do incur costs in investigating and filing charges, and they often expend resources aiding the NLRB in its attempt to prosecute charges (*e.g.*, by filing *amicus* briefs). More importantly here, from the employer's perspective, the prospect of paying out a significant amount of money in attorney's fees does not act as a disincentive in NLRA cases, as it does in employment law cases.

<sup>85</sup>Estlund, *Ossification*, at 1566; Worster, III, *If it's Hardly Worth Doing*, 1076-83.

<sup>86</sup>NLRA §10(c), 29 U.S.C. §160(c) (emphasis supplied).

<sup>87</sup>Methany and Crain, *Disloyal Workers*, 1723-24 & n. 123, discuss *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197-98 (1941) (workers fired in violation of the NLRA have a duty to mitigate damages by trying to seek other employment); Pope, *How American Workers Lost the Right to Strike*, 535, criticizes *Consolidated Edison v. NLRB*, 305 U.S. 197 (1938) for holding that the NLRB's power to remedy ULPs was remedial and not punitive.

<sup>88</sup>In 2003, the median wait for a ULP case pending an NLRB ruling was nearly three years from the filing of a charge, and employers who choose to appeal the NLRB's ruling to the federal courts can add years of further delay. Estlund, *Ossification*, at 1567.

and employer appeals of NLRB rulings to federal courts often add years of further delay.<sup>89</sup> In the context of an organizing campaign, this typically means that the *status quo* of no union is maintained.<sup>90</sup> Further, the reinstatement remedy is problematic in practice. The majority of workers discriminated against decline reinstatement. One can imagine why a reasonable worker would not wish to return to a company that had illegally fired her, but lengthy delays make this attitude even more likely, and thus make this remedy worth even less.<sup>91</sup>

The incentives this creates are troubling. James Pope notes that “[f]rom a cost-benefit point of view, it is often profitable to fire union advocates.”<sup>92</sup> Gordon Lafer explains that “[b]eyond the delays . . . , there are virtually no penalties for those ultimately found guilty.”<sup>93</sup> Thus, “[r]ational employers might well decide that the modest penalty for firing a few union supporters was worth the benefit of scaring hundreds more into abandoning the cause of unionization.”<sup>94</sup> Similarly, Kenneth Roth, the Executive Director of Human Rights Watch,

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<sup>89</sup>Lafer, “Free and Fair?” at 24; Weiler, *Promises to Keep*, at 1787-1803.

<sup>90</sup>Lafer, 22-23.

<sup>91</sup>Wooster, III, *If it’s Hardly Worth Doing* at 1081, *citing* Leonard Page, *New Directions for the Next National Labor Relations Board*, 2001 L. Rev. M.S.U.-D.C.L. 1063, 1066 (2001).

<sup>92</sup>“If the employer can avoid even a modest wage increase, the savings are likely to exceed many times over the costs of any back-pay awards that the Board might eventually assess.” Pope, *How American Workers Lost the Right to Strike*, 534, *citing, e.g.*, Morris Kleiner, “What Will it Take? Establishing the Economic Costs to Management of Noncompliance with the NLRA,” in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 137, 140-46 (Sheldon Friedman, *et al.* eds., 1994).

<sup>93</sup>Lafer, “Free and Fair?” at 25 (emphasis in original).

<sup>94</sup>Lafer, “Free and Fair?” at 25.

writes that “[l]abor law is so weak that companies often treat the minor penalties as a routine cost of doing business, not a deterrent against violations.”<sup>95</sup>

Real world experiences support these critiques. Former NLRB General Counsel Leonard Page describes “outrageous and pervasive violations” by employers which took place “on a regular basis” during his tenure in the 1990s, noting that the remedies problem was “clearly exemplified” by employer ULPs during union organizing campaigns.<sup>96</sup> Another former NLRB General Counsel, Fred Feinstein, discussing the aggressive and not infrequently illegal tactics of Wal-Mart in opposing unions, explained that “even when the board charged companies like Wal-Mart with illegal actions, the remedies often could not salvage an organizing drive crippled by employer illegalities.” Even Business Week agreed that Wal-Mart’s illegal activities “carry insignificant penalties.”<sup>97</sup>

In sum, the Supreme Court has issued many rulings adverse to labor and at least arguably contrary to the plain meaning and intent of the NLRA. Also, inadequate remedies create serious difficulties for unions, especially during organizing. The experience of the public sector, however, raises challenging questions about the extent to which these rules in and of themselves account for the low union density in the private sector. Almost all these rules apply in the public sector as well, and unions are doing quite well there.

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<sup>95</sup>Quoted in Wooster, III, *If it’s Hardly Worth Doing*, at 1083.

<sup>96</sup>Quoted in Wooster, III, *If it’s Hardly Worth Doing*, 1077.

<sup>97</sup>Quotes in Morris, *THE BLUE EAGLE AT WORK*, at 205. Morris describes some of Wal-Mart’s tactics at *id.*, 202-09.

### C. Lessons from the Public Sector

Public sector labor law rules vary tremendously by jurisdiction. Still, public sector labor statutes are generally modeled on the NLRA, with the caveat that they often provide *fewer* of the same sorts of rights. Yet even though nearly all the rules described above apply in the public sector, they have not stopped public workers from organizing at a very impressive rate. Weak remedies, for example, certainly hurt private sector unions. But no study discusses the fact that public sector labor laws provide the same, weak remedies for employees fired for supporting unions, and still public workers have organized at a rate quadruple that of private workers.

One key difference in the public sector is the absence of a background employment at-will rule that swallows the exception labor law was meant to create. Most public workers eligible to join unions are covered by civil service rules that require some form of “just cause” for discharge.<sup>98</sup> Also, the Constitution gives them some substantive and procedural protections in discharge cases. Thus, their employers can’t fire them with relative impunity at the first sign of union organizing, as happens too frequently in the private sector.

#### 1. The Similarities: The Canon of Cases in Public Sector Labor Law

Unlike private sector law, public sector labor laws come from state and local rules. Currently, there are more than 110 separate statutes governing public sector labor relations, augmented by many local ordinances and authority.<sup>99</sup> Twenty-nine states and the District of Columbia allow collective bargaining for all major groups of public employees; thirteen states allow only one to four types of public workers to bargain; and eight do not allow any public

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<sup>98</sup>See, e.g. Sprang, *Beware the Toothless Tiger*, 865 and section II-C-2, *supra*.

<sup>99</sup>Richard Kearney, *LABOR RELATIONS IN THE PUBLIC SECTOR*, 58-59 (3d ed. 2001).

workers to bargain.<sup>100</sup> While these laws vary dramatically on some points (for example, only twelve states allow any public workers to strike and many require arbitration and/or mediation to settle bargaining impasses),<sup>101</sup> public sector rules typically adopt the structure and substance of the NLRA, except that they often provide fewer of the same sorts of rights.<sup>102</sup> Notably, at least most of the problematic rules described above are standard in public sector laws.<sup>103</sup>

First, topics of bargaining in the public sector are generally more limited than those in the private sector.<sup>104</sup> Indeed, the trend in the last decade has been to *narrow* the scope of bargaining in public sector statutes.<sup>105</sup> Public sector statutes typically include explicit “management rights” language, which keeps more subjects out of the negotiating arena than does private sector law. More subjects are permissive (the parties cannot negotiate about them unless both sides want to do so) and more subjects are illegal (the parties cannot negotiate about them even if they wish) in

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<sup>100</sup>Kearney, LABOR RELATIONS IN THE PUBLIC SECTOR, 62, 66; Slater, *Homeland Security vs. Workers Rights?* at 301 & n. 17.

<sup>101</sup>Slater, *Homeland Security vs. Workers Rights?* at 301.

<sup>102</sup>See Harry Edwards, R. Theodore Clark, Jr. & Charles Craver, LABOR RELATIONS IN THE PUBLIC SECTOR (4<sup>th</sup> ed.1991), 139-42.

<sup>103</sup>While unfortunately no hornbook lists the provisions of all or even most state public sector labor laws, information can be gleaned from the following sources: Kearney, LABOR RELATIONS IN THE PUBLIC SECTOR; Joseph Grodin, Mary Weisberger & Martin Malin, PUBLIC SECTOR EMPLOYMENT (2d ed., 2004); and Joyce Najita and James Stern, eds. COLLECTIVE BARGAINING IN THE PUBLIC SECTOR: THE EXPERIENCE OF EIGHT STATES (2001). For guides to state public sector labor agencies across the country, often containing links to statutes and cases, see [www.alara.org](http://www.alara.org) or <http://www.afscme.org/otherlnk/weblnk28.htm>.

<sup>104</sup>See Grodin, Weisberger & Malin, PUBLIC SECTOR EMPLOYMENT, at 205-76 (discussing the scope of bargaining in a variety of public sector jurisdictions). For an earlier piece showing that the scope of bargaining was always narrower in the public sector, see Donald Wollett, *The Bargaining Process in the Public Sector: What is Bargainable?* 51 OR. L. REV. 177 (1971).

<sup>105</sup>Grodin, Weisberger & Malin, PUBLIC SECTOR EMPLOYMENT, at 206.

the public sector.<sup>106</sup> Also, agencies and courts often read management rights language in public sector statutes broadly, due to concerns that negotiations over the functioning of public bodies can inhibit democratic control by the public and their elected representatives.<sup>107</sup> Thus, the problems created by First National Maintenance in the private sector are worse (from the union's perspective) in the public.

For example, layoffs and subcontracting, both mandatory topics in the private sector,<sup>108</sup> are often not mandatory in public employment.<sup>109</sup> In New Jersey, the decision to subcontract is non-negotiable.<sup>110</sup> A number of state statutes provide lengthy lists of specific topics that cannot be bargained. Michigan's statute provides that bargaining between a public school and a union "shall not include" various subjects, including but not limited to the starting day for the school

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<sup>106</sup>See Grodin, Weisberger & Malin, PUBLIC SECTOR EMPLOYMENT, at 213-219 (excerpting statutory language from select states). For example, the Illinois Public Relations Act, 5 ILCS 315/4 Management Rights, provides: "Employers shall not be required to bargain over matters of inherent managerial policy," including "the functions of the employer, standards of services, its overall budget, the organizational structure, and selection of new employees." *Id.*, at 213.

<sup>107</sup>Grodin, Weisberger & Malin, PUBLIC SECTOR EMPLOYMENT, at 205; Clyde Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. TOLEDO L. REV. 265 (1987). For a good example, see *San Jose Peace Officers v. City of San Jose*, 78 Cal.App.3d 935, 946, 144 Cal. Repr. 638, 645 (1978) (police department's "use of force" policy not a mandatory subject of bargaining, despite claims it implicated officer safety, because it required "delicate judgment . . . best exercised by the appropriate legislative and executive officers").

<sup>108</sup>For subcontracting, see *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

<sup>109</sup>See, e.g. *City of Brookfield v. Wisc. Employment Rel. Comm'n*, 87 Wis.2d 819, 830, 275 N.W.2d 723, 728 (1979) (in Wisconsin, layoffs of public workers for budgetary reasons is not a mandatory topic, because it "is a matter primarily related to the exercise of municipal powers and responsibilities and the integrity of the political processes of municipal government)."

<sup>110</sup>*Local 195 IFPTE v. State of New Jersey*, 88 N.J. 393, 443 A.2d 187 (1982).

year, required student contact time, subcontracting decisions, and who can be the policyholder of an employee group insurance policy.<sup>111</sup>

The principle of Lechmere, that professional union organizers have greatly reduced rights of access to employer property, has been endorsed by several state labor agencies in public sector cases.<sup>112</sup> Further, public employers may permissibly bar such organizers under First Amendment rules concerning access to government property. For example, a recent Illinois case upheld a school district's policy of banning all non-employee union organizers from school property. Under applicable First Amendment doctrine, the employer had acted lawfully in restricting non-employee access because the union organizing activity took place in non-public fora; the employer had not "opened its doors to public," as it would for a play or basketball game.<sup>113</sup>

Rules allowing objections to dues payments applied in the public sector even earlier than Beck created them in the private. The public sector cases were decided under the First Amendment, but they are quite similar to the Beck line of cases, both in terms of the substantive

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<sup>111</sup>Grodin, Weisberger & Malin, Public Sector Employment, 214, *citing* Mich. Comp. Laws Ann. §423.215(3).

<sup>112</sup>SERB v. Napoleon City School Dist. Bd. of Ed., 13 Ohio Pub. Employee Rep. ¶ 1254 (1996) (per Lechmere, non-employees have "less rights and protection regarding access to an employer's premises than employees"; statute does "not protect non-employee union organizers, except in the rare case where the inaccessibility of employees renders the reasonable communication attempts by non-employees ineffective"); Temple Ass'n of University Professionals, Local 4531 v. Temple University, 23 Penn. Pub. Employee Rep. ¶ 23118 (1992) (per Lechmere, "non-employees only have the right to enter an employer's private property for organizational purposes if no reasonable means of communication with the employees is otherwise available.")

