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THE LAW OF TERMINATION: DOING MORE WITH LESS

JEFFREY M. HIRSCH*

Today's regulation of the workplace consists of a confused web of rules derived from multiple sources of law. Nowhere is this confusion more apparent than the governance of terminations. In addition to the scores of federal laws that apply to the end of the employment relationship, state and local governments have their own set of termination rules, which may or may not track the federal rules. The result is a patchwork of regulations that often require parties to apply different standards and to pursue claims in multiple forums for the same dispute. This complexity also makes it difficult for employers and employees to understand, comply with, and enforce termination rules. Those difficulties, in turn, undermine the rules' effectiveness and produce a system of workplace regulations that often fails to achieve its goals. In response to this problem, this Article proposes a universal "law of termination." This federal law would replace all current state, local, and federal rules governing terminations. The central substantive provision of the proposed law would be a prohibition against terminations that lack a reasonable business justification. The proposal's central aim, however, is not to promote unjust dismissal protection on its merits. Rather, the Article takes a pragmatic approach to workplace regulation and argues, perhaps counter-intuitively, that we can better achieve the goals of today's termination rules by replacing them with a single law of termination.

The laws and regulations governing the American workplace reveal a level of complexity and uncertainty that rivals virtually any other area of law. Literally hundreds of federal, state, and local laws may apply to a given workplace. Deciphering the application and requirements of these laws require resources and skills that few employers, and even fewer employees, possess. This complexity, however, affects more than employees and employers; difficulties in understanding, complying with, and enforcing today's workplace rules means that the

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policy goals underlying those rules suffer as well. In short, the current workplace regulatory system is standing in the way of its own policies.

This problem is best illustrated by rules governing the end of the employment relationship. Each jurisdiction has its own set of laws and regulations governing terminations.¹ Some of these rules are identical to other jurisdictions' rules, some are similar, and some are completely at odds with others.² Such complexity makes compliance and enforcement difficult.³ That difficulty is especially troubling given the importance of terminations. Cases involving the end of the employment relationship make up a large percentage of employment litigation.⁴ Terminations also impose far more costs on employees than other employment actions, such as demotions or refusals to hire.⁵ This significance makes the complex and often duplicative nature of the current patchwork of termination rules all the more troubling.

The problems with the current system of termination rules are unfortunate for many reasons, not the least of which is because they are unnecessary. These rules have developed over time, with little to no attention focused on the regulatory structure as a whole. A more holistic approach to the system of termination rules would reveal that, despite their many differences, a common thread exists. Whether a termination is challenged under Title VII of the Civil Rights Act ("Title VII"),⁶ Title I of the Americans with Disabilities Act ("ADA"),⁷ the

1. HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* § 11.03, at 11-15 (5th ed. Supp. 2008) [hereinafter *EMPLOYEE DISMISSAL*].

2. See Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 398-99 (2002) (explaining the interaction between federal and state claims, statutory, and common law claims).

3. *Id.* at 397 ("The current landscape, particularly in the context of employment termination, is garbled by a maze of potential claims and forums. The parties involved in an employment termination lawsuit, as well as the judiciary, must divert considerable time and attention to navigating this maze.").

4. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991) (stating that, in 1985, there were six charges of discriminatory terminations for every charge of discriminatory hiring). Overall, employment-related cases made up over 13% of all U.S. district court civil actions commenced from March 31, 2005 to March 31, 2006. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, *FEDERAL JUDICIAL CASELOAD STATISTICS Table C-2* (2007), available at http://www.uscourts.gov/caseload2006/tables/C02_Mar_06.pdf.

5. LOUIS JACOBSON ET AL., *THE COSTS OF WORKER DISLOCATION* 137, 144-45 (1993) (estimating lifetime loss of earnings caused by termination as approximately \$70,000 for employee earning approximately \$24,000 a year); see also Daniel J. Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111, 147-50 (2006) (discussing costs of termination and clarifying the estimate of JACOBSON, *supra*).

6. 42 U.S.C. §§ 2000e to 2000e-16 (2000).

7. 42 U.S.C. §§ 12111-17 (2000).

National Labor Relations Act (“NLRA”),⁸ or the plethora of other state and federal laws⁹ that govern terminations, some form of business justification defense is typically available to employers, albeit in many different forms. This commonality raises questions about the need for such a wide variety of termination rules. In particular, why make employers’ obligations turn on geography, employee characteristics,¹⁰ and other factors that are unrelated to employers’ business autonomy? If, as a matter of public policy, we want to allow employers some degree of freedom to fire employees, why not just say that?

This Article concludes that the costs of having numerous laws governing terminations outweigh whatever benefits they may provide. Clarity and simplicity should be regulatory virtues, particularly because those factors directly affect the realization of the current workplace regulatory system’s policy goals. This Article argues that simplifying the governance of terminations would better achieve those goals, as demonstrated by the proposed “law of termination.”

The law of termination would supplant all rules regulating terminations with a single, non-waivable, universal law. “All” is used deliberately, as the law would have exclusive governance over every termination in the country, no matter what federal or state¹¹ laws currently apply. Although this Article recommends various details for the law of termination,¹² the law could take many forms. This is because the law’s chief aim differs from other unjust dismissal proposals.¹³

8. 29 U.S.C. §§ 151–69 (2000).

9. Unless otherwise indicated, the term “laws” is intended to include state common law claims, in addition to statutory and administrative measures.

10. At times, policymakers may purposefully grant different protections for certain characteristics. See *infra* note 231 and accompanying text. Eliminating such distinctions may be a cost of the law of termination, but one that is likely outweighed by the benefits of the law.

11. Although local governments may have their own laws, for the sake of simplicity, “state” will be used to denote state and local, unless noted otherwise.

12. See *infra* Part III.

13. See *infra* note 18. For comparisons of at-will and just cause termination regimes that focus on their respective economic efficiency, see Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947, 951 (1984); Alan B. Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, 44 INDUS. & LAB. REL. REV. 644, 645–46 (1991); David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment At Will Versus Job Security*, 146 U. PA. L. REV. 975, 979 (1998); Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901, 1904 (1996); J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 842. Although these economic questions are important, this Article does not argue that the proposed law of termination’s business justification requirement is superior to the current at-will default in an economic sense. Rather, the Article addresses some of the economic ramifications of the proposed law of termination in Part IV.B only to support the argument that the law of termination

The law does not promote a particular substantive rule—such as just cause¹⁴ or a reasonable business justification requirement¹⁵—as a means to give additional protections for employees, although there may be good reasons to do so. Rather, the intent behind the law of termination is to provide a more effective alternative to current workplace enforcement. Although this new approach is applicable in a wide variety of circumstances, this Article accepts today's system of workplace policies as a given. These policies, particularly ones involving terminations, have been ill-served by the current regulatory scheme. The law of termination, however, represents a means to improve enforcement of these policies. The law, perhaps ironically, would do so by eliminating those very rules.

This Article does not suggest that existing termination policies are without fault. Instead, it uses these policies to show how policymakers might improve enforcement of any given workplace regulatory system. In particular, the argument for a radical new approach to the regulation of terminations is part of a more general suggestion that policymakers take a pragmatic, rather than theoretical, approach to workplace governance.¹⁶ Using what is referred to as “regulatory pragmatism,” policymakers would attempt to determine the actual impact and outcomes of their policy choices. This pragmatic approach implicates two major enforcement problems in the current workplace regulatory scheme: multiple sources of law, and a unique and unjustifiably complex set of rules within each jurisdiction. This Article proposes the law of termination as the answer to these concerns by

would do a better job of satisfying society's termination-related policy goals than the current system.

14. The definition of “just cause,” itself, is often inexact. Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of “Just Cause” in Employee Discipline Cases*, 1985 DUKE L.J. 594, 599–601. The basic premise behind just cause, however, is that—unlike the at-will default that currently exists in all but one state—an employer must have some valid reason to terminate an employee. See *id.* at 594–95 (noting the standards used in cases to determine whether an employer had a sufficiently “just” reason to terminate an employee).

15. See *infra* Part III.A.2.

16. This argument and a broader proposal to eliminate state authority over the workplace is explained further in Jeffrey M. Hirsch, *Taking States out of the Workplace*, 117 YALE L.J. POCKET PART 225, 225 (2008), <http://yalelawjournal.org/content/view/659/14/>; Jeffrey M. Hirsch, *Regulatory Pragmatism at Work* 1, 4–5 (Mar. 21, 2008) (unpublished manuscript, on file with author) [hereinafter *Regulatory Pragmatism*]; and Paul M. Secunda & Jeffrey M. Hirsch, *Workplace Federalism*, 157 U. PA. L. REV. PENNUMBRA 26 (2008), <http://www.pennumbra.com/debates/pdfs/WorkplaceFederalism.pdf> (debate between Paul M. Secunda and Jeffrey M. Hirsch regarding whether the federal government or the states can best protect worker rights). But see Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209, 214 (2008) (arguing for more state authority to prohibit workplace captive audience meetings).

vertically integrating the multiple sources of law and horizontally integrating the rules within the lone remaining jurisdiction. The result would be a single, national approach to terminations that would operate far more effectively than the current patchwork of federal and state rules.¹⁷

Proposals for some type of just cause requirement are not new. Many individual commentators, as well as the Uniform Law Commissioners, have proposed similar laws in the past.¹⁸ Interestingly, all of these proposals keep significant portions of the current regulatory scheme intact. The reluctance to upend the current system, although understandable, undermines the potential gains of the proposals. A more aggressive change is needed to improve the inefficiencies that plague the current system.

The potential impact of the law of termination and its complete preemption of existing termination rules would be immense. Most obviously, a universal business justification requirement would provide some level of protection for the large number of employees that currently lack any meaningful right against unjust dismissals.¹⁹ The law would also introduce two major transformations in workplace law by eliminating state governance over terminations and replacing the numerous federal laws with a single termination statute. These changes promise to significantly reduce the inefficiencies that hinder

17. For the sake of simplicity, this Article will refer only to terminations, although the law of termination could easily extend to discipline, reassignment, failure to promote, and other adverse employment actions. Gary Minda & Katie R. Raab, *Time for an Unjust Dismissal Statute in New York*, 54 BROOK. L. REV. 1137, 1206 (1989); see also Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 76 (1988) [hereinafter *A Seed Germinates*] (arguing for broad just cause law because “an extended suspension, a demotion, a denied promotion, or an onerous job assignment, while not as blatant, can be almost as distressful” as termination). But see Jack Stieber & Michael Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REFORM 319, 337 (1983) (arguing that extending just cause beyond discharges would dramatically increase administrative costs and be politically unpalatable).