<sup>113</sup>SEIU Local 73 and Palatine Community Consolidated School Dist. #15, 18 Pub. Employee Rep. for Illinois ¶ 1043 (2002). *See also* Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 777 F.2d 1046 (5<sup>th</sup> Cir. 1985), *aff'd* 479 U.S. 801 (1986) (teachers have a constitutional right to use school bulletin boards and mail system to discuss unions, but outside organizers have no right to similar access because they are non-public fora).

right to object to certain expenditures and the burdensome procedures unions must adopt to deal with objectors.<sup>114</sup>

Strikes by public workers are illegal even in the majority of jurisdictions that allow them to bargain,<sup>115</sup> and the definition of strike certainly includes slowdowns and other actions prohibited by Fansteel in the private sector. Indeed, public sector statutes and cases often specifically ban the practice referred to as “the blue flu”: government employees (originally police, hence the “blue”) engaging in limited strike-like acts by calling in sick in groups.<sup>116</sup>

Striker replacement works differently in the public sector. Most obviously, only a relatively small minority of states allow any public employees to strike legally. Where strikes are legal, a very few decisions have hinted that public employers could use permanent replacements,<sup>117</sup> although research for this article revealed no case in which a government

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<sup>114</sup>*Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) (First Amendment bars union security clauses in public employment that require objecting members of a union bargaining unit who are not members of a union to pay dues for purposes “unrelated to collective bargaining”); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) (requiring more elaborate procedures than the union had been using to administer dues rebate requests).

<sup>115</sup>*See* Kearney, *LABOR RELATIONS IN THE PUBLIC SECTOR*, at 234-38.

<sup>116</sup>Grodin, Weisberger & Malin, *PUBLIC SECTOR EMPLOYMENT*, at 292 (“many statutes go beyond expressly prohibiting traditional strikes to prohibit . . . job actions, or concerted activities as the ‘blue flu,’ where employees concertedly call in sick.”) *See, e.g.*, *City of Santa Ana, v. Santa Ana Police Benevolent Ass’n*, 255 Cal. Rptr. 688 (1989) (sickout by police officers constituted illegal work stoppage and was properly enjoined); *Broward Teachers Union, v. School Bd. of Broward County, Fl.*, 30 Fl. Pub. Employee Rep. ¶ 304 (2004) (school board acted appropriately in face of threatened “blue flu” by teachers).

<sup>117</sup>In *SERB v. Central Ohio Transit Authority*, 6 Ohio Pub. Employee Rep. ¶ 6060 (1988), a public labor board hearing officer noted the lack of precedent regarding permanent replacements in the public sector, and labeled the issue “a very difficult one.” While he decided that in theory, employers could use such replacements legally, there is no reported case in which an Ohio public employer actually did use permanent replacements.

employer actually used permanent replacements for strikers.<sup>118</sup> Other cases, however, at least imply that public sector strikers could not be permanently replaced. A California state labor board decision noted that while in the private sector, employers could hire permanent replacements for economic strikers, “the public sector employer does not have the economic pressure devices available” to respond to strikes.<sup>119</sup> While this decision did not explain why this was true, it is likely in part because it is questionable whether participation in a legal<sup>120</sup> strike is “just cause” for dismissal or its nearly identical twin, “permanent replacement.”

Instead of strike rights, public sector unions must deal with a host of mechanisms to resolve bargaining impasses that arguably are less effective. Some states provide arbitration, but it can be mandatory or optional, binding or advisory, depending on the state. Some states provide mediation as well as arbitration, some only allow mediation.<sup>121</sup> Of course, these mechanisms are only applicable to public workers who are allowed to bargain.

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<sup>118</sup>A very few cases discuss whether an employer *threatening* to use replacement workers in states that allow strikes is itself an employer ULP, but no case reported case involves a public employer actually *using* permanent replacement. See Edward R. Melby and Village of Frankfort, 15 Pub. Employee Rep. for Illinois ¶ 2012 (1999) (statements about possibly using replacements if there was a strike not a ULP under all the circumstances); SERB v. Central Ohio Transit Authority, 7 Ohio Pub. Employee Rep. ¶ 7041 (1989) (same); *but cf.* Shikellamy Ed. Ass’n v. Shikellamy School Dist., 22 Pennsylvania Pub. Employee Rep. ¶ 22171 (1991) (School District’s threat to hire permanent replacements was a ULP since legislature provided for interest arbitration, not strikes, as the means of impasse resolution).

<sup>119</sup>Fremont Unified School Dist. v. Fremont Unified Dist. Teachers Ass’n, 14 Pub. Employee Rep. for California ¶ 21107 (1990) (holding an intermittent strike to be a union ULP).

<sup>120</sup>*Cf.* Rockwell v. Crestwood School Dist. Bd. of Ed., 393 Mich. 616, 227 N.W. 2d 736 (1975) (it may be legal to permanently replace public employees who participate in an *illegal* strike).

<sup>121</sup>Kearney, LABOR RELATIONS IN THE PUBLIC SECTOR, 236-37, 262-65 (describing which states use which type of impasse resolution procedure).

As to remedies, most public sector statutes simply copy the NLRA's language, and public sector agencies generally use the NLRB's interpretation of that language.<sup>122</sup> Thus, the standard remedy for illegal discharge is, as in the private sector, reinstatement with backpay, minus whatever the employee earned or should have earned.<sup>123</sup> Punitive and emotional damages are not available in public sector ULP cases, and generally neither are attorneys' fees.<sup>124</sup>

Coverage of supervisors is perhaps the only area in which public sector labor law is sometimes more union-friendly than the NLRA. A few state public sector statutes allow supervisors to form unions, or define "supervisor" more narrowly than the NLRA does after Kentucky River.<sup>125</sup> On the other hand, recall that twenty-one states do not provide collective bargaining rights to *any* public sector workers, or only grant such rights to employees in limited, specific job categories. Thus, while in the public sector, supervisors in a few states can bargain collectively where their private sector equivalents could not, those numbers are overwhelmed by the large swaths of public employment in various parts of the country in which collective bargaining is prohibited.

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<sup>122</sup>For example, the Ohio public sector law tracks the language of the NLRA. In response to employer ULPs, the state public sector board can issue a cease and desist order "and take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of [the Ohio public sector labor law]." Ohio Revised Code, §4117.12(3).

<sup>123</sup>*See, e.g.,* Int'l B'hood of Firemen and Oilers, Local 1201 and Upper Moreland Township School Dist. 31, Pennsylvania Pub. Employee Rep. ¶ 31106 (2000) (illegally discharged public employees not entitled to any back pay because they failed to engage in vigorous job searches); SERB and Warren County Sheriff, 11 Ohio Pub. Employee Rep. ¶ 1140 (1994) (discussing methods to calculate the amount to be offset against the backpay award).

<sup>124</sup>Edwards, Clark & Craver, LABOR RELATIONS LAW IN THE PUBLIC SECTOR, 143.

<sup>125</sup>*See* Grodin, Weisberger & Malin, PUBLIC SECTOR EMPLOYMENT, 140-52 (describing public sector rules on supervisors).

On the whole, therefore, public sector labor statutes could be described as at most providing “NLRA-lite” rights: the same type of rights as the NLRA provides, but fewer of them. Yet, while at least most of the rules said to hurt private sector workers have been widely adopted in the public sector, public workers still organize quite successfully. To give a striking example, federal sector workers have a union density of 35 percent,<sup>126</sup> despite the fact that under the law that covers most federal workers,<sup>127</sup> unions cannot bargain about wages, hours of work, or union security clauses, among other things.<sup>128</sup>

## 2. The Difference: Just Cause in the Public Sector Instead of At-Will

So, given that the same weaknesses appear in private and public sector labor law, why is union density so much higher in the public sector? A large part of the reason is that public employers are not able to fire public workers engaged in union organizing as easily. This is because public employees generally are not at-will due to civil service and related rules, and are given substantive and procedural protections by the Constitution. In short, there is no underlying rule of at-will to swallow the exception that the labor law is designed to create.

Civil service laws date from the late nineteenth century, and they are designed to protect merit principles: public workers should be hired, fired, promoted, or demoted because of their abilities, not as favors or punishments by political machine bosses. Thus, civil service rules typically require some form of just cause to fire a covered employee. While not all public

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<sup>126</sup>“Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry,” Bureau of Labor Statistics, *available at* <http://www.bls.gov/news.release/union2.t03.htm>

<sup>127</sup>Federal Service Labor-Management Relations Act, 5 U.S.C. §§ 7101-35.

<sup>128</sup>5 U.S.C. §7103(14); Slater, *Homeland Security vs. Workers Rights?*, at 303-04 (discussing exclusions from the scope of bargaining under the federal sector labor statute).

officials are covered by just cause rules (policy-making officials typically are not, and there is often a probationary period), the vast majority of public employees eligible to form unions are covered by such rules.<sup>129</sup>

Additionally, the Constitution provides public workers with substantive and procedural protections. As to substance, for example, it violates the First Amendment for public employers to discriminate against their employees because of their union membership.<sup>130</sup> Also, most public employees cannot be fired for exercising certain Constitutional rights (cases use various balancing tests). For example, in Connick v. Myers, the Supreme Court held that if public employers discipline their employees for speech covered by the First Amendment, courts must balance the interests of the employee as a citizen in commenting on matters of public concern, and the interests of the State as an employer in promoting efficient public services.<sup>131</sup>

Many public employees also have Constitutionally-protected procedural rights when their discharge is proposed. Civil service just cause rules (among other things) can create a property interest in a job which cannot be taken away without due process.<sup>132</sup> The Supreme Court has held that an employee with a property interest in a job is entitled to both a relatively brief hearing

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<sup>129</sup>Sprang, *Beware the Toothless Tiger*, at 865; Grodin, Weisberger & Malin, PUBLIC SECTOR EMPLOYMENT, at 70-75; Edwards, Clark & Craver, LABOR RELATIONS LAW IN THE PUBLIC SECTOR, at 431-42.

<sup>130</sup>Keyishian v. Bd. of Regents, 385 U. S. 589 (1967) (public employment cannot be predicated on relinquishing right of association); AFSCME v. Woodward, 406 F.2d 137 (8<sup>th</sup> Cir. 1969) (conditioning employment on waiving the right to join a union violates the First Amendment). Other protections apply as well. NTEU v. Von Raab, 489 U.S. 656 (1989) held that requiring suspicionless drug testing of public workers in jobs not deemed “safety sensitive” violates the Fourth Amendment; thus, such employees could not be fired for refusing such tests.

<sup>131</sup>461 U.S. 138 (1983).

<sup>132</sup>Bd. of Regents v. Roth, 408 U. S. 564 (1972); Perry v. Sinderman, 408 U. S. 593 (1972).

prior to a proposed discharge and a more formal hearing after the discharge.<sup>133</sup> These rules make it more difficult for a public employer to discharge union supporters summarily in an attempt to thwart a union organizing campaign. No such protections exist for private sector employees wishing to unionize.

Further, under civil service just cause rules, the burden is on the employer to prove that a valid reason existed for a discharge. In contrast, in a private sector ULP case, the burden is on the employee to prove anti-union motivation.<sup>134</sup> Thus, in the public sector, it is more difficult for employers to win simply by asserting a whole host of reasons — ranging from sensible-sounding to silly — for the discharge, hoping the fact-finder will give credence to it sufficient to defeat plaintiff's attempt to carry her burden of proof. Instead, government employers must carry the burden to show that a particular, plausible, legitimate reason was in fact the real reason. Also, this rule makes it less fruitful for employers to engage in multiple, time-wasting appeals, a process that can undercut organizing even if the fired worker ultimately prevails. Thus, delays in remedies, a serious problem in the private sector, are not a serious problem in the public.

It is surprising that of all the fine studies of U.S. labor law cited herein, none compares public sector labor law or even gives the experiences in the public sector more than the briefest mention. After all, in deciding the impact of legal rules on American workers, it would seemingly be instructive to compare the public sector, in which many rules are largely the same, but the outcome, at least as far as union density goes, is quite different.

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<sup>133</sup>Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532 (1985).

<sup>134</sup>Wright Line, 251 NLRB 1083 (1980).

### 3. Non-Legal Factors: Employer Hostility

Legal rules, of course, are not the only factors that affect union density. In response to the thesis above, it could be suggested that private sector employers are often much more aggressively hostile toward unions<sup>135</sup> than are their public sector counterparts. Indeed, some have argued that what makes U.S. private sector labor relations unique among industrialized democracies is the level of employer hostility toward unions.<sup>136</sup> In addition to firing employees for organizing, many private employers convincingly threaten to close or move their shops in response to unionization. According to one survey, while only 1 percent of private sector companies *actually* close up shop after their employees vote to unionize, 71 percent of manufacturing employers *threaten* to close during a union election campaign.<sup>137</sup> Although privatization is a real threat to public sector unions, equivalent threats of moving the work are more routine in the private sector.

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<sup>135</sup>For descriptions of private sector employer hostility to unions, *see, e.g.*, Paul Weiler, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990), at 105-33; Julius Getman, *Explaining the Fall of the Labor Movement*, 41 *ST. LOUIS U. L.J.* 575, 578-84 (1997); Richard Freeman & Morris Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 *INDUS. & LAB. REL. REV.* 351, 351 (1990).