18. See *infra* Part III; see, e.g., Lawrence G. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1435 (1967) (arguing for a termination law that restricts an employer’s absolute right to discharge an employee).

19. See Theodore J. St. Antoine, *The Model Employment Termination Act: A Threat to Management or a Long-Overdue Employee Right?*, in PROCEEDINGS OF NEW YORK UNIVERSITY 45TH ANNUAL NATIONAL CONFERENCE ON LABOR 269, 270 (Bruno Stein ed., 1993) [hereinafter *Model Termination Act*] (estimating that 150,000 employees per year are terminated without just cause); Jack Stieber, *Recent Developments in Employment-At-Will*, 36 LAB. L.J. 557, 558 (1985) (estimating that 60 million U.S. employees work under at-will and that 150,000 of the 2 million discharges each year are without just cause). Some large employers, however, provide job security protection to decrease the chances of discrimination and other claims that could arise from a termination. See *infra* note 344 and accompanying text.

enforcement of today's workplace regulatory scheme. Such enforcement gains help not only the employees who are the primary beneficiaries of workplace laws, but society as well.²⁰ The law of termination's simplified governance scheme would improve compliance and enforcement with the policy goals of existing workplace laws—even though those laws no longer apply to terminations. Further, by decreasing the risk of unjust termination, the law would give employees more freedom to exercise or enforce a wide range of workplace rights.²¹

To be sure, the law's near-term political feasibility is limited. That infeasibility, however, is not a fatal shortcoming. To the contrary, the law's pragmatic approach to regulation is important in its own right. An aggressive examination of any proposed law—even one that is never fully enacted—may help to prompt new insights and to address serious problems neglected by a more narrow analysis.²² Moreover, even if we do not completely eliminate state authority over terminations or streamline all existing federal rules, any reduction in the current number of legal standards, definitions, and possible forums will enhance enforcement of the current set of termination rules. The hope is that the proposal, if nothing else, will spur regulatory reform that will make workplace governance more effective.

Part I of this Article explores many of the problems with today's governance of the end of the employment relationship. Part II describes and critiques some of the major alternatives to the current system and its “at-will”²³ default. Part III provides details on the

20. See Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1656–57 (1996).

21. See Michael Fischl, ‘A domain into which the King’s writ does not seek to run’: *Workplace Justice in the Shadow of Employment-at-Will*, in LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES & POSSIBILITIES 253, 260–61 (Joanne Conaghan et al. eds., 2002) [hereinafter *Workplace Justice*] (arguing that efforts to enhance employees’ workplace rights cannot be successful without first eliminating employment-at-will termination).

22. See Andrew B. Coan, *Well, Should They? A Response to If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 213, 215 & 219 n.26 (2007) (arguing that examining deep questions in a fresh context can cast them in a revealing new light and criticizing “minimalist” scholarship which, by “refusing to confront deep theoretical questions can seriously limit the interest of the remaining avenues for discussion . . . [and] can make superficial explanations appear more compelling than they really are while obscuring important deep theoretical alternatives”).

23. “At-will” is typically defined as permitting either party to end the employment relationship for any or no reason. *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519–20 (1884), *overruled on other grounds* by *Hutton v. Watters*, 179 S.W. 134, 137–38 (Tenn. 1915); Befort, *supra* note 2, at 356. The at-will default has a long history in the United States. It began to gain strength in the late 1800s and was the default rule in nearly every state by the 1930s. See Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 700 (1994) [hereinafter *At-Will*] (listing the date of

proposed law of termination. Finally, Part IV addresses the law's impact on the current system of workplace laws, focusing in particular on Title VII and the NLRA.

I. PROBLEMS WITH CURRENT TERMINATION LAWS

Much like the overall workplace regulatory system, laws governing terminations are numerous, complex, and unnecessarily confusing. Over twenty-five different federal statutes may govern terminations.²⁴ In addition, every state and numerous localities have their own set of termination statutes and common law rules.²⁵ Although there are commonalities among these regimes, there are numerous differences as well. Rather than signifying a reasoned and comprehensive approach to regulation, these various laws are the result of incrementalism run amok.²⁶ Policymakers are often wise to cautiously develop a given area of law. Even gradual changes, however, if made with no attempt to coordinate with existing laws, are likely to be ineffective or counterproductive. Today's termination governance system is a perfect example of this problem. Policymakers appear to have created new termination rules with little to no thought about their interaction with preexisting measures. The consequences of this failure are serious.

The morass of termination rules means that a single set of facts can subject employers to lawsuits based on multiple sources of law and pursued in multiple forums.²⁷ This redundancy imposes costs on

adoption of employment at-will by each state); *see also* Richard A. Bales, *Explaining the Spread of At-Will Employment as an Inter-Jurisdictional Race-to-the-Bottom of Employment Standards*, 75 TENN. L. REV. 453, 455 (2008) (arguing that at-will spread initially among underindustrialized states trying to attract capital).

24. *See* PERRITT, EMPLOYEE DISMISSAL, *supra* note 1, at ix-x (listing federal statutes that govern termination).

25. *See id.* §§ 1.07, 2.10, 3.06 (providing a "state-by-state" summary of termination laws).

26. *See* Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure, 52 Fed. Reg. 23,629, 23,631 (June 24, 1987) (recommending streamlining of over a dozen federal whistleblower protection laws with a "lack of uniformity [that] does not [appear] to be reasoned, but most likely reflects the incremental enactment of the various statutes over a period of years," and that result in a system where "available procedures and protections may differ depending solely upon the industry to which an aggrieved employee belongs"). *But cf.* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 11 (1993) (arguing that common law wrongful discharge decisions generally mirror "life-cycle" model of employment, under which employees are more vulnerable to unjust terminations during the beginning and end of their careers).

27. *See, e.g.*, *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 796 (1986) (holding that employee's state administrative case did not have preclusive effect against Title VII claim in federal district court, but was preclusive against § 1983 claim).

both employers and employees.²⁸ It is often difficult for employers to predict *ex ante* the consequences of any given termination decision.²⁹ Employees, in turn, face an uncertain strategy of which claims to pursue, when to pursue them, and in which forum.³⁰ Costs are borne not only by the parties, but also by the judicial or administrative systems that have to decipher complex claims in multiple proceedings. Worse still is that much of this cost comes with no apparent benefit. Although in certain instances a particular forum may provide specialized adjudication, there are few occasions where that benefit appears significant.³¹ Moreover, even where a specific forum or source of law provides some advantage, the costs associated with the overall complexity of the system appear much larger.

The multitude of rules also undermines many of the economic arguments for leaving employers' ability to terminate employees largely unregulated. Under neoclassical economic theory, parties will bargain to the most efficient outcome, which may or may not include protections against termination.³² For example, most collective-bargaining agreements between unions and employers have some form of just cause protection,³³ which is the economically efficient outcome if unionized employees are more willing to pay for such protection than employers are willing to pay for an at-will relationship.³⁴ Under the neoclassical view, therefore, nonunion employees simply value just cause protection less than employers value the at-will rule.³⁵ However, there are serious problems with this paradigm.

28. Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 205–06 (2007) [hereinafter *Rethinking*].

29. See, e.g., *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468, 1470–71 (9th Cir. 1984) (discussing termination case in which employee pursued claims for state public policy tort after having Mine Safety and Health Act and NLRA claims dismissed after union rejected employee's request for arbitration under collective-bargaining agreement), *overruled on other grounds by Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); see also Krueger, *supra* note 13, at 646 (noting problems with current common law system's *ex ante* uncertainty).

30. PERRITT, EMPLOYEE DISMISSAL, *supra* note 1, § 11.03, at 11-16.

31. See *infra* Part IV.A.2.

32. See *supra* note 13.

33. BASIC PATTERNS IN UNION CONTRACTS 127 (14th ed. 1995) (stating that cause or just cause protection is present in 92% of collective-bargaining agreements).

34. See generally Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 219–24 (2001) (discussing the allocation of job security costs in the context of default contractual rules).

35. A thorough analysis of this theory is well beyond the scope of this Article. See, e.g., Jeffrey L. Harrison, *The "New" Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327, 356–59 (1984) (discussing the possible values assigned by employees and employers to job security and discharge rights).

One of the central assumptions of the neoclassical economic model is that parties bargain with full knowledge of relevant information³⁶—an assumption that directly implicates the complexity of today's system of termination rules. Numerous studies have shown that employees are severely misinformed about their employment rights, particularly the lack of protection against unjust dismissals.³⁷ This information asymmetry undermines the assumption that individual bargaining will result in an economically efficient termination rule.³⁸

Employees' lack of knowledge about their at-will status will often prevent them from bargaining with their employers for a just cause rule, even if they strongly favor such protection. The result is an economically inefficient oversupply of labor caused by employees' acting as if they were covered by a just cause rule even though they actually lack such protection.³⁹ The information asymmetry also eliminates what would otherwise be competitive pressure on employers to attract workers by giving just cause protection.⁴⁰ If a majority of employees with full information prefer just cause, employers will compete for

36. *Id.* at 355–56, 356 n.156.

37. See RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 119 (1999) (finding that 83% of employees incorrectly believed that employers cannot fire someone for no reason); Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 134 (1997) (finding, in a study asking questions that Rudy later used, that 80% of unemployed workers erroneously believed an employer can terminate an employee for whistleblowing or hire another employee at a lower wage, and nearly 90% erroneously believed that termination could not be based on employer's personal dislike of employee or belief of employee misconduct); 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 BERKELEY J. EMP. & LAB. L. 307, 326–27 (2002) (finding that 77% of employees incorrectly believed that an employer could not terminate an employee to hire another employee at a lower wage, and that approximately 84–85% of employees incorrectly believed that an employer could not fire based on personality conflicts or a mistaken belief that an employee engaged in misconduct).

38. Sunstein, *supra* note 34, at 231 (“The fact that workers believe that they have legal protection against arbitrary discharge is devastating to the suggestion that an at-will default rule accurately captures the shared understanding of the parties . . . [and] is devastating to the at-will rule as conventionally defended.”); see also PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 73–74 (1990) (discussing labor market imperfections).

39. Because employees believe that their work conditions are better than they actually are, more individuals are willing to provide more labor than if they were aware of the true nature of their job security. See Christine Jolls, *Employment Law*, in 2 HANDBOOK OF LAW AND ECONOMICS 1349, 1376 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (stating that “inadequate employee-side information” about an employer's ability to discharge employees without justification “leads employees to oversupply labor”).

40. See Sunstein, *supra* note 34, at 229 (discussing the general ignorance among employees that at-will termination is the default rule for employment contracts); see also Estlund, *supra* note 20, at 1668–69 (noting the additional problem of job lock-in caused by costs of leaving and employees' inability to estimate risk accurately).

workers by offering that benefit. However, if employees erroneously believe that the law already provides just cause protection, employers have little incentive to disabuse them of that notion.⁴¹ Information asymmetries and other problems with the neoclassical model⁴² therefore justify increased regulation of terminations as a means to better approximate the economically efficient outcome.⁴³

It is true that, from an economic perspective, the law of termination may go too far in correcting for information asymmetries, as it would not permit employees to waive their rights under the law.⁴⁴ In other words, the law could prevent an efficient outcome in instances where employers care more about having an at-will relationship than fully informed employees care about having protection against unjust dismissal. This problem is muted by the fact that the number of such instances is probably small. As noted, a great majority of union contracts contain just cause protection.⁴⁵ Such contracts approximate employer and employee desires generally, as unions are able to overcome asymmetries and other market failures that exist with individual employee agreements.⁴⁶ The union example, in addition to surveys of nonunionized employees, indicates that a majority of employees value termination protection more than employers value the at-will relationship.⁴⁷

41. Unions are often able to overcome this problem because they are knowledgeable repeat players that can bargain with employers on behalf of a group of employees. Sunstein, *supra* note 37, at 257.

42. Another assumption under the neoclassical model is the lack of transaction costs. This assumption often falls apart in the individual employment context because it may be prohibitively expensive for an employer to negotiate terms and conditions of work individually with each employee. *Id.* at 225–26. The result is that even where an individual employee prefers unjust termination protection more than an employer wants at-will, the economically efficient outcome—just cause protection—will not occur because the employer will not engage in negotiations with that employee. *See also* Jolls, *supra* note 39, at 1376 (noting the “adverse selection” problem caused by employers fearing that they will attract bad workers if they are among the few that offer unjust termination protection).

43. *See* Sunstein, *supra* note 37, at 206 (arguing for a waivable just cause default); *see also* James Robert Ward III, Note, *The Endowment Effect and the Empirical Case for Changing the Default Employment Contract from Termination “At-Will” to “For-Cause” Discharge*, 28 *LAW & PSYCHOL. REV.* 205, 209–13 (2004) (arguing that the endowment effect—under which people value things more when they already own them than when they do not own them—undermines neoclassical economic defense of at-will default).

44. *See infra* Part III.F.

45. *See supra* notes 33–34 and accompanying text.

46. Fischl, *Rethinking*, *supra* note 28, at 171–72.

47. Harrison, *supra* note 35, at 361; *see also* FREEMAN & ROGERS, *supra* note 37, at 130 (finding, in survey, that 67% of employees want more legal protections against terminations without cause).

Beyond the economic debate is the reality that the complex system of current termination rules does a poor job achieving its own goals. Because employer self-compliance is an important facet of a rule's effectiveness, difficulties in understanding and applying the multitude of termination rules is a significant problem. That problem is exacerbated by the expense of bringing claims and other impediments to employees' challenging their terminations.⁴⁸ Employees' lack of awareness about their rights makes the likelihood of enforcement even more remote. When employees are unable to recognize unlawful action by their employers, they will not raise internal objections to the conduct. Further, because most employment laws are enforced primarily through private rights of action,⁴⁹ employees' ignorance about their legal rights will often prevent them from bringing cases once internal objections, to the extent that they exist, fail.

The problems with the current termination scheme beg for a solution that provides more clarity and efficient enforcement. Given the severity of these problems, such a change should be drastic. For example, the law of termination would eliminate the costs associated with multiple sources of law by abandoning the federalist model of workplace termination regulation. National legislation, although far from perfect,⁵⁰ is the only way to ensure that the basic protections of the law are actually enacted. It is virtually impossible to get all states to implement the same termination rules—particularly in states that actively try to attract business by advertising low labor costs.⁵¹ Only a vertical integration of termination rules will achieve the conditions necessary for realizing the enforcement gains discussed here.

A similar problem is that the termination rules within a given jurisdiction are too plentiful and complex. A better approach would streamline and simplify the termination rules within each jurisdiction.⁵² The law of termination would accomplish this goal by replacing all federal termination rules with a single law that would achieve greater compliance with the goals of the various termination rules

48. See Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 879–84 (2008) (citing reasons why many employees will not complain about workplace discrimination, including fear of social pressure and retaliation).

49. The NLRA is a major exception, as the National Labor Relations Board (“NLRB”) possesses exclusive authority to enforce the statute. See 29 U.S.C. §§ 153, 160–61 (2000).

50. See Hirsch, *Regulatory Pragmatism*, *supra* note 16, at 36–40 (discussing problems with national legislation, such as the Employee Retirement Income Security Act).

51. Stieber & Murray, *supra* note 17, at 336.

52. See Morriss, *At-Will*, *supra* note 23, at 682 (arguing that growth of employment at-will was due largely to its “benefit[] to judges [as] a simple, clear rule”).

that now exist. Changes of this magnitude come with costs of their own, of course, and there are legitimate disagreements about whether those costs exceed the benefits. However, even if such dramatic changes are viewed as too disruptive, the proposal's stress on the need to simplify the sources and types of termination law claims will hopefully prompt beneficial, if not substantial, moves in that direction.

II. MAJOR UNJUST DISMISSAL PROPOSALS

Since Lawrence Blades' seminal article in 1967,⁵³ numerous commentators have proposed some form of unjust dismissal protection.⁵⁴ The details of such proposals are important, as the ability to achieve their goals depends on how the proposals would impact behavior in the workplace and how the new protections would actually be enforced. Although these proposals serve as a guide, this Article's aim is quite different. Unlike past proposals, the central goal of the law of termination is not to enact unjust termination protection on its merits. Rather, the law's aim is to better fulfill the goals of the current system of termination rules. Protection against unjust terminations is simply a means to achieve the goals of other preexisting laws.

Because the key advantage of the law of termination is that it is more efficient than the current system, the simple fact that there exists a single, universal termination law provides a large portion of the benefits of the proposal. To be sure, the law's details will influence its effectiveness in achieving the policy goals of today's workplace rules. Yet, there is a wide range of suitable choices, and the recommendations that follow should serve as a starting point for discussion, rather than a definitive statement of the best course.

Before setting forth the details of the proposed law of termination, a look backwards is warranted. Numerous unjust dismissal proposals and statutes already exist. These alternatives provide guidance, both negative and positive, that will inform the specifics of the proposed law of termination. Three of these alternatives merit special attention, as they represent distinctive approaches to this issue: Montana's unjust dismissal statute, the Uniform Law Commissioners' proposed model rule, and Stephen Befort's proposed federal statute.

53. Blades, *supra* note 18.

54. See, e.g., St. Antoine, *A Seed Germinates*, *supra* note 17, at 70–80 (discussing the benefits of just cause statutes).

A. *Montana Wrongful Discharge From Employment Act*

Although a handful of states have debated unjust dismissal legislation over the past few decades, only one has actually implemented such a measure. In 1987, Montana enacted the Wrongful Discharge from Employment Act (“WDEA”),⁵⁵ largely at the urging of employers who were dissatisfied with the common law termination claims available in the state.⁵⁶

The WDEA’s substantive provision incorporates common law causes of action based on public policy, lack of good cause, and express contract theory. The Act prohibits terminations that retaliate against an employee who refused to violate, or reported a violation of, public policy; terminations that were not made for “good cause;” or terminations that violated express provisions of the employer’s written personnel policy.⁵⁷ Good cause is defined 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.”⁵⁸

Not surprisingly, given employers’ role in its passage, the WDEA limits employers’ potential liability. The Act restricts punitive damages to cases involving “clear and convincing evidence” of “actual fraud or actual malice” by an employer.⁵⁹ If fraud or malice is lacking, an employee can recover a maximum of four years of wages and benefits, less interim earnings.⁶⁰ Moreover, the WDEA does not permit awards for pain and suffering, emotional distress, compensatory damages, or reinstatement.⁶¹ Finally, although the WDEA makes no exceptions for small workforces, it does not apply to employees who work under a written contract for a specified term or to employees covered by a collective-bargaining agreement.⁶²

The WDEA contains several enforcement-related provisions. For instance, before pursuing a WDEA suit, an employee must exhaust any internal grievance procedures.⁶³ That exhaustion requirement is

55. MONT. CODE ANN. §§ 39-2-901 to -915 (2007).

56. Krueger, *supra* note 13, at 647.

57. MONT. CODE ANN. § 39-2-904(1). The “good cause” provision applies only to employees who complete a probationary period. *Id.* § 39-2-904(1)(b).

58. *Id.* § 39-2-903(5).

59. *Id.* § 39-2-905(2).

60. *Id.* § 39-2-905(1).

61. *Id.* § 39-2-905(3).

62. *Id.* § 39-2-912(2). Termination without cause during the period of time covered by an individual’s specified term agreement would likely result in a common law claim of breach of contract.