<sup>136</sup>*See, e.g.*, Sanford Jacoby, “American Exceptionalism Revisited: The Importance of Management” in Sanford Jacoby, ed. *MASTERS TO MANAGERS: HISTORICAL AND COMPARATIVE PERSPECTIVES ON AMERICAN EMPLOYERS* (1991); Patricia Sexton, *THE WAR ON LABOR AND THE LEFT: UNDERSTANDING AMERICA’S UNIQUE CONSERVATIVISM* (1991).

<sup>137</sup>Lafer, “Free and Fair?” at 19, *citing*, Kate Brofenbrenner, “Uneasy Terrain: the Impact of Capital Mobility on Workers, Wages, and Union Organizing,” U.S. Trade Deficit Review Commission (Washington: 2000).

Granted, public employers are often not as aggressive about trying to defeat unions as private employers, but many public employers do resist unionization vigorously.<sup>138</sup> Also, while there is a difference in employer behavior in the private and public sectors, the reasons for that difference need to be unpacked.

Aggressive opposition to unions by public employers is more common than the conventional wisdom would have it. One study notes that “the evidence suggests the majority of employers in both sectors” oppose unionization.<sup>139</sup> In the past few years, some large and influential public employers have taken very aggressive actions against unions. The creation of the Department of Homeland Security (DHS) was delayed for months due to the Bush administration’s insistence that the tens of thousands of workers in the new, merged department be denied collective bargaining rights they had enjoyed in predecessor agencies.<sup>140</sup> And while the statute creating the DHS permitted that agency to implement even weaker bargaining rights than the federal sector statute allowed, the regulations the Bush administration promulgated gutted bargaining rights so thoroughly that the D.C. Circuit upheld an injunction against the regulations, on the grounds that they violated the minimal guarantee of “collective bargaining” rights in the statute creating the DHS.<sup>141</sup> For similar reasons, a court also recently struck down a

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<sup>138</sup>For examples, see Miller Berkeley and William Canak, *There Should Be No Blanket Guarantee: Employer Opposition to Public Employee Unions, C. 1965-75*, 24 J. OF COLLECTIVE NEGOTIATIONS IN THE PUBLIC SECTOR 17 (1995).

<sup>139</sup>Berkeley and Canak, *There Should be No Blanket Guarantees*, at 18 (quote) and 31 (describing continuing opposition by public employers to public sector unions).

<sup>140</sup>See Slater, *Homeland Security vs. Workers Rights?*

<sup>141</sup>NTEU v. Chertoff, 452 F.3d 839 (D.C. Cir. 2006) (upholding District Court ruling that a system permitting management to waive any provision of a collective bargaining agreement at its

similar attempt to gut union and related rights for employees of the Department of Defense.<sup>142</sup>

The Bush administration has succeeded in revoking the collective bargaining rights of thousands of employees.<sup>143</sup> Such attacks are not limited to the federal government: governors of Indiana and Missouri recently revoked the collective bargaining rights of state employees in those states.<sup>144</sup>

Still, the situation is worse in the private sector. One study found that private sector employers were six times more likely to engage in ULPs, including discharges for union activity, than public sector employers during union organizing campaigns.<sup>145</sup> While a rate even one-sixth of that in the private sector is still distressingly high, the difference is significant.

The question is, what causes this difference in behavior? The traditional answers are that public employers are less concerned with competition through lower wages than are private employers, and that political pressure inhibits public employers from expensive quasi-legal anti-union campaigns. While there is some truth to both those points, budget problems in a political environment sympathetic to tax cutting and unsympathetic to “bureaucrats” have given public employers incentives to fight unions for financial reasons and a political rhetoric to do so.

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discretion did not satisfy the minimal statutory requirement to preserve the right to bargain collectively).

<sup>142</sup>AFGE v. Rumsfeld, 422 F.Supp.2d 16 (D. D.C. 2006).

<sup>143</sup>Slater, *Homeland Security vs. Workers Rights?* at 310-319 (collective bargaining rights removed for employees in some parts of the Department of Justice, and other agencies).

<sup>144</sup>Indiana Exec. Order No. 05-14, 28 Ind. Reg. 1904 (Jan. 11, 2005); Missouri Exec. Order No. 05-01, 30 Mo. Reg. 261 (Jan. 11, 2005).

<sup>145</sup>Tom Juravich and Kate Broenbrenner, “Preparing for the Worst: Organizing and Staying Organized in the Public Sector,” in Brofenbrenner, *et al.*, at 266-69.

Most importantly here, the legal context in the private sector allows opposition and hostility to be turned into action more frequently and effectively. The background at-will rule significantly facilitates the use of quasi-legal to illegal tactics against unions. In contrast, in the public sector, the lack of this rule that swallows the exception inhibits such tactics by making them less effective. Protections against arbitrary dismissals based in civil service or other rules take away a “union avoidance” tool of easily firing union supporters, a tool that is too often used in the private sector. Without the at-will rule, the labor law exception is enforceable.

### III. Employment At-Will Undermines Anti-Discrimination Law

Title VII famously prohibits covered employers from taking adverse employment actions such as discharge because of an employee’s sex, race, religion, or national origin.<sup>146</sup> But this rule sits uneasily with the background at-will rule that employers can discharge workers for any reason *other* than a legally prohibited reason. Employees have the burden of proof to show that illegal discrimination was the reason for the act; under at-will rules, it is legal for employers to fire employees for any number of reasons including the morally and intellectually indefensible, the petty, and the illogical. A realistic Title VII plaintiff must therefore try to disprove a wide variety of “reasons” an employer is allowed to present or even suggest during litigation.

To confirm the difficulty Title VII puts on plaintiffs, this article will compare Batson rules governing peremptory challenges to jurors. Batson rules are analogous to Title VII rules. Historically, juror challenges could be made for any reason at all, or no reason; Batson made an exception, barring challenges that plaintiff proved were based on illegal discrimination (*e.g.*, for race or gender). Batson rules for proof precisely track Title VII rules for individual disparate

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<sup>146</sup>Title VII, §703(a), 29 U.S.C. § 2000e-2(a).

treatment cases. Thus, the failures of Batson are illuminating for Title VII cases. Commentators, and even one Supreme Court Justice, have found this system so problematic that they have suggested that only a rule requiring “cause” for striking a potential juror can effectively deal with race discrimination in juror selection. This, of course, is exactly equivalent to recognizing that the rule of at-will employment swallows the exception Title VII was designed to create.

#### A. Problems With Title VII and the Established Critiques

Serious problems exist in employment discrimination law. Title VII plaintiffs generally fare worse than plaintiffs in most other types of suit, at every stage of the process.<sup>147</sup> Before going to court, plaintiffs must first file with the Equal Employment Opportunity Commission (EEOC); only about 15 percent of claims filed with the EEOC result in any relief for plaintiffs, a rate generally lower than for other administrative claims. Plaintiffs lose employment discrimination cases both at the trial level and on appeal at a greater rate than plaintiffs in almost literally every other type of civil case.<sup>148</sup> A recent study found that at the pretrial stage, defendants won 98 percent of employment discrimination cases; compare that to a 66 percent success rate for defendants in insurance cases. In cases tried before judges, employment discrimination plaintiffs succeeded in 18.7 percent of the cases. In contrast, plaintiffs in insurance cases won 43.6 percent of the time, and plaintiffs in personal injury cases won 41.8

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<sup>147</sup>Clermont, Eisenberg, & Schwab, *How Employment-Discrimination Plaintiffs Fare*, at 548. See also Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 891 (2006) (“Empirical studies amply demonstrate a plaintiff ‘s slim chances of winning an employment discrimination suit.”)

<sup>148</sup>Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, at 55; Clermont, Eisenberg, & Schwab, *How Employment-Discrimination Plaintiffs Fare*, at 555-64.

percent of the time.<sup>149</sup> Further, employment discrimination defendants who lose at the trial level do startlingly better on appeal (winning reversal over 43 percent of the time) than do employment discrimination plaintiffs who lose at the trial level (winning reversal 5.85 percent of the time, a lower rate than any other category of cases except prisoner habeas corpus cases).<sup>150</sup>

The difficulties that the at-will rule creates in employment discrimination cases would seem fairly apparent. Plaintiffs must prove the employer acted because of one particular illegal motivation (discrimination because plaintiff was a member of a protected category), while employers will win if the fact-finder instead believes it was likely that the employer acted out of an almost literally infinite number of alternative motivations. Still, many authors have focused on other difficulties in the law.

There is a fascinating literature on the inability of Title VII doctrine to handle unconscious discrimination and stereotyping. “Research suggests that unconscious biases and cognitive stereotypes account for much of modern day discrimination,” Sheila Foster writes, and these biases can “distort causal judgments about discrimination”<sup>151</sup> Joan Williams gives an example: an employer is likely to assume that a woman with children who is late to work is late

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<sup>149</sup>Michael Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?* 53 EMORY L.J. 1887, 1943 (2004); Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, at 560.

<sup>150</sup>Zimmer, *The New Discrimination Law*, at 1944; see also Clermont, Eisenberg, & Schwab, *How Employment-Discrimination Plaintiffs Fare*, at 552 (appellate courts reverse plaintiffs’ wins far more often than defendants’ wins: for wins at the pretrial stage, 42 percent to 11 percent; for wins after the trial stage, 42 percent to 7 percent).

<sup>151</sup>Sheila Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 HOUS. L. REV. 1469, 1476 (2005); see also Ann Hodges, *The Limits of Multiple Rights and Remedies: A Call for Revisiting the Law of the Workplace*, 22 HOFSTRA LAB. & EMP. L. J. 601, 616 (2005) (much modern discrimination results from workplace structures and policies, rather than intentional, conscious discrimination).

because of her childcare responsibilities, but assume that a man with children who arrived late was there because he was caught in traffic.<sup>152</sup> This is convincing, but consider how a just cause system would change this scenario. The employer would have to articulate and prove legitimate reasons for taking an adverse action such as discharge, and inaccurate assumptions based on stereotypes could be exposed.

Other critiques of Title VII law abound. Foster argues that the framework that slots Title VII claims into either intentional or disparate impact discrimination categories obscures the true issues.<sup>153</sup> Michael Selmi cites false perceptions that discrimination cases are too easy to win and that courts perceive Title VII claims as “generally unmeritorious, brought by whining plaintiffs.”<sup>154</sup> Anne McGinley shows that the EEOC is flooded with charges of discrimination that it cannot adequately investigate.<sup>155</sup>

As with labor law, Title VII scholars point to some key cases that seemed to undermine the rights the statute was designed to ensure.<sup>156</sup> The Supreme Court’s decision in Wards Cove v.

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<sup>152</sup>Joan Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the “Cluelessness” Defense*, 7 EMPLOYEE RTS. & EMPLOYMENT POL’Y J. 401, 433-34 (2003).

<sup>153</sup>Foster, *Causation in Antidiscrimination Law*, at 1471.

<sup>154</sup>Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, at 556.

<sup>155</sup>McGinley, *Rethinking Civil Rights and Employment at Will*, at 1450. Between fiscal years 1970 and 1989, there was an increase of 2,166 percent in employment discrimination cases, as compared with an increase of 125 percent for the general civil caseload. *Id.*, at 1485. This problem continues. In fiscal year 2003, the EEOC received 81,293 charges from private sector employees and filed or participated in 393 lawsuits. Hodges, *The Limits of Multiple Rights and Remedies*, at 609-10 (2005).

<sup>156</sup>Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, at 555, asks: “Why is it that courts continually impose roadblocks for employment discrimination plaintiffs that do not exist for other civil plaintiffs?”

Atonio<sup>157</sup> was so anti-plaintiff that Congress passed the 1991 Civil Rights Act<sup>158</sup> to overturn it.<sup>159</sup> Among other things, Wards Cove made it more difficult for plaintiffs to establish a relevant labor market pool for comparison with an employer's workforce;<sup>160</sup> required plaintiffs to identify with great specificity which employer practice caused discrimination, even where the employer used multiple practices that might have had a discriminatory effect and the impact of any particular practice was difficult to isolate;<sup>161</sup> and lessened the employer's burden to defend a practice with a discriminatory effect from something like "business necessity" to something more like "job related."<sup>162</sup> Beyond that, the 1991 Act "overturned or otherwise modified twelve Supreme Court decisions that limited or severely curtailed civil rights law."<sup>163</sup>

Much criticism focuses on the procedural burden-shifting rules of "McDonnell Douglas" cases, suits alleging intentional ("disparate treatment") discrimination against an individual.<sup>164</sup>

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<sup>157</sup>490 U.S. 642 (1989) .

<sup>158</sup>42 U.S.C. §1981a and scattered sections of Title VII (2005).

<sup>159</sup>Section 2(b) of the Findings to the 1991 Act states "The decision of the Supreme Court in Wards Cove Packing Co. v. Atonio has weakened the scope and effectiveness of Federal civil rights protection." Pub. L. No. 102-166, 105 Stat. 1071 (1991).

<sup>160</sup>490 U.S. 642, 650-55.

<sup>161</sup>490 U.S. at 657.

<sup>162</sup>490 642 at 659.

<sup>163</sup>Robert Belton, *Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact Theory of Discrimination*, HOFSTRA LAB. & EMP. L. J. 431, 467 (2005).

<sup>164</sup>First, plaintiff must make out a *prima facie* case, showing: (i) plaintiff belongs to a Title VII-protected group; (ii) plaintiff applied and was qualified for a job for which the employer was seeking applicants; (iii) despite plaintiff's qualifications, the employer rejected plaintiff; and (iv) after the rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications. If plaintiff shows this, then, second, defendant has the

The rules McDonnell Douglas and its progeny created do seem unhelpful, unnecessarily complex, and arguably biased against plaintiffs. The criticism has ranged from a sophisticated argument that the McDonnell Douglas *prima facie* case is too insubstantial to support a presumption of discrimination in the first place<sup>165</sup> to the highly quotable line that “the McDonnell Douglas framework contributes about as much to the proper outcome of a discrimination case as the Star Spangled Banner contributes to the proper outcome of a baseball game.”<sup>166</sup>

The problems of McDonnell Douglas were magnified, or perhaps revealed, by St. Mary’s Honor Center v. Hicks.<sup>167</sup> In Hicks, the Supreme Court held that a plaintiff in a Title VII case could still lose on summary judgment even though he made out a *prima facie* case and proved that the employer’s proffered “legitimate, non-discriminatory reason” was pretext, *i.e.*, not the real reason for the employer’s act.<sup>168</sup> The fact-finder could find that the employer acted out of a non-discriminatory motive *other than* the reason the employer articulated. Shocking many commentators, Hicks held that fact finders could find a reason to be the “real” motivation for a challenged act even though the employer in Hicks not only failed to articulate this reason, but

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burden of production to articulate a “legitimate, non-discriminatory reason” for the employment action being challenged as discriminatory. Then, third, plaintiff has the burden of persuasion to show that defendant’s reason was pretext. McDonnell Douglas v. Green, 441 U.S. 792 (1973).

<sup>165</sup>Malamud, *The Last Minuet*, at 236-37.

<sup>166</sup>Stephen Smith, *Title VII’s National Anthem: Is There a Prima Facie Case for the Prima Facie Case?* 12 Lab. Law. 371, 372 (1996). For this and other sources, see William Corbett, *An Allegory of the Cave and the Desert Palace*, 41 Hous. L. Rev. 1549, 1558-59, n. 58 (2005).

<sup>167</sup>509 U.S. 502 (1993).

<sup>168</sup>509 U.S. 502, 508 (petitioner had shown the employer’s proffered legitimate non-discriminatory motive to be false).

also *denied* the reason was even true.<sup>169</sup> The Court stressed that the burden of persuasion always remained with plaintiff, concluding that, “Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action.”<sup>170</sup>

This decision prompted a hailstorm of academic criticism,<sup>171</sup> and a few authors did discuss the difficulty of reconciling at-will and Title VII rules.<sup>172</sup> But the more common response was that Hicks should be reversed, or that the entire the McDonnell Douglas process should be abandoned or substantially revised.<sup>173</sup>

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<sup>169</sup>In Hicks, the employer’s proffered reason was that plaintiff had committed certain specified bad acts; it denied that personal dislike was the motivating reason for plaintiff’s discharge and further denied that personal dislike existed. The Court found that plaintiff had proved that the proffered reason was pretext, but it essentially also found that the real reason was in fact personal dislike. 509 U.S. at 542-543 (Souter, J., dissenting).

<sup>170</sup>509 U.S. at 523.

<sup>171</sup>“Hicks dramatically limited the usefulness of the McDonnell Douglas process.” Zimmer, *The New Discrimination Law*, at 1900. See also *id.*, at 1899, n. 4, citing, e.g. Mark Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary’s Honor Center v. Hicks, Pretext, and the ‘Personality’ Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 209-10, 239 (1997) (liability should be decided on the evidence, not the “conjecture of the factfinder”; Hicks is “a veritable guide for avoiding liability”); Henry Chambers Jr., *Discrimination, Plain and Simple*, 36 TULSA L.J. 557, 573 (2001) (proving the employer’s proffered reasons are not credible is difficult; it should be treated as powerful evidence of discrimination and should always be sufficient to avoid a directed verdict). For earlier articles attacking Hicks, see Malamud, *The Last Minuet* at 2235, n. 28.

<sup>172</sup>McGinley, *Rethinking Civil Rights and Employment at Will* is the strongest in identifying at-will as the underlying problem. Donna Young, *Racial Releases, Involuntary Separations, and Employment At-Will*, 34 LOY. L.A. L. REV. 351, 355 (2001) notes “fundamental problems with the at-will doctrine’s foundation in a theory of formal equality and its collaborative role in the subordination of women and people of color” and offers an “alternative to at-will employment requiring employers to provide notice of dismissal or pay in lieu of notice”. Chad Derum and Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177, 1182 (2002) notes that “the employment at will critique has not, for the most part, been used to confront Hicks and its progeny.” *Id.*, at 1191.

<sup>173</sup>See sources in note 171, *infra*, e.g., Malamud, *The Last Minuet*, at 2311-22.

Lower courts initially made the effects of Hicks even worse. After Hicks, some Federal Circuits required “pretext plus” — meaning that to avoid losing on summary judgment, plaintiffs *always* had to show *more* than just a *prima facie* case and that the defendant’s proffered reason was pretext.<sup>174</sup> The Supreme Court then held in Reeves v. Sanderson Plumbing Products that a *prima facie* case and proof of pretext “*may permit*” a finding of discrimination.<sup>175</sup> But plaintiffs can still lose on summary judgment even after proving both *prima facie* case and pretext. Reeves reined in an extreme anti-plaintiff reading of Hicks, but the problem Hicks exemplifies still exists.

This problem would not exist if the rule that swallows the exception were removed. McGinley explains how Hicks itself would have come out under a just cause regime. The employer would have had the burden to show a valid reason. It would have articulated its defense that plaintiff was fired because he violated certain rules (the non-discriminatory reason articulated in Hicks). But, when plaintiff showed that reason to be false, under a just cause regime, plaintiff would have won. This seems like the more just result: it seems fair that a party loses if it lies in litigation about its act that harmed another party; and, as McGinley notes, the employer has access to the information concerning plaintiff’s discharge.<sup>176</sup> Further, we can see in another area of law that, where the issue is an actor’s motivation, it is fairer and more reasonable to put the burden on the actor to prove what his state of mind was, rather than to require another party, with much less information about the actor, to try to do the same.

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<sup>174</sup>See Zimmer, *The New Discrimination Law*, 1904.

<sup>175</sup>530 U.S. at 135 (emphasis supplied).

<sup>176</sup>McGinley, *Rethinking Civil Rights and Employment at Will*, at 1463.

## B. Lessons From Batson and the Law of Preemptive Juror Strikes

The problem that at-will rules create in Title VII law is highlighted by an analogous area of law: peremptory challenges to prospective jurors made on the basis of race. Such challenges violate the Equal Protection Clause of the Fourteenth Amendment,<sup>177</sup> but, similar to at-will rules, peremptory challenges made for any of a whole host of other reasons, including poor or silly ones, are legal.<sup>178</sup> Experience with peremptory challenges shows that a regime that permits actions based on any motivation except a specified few is difficult to administer. Here too, discrimination law is crippled by a *laissez-faire* ground norm. Some recent proposals to amend rules for peremptory challenges acknowledge that the problem is this background analog of the at-will rule, and that, therefore, challenges should be permitted only for cause. Employment discrimination scholars should pay more heed to this area of law.

### 1. Batson and McDonnell Douglas

In Batson v. Kentucky, the Supreme Court set out a method of proof for cases claiming discrimination in peremptory challenges, a structure identical to the McDonnell Douglas line of Title VII cases.<sup>179</sup> First, the criminal defendant must make a *prima facie* showing that the

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<sup>177</sup>Batson v. Kentucky, 476 U.S. 79 (1986).

<sup>178</sup>Quin Sorenson, *Backdooring Batson: The Improper Use of Racial Memory and Other 'Peculiar' Characteristics in Juror Challenges*, 35 COLUM. HUM. RTS. L. REV. 71 (2003); Samuel Gross, *Race, Peremptories, and Capital Jury Deliberations*, 3 U. PA. J. CONST. L. 283 (2001).

<sup>179</sup>*See* Johnson v. California, 545 U.S. 162, 125 S. Ct. 2410, 2418, n. 7 (2005) (Batson process “comports with our interpretation of the burden-shifting framework in cases arising under Title VII”), *citing, e.g.*, McDonnell Douglas and Hicks. For examples of the Supreme Court using Title VII precedent in Batson cases, *see* Antony Page, *Batson’s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 167 & n. 58 (2005).

prosecutor used peremptory challenges to exclude potential jurors because of their race; the facts must create an inference of discriminatory purpose. Second, if such a showing is made, the burden shifts to the State to offer a non-discriminatory reason for the exclusion.<sup>180</sup> Analogous to McDonnell Douglas, “even if the State produces only a frivolous or utterly nonsensical justification for its strike, the case does not end – it merely proceeds to step three.”<sup>181</sup> Third, the criminal defendant has the opportunity to try to show that the State’s explanation was merely “pretext.” And even if defendant does so, the trial court must decide whether defendant established “purposeful discrimination.”<sup>182</sup> As with McDonnell Douglas, the burden of persuasion always rests with the party asserting discrimination.<sup>183</sup>

Notably, the underlying “rule” in Batson cases is precisely analogous to the underlying rule of employment at-will in Title VII cases. Employment discrimination law must co-exist with an overarching legal rule permitting the employer to discharge for almost any reason. Batson’s Constitutional protections must co-exist with a similar overarching rule, what Samuel Gross calls, “the unreviewable discretion that was understood to be the essence of the right to exercise peremptory challenges.”<sup>184</sup>

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<sup>180</sup>Johnson v. California, 125 S.Ct. 2410, 2416.

<sup>181</sup>Johnson v. California, 125 S.Ct. at 2417, *citing* Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam).

<sup>182</sup>*Id.*; Batson, at 96-97; Sorenson, *Backdooring Batson*, at 78-79.

<sup>183</sup>Johnson v. California, 125 S.Ct. at 2417; Sorenson, *Backdooring Batson*, 94.

<sup>184</sup>Gross, *Race, Peremptories, and Capital Jury Deliberations*, at 290.

## 2. Batson: an Exception Swallowed by a Similar Rule

This general rule of party discretion in peremptory challenges has largely swallowed the Batson exception, just as employment at-will has swallowed anti-discrimination law. Batson has “engendered an enormous amount of often virulent criticism,”<sup>185</sup> Antony Page notes, adding that the Batson “framework is woefully ill-suited” to address race discrimination.<sup>186</sup> Daniel Hinkle concludes that “most commentators and practicing lawyers” believe that Batson is “ineffective” even at stopping challenges based only and unambiguously on race.<sup>187</sup> David Cole agrees that Batson is “generally ineffective at stopping even blatant racists.”<sup>188</sup> Samuel Gross provides evidence that “Batson is not much of a check” on race discrimination in peremptory challenges.<sup>189</sup> Lonnie Brown, Jr., argues that Batson’s burden shifting process actually makes judges *more* willing to accept the state’s race-neutral explanations, “no matter how suspect.”<sup>190</sup> Similarly, Quin Sorenson complains when the state offers its nondiscriminatory reason for the challenge, “courts defer to any explanation, regardless of how unreasonable or implausible.”<sup>191</sup>

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<sup>185</sup>Page, *Batson’s Blind Spot* at 178 & n. 102, citing numerous critiques.

<sup>186</sup>Page, *Batson’s Blind-Spot*, at 156 (2005).

<sup>187</sup>Daniel Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?* 9 BUFF. CRIM. L.R. 139, 1999 (2005).

<sup>188</sup>David Cole, *NO EQUAL JUSTICE* (1999), at 120.

<sup>189</sup>Gross, *Race, Peremptories, and Capital Jury Deliberations*, at 288-89.

<sup>190</sup>Lonnie Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 214 (2003).

<sup>191</sup>Sorenson, *Backdooring Batson*, at 71. See also Gross, *Race, Peremptories, and Capital Jury Deliberations*, at 290 (“judges may accept such justifications even if they are implausible”).

Recently, in Miller-El v. Dretke, the Supreme Court acknowledged that in *Batson* cases, “the rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences.”<sup>192</sup> This actually understates the problem, because to defeat a Batson claim, it is not necessary to show that a motivation for a strike is in any substantive or normative sense “legitimate.” The claim loses if the fact-finder believes that the motivation for the strike was motivated by any reason besides prohibited discrimination, even a frivolous or nonsensical reason.

In a concurring opinion in Miller-El, Justice Breyer detailed the “practical problems of proof” in *Batson* cases, and – most significantly here – he arguably endorsed a suggestion that the problem could only be solved by requiring that all strikes be done “for cause.” That thesis is exactly analogous to the argument herein that Title VII rights are fatally undermined by the absence of just cause discharge rules.

Indeed, Justice Breyer’s concerns could have been taken from any of a number of critiques of employment discrimination law, if the word “employer” was substituted for “prosecutor.”<sup>193</sup> Most significantly here, he noted that Batson asks fact finders to “engage in the awkward, sometimes hopeless, task of second-guessing a prosecutor’s instinctive judgment – the underlying basis for which may be invisible even to the prosecutor exercising the challenge.”<sup>194</sup> As with Title VII law, this problem would not exist if the actor accused of racial discrimination were required to prove a legitimate, defensible reason for the act.