63. *Id.* § 39-2-911(2).

important, as the statute of limitations is one year after termination.⁶⁴ The WDEA also explicitly avoids preemption issues by exempting terminations that are subject to other state or federal statutes that give a procedure or remedy for discharges.⁶⁵

The WDEA contemplates different types of enforcement mechanisms. In addition to allowing judicial claims, the Act encourages arbitration. A valid arbitration offer by either party must meet certain procedural requirements and, if such an offer is accepted, arbitration is the exclusive forum for the dispute.⁶⁶ However, a party cannot reject an offer to arbitrate without risk. A party who rejects a valid arbitration offer and subsequently loses the case may be required to pay attorney's fees incurred after the offer.⁶⁷

Although an initial step toward a comprehensive unjust dismissal law, the WDEA is quite limited in scope. It does preempt state common law implied contract and tort claims,⁶⁸ but still leaves in place a great deal of existing workplace law. In particular, the WDEA's exemption of any termination that may have a remedy under other laws significantly narrows the Act's application, as there are a multitude of statutes that cover claims for discrimination, whistleblowing, and numerous other reasons for termination. Moreover, the WDEA fails to impose any procedural or notice requirements on employers; thus, the information asymmetries that exist in the current system⁶⁹ are left largely unaffected.

The WDEA provides some additional clarity and predictability for certain terminations, but leaves in place many other existing problems.⁷⁰ Any one state is limited in its ability to transform termination law nationwide, but Montana would have been better served by taking seriously the need for more horizontal integration. The WDEA's narrow preemptive effect and its failure to integrate enforcement of state termination claims represent the Act's primary shortcomings. A law that has any serious hope of improving the current system of termination governance must do more.

64. *Id.* § 39-2-911(1).

65. *Id.* § 39-2-912(1). The exclusion of employees by collective-bargaining agreements also avoids potential preemption issues. See *infra* notes 307–311 and accompanying text.

66. MONT. CODE ANN. § 39-2-914.

67. *Id.* § 39-2-915.

68. *Id.* § 39-2-913; *Kneeland v. Luzenak Am., Inc.*, 961 P.2d 725, 729 (Mont. 1998).

69. See *supra* notes 36–43 and accompanying text.

70. For a discussion of some of the practical effects of the WDEA, see *infra* notes 347–357 and accompanying text.

B. Model Employment Termination Act

The limits of a single-state enactment like the WDEA are contrasted by more comprehensive reforms. One of the most notable of these proposals was made in 1991, when the National Conference of Commissioners on Uniform State Laws proposed the Model Employment Termination Act ("META").⁷¹

The META is a proposed model for state legislation that has yet to be enacted anywhere. In contrast to Montana's approach, the META imposes limits on its coverage based on employer size and the amount of hours employees work. The META excludes private employers with fewer than five employees⁷² and employees at covered firms are protected only if they work an average of twenty hours per week and have worked for their employer for at least one year.⁷³

The main substantive provision of the META proscribes the termination of covered employees without good cause.⁷⁴ Employees have the burden of establishing a lack of good cause.⁷⁵ The META also provides an explicit waiver provision that would allow parties to waive the good cause requirement through an agreement that gave the employee at least one month's worth of severance pay, up to a maximum of thirty months, for each year the employee worked for the employer.⁷⁶

The META does a better job than the WDEA of preempting state termination claims, but still leaves much to be desired. Although the META preempts most state common law claims involving termination,⁷⁷ it leaves a significant portion of termination claims undisturbed. For example, the META does not apply to suits alleging breaches of an express contract, or violations of a state or federal statute.⁷⁸ Moreover, independent torts that involve facts separate from the termination would survive under the META.⁷⁹

71. MODEL EMPLOYMENT TERMINATION ACT (1999) [hereinafter META]. Theodore St. Antoine, the Uniform Law Commissioner's reporter for the META, has written an informative history and description of the proposal. Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361 (1994) [hereinafter *Making*].

72. META § 1(2).

73. *Id.* § 3(b) (applying to employee who worked for employer "at least 520 hours during the 26 weeks next preceding the termination").

74. *Id.* § 3(a).

75. *Id.* § 6(e).

76. *Id.* § 4(c).

77. *Id.* § 2(c).

78. *Id.* § 2(e).

79. *Id.* § 2(c) cmt.; St. Antoine, *Making*, *supra* note 71, at 374 (noting that the META would not affect claims for assault, malicious prosecution, and false imprisonment).

Enforcement would occur primarily through state-run arbitration.⁸⁰ Although the state would oversee META arbitrations, the parties would be responsible for paying much of the enforcement costs.⁸¹ Available remedies for successful employees include reinstatement, backpay or frontpay for no more than thirty-six months, and reasonable costs and attorney's fees.⁸² Compensatory and punitive damages are not permitted.⁸³

The META, although laudable in its attempt to expand employees' protection against unjust terminations, does not go far enough in remedying the inefficiencies that plague the current system of termination regulations. Rather than preempting all state common law claims, the META instead adds an independent cause of action, while expressly leaving intact not only certain state contract claims, but *all* state and federal statutory claims.⁸⁴ Maintaining these statutory claims means that even if every state adopted the META, the current complexity and duplicity of the current termination regulatory scheme would still exist.⁸⁵

The META's reliance on action of state legislatures for its existence is another shortcoming. It is unlikely that most states would enact the law—indeed, Montana is the only state that has enacted anything close and it did so before the META existed⁸⁶—and the chances are even more remote that every state would pass the same version.⁸⁷ Thus, the META would not resolve the current disparities among the states, thereby leaving in place many of the problems of decentralized regulation. At best, the META could serve as a step towards streamlining termination law, but the step would likely be a small one.

80. META § 6 & cmt. The META also contemplates other methods of enforcement, such as private arbitration and judicial adjudication. *Id.* § 6 cmt., app. (presenting administrative and judicial alternatives for proceedings and remedies).

81. *Id.* § 5(e) & cmt.; St. Antoine, *Making, supra* note 71, at 380 (estimating costs for each party at approximately \$700–\$1100).

82. META §§ 7(b), (e), (f); see Dawn S. Perry, Comment, *Detering Egregious Violations of Public Policy: A Proposed Amendment to the Model Employment Termination Act*, 67 WASH. L. REV. 915, 925 (1992) (criticizing META's remedies for failing to adequately prevent violations of public policy through punitive damages).

83. META § 7(d).

84. See *supra* notes 77–78.

85. This selective preemption has also been criticized as favoring employers because it eliminates most claims for intentional infliction of emotional distress and defamation. Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1507 (1996).

86. See *infra* Part II.A.

87. Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 889 (1994).

C. Befort's Proposal

Almost all of the many academic just cause proposals have focused on the substantive merits of protecting employees from unjust terminations.⁸⁸ This Article's pragmatic approach—arguing that a new termination law should attempt to maximize the attainment of society's employment policy goals—is far different. However, Stephen Befort's proposal for a single META claim⁸⁹ does much to address these pragmatic policy goals, although it still centers on the substantive merits of unjust termination protection.

Befort uses the META as his baseline and addresses several of its shortcomings, particularly with regard to pragmatic goals.⁹⁰ A truly pragmatic approach, however, would have gone farther.⁹¹ In particular, although Befort does much to streamline termination law, he still leaves vestiges of the current system.

One of the most important changes under Befort's proposal would be to increase the META's preemptive reach. Befort recognizes that the META and the current system of termination laws can require employers to defend a single termination in different proceedings,⁹² yet his proposal maintains the possibility of a single termination dispute implicating multiple *standards*, even in the same litigation.

Befort proposes that a single META claim supplants all other existing termination claims, except those that arise under collective-bargaining agreements.⁹³ This proposal is superior to the original META, but still leaves a potential problem. Although Befort would create a single claim, this claim would incorporate all existing termination standards as part of a new good cause claim.⁹⁴ This approach is a reasonable attempt to maintain existing levels of protection under

88. For examples of such academic just cause proposals, see generally Blades, *supra* note 18; St. Antoine, *A Seed Germinates*, *supra* note 17.

89. Befort, *supra* note 2, at 424–32.

90. *Id.* Ann McGinley has also proposed a federal just cause statute that would preempt many federal and state antidiscrimination actions. See McGinley, *supra* note 85, at 1448, 1511–24. Because her proposal is less aggressive than Befort's, the following discussion is applicable to both proposals.

91. It is not surprising that Befort's proposal is more limited than the law of termination, as he was not attempting to address shortcomings in the overall termination regulatory system.

92. Befort, *supra* note 2, at 427.

93. *Id.* at 428.

94. *Id.* at 428–29 & n.508; see also Kathleen C. McGowan, Note, *Unequal Opportunity in At-Will Employment: The Search for a Remedy*, 72 ST. JOHN'S L. REV. 141, 166 n.162 (1998) (arguing for universal just cause standard that does not disturb current antidiscrimination laws).

his proposed universal standard, but it comes at a cost.⁹⁵ Consider, for example, the termination of a fifty-five-year-old disabled employee. Under Befort's proposal, the employee would have a single META claim for a termination without good cause. To make out that claim, she could allege, among other things, that she was terminated because of her sex, age, disability, and in retaliation for attempting to take medical leave. Each one of these allegations would require different standards, incorporated from Title VII, the Age Discrimination in Employment Act ("ADEA"),⁹⁶ the ADA, and the Family and Medical Leave Act ("FMLA"),⁹⁷ respectively.⁹⁸ Thus, Befort's proposal would simplify jurisdictional issues, but could leave in place many of the problems associated with the multitude of laws now covering terminations. A better option would be a true single standard that obviates the need to use different legal frameworks for the same set of facts.⁹⁹

Befort also argues that his single claim would alleviate much of the backlash problem that plagues antidiscrimination law.¹⁰⁰ To be sure, creating a single termination claim would reduce the hostility that currently exists against laws that protect specific classifications.¹⁰¹ By maintaining the standards of those laws,¹⁰² however, Befort would also preserve some of their accompanying backlash. Those who currently object to independent class-based discrimination claims are unlikely to be placated by Befort's proposal. Although employees would no longer be able to bring claims under a specific antidiscrimination statute, they would be able to make the same arguments—possibility with reference to the same statutes—in his new unified proceeding. In short, by incorporating the existing statutory termination standards, Befort risks incorporating their backlash problems as well.