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<sup>192</sup>Miller-El v. Dretke, 545 U.S. 231, 125 S.Ct. 2317, 2324 (2005).

<sup>193</sup>See 125 S.Ct. 2317, 2341 (Breyer, concurring), *citing* Page, *Batson’s Blind-Spot*, at 161 (discussing “unconscious and unintentional” discrimination).

<sup>194</sup>125 S.Ct. at 2341 (Breyer, concurring).

Breyer explored the weakness of Batson rules, citing at length studies and articles “suggesting that, despite Batson, the discriminatory use of peremptory challenges remains a problem.”<sup>195</sup> The “use of race- and gender-based stereotypes in the jury selection process seems better organized and more systematized than ever before.”<sup>196</sup> The case at bar illustrated the inability of the rule to accomplish its goal: defendant Miller-El had “marshaled extensive evidence of racial bias,” yet his “challenge has resulted in 17 years of largely unsuccessful and

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<sup>195</sup>125 S.Ct. at 2341-42, (Breyer, concurring), *citing* David Baldus, George Woodworth, David Zuckerman, Neil Weiner, & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 52-53, 73, n. 197 (2001) (in 317 capital trials in Philadelphia between 1981 and 1997, prosecutors struck 51 percent of black jurors and 26 percent of nonblack jurors; race-based uses of prosecutorial peremptories declined by only 2 percent after *Batson*); Mary Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 LAW & HUMAN BEHAVIOR 695, 698-699 (1999) (in one North Carolina county, 71 percent of excused black jurors were removed by the prosecution); Neely Tucker, “In Moore’s Trials, Excluded Jurors Fit Racial Pattern,” *Washington Post*, Apr. 2, 2001, p. A1 (in a D.C. murder case, prosecutors excused forty-one blacks or other minorities and only six whites); Gregory Mize, “A Legal Discrimination: Juries Are Not Supposed to be Picked on the Basis of Race and Sex, But It Happens All the Time,” *Washington Post*, Oct. 8, 2000, p. B8 (authored by a judge on the D.C. Superior Court); Kevin Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L.REV. 447, 462- 464 (1996) (Batson challenge success rates are lower where peremptories were used to strike black, rather than white, potential jurors); Jeffrey Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L.REV. 511, 583-589 (few Batson challenges succeed); Note, *Batson v. Kentucky and J.E.B. v. Alabama ex rel. T.B.: Is the Peremptory Challenge Still Preeminent?*, 36 B.C. L. REV. 161, 189, and n. 303 (1994) (same); Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the “Blind” Peremptory Challenge*, 29 U. MICH. J.L. REFORM 981, 1006, nn. 126-127, 1035 (1996) (attorneys’ views on the difficulty of proving *Batson* claims).

<sup>196</sup>125 S.Ct. at 2342 (Breyer concurring), *citing* Leonard Post, *A Loaded Box of Stereotypes: Despite ‘Batson,’ Race, Gender Play Big Roles in Jury Selection*, NAT. L.J. (Apr. 25, 2005), at 1, 18.

protracted litigation – including 8 different judicial proceedings . . . involving 23 judges, of whom 6 found the Batson standard violated and 16 to the contrary.”<sup>197</sup>

Most significantly here, Justice Breyer ultimately suggested that the solution to this problem would be to require an articulated and truly legitimate “cause” for striking jurors. He wrote that “a jury system without peremptories is no longer unthinkable,”<sup>198</sup> and quoted approvingly from an article written by Justice Stevens that argued, “citizens should not be denied the opportunity to serve as jurors unless an impartial judge states a reason for the denial, as with a strike for cause.”<sup>199</sup> For all these reasons as well, employment should not be terminated except for cause. Otherwise, the rule swallows the exception.

### C. Removing the Rule Would Strengthen the Exception

The state of Title VII law is so bad that Ann McGinley has called for just cause discharge to *replace*, not merely supplement anti-discrimination law.<sup>200</sup> But it is not necessary or desirable to go this far. First, anti-discrimination law can work well in combination with just cause protections (union members, for example, can bring discrimination claims under both federal law and just cause contract provisions).<sup>201</sup> Anti-discrimination laws can add extra damages (punitive

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<sup>197</sup>125 S.Ct. 2317, 2340 (Breyer, concurring).

<sup>198</sup>125 S.Ct. at 2343, collecting judicial opinions and articles arguing for the abolition of peremptory challenges.

<sup>199</sup>125 S.Ct. at 2344, *citing* Justice John Paul Stevens, *Foreword, Symposium: The Jury at a Crossroad: The American Experience*, 78 CHI.-KENT L.REV. 907, 907-908 (2003).

<sup>200</sup>“Given the failure of antidiscrimination law to protect against unlawful discharge, Congress should create a consistent national employment discharge policy. This policy would replace the current patchwork of civil rights laws regulating the workplace.” McGinley, *Rethinking Civil Rights and Employment at Will*, 1147.

<sup>201</sup>*Alexander v. Gardner-Denver*, 423 U.S. 1058 (1976).

and emotional distress damages are available in disparate treatment cases but not under most general just cause regimes). This underscores, for example, that combating racism in employment is an especially important goal and that racist acts can often cause more psychic harm than a discharge for trivial reasons. Such acts are a reminder that some members of society have long been and still are vulnerable to harms in many significant aspects of their lives simply because of being born into a certain group. It is also worth underscoring by statute that certain types of “reasons” are not “just cause.” Finally, it would also be odd to have discharge entirely carved out of anti-discrimination law, while anti-discrimination law would still be necessary to cover a wide range of other employment-related acts (hiring, discipline, harassment, etc.).<sup>202</sup>

Also, a just cause rule would likely reduce the number of weak discrimination claims. Given that the majority of American workers are at-will employees, if they are fired, in their minds unjustly, what advice is a lawyer likely to give them about their legal options? The current regime makes it more probable that workers will, as Cynthia Estlund puts it, “see and claim discrimination when there is simply garden variety unfairness.”<sup>203</sup> This is not to say that the shockingly low success rates of Title VII plaintiffs are due significantly to weak claims. After all, plaintiffs’ lawyers in employment discrimination cases are still business people, often working on a contingency-fee basis.<sup>204</sup> But a general just cause standard would redirect some time- and resource-wasting Title VII cases into a more appropriate legal framework.

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<sup>202</sup>McGinley, *Rethinking Civil Rights and Employment at Will*, at 1523, argues that removing discharge cases from Title VII coverage would free up EEOC resources to prosecute other cases.

<sup>203</sup>Estlund, *Wrongful Discharge Protections*, at 1680.

<sup>204</sup>See Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, at 569-71.

#### IV. Balancing the Rule and the Exceptions: the Weight of the Rule

Assuming that the at-will rule necessarily and fundamentally interferes with the successful enforcement of the NLRA and Title VII, what should be done? First, as argued above, we should understand this effect when analyzing or proposing changes to Title VII and the NLRA. Second, we should take this effect into account when debating the future of the at-will rule. In this regard, if a rule vitiates exceptions, the next step should be to weigh the value of the rule versus the value of the exceptions.

At-will doctrine is often seen as crucial in U.S. employment law. But there is a strong argument for jettisoning a rule that swallows exceptions where, as here: (a) the rule has become so riddled with other exceptions so small yet vague as to make the rule less workable on its own terms for employers as well as employees; (b) the rule has already been rejected by large parts of the economy, by one state, and by most other comparable nations, with no obvious disastrous effects; and (c) the exceptions the rule is swallowing express vitally important societal interests.

##### A. The Surprisingly Contentious Early History of Employment At-Will

On one hand, at-will employment law seems to be a permanent fixture in U.S. law: deeply rooted and stubbornly persisting while other nations abandon it.<sup>205</sup> At-will has been the default rule in the U.S. for over a century, with no serious attempt to abandon the entire rule on a national basis. Yet employment at-will was not a fixture of American life from the start: it did not emerge as the general rule until a century of U.S. history had passed. Further, there were

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<sup>205</sup> See, e.g. Scott Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment At Will*, U. PA. L. REV. 295, 299-300 (2006), quoting *Bammert v. Don's Super Valu*, 646 N.W.2d 365, at 370-71 (employment at-will is "central to the free market economy").

challenges to it almost from the beginning, through statutes creating, or attempting to create, significant exceptions.

Employment at-will emerged in the U.S. in the late nineteenth century. At least through the Civil War, the U.S. used variants of English master-servant law: hiring generally was presumed to be for a year and terminable on three months notice. Penalties for workers who quit early could be significant: jail in early times; later, forfeiture of all pay, including that for work completed. But the old rule did seem to promise that employees could not be discharged without cause during the presumed term.<sup>206</sup> In 1877, Horace Wood published a treatise asserting that employment “at-will” was the “American rule.” Despite significant evidence that this was not, in fact, the doctrine American courts had been using,<sup>207</sup> courts in a significant number of states quickly embraced it.<sup>208</sup>

Almost immediately, legislatures tried to create exceptions to the at-will rule. In the late nineteenth century, unions, progressives, and their allies helped pass hundreds of laws regulating the workplace, scores limiting the at-will rule. Courts held many such laws unconstitutional in

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<sup>206</sup>Robert Steinfeld, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY (2001), 253-314; Christopher Tomlins, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (1993), at 259-92.

<sup>207</sup>Matheny and Crain, *Disloyal Workers*, at 1710 (Wood’s claim “had virtually no support in the law”). This is the overwhelming majority view, *see, e.g.*, Sprang, *Beware the Toothless Tiger*, 860-61; Jay Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976). *But see* Mayer Freed and Daniel Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551 (1990) (arguing the at-will rule had some support in cases prior to Wood’s treatise, but admitting this claim is contrary to the conventional understanding).

<sup>208</sup>Steinfeld, COERCION, CONTRACT, AND FREE LABOR, at 10.

what is generically known as the “Lochner” era.<sup>209</sup> William Forbath estimates that sixty such laws were invalidated by 1900,<sup>210</sup> and further that from the 1880s to 1922, roughly 300 separate laws regulating labor and employment were held unconstitutional.<sup>211</sup> Two Supreme Court cases held that laws prohibiting employers from discharging employees because of their union membership were unconstitutional. But these were only part of a broad wave of laws attempting to limit at-will rules in this and other ways.<sup>212</sup>

Although they did not survive judicial scrutiny, the fact that these laws were enacted is evidence of widespread popular and legislative support for some exceptions to the at-will rule quite soon after it was adopted. In the 1890s, Illinois, Ohio, Pennsylvania, and Missouri all enacted statutes making union membership an illegal grounds for discharge. The Illinois Supreme Court struck its state law down in 1900, and other state courts did likewise.<sup>213</sup>

Attempts to carve out exceptions to at-will rules by providing various protections at work continued. In the late nineteenth century, many states passed laws limiting hours of work (under

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<sup>209</sup>*Lochner v. New York*, 198 U.S. 45 (1905).

<sup>210</sup>William Forbath, “Law and the Shaping of Labor Politics in the United States and England,” in Christopher Tomlins and Andrew King, eds., *LABOR LAW IN AMERICA* (1992), at 211. For lists of cases invalidating labor and employment laws in the “Lochner” era, see William Forbath, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991), at 177-92, 199-303.

<sup>211</sup>Forbath, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT*, 187.

<sup>212</sup>*Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States* 208 U.S. 161 (1908). For additional cases on statutes limiting the right to discharge for union membership, see Forbath, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT*, at 199-200, listing cases from California, Nevada, Colorado, Ohio, Oklahoma, Minnesota, New York, Kansas, and Wisconsin.

<sup>213</sup>Forbath, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT*, at 177 (collecting case, e.g., *Gillespie v. People*, 188 Ill. 176, 58 N.E. 1007 (1900)).

such laws, employers could not discharge employees for refusing to work over the limit).<sup>214</sup> In the first two decades of the twentieth century, courts invalidated hours laws in California, Alaska, Oregon, Massachusetts, Utah, Louisiana, Washington, Missouri, and Wisconsin.<sup>215</sup> Again, these laws demonstrated a popular sentiment that employment should not be entirely at-will.

Soon thereafter, laws that prohibited discharge on various grounds became well-established. The Railway Labor Act of 1926 prohibited covered employers (mostly railroads) from discharging employees because of union affiliation.<sup>216</sup> The Norris-LaGuardia Act of 1932 generally made “yellow dog” contracts (agreements requiring that employees not be union members, on pain of discharge) unenforceable.<sup>217</sup> A few years later, the NLRA made it illegal to discharge employees for supporting a union. Also, during the New Deal, the Fair Labor Standards Act, generally governing wages and hours, included a provision that would be common among later employment laws: an anti-retaliation section barring covered employers from firing employees because of the employee’s attempts to enforce rights under the law.<sup>218</sup>

Of course, these laws did not intend to eliminate the general rule of employment at-will. But from the very inception of employment-at-will, legislatures all across the country repeatedly

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<sup>214</sup>See Forbath, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT, at 180-82 (collecting cases from over a dozen states that either uphold or struck down such laws).

<sup>215</sup>Forbath, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT, at 190-91.

<sup>216</sup>Railway Labor Act, 45 U.S.C. §§ 151-63, 181-88, 44 Stat. 577 (1926). Section 152 provides that no covered employer shall “deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of its choice.

<sup>217</sup>Norris-LaGuardia Act, 29 U.S.C. §§101-15, 47 Stat. 70 (1932) as amended, §103.

<sup>218</sup>FLSA §215(a)(2). For anti-retaliation provisions in modern laws, see section IV-B, *supra*.

enacted exceptions to it. This reflects a long-standing, widespread unease with employment at-will in its full, undiluted form.

#### B. The Decreased Utility of the Modern Rule

Ironically, despite its debilitating effect on the NLRA and Title VII, the employment at-will rule today is weakened and unclear. It is increasingly subject to common law exceptions that are numerous, vague, and yet very narrow.<sup>219</sup> This simultaneously makes employment less reliably within the sole discretion of the employer while providing employees with few predictable or even easily understood rights. This makes the rule less valuable to both sides.

One set of exceptions comes from common law tort and contract doctrines. Since the 1970s, forty to forty-five states have adopted some such modifications to the at-will rule. From the late 1970s to the late 1980s, the number of states incorporating the tort of wrongful discharge more than tripled and judicial adoption of the implied contract exception (employment contracts based, for example, on employee handbooks) quadrupled from fewer than ten states to nearly forty.<sup>220</sup> By the early 1990s, employees were filing approximately 10,000 wrongful discharge suits annually in state courts.<sup>221</sup>

While numerous, these exceptions are narrow and unpredictable, disadvantaging employers and employees. The most common exception, the tort of wrongful discharge in violation of public policy,<sup>222</sup> now covers, in various ways in different jurisdictions, discharges

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<sup>219</sup>At-will doctrine “has become mired in incoherence.” Moss, *Where There’s At Will*, at 295.

<sup>220</sup>Bird, *Rethinking Wrongful Discharge*, at 521-22.

<sup>221</sup>McGinley, *Rethinking Civil Rights and Employment at Will*, at 1491.

<sup>222</sup>See Wheeler, Klaas & Mahony, *WORKPLACE JUSTICE WITHOUT UNIONS*, at 19.

motivated by the employee's exercise of a work-related right (e.g., filing a workers' compensation claim), refusal to violate laws at work (e.g., health and safety rules), reporting illegal activity by the company (whistle-blowing), or protecting public safety.<sup>223</sup> Courts are "wildly inconsistent" in what is protected,<sup>224</sup> making distinctions that would, at minimum, be difficult for a non-expert party to predict in advance. For example, in cases involving discharge for revealing an employer's illegal acts, some courts protect employees who report the act to a public agency, but not employees who report the act internally within the company.<sup>225</sup>

Courts now find implied contracts based on language in employee handbooks, employer rules, and in oral statements. Courts have also used promissory estoppel rules in cases involving oral statements and patterns of behavior. A few courts have even found an obligation of good faith and fair dealing in at-will employment contracts,<sup>226</sup> albeit in especially unclear decisions.<sup>227</sup> But contract exceptions generally are often confusing.<sup>228</sup>

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<sup>223</sup>See, e.g. Sprang, *Beware the Toothless Tiger*, 866-67; J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 355 (1995) (decrying "agonizing judicial searches for 'proper' sources of public policy"); Cynthia Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1661 (1996).

<sup>224</sup>Sprang, *Beware the Toothless Tiger*, at 867-68; Christopher Pennington, *The Public Policy Exception to the Employment-at-Will Doctrine: Its Inconsistencies in Application*, 68 TUL. L. REV. 1583 (1994).

<sup>225</sup>See, e.g., *Fox v. MCI Communications*, 931 P.2d 857 (Utah 1997) (reporting fraud to employer not protected, but informing the police would be).

<sup>226</sup>Corbett, *Waiting for the Labor Law of the Twenty-First Century*, at 271-72; Wheeler, Klaas & Mahony, *WORKPLACE JUSTICE WITHOUT UNIONS* at 19; Sprang, *Beware the Toothless Tiger*, 869-71.

<sup>227</sup>Parker, *At-Will Employment and the Common Law*, at 362-70.

<sup>228</sup>Parker, *At-Will Employment and the Common Law*, at 354

Thus, many claim that the at-will rule is “riddled with so many exceptions that it cannot be relied upon.”<sup>229</sup> Again, one gets the gist from reading the titles of law review articles: “At-Will Employment: Going, Going . . .,” and “Employment-at-Will: The Impending Death of a Doctrine,” for example.<sup>230</sup> Also, a continuing stream of law review articles documents erosions of at-will rules in particular states.<sup>231</sup>

Such fears are partly overblown,<sup>232</sup> but perhaps the best description of the at-will rule today is that it embodies the worst of both worlds, with exceptions so numerous and unclear as to frustrate employers but too small and narrow to protect employees in the vast majority of circumstances. Many of the states recognizing the public policy exception have defined public policy very narrowly, such that only a “handful of employees” can use the tort of wrongful discharge.<sup>233</sup> The doctrine that employee manuals can become enforceable contracts is also

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<sup>229</sup>Corbett, *Waiting for the Labor Law of the Twenty-First Century*, at 261-62 and n. 7, quoting Deborah Ballam, *Employment-At-Will, the Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 657 (2000); Wheeler Klaas, and Mahony, *WORKPLACE JUSTICE WITHOUT UNIONS*, at 2 (management attorneys claim that the at-will rule is “gone entirely.”)

<sup>230</sup>Cheryl Massingale, *At-Will Employment: Going, Going . . .*, 24 U. RICH. L. REV. 187 (1990); Ballam, *Employment-at-Will: the Impending Death of a Doctrine*.

<sup>231</sup>*See, e.g.*, Amy Carlson, *States are Eroding At-Will Employment Doctrines: Will Pennsylvania Join the Crowd?* 42 DUQ. L. REV. 511 (2004); Jason Lemons, *For Any Reason or No Reason at All: Reconciling Employment-at-Will with the Rights of Texas Workers*, 35 ST. MARY’S L.J. 741 (2004); Susan Dana, *South Dakota Employment at Will Doctrine: Twenty Years of Judicial Erosion*, 49 S.D. L. REV. 47 (2003)

<sup>232</sup>*See, e.g.*, Lauren Edelman, Steven Abraham, and Howard Erlanger, *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC’Y REV. 47 (1992).

<sup>233</sup>Sprang, *Beware the Toothless Tiger*, 868.

“extremely limited” and can easily be avoided by explicit disclaimers in the handbook.<sup>234</sup> The few courts that have recognized the implied covenant of good faith and fair dealing use it “very conservatively.”<sup>235</sup> Further, these common law theories vary dramatically from state to state.<sup>236</sup> Different states use the same rationales to adopt and reject opposite sets of rules.<sup>237</sup>

Statutory exceptions to at-will further undercut the utility of the rule. At the federal level, beyond Title VII and the NLRA, the Americans With Disabilities Act<sup>238</sup> and the Age Discrimination in Employment Act bar discharge for specific reasons.<sup>239</sup> A host of other employment laws bar “retaliation” (including discharge) against employees for attempting to enforce their rights under those laws: for example, the FLSA, mentioned above; the Occupational Health and Safety Act;<sup>240</sup> and the Family and Medical Leave Act.<sup>241</sup>

Further, state statutes limiting grounds for discharge continue to proliferate. Most, if not all, state workers’ compensation and unemployment compensation laws contain anti-retaliation

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<sup>234</sup>McGinley, *Rethinking Civil Rights and Employment at Will*, 1495.

<sup>235</sup>*Id.*, at 1494.

<sup>236</sup>Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 333 (2005).

<sup>237</sup>Moss, *Where There’s At Will*, at 301. *See id.* at 304-326, detailing approaches by Wisconsin and New York that adopt the opposite types of exceptions to employment at-will.

<sup>238</sup>42 U.S.C. §1201 *et seq.* (2005).

<sup>239</sup>29 U.S.C. § 621, *et seq.*

<sup>240</sup>29 U.S.C. § 651-678; 29 U.S.C. § 660(c) prohibits retaliation.

<sup>241</sup>29 U.S.C. 2601-2617, 2651 & 2652. 29 U.S.C. §2615(a) prohibits retaliation.

rules.<sup>242</sup> Seventeen states and many local governments bar discrimination, including discharge, on the basis of sexual orientation.<sup>243</sup> Some state laws go even further beyond federal law. In the 1990s, eight states enacted “lifestyle discrimination statutes,” which bar employers from discriminating against employees for using “lawful products” or engaging in “lawful activities.” Although few cases have been decided under such statutes thus far, they potentially cut a wide swath out of employment at-will.<sup>244</sup>

### C. Practical and Moral Considerations

Again, this system has become the worst of both worlds. Employers cannot feel secure that they can fire at will, employees in most cases are not protected from arbitrary discharge, and neither side is confident as to what the law is. Clyde Summers warned that such a system would “hold out promises to the employee, harass and impoverish the employer, enrich the lawyers, and

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<sup>242</sup>See Mark Rothstein, Charles Craver, Elinor Schroeder, and Elaine Shoben, EMPLOYMENT LAW (3<sup>rd</sup> ed.2005), at 799.

<sup>243</sup>Seventeen states bar employment discrimination on the basis of sexual orientation in the private and public sectors; six more bar it for public employees only. See <http://www.lambdalegal.org/cgi-bin/iowa/states/antidiscrimi-map>. Including similar laws passed by cities (at least 140), such laws cover “more than forty percent of the country’s population and jobs.” Stephen Clark, *Progressive Federalism: A Gay Liberationist Perspective*, 66 ALB. L. REV. 719, 720-22 & nn.7-9 (2003)

<sup>244</sup>Robert Howie and Laurence Shapero, *Lifestyle Discrimination Statutes: A Dangerous Erosion of At-Will Employment, a Passing Fad, or Both?*, 31 EMPLOYEE RELATIONS L. J. 21, 21-22 (2005); Stephen Sugarman, “Lifestyle” Discrimination in Employment, 24 BERK. J. LAB. & EMPL. L. 377 (2003).

clog the legal machinery.”<sup>245</sup> Matthew Finkin agrees that this system is “a lottery” primarily benefitting lawyers on both sides.<sup>246</sup> Finkin quotes a report arguing that the current system

has none of the economic benefits of wrongful discharge protective law precisely because it eschews protecting employees from wrongful discharge; but it does have all the high transaction costs and uncertainties that have been singled out as negative aspects of such systems.<sup>247</sup>

Further, it appears that neither employers nor employees really understand the rule. Employers greatly overestimate their exposure to wrongful discharge liability,<sup>248</sup> and may not understand that at-will actually is the rule.<sup>249</sup> At-will employees also often incorrectly think that they can only be fired for cause, and a substantial majority of workers do not believe that at-will is the current rule.<sup>250</sup>

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<sup>245</sup>Clyde Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 24 (1988).

<sup>246</sup>Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457 (1992).

<sup>247</sup>Finkin, *Second Thoughts on a Restatement of Employment Law*, at 302-03, citing David Autor, John Donohoe, and Stewart Schwab, *The Costs of Wrongful-Discharge Laws*, (Nat’l Bureau of Econ. Research, Working Paper No. 9425, 2002), 21.

<sup>248</sup>Bird, *Rethinking Wrongful Discharge*, at 575 (a study that found that the costs of wrongful discharge doctrines, including judgments and settlements, was about \$100 per termination, or \$10 per employee, but employers plan as if their exposure to wrongful discharge was one hundred times as great).

<sup>249</sup>Moss, *Where There’s At-Will*, 348, citing Jesse Rudy, *What They Don’t Know Won’t Hurt Them: Defending Employment-At-Will in Light of Findings That Employees Believe They Possess Just Cause Protection*, 23 BERK. J. EMP. & LAB. LAW 307 (2002).

<sup>250</sup>Rudy, *What They Don’t Know*, at 331; McGinley, *Rethinking Civil Rights and Employment at Will*, 1492 & n. 320 (a survey found that only 15-22 percent of respondents knew that employers could fire without cause); Freeman and Rogers, *WHAT WORKERS WANT* at 4-8, 118-21; Pauline Kim, *Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protections in an At-Will World*, 83 CORNELL L. REV. 105 (1997).

Also, most employees are not, in any practical sense, “bargaining” for such a rule. To imagine realistically an applicant for a low level retail or factory job asking for a just cause provision is to put to rest the question of “bargaining.” The obstacles to agreement would be much greater than for, say, a request for greater compensation. First, who would write the “just cause” agreement and who would interpret the terms? Few such applicants could even suggest answers. Second, it would be a brave applicant indeed who would raise the prospect of her prospective employer firing her for an unjust cause. Third, it is unlikely a manager would grant this demand simply because it is so unusual. Managers are used to dealing with some variations in pay, but (outside the unionized and public sectors) are not used to just cause provisions, and they would predictably be unenthusiastic about supervising a team of employees some of whom were protected by just cause provisions and some of whom were not. Fourth, the fact that many managers would consider it an odd request itself creates a disincentive to propose it. Suppose an entry level law professor demanded that a law school buy a pet pony for his child in lieu of the more normal moving expenses. This might actually be cheaper for the employer, but it would undoubtedly be considered more than a bit strange – not the sort of reputation a starting employee (even a skilled professional) would want.