95. Thanks is owed to Stephen Befort, who further explained his proposal to this author as an attempt to have current workplace laws inform his just cause claim so that, for example, an action that would currently violate the ADEA would also be unlawful under the universal just cause analysis. E-mail from Stephen Befort, Professor of Law, University of Minnesota School of Law, to Jeffrey M. Hirsch, Associate Professor of Law, University of Tennessee College of Law (Feb. 22, 2008) (on file with author).

96. 29 U.S.C. §§ 621–34 (2000).

97. 29 U.S.C. §§ 2601, 2611–19 (2000).

98. Befort, *supra* note 2, at 428.

99. The proposed law of termination's unitary standard would still consider employees' discrimination claims, but those allegations would be factual questions that fall under a single legal standard—not separate legal issues as could be the case under Befort's proposal. See *infra* Part III.A.2.

100. Befort, *supra* note 2, at 429.

101. See *infra* notes 265–273 and accompanying text.

102. Befort, *supra* note 2, at 429 n.508 (stating that his "just cause standard would still result in differential degrees of actual legal protection since existing statutes would be encompassed within the just cause concept").

In contrast, the law of termination would do away with all existing termination standards. Under the law, employees would still be able to claim that discrimination motivated their termination and minority employees would likely have more opportunities to make such a claim. However, unlike Befort's proposal, those claims would no longer specifically refer to class-based rules. By eliminating the language and standards of current antidiscrimination laws, the law of termination would also eliminate much of the backlash that those laws engender.¹⁰³

Befort achieves much with his proposal and his willingness to address problems with today's system of termination rules is commendable. The law of termination, however, would do more by providing the type of structural reform that the current system needs. The hope is that the law's pragmatic approach to termination governance would achieve more clarity, lower compliance costs, and greater protection for the policy goals of today's termination regulatory system.

III. THE LAW OF TERMINATION

The details of any proposal are obviously important and the law of termination is no exception. Yet, the law's aim casts its details in a different light. As noted, the law is not intended, as are others, to promote just cause on its merits or to argue for more workplace protections—although there are good cases to be made for both of those goals.¹⁰⁴ Rather, the aim is to improve enforcement of prohibitions in current workplace laws. Accordingly, the proposed details focus primarily on the pragmatic goal of reducing the number of terminations prohibited by existing laws, such as those motivated by discrimination, interference with whistleblowing, and retaliation against employees who exercise their rights.

A. Standards

The centerpiece of the law of termination is its governance of employers' ability to terminate employees. Unjust dismissal provisions typically address two major concerns, which Henry Perritt has described as "substantive fairness" and "procedural fairness."¹⁰⁵ Substan-

103. See *infra* notes 265–273 and accompanying text.

104. See Estlund, *supra* note 20, 1669 (discussing social benefits of unjust dismissal protection); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1833–34 (1980) (noting costs of unjust terminations, such as dislocation, emotional distress, job searches, and need to train new employees); *supra* note 88.

105. PERRITT, EMPLOYEE DISMISSAL, *supra* note 1, § 11.02, at 11-6.

tive fairness looks to whether an employer's decision to terminate an employee was based on a legitimate business need; procedural fairness addresses the employee's attempts to evaluate whether the purported valid reason for the termination actually existed.¹⁰⁶

The law of termination would explicitly implement both procedural and substantive standards. The procedural requirements would reduce the information asymmetries currently prevalent in the workplace,¹⁰⁷ while providing *ex ante* clarity that would help to focus disputes over termination decisions. The substantive standard would impose an exclusive restriction on employers' ability to terminate employees by prohibiting terminations that cannot be justified by a valid business reason.

1. *Procedural Standard*

One of the many concerns with our current system of workplace rules is that employees are often unaware of an employer's motivation for a termination decision until litigation commences. This is unfortunate, as that information—although perhaps uncomfortable for an employer to provide—can help parties focus on what true areas of disagreement exist. Moreover, the lack of knowledge forces employees to guess at the employer's motivation, which can lead to unfounded suspicions of discrimination.¹⁰⁸ The proposed law of termination would lessen these problems by requiring the employer to follow certain procedural measures when it contemplates or makes a decision to terminate.

Although most unjust dismissal proposals focus on substantive standards, the procedural standard may be more important, especially when the dispute centers on an employee's job performance.¹⁰⁹ Procedural requirements are particularly adept at addressing the gaps in information that often complicate performance-related disputes.¹¹⁰ The law of termination's procedural standard would impose two requirements on employers: notice of an impending termination and justification for an actual termination decision.

Before any termination becomes official, an employer would have to provide reasonable notice to the employee that it is contemplating termination; this would allow the employee to rebut the employer's reasoning or possibly remedy performance problems that may lead to

106. *Id.*

107. *See supra* notes 38–43 and accompanying text.

108. *See infra* notes 277–278 and accompanying text.

109. PERRITT, *EMPLOYEE DISMISSAL*, *supra* note 1, § 11.02, at 11-11.

110. *See supra* notes 35–45 and accompanying text.

termination.¹¹¹ An employer's failure to provide notice of termination within a certain period of time—two weeks would be appropriate—would establish a presumption that its subsequent justification is without merit. An employer could rebut this presumption under certain circumstances, such as an exigent business need or serious employee misconduct, such as theft, that warrants immediate dismissal.

For less serious performance issues, the notice requirement would prompt employers to begin substantiating the required business justification¹¹² for any future termination and thereby provide employees the opportunity to address the underlying problem. More generally, the notice requirement would give employees a better understanding of the employer's expectations, which improves the workforce's overall job performance.¹¹³ A general increase in the quality of work, as well as a requirement that parties address problems earlier, would also prevent many terminations that occur under the current system.

The other major procedural requirement would come into play at the time of termination. It would require the employer to inform the employee in writing of the reason for its decision and, in combination with the notice requirement, establish a detailed rationale that would be the focus of any subsequent litigation. This information would provide employees a genuine opportunity to challenge the reasoning behind a termination—an opportunity that stands in stark contrast to most state common law termination claims, which typically give extraordinary deference to employers' subjective conclusions about employees' work performance.¹¹⁴

111. See, e.g., Grief Bros. Coop. Corp., Lab. Arb. Rep. (BNA) 555, 557–59 (1964) (discussing criteria for determining just cause, including notice of possible discipline). Many European countries have long had such rights. Karen Paull, Note, *Employment Termination Reform: What Should a Statute Require Before Termination?—Lessons from the French, British, and German Experiences*, 14 HASTINGS INT'L & COMP. L. REV. 619, 631 & n.78 (1991) (noting laws in Belgium, Denmark, France, Germany, and the Netherlands).

112. See *infra* Part III.A.2.

113. See Abrams & Nolan, *supra* note 14, at 610 (“[I]t is in the employer’s interest to give employees adequate notice of their obligations.”); Ellen Dannin, *Why At-Will Employment is Bad for Employers and Just Cause is Good for Them*, 58 LABOR L.J. 5, 11–12 (2007) (arguing that just cause law would overcome employer resistance to informing employees about work problems before termination).

114. See, e.g., Pugh v. See’s Candies, Inc., 171 Cal. Rptr. 917, 928 (Ct. App. 1981) (granting employer substantial leeway to exercise subjective judgment regarding employee who occupies sensitive managerial or confidential position). Under what is generally described as a “service letter” law, some states have imposed similar notice requirements that require an employer to provide employees with a letter that describes the reasons for a termination. See, e.g., MO. ANN. STAT. § 290.140(1) (West 2005); MONT. CODE ANN. § 39-2-801(1) (2007). This requirement is also a feature in many foreign unjust dismissal laws. See, e.g., 9

The reasoning underlying a termination decision is crucial, for it narrows the parameters of any subsequent legal dispute, provides employees more information about the justification for a termination decision, and forces employers to consider earlier whether and why they should terminate an employee. Given the importance of such information, violations of the information requirement would provide an independent cause of action.¹¹⁵ Moreover, to ensure the requirement's ability to clarify disputes and to reduce information asymmetries, an employer would be bound in any subsequent litigation by the justification it provided to an employee.¹¹⁶

The procedural standard would address several problems with the current system, particularly the harms caused by inadequate information. Indeed, the procedural standard by itself would represent a significant advance in termination law. However, the standard also supports the substantive business justification requirement by forcing parties to focus on that issue much earlier than they would otherwise.

2. *Substantive Standard*

The law of termination's procedural requirements are important for many reasons, not the least of which is their support for the law's core protection—the substantive requirement that delineates the boundaries of a lawful termination. Ensuring that employers communicate the reason for a termination is important, but more is needed to enforce the goals of existing laws, such as the prohibitions against certain discriminatory and retaliatory terminations. Effective enforcement of our current workplace policies requires a robust substantive standard, yet it need not represent a substantial threat to the long-standing concern for employer autonomy.¹¹⁷ What is needed is a substantive standard that strikes an appropriate balance between protecting employers' latitude to make personnel decisions and prohibiting

§ Lag om anställningsskydd (SFS 1982:80) (Swed.) (requiring explanation for termination upon employee's request). The United Kingdom's flexible hours law also has a writing requirement. See Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 75–76 (describing U.K. law requiring that employers justify reason for denying an employee's request for flexible work hours).

115. See PERRITT, *EMPLOYEE DISMISSAL*, *supra* note 1, § 11.10, at 11-58 (citing cases providing damages for violations of service letter laws). Damages could include backpay until the time that the employer provides the required information, and liquidated damages.

116. Montana had such a law, but has since abandoned it. See MONT. CODE ANN. § 39-2-801(3) (providing that an employer's justification “may be modified at any time and may not limit [an employer's] ability to present a full defense in any action brought by the discharged employee”).

117. See, e.g., *infra* Part IV.A.1. & notes 286–290 and accompanying text.

terminations that are contrary to existing policies. The law of termination's reasonable business justification requirement is such a standard.