This is why individually-bargained just cause agreements are actually quite rare, and nearly non-existent outside the highest levels of employment.<sup>251</sup> This does not indicate that employees do not value “just cause” agreements, because in the unionized sector, where bargaining power is more equal, just-cause provisions are practically universal.

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<sup>251</sup>Rothstein, Craver, Schroeder, and Shoben, *EMPLOYMENT LAW*, at 747-49.

Moral objections to at-will rules can also be made. Such rules permit employers to treat employees much like property in important respects.<sup>252</sup> Estimates of the number of workers fired annually without just cause range from 150,000 to 200,000, and these discharges have serious effects on the finances and mental and physical health of the workers and families involved. Many suffer severe emotional trauma.<sup>253</sup> Finkin writes, “morally, the just employer does not dismiss an employee without just cause.”<sup>254</sup>

In sum, the at-will rule has both practical and moral difficulties.<sup>255</sup> Again, the point here is to weigh the utility of the rule against the important exceptions that the rule undermines. As Finkin concludes, “[o]nce exceptions start to be made, anomalies emerge. The greater the texture of exceptions, the more anomalous it becomes to insist upon the at-will rule.”<sup>256</sup>

#### D. Proposed and Actual Eliminations of the At-Will Presumption

In weighing whether to dispose of a rule that swallows important exceptions, it is worth looking at jurisdictions that have actually done so, to show that eliminating the rule is not as radical or unthinkable as might be supposed. Employees in significant segments of the U.S.

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<sup>252</sup>Bird, *Rethinking Wrongful Discharge*, at 520.

<sup>253</sup>McGinley, *Rethinking Civil Rights and Employment at Will*, at 1498 (between 150,000-200,000 employees fired every year without cause); Sprang, *Beware the Toothless Tiger*, at 851-52 (putting the number at about 200,000).

<sup>254</sup>Finkin, *Second Thoughts on a Restatement of Employment Law*, at 301.

<sup>255</sup>Defenders of the at-will rule could stress the morality of granting unrestricted rights to property owners. *Cf.* Derum & Engle, *The Rise of the Personal Animosity Presumption*, 1211-12 (opponents of Title VII complained about interference with the “civil rights” of business owners). The question is, does the right of employers to discharge an employee for indefensible reasons have sufficient moral force to outweigh the harms such firings have on employees?

<sup>256</sup>Finkin, *Second Thoughts on a Restatement of Employment Law*, at 299-300.

economy are currently not at-will. The state of Montana has already adopted a law replacing the at-will presumption with a general just-cause rule – notably, at the behest of employers — as have the Virgin Islands, Puerto Rico, and nearly every other industrial democracy.<sup>257</sup>

### 1. The Public and Unionized Sectors

In the U.S. today, large sections of the economy function with just cause, not at-will rules. All or nearly all private sector employees working under union contracts (which almost always contain “just cause” discharge provisions) and most public employees (covered by civil service rules, as described above).<sup>258</sup> Despite a few enduring myths, there is no evidence that these rules have caused any significant inefficiency in either sector.

First, many studies show that unionization can actually increase productivity and efficiency. A World Bank report based on more than 1,000 studies on the effects of unions found that countries with high unionization rates tend to have higher productivity and lower unemployment. Freeman and Medoff’s What do Unions Do? concludes that unionized firms are often more productive than non-union establishments. A recent survey of the literature found “scant evidence” that unions reduce productivity and “substantial evidence” that they improve productivity in many industries. Another survey similarly noted that most analyses have found that unions improve firm performance.<sup>259</sup> A few studies dissent in part from these findings.<sup>260</sup>

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<sup>257</sup>Wheeler Klaas, and Mahony, *WORKPLACE JUSTICE WITHOUT UNIONS*, at 15; Mont. Code Ann. § 39-2-904(1)(b); see Sections IV-D-1 to IV-D-3, *supra*.

<sup>258</sup>Bird, *Rethinking Wrongful Discharge*, at 530 (most union members and public workers are governed by just cause rules); Sprang, *Beware the Toothless Tiger*, 910, & n. 386 (nearly all collective bargaining agreements have just cause requirements).

<sup>259</sup>Slater, *Homeland Security vs. Workers Rights?*, at 339-40, citing World Bank, *Unions and Collective Bargaining: Economic Effects in a Global Environment* (2002), available at: [http://publications.worldbank.org/ecommerce/catalog/product?item\\_id=1061824](http://publications.worldbank.org/ecommerce/catalog/product?item_id=1061824); RICHARD

But even this minority view is not a brief for at-will employment. On the other hand, at-will rules may impede productivity.<sup>261</sup>

What of the objection that just-cause rules would raise unemployment rates because employers would be less willing to hire employees that they could not fire? Even with just cause protection, workers in the unionized or public sector can and routinely are fired. A study of 29,000 labor arbitrations found that employees were at least partially successful in 49 percent of the cases, which means employers were entirely successful 51 percent of the time.<sup>262</sup> And unions certainly do not challenge all discharges in arbitrations. As to public employees for example, in 2001, nearly 9,000 federal employees were terminated for disciplinary reasons alone.<sup>263</sup> Further data below also suggests that just cause rules are not a major factor in employment rates.

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FREEMAN AND JAMES MEDOFF, WHAT DO UNIONS DO? (1984); Dale Belman and Richard Block, *The Impact of Collective Bargaining on Competitiveness and Employment: A Review of the Literature*, in RICHARD BLOCK, ED., BARGAINING FOR COMPETITIVENESS: LAW RESEARCH AND CASE STUDIES (2003), 45-74 Lawrence Mishel with Matthew Walters, *How Unions Help All Workers* (2003) available at: [http://www.epinet.org/content.cfm/briefingpapers\\_bp143](http://www.epinet.org/content.cfm/briefingpapers_bp143). For a fuller discussion of this issue, see Slater, *Homeland Security vs. Workers' Rights?* at 329-45.

<sup>260</sup>Estlund *The Ossification of American Labor Law*, at 1595, n. 296 (labor economists “generally agree that unionization is sometimes associated with higher productivity, but that it is also, and more reliably, associated with higher labor costs and lower profit margins”); Barry Hirsch, *LABOR UNIONS AND THE ECONOMIC PERFORMANCE OF FIRMS* (1991) does not find a positive correlation between unions and efficiency.

<sup>261</sup>Roger Abrams and Dennis Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 602 (wrongful discharges create employee dissatisfaction, which makes it difficult to hire and retain qualified workers; thus, such discharges can impose significant costs on employers).

<sup>262</sup>Malamud, *The Last Minuet*, at 2256.

<sup>263</sup>Slater, *Homeland Security vs. Workers' Rights?*, 337.

Also, simple compromises exist that allow employers to rid themselves easily of hires who turn out to be obviously unsuited for the job, while still preserving just cause rights for the bulk of employees, most obviously probationary periods before just-cause protections kick in. This would be consistent with provisions in most civil service laws and many union contracts,<sup>264</sup> as well as the law in many European nations.<sup>265</sup>

## 2. Montana's Just Cause Statute

Three jurisdictions in the U.S. have already eliminated the at-will rule entirely: Montana, the Virgin Islands, and Puerto Rico.<sup>266</sup> This section will briefly discuss Montana's experience. Three points are notable. First, the value of the rule is being questioned. Second, Montana's rule was passed largely at the behest of *employers*. Third, no disasters ensued after the rule was eliminated. Notably, the unemployment rate in Montana declined from 7.4 percent in 1987 when the Montana Act was passed to 5.5 percent in 1995.<sup>267</sup>

Montana's Act provides in part that a discharge is wrongful if it was not for good cause and the employee had completed a probationary period of employment.<sup>268</sup> Employers lobbied for

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<sup>264</sup>McGinley, *Rethinking Civil Rights and Employment at Will*, 1511-12 (1996).

<sup>265</sup>For example, under the Employment Rights Act of 1996, British employees generally have just cause protections only after a probationary period of at least a year (no minimum period of service is required to be protected from dismissals on the basis of certain reasons, such as for union membership, health and safety activities, or sex or race) William Keller and Timothy Darby, *INTERNATIONAL LABOR AND EMPLOYMENT LAWS*, Vol. 1 (2d ed. 2003), 7-23, 7-28.

<sup>266</sup>McGinley, *Rethinking Civil Rights and Employment at Will*, at 1504-05.

<sup>267</sup>*Id.*, at 1523.

<sup>268</sup>A discharge is wrongful if: (1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; (2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or (3) the employer violated the express provisions of its own written personnel policy. Mont. Code

this bill because they felt the at-will system was too unpredictable and awards were too high in wrongful discharge cases.<sup>269</sup> Thus, the Act preempts all common law causes of action for discharge arising from tort, express contract, or implied contract.<sup>270</sup> A prevailing plaintiff may receive lost wages and benefits for up to four years from the date of discharge.<sup>271</sup> Punitive damages are available only if the employee can show by clear and convincing evidence that the employer engaged in actual fraud or malice.<sup>272</sup> There is no fee-shifting provision in favor of plaintiffs, and plaintiffs have the burden of proving a lack of good cause.<sup>273</sup>

Although this is a fairly weak “just cause” statute,<sup>274</sup> it does eliminate the at-will presumption. It suggests that the “American rule” of at-will might be altered in other U.S.

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Ann. § 39-2-904 (1993). The Act defines “good cause” as “reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer’s operation, or other legitimate business reason.” Mont. Code Ann. § 39-2-903(5) (1993).

<sup>269</sup>Parker, *At-Will Employment and the Common Law*, at 373 (“the leading proponents of the Montana legislation were employer groups whose main concerns were the run-away juries and the large damage awards common in the 1980s”); McGinley, *Rethinking Civil Rights and Employment at Will*, at 1524 (employers backed the Montana bill in part because Montana courts had liberally interpreted the covenant of good faith and fair dealing); LeRoy Schramm, *Montana Employment Law and the 1987 Wrongful Discharge From Employment Act: A New Order Begins*, 51 MONT. L. REV. 94, 108 (1990).

<sup>270</sup>Mont. Code Ann. § 39-2-913.

<sup>271</sup>Mont. Code Ann. § 39-2-905(1).

<sup>272</sup>Mont. Code Ann. § 39-2-905(2).

<sup>273</sup>McGinley, *Rethinking Civil Rights and Employment at Will*, at 1504, n. 379; Parker, *At-Will Employment and the Common Law*, at 372.

<sup>274</sup>Parker, *At-Will Employment and the Common Law*, at 372-73, argues that while the Act “may sound progressive,” in fact “it effectively insulates employers from true contract damages or tort compensation.”

jurisdictions, in part because employers might back a just cause rule to avoid litigation under other legal theories.

### 3. Just Cause in Other Countries

The at-will rule is almost unique to the U.S., among industrialized democracies. Approximately sixty such countries have some form of just cause protection; only the U.S., Austria, Belgium, Denmark, Israel, and South Africa do not.<sup>275</sup> The other major industrialized nations have ratified the Termination of Employment Convention of the International Labor Organization (ILO), which requires just cause for termination.<sup>276</sup> Article 4 of the Convention states that employment shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking.” Workers have the rights to try to rebut the charges against them before termination and to appeal to an impartial body. The burden of proof is on the employer.<sup>277</sup>

There are variations in practice as to, for example, the burden of proof, what body hears the case, and remedies.<sup>278</sup> The German statute provides that dismissals that are “socially

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<sup>275</sup>Sprang, *Beware the Toothless Tiger*, at 855, n.23; Wheeler, Klaas & Mahony, *WORKPLACE JUSTICE WITHOUT UNIONS*, at 69, *citing* M. Crotty, G. Davenport, P. Torres, A. Trebilcock, and M.L. Ruiz Vega, eds., *TERMINATION OF EMPLOYMENT DIGEST* (International Labor Organization, 2000); McGinley, *Rethinking Civil Rights and Employment at Will*, 1501, *citing* *EMPLOYMENT SECURITY LAW AND PRACTICE IN BELGIUM, BULGARIA, FRANCE, GERMANY, GREAT BRITAIN, ITALY, JAPAN AND THE EUROPEAN COMMUNITIES* (Roger Blanpain & Tadashi Hanami, eds., 1994).

<sup>276</sup>Convention No. 158, adopted in 1982. McGinley, *Rethinking Civil Rights and Employment at Will*, at 1501; Wheeler, Klaas, and Mahony, *WORKPLACE JUSTICE WITHOUT UNIONS*, at 70.

<sup>277</sup>Wheeler, Klaas, and Mahony, *WORKPLACE JUSTICE WITHOUT UNIONS*, at 71. The convention specifies that certain reasons shall not be considered valid, including union membership, race, color, pregnancy, religion, national origin, and political opinion. *Id.*

<sup>278</sup>*Id.*, at 72.

unjustified” are void. Swedish law requires that dismissals must be based on “objective cause.” Japanese law requires that dismissals must have an “objectively and socially reasonable cause.”<sup>279</sup> British law requires that the discharge be “fair,” and gives (non-exclusive) lists of fair and unfair reasons.<sup>280</sup> Italy requires a “justified reason”; others use similar rules.<sup>281</sup> A number of countries allow summary dismissal for especially bad behavior.<sup>282</sup>

Again, a common critique of just-cause rules is that they can raise unemployment levels: employers may be less willing to hire if they believe it is more difficult to fire employees they do not want to retain. On the other hand, just cause rules may promote stable employment relationships, conducive to investment in human capital and cooperation.<sup>283</sup> The empirical evidence from Europe, in short, is mixed. A 1999 study by the Organization for Economic Cooperation and Development found no evidence that overall employment levels were affected by regulation of termination; but an ILO report found some evidence that “excessive regulation may deter employers from hiring workers for fear of difficulty in getting rid of them.”<sup>284</sup> Also, while some argue that U.S. labor and employment laws are responsible for unemployment rates, currently lower in the U.S. than in Europe and Japan, it is worth noting that in the last few

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<sup>279</sup>Summers, *Worker Dislocation*, at 1043, 1048, 1053. Wheeler, Klaas & Mahony, WORKPLACE JUSTICE WITHOUT UNIONS, Appx. A, describes termination laws of eleven countries.

<sup>280</sup>Keller and Darby, INTERNATIONAL LABOR AND EMPLOYMENT LAWS, at 7-25 to 7-28.

<sup>281</sup>Wheeler, Klaas & Mahony, WORKPLACE JUSTICE WITHOUT UNIONS, at 73-75.

<sup>282</sup>For example, summary dismissal is allowed in Germany for “grave misconduct”; in Italy for “very grave misconduct”; and in Norway for “gross breach of duty.” *Id.*, 73.

<sup>283</sup>Finkin, *Second Thoughts on a Restatement of Employment Law*, 301.

<sup>284</sup>Wheeler, Klaas & Mahony, WORKPLACE JUSTICE WITHOUT UNIONS, at 69, citing Crotty, *et al.*, TERMINATION OF EMPLOYMENT DIGEST, at 10.

decades, there have been significant periods in which a number of European countries and Japan have had lower unemployment than the U.S. did. It is hard to attribute these shifts in employment rates to the unchanging just cause rule, as opposed to other factors.<sup>285</sup>

This debate was highlighted recently when French students and others protested over proposals to remove just cause protections from young workers in their first two years of employment. Proponents of the proposal often cited high levels of unemployment among French youth as the main reason for the proposed change. As Will Pfaff has explained, the cited rate was deceptive. Free baccalaureate- and university-level education keeps young people in France out of the job market for much longer than young people in comparable countries. In reality, only 7.8 percent of French people under 25 are actually out of work (as compared to 7.4 percent in Britain and 6.5% in Germany). Comparison to U.S. figures is “practically impossible,” since U.S. unemployment numbers exclude the imprisoned and those not actively seeking work.<sup>286</sup>

Also, while France and Germany have in recent years experienced higher rates of unemployment than has the U.S., this arguably not because of the lack of an at-will rule, but rather because a broader web of labor and employment laws add restrictions well beyond just cause discharge requirements. For example, laws in those countries require either administrative approval of or notice and consultation with employee organizations before layoffs or collective dismissals. Laws restricting *disciplinary* discharges do not have the negative effects of laws that also restrict mass layoffs.<sup>287</sup> Generally, French employment law is “much more inflexible” than

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<sup>285</sup>See Corbett, *Waiting for the Labor Law of the Twenty-First Century*, at 262 & n. 9.

<sup>286</sup>Pfaff, “France: The Children’s Hour,” at 40.

<sup>287</sup>McGinley, *Rethinking Civil Rights and Employment at Will*, at 1519-22; Finkin, *Second Thoughts on a Restatement of Employment Law*, at 302.

other countries that use just cause rules and have relatively low unemployment, for example, Scandinavian nations.<sup>288</sup>

That most of the rest of the world has rejected at-will employment is not a dispositive reason for the U.S. to reject it. But it does underscore the fact that the rule is not necessary for productive businesses or a modern economy.

#### 4. The Model Uniform Employment Termination Act

Even in the U.S., discussions continue about eliminating the default at-will rule for the non-union, private sector. The Model Uniform Employment-Termination Act (META), drafted by the National Conference of Commissioners on Uniform State Laws would bar discharge without “good cause”<sup>289</sup> for employees with a minimum term of service.<sup>290</sup> The META would pre-empt discharge claims based on public policy or contract, but not claims arising under state or federal statutes, collective bargaining agreements, or express contracts.<sup>291</sup>

The META has been critiqued for being weak, a “toothless tiger.” Not only does it provide no tort, contract, or punitive damages, it also allows employers and employee to agree as to what constitutes good cause or even waive the good cause requirement under certain

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<sup>288</sup>Pfaff, “France, The Children’s Hour,” at 40.

<sup>289</sup>The default definition of “Good Cause” is: “(i) a reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee’s duties, responsibilities, conduct (on the job or otherwise), job performance, and employment record, or (ii) the exercise of business judgment in good faith by the employer. . . .” Parker, *At-Will Employment and the Common Law*, at 377.

<sup>290</sup>META applies to employees employed by the same employer for a total of one year or more who worked at least twenty hours a week for the employer for twenty-six weeks prior to termination. Parker, *At-Will Employment and the Common Law*, at 377.

<sup>291</sup>*Id.*

circumstances.<sup>292</sup> Also, unlike most just cause rules, the META puts the burden on the employee to prove that the employer lacked good cause.<sup>293</sup>

The META has not yet been adopted in any states,<sup>294</sup> and opposition to it remains significant.<sup>295</sup> Still, it shows that at least parts of the mainstream legal reform movement in the U.S. are comfortable with jettisoning the at-will rule.

#### V. Balancing the Rule and the Exceptions: the Weight of the Exceptions

What of the exceptions the at-will rule is swallowing? Title VII and the NLRA unquestionably express well-established, generally accepted, vitally important values in this society, rights considered core human rights in all advanced democratic nations. This proposition is not seriously disputed, so this section will only briefly summarize the points.

The right of workers to act collectively is firmly rooted in basic concepts of civil liberties.<sup>296</sup> Labor rights are human rights. Article 23(4) of the United Nation's Universal

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<sup>292</sup>Parties may waive just cause protection if the employer agrees to provide the employee with a month's severance pay if the discharge was for any reason other than willful misconduct. Sprang, *Beware the Toothless Tiger*, at 889, 896, 898, 901 (the META is Sprang's "toothless tiger"); McGinley, *Rethinking Civil Rights and Employment at Will*, at 1506-07, citing META §§ 3, 4(c), 5, and 6; Parker, *At-Will Employment and the Common Law*, 377, 379.

<sup>293</sup>McGinley, *Rethinking Civil Rights and Employment at Will*, at 1507, citing META § 6(e).

<sup>294</sup>Bird, *Rethinking Wrongful Discharge*, at 524; Parker, *At-Will Employment and the Common Law*, at 378.

<sup>295</sup>The American Law Institute is working on a Restatement of Employment Law which Matthew Finkin has criticized partly because the "whole thrust of this draft is to shore up the at-will rule." Finkin, *Second Thoughts on a Restatement of Employment Law*, at 280-83, 300 (quote on 300). Robert Bird argues that adopting just cause as the default rule would require an "immense" change in the law, and that "chances are remote" that this will happen. Bird, *Rethinking Wrongful Discharge*, 523. For similar skepticism, see Parker, *At-Will Employment and the Common Law*.

Declaration of Human Rights of 1948 includes the right to form unions. Article 22 of the International Covenant on Civil and Political Rights, which the United States ratified in 1992, incorporates language from the Universal Declaration: “Everyone shall have the right . . . to form and join trade unions for the protection of his interests.” Article 8 of the International Covenant on Economic, Social and Cultural Rights also affirms the “right of everyone to form trade unions and join the trade union of his choice.”<sup>297</sup>

The NLRA was passed to solve one of the most serious continuing problems in American social and economic history: the willingness of workers to organize into unions and take collective action even when they generally had no legal right to do so; and the strong, violent, and often deadly opposition they faced.<sup>298</sup> The NLRA’s Findings and Declaration of Policy states that the right “to organize and bargain collectively safeguards commerce from injury,” and declared it to be national policy to avoid such injuries by “encouraging the practice and procedure of collective bargaining” and protecting the right to organize unions.<sup>299</sup> The NLRA “established the most democratic procedure in U.S. labor history for the participation of workers

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<sup>296</sup>Reuben Garcia, *Labor’s Fragile Freedom of Association Post-9/11*, 8 U. PA. J. LAB. & EMP. L. 283, 288 (2006).

<sup>297</sup>James Gross, *A Human Rights Perspective on United States Labor Relations Law: a Violation of the Right of Freedom of Association*, 3 EMPLOYEE RIGHTS & EMPL. POLICY J. 65, 71-72 (1999).

<sup>298</sup>The history of the NLRA and the era in which it was fought for and won is rich and fascinating. For a sampling, see Melvyn Dubofsky, *THE STATE AND LABOR IN MODERN AMERICA*, 107-68; James Gross, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW*, VOL. 1 (1933-37) (1974); Irving Bernstein, *THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-41* (1969); Michael Goldfield, *Worker Insurgency, Radical Organization, and New Deal Labor Legislation*, 83 AM. POL. SCI. REVIEW 1257 (1989).

<sup>299</sup>29 U.S.C. § 151.

in the determination of their wages, hours, and working conditions,”<sup>300</sup> James Gross writes. Ellen Dannin adds that the NLRA’s values were “intended to, and still can, transform our workplaces and our society.”<sup>301</sup>

Concrete demonstrations of the profound importance of these values can be found in the tens of millions of workers who have joined unions in the past century, despite opposition that killed thousands and injured many more.<sup>302</sup> The desire for an effective voice in the conditions of one’s work – where many people spend at least half their waking hours – is deeply held and widespread. The NLRA still holds out the most promise for providing such a voice to a huge segment of the American economy.

Title VII arose out of the equally strong and determined civil rights movement. It was also the product of social turmoil that saw its advocates beaten and killed.<sup>303</sup> Title VII was passed to address systemic, pervasive problems of discrimination throughout the American economy, discrimination that excluded most or all blacks and most or all women from entire job categories and professions.<sup>304</sup> The need for an effective Title VII continues today. As Nancy

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<sup>300</sup>Gross, *A Human Rights Perspective on United States Labor Relations Law*, 79.

<sup>301</sup>Ellen Dannin, *TAKING BACK THE WORKERS’ LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* (2006), at 51.

<sup>302</sup>*See, e.g.,* Sexton, *THE WAR ON LABOR AND THE LEFT*.

<sup>303</sup>The 1964 Civil Rights Act and the movement behind it also has attracted interesting histories. *See, e.g.,* Juan Williams, *EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEARS, 1954-1965* (1987); Robert Loewy, *TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964* (1990).

<sup>304</sup> *See, e.g.,* David Roediger, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991); Alice Kessler-Harris, *OUT TO WORK: A HISTORY OF WAGE EARNING WOMEN IN THE UNITED STATES* (1982).

Dowd notes, while “opportunities for women and minorities have improved, persisting, dramatic sex and race segregation, both between and within occupations” remains, “with great significance for the families of those workers.” Thus, the intervention of the state to insure some employment opportunity and commitment to these values, is critical.”<sup>305</sup>

There is practically no opposition to the basic idea that the types of workers the NLRA covers should have the right to organize and bargain collectively,<sup>306</sup> and practically no opposition to the promise in Title VII that at least most employers should not be allowed to discriminate on the basis of race, sex, religion, or national origin.<sup>307</sup> Instead, these laws express widely-shared, deeply held values.

## VI. Conclusion

In debates about laws regulating the workplace in the U.S., it is necessary to understand the extent to which the at-will rule undermines the NLRA and Title VII and to balance the value of continuing the rule against the harm the rule does by crippling its exceptions. Here, the at-will rule was never fully embraced in the U.S., and today is so riddled with so many small vague exceptions as to thoroughly frustrate advocates for both employers and employees. The rule has been eliminated in segments of the U.S. economy and elsewhere with no disastrous effects. On the other hand, the exceptions embodied in labor and anti-discrimination law are universally and correctly understood as vitally important.

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<sup>305</sup>Dowd, *Liberty vs. Equality*, 479.

<sup>306</sup>Even the rabidly anti-union National Right to Work Foundation has not taken that position.

<sup>307</sup>Richard Epstein, practically the only academic who argues that anti-discrimination laws is a bad idea in principle, admits his thesis is “well outside the mainstream of American political thought.” Epstein, *FORBIDDEN GROUNDS*, at 6.

While the effects of at-will doctrine must be considered in debates over the future of this rule, the NLRA, and Title VII, eliminating employment at-will, of course, would not solve all the problems in NLRA or Title VII law. In the area of discrimination, for example, it would not affect most sexual harassment cases. But discharge rules are important. The bulk of Title VII claims now involve firing.<sup>308</sup> In labor law, unions would still face international competition and less than favorable interpretations of the NLRA. Still, removing the common impediment, the rule that swallows both exceptions, would be the single most important step that could be taken to vindicate rights that nearly all Americans believe workers in this country should have.

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<sup>308</sup>John Donohue and Peter Seigelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991).