Substantive termination standards can take many defensible forms. One approach is a general standard that, for example, would require terminations to be made either with "just cause" or in "good faith." Alternatively, a standard could create a specific list of valid or invalid justifications for terminations. Given the pragmatic aim of the proposed law of termination, the best option is a general standard that consists of objective¹¹⁸ and subjective inquiries into whether the employer had a reasonable business justification for its decision to terminate. One example of such a standard would be a rule prohibiting "any termination that was not actually motivated by a reasonable business justification." A "reasonable business justification" would be a rationale that would lead a reasonable employer to terminate an employee in a given situation.¹¹⁹

Reasonable business justifications would include a wide range of situations. One set of reasons would involve employee misconduct or poor performance. Although close cases will always exist, it is reasonable for employers to be able to terminate employees because of serious misconduct or performance problems.¹²⁰ Another set of reasons would involve business conditions that are unrelated to an individual

118. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68–69 (2006) (emphasizing the benefits of an objective standard).

119. This reasonableness test is similar to Great Britain's unjust dismissal law, which defers to employers' decisions if they fall within a certain range of reasonableness. Michael Bennett, *Montana's Employment Protection: A Comparative Critique of Montana's Wrongful Discharge From Employment Act In Light Of The United Kingdom's Unfair Dismissal Law*, 57 MONT. L. REV. 115, 132 (1996) (noting the reasonableness standard in Great Britain's unjust dismissal law); see also *Baldwin v. Sisters of Providence in Wash., Inc.*, 769 P.2d 298, 304 (Wash. 1989) (en banc) (holding that "a discharge for 'just cause' is one which is not for any arbitrary, capricious, or illegal reason and which is based on facts . . . supported by substantial evidence and . . . reasonably believed by the employer to be true"); Wendi J. Delmendo, Comment, *Determining Just Cause: An Equitable Solution for the Workplace*, 66 WASH. L. REV. 831, 838 (1991) ("[A] reasonableness standard gives the factfinder an objective guideline for determining just cause.").

120. Off-duty misconduct is justification that can raise close questions. See *Abrams & Nolan*, *supra* note 14, at 605–06 (citing examples, including a child-care worker who molests children away from work or a bank employee who is discovered to have been convicted of embezzling client funds in a previous job); Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631, 682–83 (1988) (arguing, as part of unjust dismissal proposal, that off-duty conduct which "significantly lessened the employee's value to the enterprise or made the employee unavailable for work when needed, such as conviction of a crime entailing imprisonment, would justify a discharge, as would convincingly documented production below the accepted norm in the workplace, or serious customer dissatisfaction").

employee's performance, but that require the elimination of one or more jobs.

Both types of justification implicate the need for employers to make termination decisions equally and fairly—in other words, the reasonable business justification requirement would require employers to treat similarly situated employees in the same way. The absence of equal treatment, such as punishing an employee more harshly than others who engaged in the same misconduct, indicates a lack of reasonableness and would violate the law of termination.

If an employer's motivation included both valid and invalid reasons, the law would employ a mixed-motive analysis similar to that under the NLRA.¹²¹ Under this analysis, an employer would presumptively violate the law if an invalid reason was a motivating factor in its decision to terminate.¹²² An employer would be able to rebut that presumption and avoid liability by showing that it would have made the same decision absent the improper reason.¹²³ This approach differs from the Title VII analysis, which would impose liability on an employer that satisfies this affirmative defense, but significantly limits the available remedies.¹²⁴ Eliminating liability in its entirety is the more traditional approach,¹²⁵ and it better reflects the need to balance employee rights against employer autonomy.¹²⁶

In contrast to this general substantive standard, some just cause statutes and proposals specifically enumerate which termination justifications are permitted or prohibited.¹²⁷ The enumerated approach suffers from the trade-off between inclusiveness and unwieldiness. For the law to be manageable, there must be a limit to the number of enumerated reasons. However, such a limit would invariably omit, in the case of a list of prohibited actions, some reasons that would normally be considered improper.¹²⁸ As an enumerated law attempts to

121. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 394–95 (1983).

122. *Id.* at 398.

123. *See infra* notes 248–251 and accompanying text.

124. *See infra* notes 248–251 and accompanying text.

125. *See, e.g., Transp. Mgmt.*, 462 U.S. at 394 (NLRA claim); *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 276 (1977) (constitutional claim).

126. *But see* Anne Marie Lofaso, *Toward a Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 *UMKC L. REV.* 1, 64–65 (2007) (advocating for greater employee autonomy).

127. For examples of statutes that enumerate permissible and prohibited termination justifications, see Puerto Rico Unjust Dismissal Act, P.R. LAWS ANN. tit. 29, § 185b (2001); Virgin Islands Wrongful Discharge Act, V.I. CODE ANN. tit. 24, § 76 (1997). *See also* Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 *NEB. L. REV.* 62, 84–85 (2008) (proposing enumerated wrongful discharge statute).

128. PERRITT, *EMPLOYEE DISMISSAL*, *supra* note 1, § 11.20, at 11-77.

mitigate this risk by adding more reasons, the law would become increasingly complex. In contrast, the general standard would cover any factual scenario, even ones that legislators never considered.¹²⁹ Because this flexibility is important for both employers and adjudicators, the general standard is preferable to an enumerated one.¹³⁰

This general standard is admittedly imprecise and would create some degree of uncertainty for an employer deciding whether to terminate an employee.¹³¹ That imprecision is purposeful, however. Attempting to fashion rules for all possible factual situations is a fool's errand that would add significant complexity to the law. The reasonable business justification standard, although vague, is much easier for employers and employees to understand than a complex, albeit more specific, set of rules.¹³²

The lack of specificity is also not as troublesome as it may first appear. Employers can create a large number of presumptively valid workplace rules, thereby eliminating much of the ex ante clarity problem.¹³³ Most terminations also involve clearly reasonable or unreasonable business decisions, whether or not they are currently prohibited. For example, firing an employee because she is overweight would generally be allowed under existing laws providing for at-will termination, but would be prohibited under the reasonable business justification standard unless special circumstances exist.¹³⁴ Similarly, most actions that are currently unlawful, such as discrimination based on race, would also violate the law of termination in most instances. Closer cases would typically involve questions about whether an employee's performance or business circumstances reasonably justified termination—factual questions that no degree of legislative specificity can ameliorate. Moreover, the law of termination would not begin on a clean slate. Judicial interpretations of existing law¹³⁵ would provide

129. Blades, *supra* note 18, at 1432.

130. See Minda & Raab, *supra* note 17, at 1193 (noting that termination statutes should leave the term "just cause" undefined); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 521–22 (1976) (same).

131. Henry H. Perritt, Jr., *Wrongful Dismissal Legislation*, 35 UCLA L. REV. 65, 81 (1987) [hereinafter *Wrongful Dismissal*].

132. PERRITT, EMPLOYEE DISMISSAL, *supra* note 1, § 11.21[A], at 11-80.

133. Summers, *supra* note 130, at 502.

134. Special circumstances could include jobs where weight may impact the employee's ability to perform necessary tasks or create a health or safety risk to others, such as law enforcement officers, jockeys, and flight attendants.

135. This precedent could include decisions under the numerous statutes and common law claims currently covering terminations, as well as decisions interpreting just cause provisions in collective-bargaining agreements or under Montana's WDEA. See, e.g., Stefania Scarponi, *The Present and Future of the Law of Diversity: Antidiscrimination in Employment and*

guidance to employers and courts about what constitutes a reasonable business justification.¹³⁶

Lack of specificity also naturally leads to some degree of deference to employers.¹³⁷ Such deference may be too broad for employee advocates, yet it serves several important functions. Although employee rights are a primary concern of our current workplace regulatory system, employers must have enough discretion to effectively manage their businesses. This need is reflected by the fact that virtually all workplace laws carve out an area of employer autonomy. The law of termination's substantive standard, in addition to its caps on remedies,¹³⁸ would satisfy this need by providing employers with enough freedom to make termination decisions when necessary. Moreover, instances in which legal uncertainty affects the employer's decision—that is, when fear of a successful law of termination suit stops the employer from firing an employee—serve as a warning that the employer may not have had a sufficiently reasonable business justification. Although imperfect, the risk of losing a law of termination lawsuit may prompt employers to self-regulate their termination decisions, which would in turn make the law more effective. Finally, to the extent that the law of termination is politically feasible, significant employer discretion is needed to gain employer support or at least dampen employer resistance.

European Law, 30 Vt. L. REV. 693, 697 (2006) (describing European Court of Justice's interpretation of "business necessity").

136. See, e.g., *Buck v. Billings Mont. Chevrolet, Inc.*, 811 P.2d 537, 540 (Mont. 1991) (defining "legitimate business reason" prong of WDEA's just cause requirement as "a reason that is neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business" and recognizing that application of that definition must consider employers' discretion to make employment decisions, as well as employees' interest in being employed).

137. Henry Perritt has also argued that a general standard might give adjudicators too much authority to review business decisions. Perritt, *Wrongful Dismissal*, *supra* note 131, at 81 (citing ROBERTO UNGER, *LAW IN MODERN SOCIETY* 193–94, 197 (1976)). Yet, some discretion is needed to ensure fair enforcement. See *Abrams & Nolan*, *supra* note 14, at 611–12 (providing for a "theory of just cause" that includes language that requires use of discretion in determining whether the just cause standard is met). Additionally, it is far from certain that adjudicating a general standard will significantly interfere with business autonomy. Such a review is likely to be deferential to an employer's judgment and possibly more deferential than an inflexible enumerated standard. See *Summers*, *supra* note 130, at 521 (suggesting that employers have already contributed to developing a just cause standard through "thousands of arbitration decisions"). Moreover, Perritt's proposed affirmative defense, under which an employer can escape liability by showing a legitimate business reason for violating an enumerated standard, Perritt, *Wrongful Dismissal*, *supra* note 131, at 84, is identical to the law of termination's substantive standard.

138. See *infra* Part III.

The superiority of the general standard is illustrated by its dominance in existing just cause regimes. Nearly every country with an unjust termination law uses a general standard.¹³⁹ Similarly, arbitrators have long interpreted general just cause or good faith standards contained in collective-bargaining agreements.¹⁴⁰ Some state and federal legislation have also used a general standard without any ill-effects, including Montana's WDEA¹⁴¹ and the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), which prohibits employment discrimination based on military status and provides general just cause protection for one year after employees return to work from active military duty.¹⁴² Accordingly, a general substantive standard would be the best option for improving enforcement of current termination policies.

B. Coverage

One of the more inconsistent areas under the existing workplace regulatory system is the definition of covered "employers" and "employees." These definitions are critically important because a law will have no application to a business or worker who does not meet the law's definition of employer or employee. Thus, a narrow scope of coverage would significantly limit the impact of a workplace law, while broadening coverage risks interfering with relationships that workplace laws have traditionally left unregulated.

1. Coverage of Employers

The most common employer exception is to limit a law's coverage to businesses with a specified number of employees. That num-

139. See International Labour Organization, Profiles of National Legislation covering Termination of Employment, <http://www.ilo.org/public/english/dialogue/ifpdial/info/termination/countries/index.htm> (last visited Nov. 17, 2008) (summarizing termination laws of every country); International Labour Organization, R119 Termination of Employment Recommendation, 1963, <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R119> (last visited Nov. 17, 2008) ("Termination of employment should not take place unless there is a valid reason . . . connected with the capacity or conduct of the worker or based on the operational requirements of the . . . establishment."). See also Samuel Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 AM. J. COMP. L. 310, 311-18, 320 (1985) (providing an overview of unjust dismissal statutes in Canada, Japan, and Western Europe and finding that none of the statutes provide specific criteria of just cause).

140. Summers, *supra* note 130, at 499-501 & n.104 (discussing the well-established "common law" of unjust dismissal arbitration under collective-bargaining agreements and noting a 1975 survey finding that 79% of collective-bargaining agreements explicitly used cause or just cause, although many also listed certain actions, such as unauthorized strikes or dishonesty, as grounds for discharge).

141. MONT. CODE ANN. § 39-2-904 (2007).

142. 38 U.S.C. § 4316(c) (2000).

ber, however, can be significantly different. At one extreme is the FLSA, which has no numerical cut-off.¹⁴³ Other statutes, particularly ones dealing with discrimination, often exempt employers with fewer than fifteen to twenty employees.¹⁴⁴ On the other end of the spectrum is the Worker Adjustment and Retraining Notification Act (“WARN”), which requires employers with at least one hundred full-time employees to provide notice of layoffs in certain circumstances.¹⁴⁵

Although small workforces are not immune from the risk of unjust dismissals,¹⁴⁶ some type of exclusion is warranted under the law of termination. Businesses with only a few employees often face a very different termination calculus than larger employers.¹⁴⁷ The marginal cost of losing and replacing an employee is generally higher for small employers, which means that the cost of unjustly dismissing an employee is higher as well. Because of this higher cost, small employers are likely to be more reticent to terminate employees without a good reason. Further, applying the law of termination, despite its relative simplicity, to small employers currently exempt from most workplace rules would impose costs that larger employers do not face. Allowing these small employers to avoid such costs initially may allow them to grow enough to become covered employers in the future.

Given that the law of termination’s reasonable business justification requirement would produce fewer benefits at a greater cost in small workforces, it makes sense to maintain some form of small employer exemption. It is true that other statutes, both in the United States and other countries, apply to employers of all sizes.¹⁴⁸ However, maintaining the exclusion of some small employers, in light of

143. 29 U.S.C. § 203(d) (2000) (defining employer).

144. *See id.* § 630(b) (requiring twenty or more employees under the ADEA); 42 U.S.C. § 2000e(b) (2000) (requiring fifteen or more employees under Title VII); 42 U.S.C. § 12111(5)(A) (2000) (requiring fifteen or more employees under the ADA).

145. 29 U.S.C. §§ 2101(a)(1), 2102 (2000).

146. Stieber & Murray, *supra* note 17, at 338 (noting that employees in small firms may need unjust dismissal protection more than employees of larger firms).

147. *Cf.* Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN’S L. REV. 1197, 1248–50 (2006) (discussing small employers’ disproportionate burden of complying with workplace regulations).

148. Some countries apply unjust dismissal laws to all employers. *See, e.g.*, 1 § Lag om anställningsskydd (SFS 1982:80) (Swed.) (providing that Swedish unjust dismissal law applies to both public and private employees and making no reference to size of employer). The NLRA, the FLSA, and USERRA also apply to employers of any size, although both the NLRA and the FLSA generally apply only to employers who engage in a certain level of business per year. *See* 29 C.F.R. § 779.22 (2006) (presuming that \$500,000 in annual business justifies FLSA coverage); Detroit Newspaper Agency, 326 NLRB Dec. (CCH) 700, 730 (1998) (noting the \$500,000 threshold under NLRA).

the relevant costs and benefits, seems the best course. Moreover, preserving some level of protection for small business may be crucial to the proposal's political survival.

Although no magic number exists, a reasonable option would be to limit the exemption to any employer with fewer than five employees. That threshold is lower than most current workplace laws and would ensure that the law of termination applies to the vast majority of employees, while still allowing very small employers to operate free from the law's requirements until the employer become large enough to be covered by the law.¹⁴⁹ California's employment discrimination statute, for instance, has a five-employee rule¹⁵⁰ and there is no evidence that it has imposed significant costs on employers.

A final issue is whether the law of termination should apply to public employers. Because the size of the public sector workforce is significant,¹⁵¹ a proposal attempting to address problems with the overall system of termination rules needs to consider both private and public employees. From a legal standpoint, covering federal employers is straightforward, as there is no question that Congress has authority to apply the law of termination to federal employers.¹⁵² Applying the law to state employers, however, raises questions of sovereign immunity.¹⁵³ Although state employee immunity against individual lawsuits seeking monetary damages is far too complex to discuss here,¹⁵⁴ the likely conclusion would be that Congress cannot directly

149. This rule would exclude approximately 11% of all firms in the United States and 5% of all employees. U.S. CENSUS BUREAU, STATISTICS ABOUT BUSINESS SIZE Table 2(a) (2004), available at <http://www.census.gov/epcd/www/smallbus.html>.

150. California Fair Employment and Housing Act, CAL. GOV'T CODE § 12926(d) (West 2005).

151. In 2006, there were 20.4 million public employees, constituting approximately 16% of all employees in the United States. See Barry T. Hirsch & David A. Macpherson, Union Membership, Coverage, Density, and Employment Among Public Sector Workers, 1973–2007, <http://unionstats.gsu.edu/> (last visited Nov. 17, 2008).

152. The law, however, would need to permit claims that a termination violated an employee's constitutional rights. See generally Paul M. Secunda, *Whither the Pickering Rights of Federal Employees?*, 79 U. COLO. L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=1010243> (discussing First Amendment claims). Although this unavoidable claim adds an additional level of analysis, it could easily be accommodated by excluding all extra-constitutional actions from the meaning of "reasonable business justification."

153. See generally Jeffrey M. Hirsch, *Can Congress Use Its War Powers to Protect Military Employees from State Sovereign Immunity?*, 34 SETON HALL L. REV. 999, 1002–1113 (2004) [hereinafter *War Powers*] (discussing state sovereign immunity). Counties and municipalities do not enjoy sovereign immunity from private suits. *Alden v. Maine*, 527 U.S. 706, 756 (1999).

154. See generally Hirsch, *War Powers*, *supra* note 153 (discussing the complexities of state sovereign immunity in the context of employment law).

abrogate state sovereign immunity under the law of termination.¹⁵⁵ Despite this hurdle, Congress could enact a law that would allow individuals to seek monetary damages against most, if not all, state employers. By conditioning related funding on states' waiver of sovereign immunity under the law of termination, Congress could ensure that the law would apply nationally without running afoul of the Supreme Court of the United State's current state sovereign immunity jurisprudence.¹⁵⁶

2. Coverage of Employees

Even if an employer falls under a statute, some of the employer's workers may not. A worker's exclusion is frequently the result of classification as either an independent contractor or supervisor/manager.¹⁵⁷ Both of these classifications have gained notoriety lately, as employers have aggressively used them in an often successful attempt to exclude workers and avoid the need to comply with various workplace laws.¹⁵⁸ Although these exclusions are defensible in limited situations, completely excluding a worker from the protections of a given law is serious and should occur only where the worker's role is one that the law was not intended to cover.

The question whether a worker is an employee or independent contractor has long been vexing. Indeed, current independent contractor rules provide an excellent example of the overly complex nature of today's workplace regulatory scheme. The standard to determine whether a worker is an employee or independent contrac-

155. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996) (holding that Congress's Commerce Clause Power is insufficient to abrogate state sovereign immunity). This conclusion, although the most likely given the Supreme Court's current membership, is by no means the only or best outcome. Recent cases suggest that the Court may take a case-by-case approach to sovereign immunity claims; thus, some claims under the law of termination—such as those demonstrating that state employers have a practice of discriminatory terminations—may be sufficient to abrogate state immunity under the Fourteenth Amendment. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726–34 (2003) (upholding congressional abrogation under FMLA).

156. Hirsch, *War Powers*, *supra* note 154, at 1044–45. See, e.g., Civil Rights Act of 2008, S. 2554, 110th Cong. §§ 201, 304, 469 (2008) (pending bill that would enact conditional waivers under the ADEA, FLSA, and USERRA).

157. See, e.g., 29 U.S.C. § 152(3) (2000) (providing that the term employee does not include independent contractors or individuals employed as supervisors); *Wojewski v. Rapid City Reg'l Hosp., Inc.*, 450 F.3d 338, 345 (8th Cir. 2006) (holding worker was an independent contractor and could not bring claim under Title VII).

158. See Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought To Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 297–98 (2001) (describing Microsoft's improper classification of workers as independent contractors).

tor differs depending on the legal claim at issue.¹⁵⁹ Not only are these disparate standards unnecessarily complex, they also raise the possibility that a given worker could be considered an employee under one claim and an independent contractor under another—even in the same legal proceeding against the same employer involving the same set of facts.

The law of termination's concern with simplification demands a more unified approach. The most appropriate existing standard is the FLSA's economic realities test.¹⁶⁰ Because this analysis is broader than the alternative "*Darden*" or "right-to-control" test,¹⁶¹ it would allow more workers to enjoy protection under the law of termination. This would partially address some employers' abuse of the independent contractor classification to exclude workers who otherwise appear to qualify as covered employees.

Although meeting the definition of an employee is necessary to enjoy protection under a workplace statute, it is not sufficient, as many statutes exclude certain categories of employees. For example, the FLSA specifically excludes employees who perform certain types of jobs.¹⁶² Moreover, other statutes exclude employees who are classified as either supervisory or managerial.¹⁶³ Some of these exclusions reasonably reflect the policies of a specific statute, while others indicate little more than political pressure from a given industry.¹⁶⁴ Whatever persuasiveness these exclusions hold under current law, the goals of the law of termination demand a more simple and broad rule.

159. The default standard is often referred to as the *Darden* or right-to-control test, which is derived from common law rules regarding a principal's vicarious liability for actions of its agents. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (setting forth multi-factor test for employee classification under ERISA). The other major approach is the broader economic realities test, which seeks to determine the underlying work relationship and applies to certain statutes such as the FLSA. See *Sec'y of Lab. v. Lauritzen*, 835 F.2d 1529, 1534–35 (7th Cir. 1987) (setting forth criteria to determine the economic realities of the working relationship).

160. See *Lauritzen*, 835 F.2d at 1534–35.

161. See *Darden*, 503 U.S. at 323–24.

162. Some of these exempted jobs are specifically listed in the FLSA, while others are covered by the more general exemption covering certain types of executive, administrative, and professional employees. 29 U.S.C. § 213 (2000 & Supp. V 2005).

163. See, e.g., 29 U.S.C. § 152(3) (2000) (excluding NLRA supervisors from definition of employee); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 284 (1974) (noting that managerial employees are implicitly excluded from NLRA).

164. Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1336–37 (1987) (arguing that FLSA's agricultural exclusion was political compromise to garner support from Southern politicians seeking to maintain subjugation of blacks).

The exclusion of supervisory or managerial employees from workplace laws, particularly the NLRA, has been a politically charged issue over the last few years.¹⁶⁵ Excluding certain high-level employees from the NLRA has some logic given the potential conflict of interests that could arise if a union member was intimately involved with setting company policy, particularly with regard to labor relations.¹⁶⁶ Even outside of the union context, one could justify the exclusion of high-level managers, as those officials are so tied to the firm's decisionmaking that it is difficult to separate the employer from the employee. Lower-level officials, however, share many of the same concerns as other employees and deserve protection.

Even under the NLRA, the concern that an employee will be conflicted between loyalty to a union and the need to enact the employer's policies is not present for middle- and low-level supervisors and managers who have little to no influence over an employer's policies. Outside of the union context, where the potential for conflicted loyalty does not exist, the exclusion of these supervisory and managerial employees makes even less sense.¹⁶⁷ This is especially true with regard to a law that broadly prohibits unjust dismissals.¹⁶⁸ In the modern economy, where a growing number of employees perform some type of supervisory task, excluding all supervisors would gut the law of termination. It is also difficult to justify excluding middle- and low-level supervisory and managerial employees from the law given that they face much of the same threat to their job security as other employees. Moreover, a broad supervisory/managerial exclusion would undermine the law's goal of enhancing enforcement of current workplace policies. Although supervisory or managerial employees may be excluded from certain statutes, like the NLRA, they are likely covered by other statutes.¹⁶⁹ Thus, to avoid excluding workers who are covered by existing laws, the law of termination should not adopt a broad supervisory or managerial exclusion.

165. See Michelle Amber & Michael R. Triplett, *Long-Awaited Ruling on Supervisors Prompts Flood of Reaction from Unions, Management*, Daily Lab. Rep. (BNA), Oct. 4, 2006, at AA-3 (discussing the controversy and "outrage" created by NLRB rulings on the definition of "supervisors" under the NLRA).

166. See S. REP. NO. 80-105, at 3-5 (1947) (citing such conflict of interest concerns in union-management relations as reason for enacting NLRA supervisory exclusion).

167. See Summers, *supra* note 130, at 526 (stating that supervisory and managerial personnel are "among those most in need of statutory protection against unjust dismissal").

168. St. Antoine, *A Seed Germinates*, *supra* note 17, at 72.

169. See, e.g., 42 U.S.C. § 2000e(f) (2000) (defining "employee" under Title VII as "an individual employed by an employer").

High-level employees present a more difficult case. They do not share many of the job security concerns of lower-level employees,¹⁷⁰ yet other factors support their inclusion under the law of termination. For instance, excluding high-level employees would require factual determinations that add to the compliance and enforcement costs of the law.¹⁷¹ A simple rule including all employees, even high-level ones, would also create more predictable litigation outcomes.¹⁷² Accordingly, the law of termination should apply to all employees, even those with supervisory or managerial duties.¹⁷³

Finally, some just cause proposals would also exclude probationary employees.¹⁷⁴ This exclusion could help mitigate any negative employment effects caused by the law of termination's business justification requirement. By giving employers a window—perhaps ninety days—to freely terminate new employees, there are fewer costs to hire workers because a low-cost exit strategy exists if that decision does not work out. Barring this limited exemption, however, the law of termination would cover the vast majority of employees.

170. Indeed, most high-level employees would likely have the opportunity to contract for just cause protection.

171. See, e.g., 1(1) § Lag om anställningsskydd (SFS 1982:80) (Swed.) (excluding from Swedish unjust dismissal law employees who occupy managerial or comparable positions); NLRB v. Bell Aerospace Co., 416 U.S. 267, 288–89 (1974) (upholding NLRB analysis for excluding managerial employees); Summers, *supra* note 130, at 526 (recommending an English policy that exempts employees with two-year fixed term written contracts that explicitly waive the employee's rights under the statute).

172. See Krueger, *supra* note 13, at 650 (citing surveys and studies that indicate that damage awards and litigation costs in employment termination suits are more limited in countries that require just cause dismissal). The law of termination's preemption of common law termination suits also eliminates the potential for many large "lottery" awards that currently are a risk in many states. See *id.* (stating that, in some termination suits, awards to claimants have "exceeded the prize for winning the state lottery"). Employers are particularly wary of termination cases involving highly compensated employees; thus, replacing that risk with a more predictable suit involving capped damages is more likely to garner employer support. See St. Antoine, *Making, supra* note 71, at 373 (describing employers' push to include high-level employees under the META).

173. The law is unlikely to be a factor for the few employees who make the most fundamental business decisions on the employer's behalf, as it would generally be easier for an employer to argue that terminating the most important employees had a reasonable business justification.

174. See, e.g., MONT. CODE ANN. § 39-2-904(2) (2007) (default six month probationary period); A.B. 3017, 1984 Leg., Reg. Sess. § 2880(b) (Cal. 1984) (two years); H.B. 5155, 82d Leg., Reg. Sess. § 2(c) (Mich. 1983) (six months); A.B. 1832, 199th Leg. § 1 (N.J. 1980) (six months); see also 29 U.S.C. § 206(g)(1) (2000) (permitting employers under FLSA to pay a lower minimum wage to employees under the age of twenty for the first ninety days of employment).

C. *Burden of Proof*

Many just cause statutes and proposals have taken very different views on the appropriate allocation of burdens of proof. Because of the law of termination's unique structure and goals, this issue is particularly challenging. Ultimately, however, the law's burdens of proof should reflect the policies underlying its procedural and substantive standards. This would be accomplished by giving the employer the burden to show that it satisfied the procedural requirements and giving the employee the burden to show that the employer's stated rationale for the termination did not constitute a reasonable business justification.

The law of termination's procedural requirements are somewhat novel and have few examples to draw from. One example that does exist is state "service letter" laws, which require employers to provide employees with a reason for a termination decision.¹⁷⁵ Those laws typically require the employer to prove that it gave the employee a valid letter¹⁷⁶ expressing a good reason for the termination. The employer is in the best position to preserve and provide such information. Moreover, if the employer complied with the procedural requirements, the burden is quite low; the employer need only reproduce the information that it already provided to the employee.

The burden assigned to the substantive requirement is a closer question. Most collective-bargaining agreements and European laws—which lack the law of termination's procedural requirements—place the burden of proving just cause or its equivalent on the employer.¹⁷⁷ In part because of its procedural requirements, the law of termination would instead give employees the burden of showing that the termination lacked a reasonable business justification. Once the employer proved that it informed the employee of the reason for the termination, the employee would have sufficient information to argue that the employer's stated reason did not actually motivate the termination, that it did not constitute a reasonable business justification, or

175. See *supra* note 114.

176. See *supra* note 114.

177. See Summers, *supra* note 130, at 513–19 (noting in particular that the unjust dismissal laws of Great Britain and Sweden require the employer to prove just cause). The British just cause statute, for example, assumes that a termination is unfair unless the employer can show that one of the enumerated valid reasons for the termination existed. Employment Rights Act, 1996, § 98 (Eng.) (stating that valid reasons include those related to the employee's abilities, the conduct of the employee, lack of work, or a catch-all "substantial reason" justifying termination). An employer in Great Britain bears the burden of justifying the termination, but must show only that it had a reasonable belief that one of the permitted reasons existed. See *supra* note 119.

that other unjustifiable reasons were also involved.¹⁷⁸ This burden is not onerous, as the information provided under the procedural requirement is binding on the employer.¹⁷⁹ Thus, the employee's burden involves only a rebuttal of the employer's stated motivation. Moreover, giving employees some type of burden also has the advantage of helping to avoid, although not eliminate, frivolous suits.¹⁸⁰

The law of termination would essentially impose a hybrid burden scheme. Under this scheme, the employer possesses the initial burden of showing that it satisfied the law's procedural requirements, particularly by giving the employee a reason for the termination. If the employer is successful, the burden then shifts to the employee to show that the employer was actually motivated, at least in part, by something that did not constitute a reasonable business justification. This hybrid structure would assign the burdens of proof to the parties with superior access to the relevant information and in a manner that best clarifies the issues during litigation. The result would be an enforcement process that minimizes frivolous lawsuits while streamlining litigation of meritorious claims.

D. *Forum*

One of the most significant enforcement problems in the current workplace regulatory scheme is the very real possibility that an employee will have to pursue claims related to the same set of facts in multiple forums. Thus, the foremost concern in establishing the law of termination is to ensure that all claims related to a given set of facts can be adjudicated in as few forums as possible.

Until all workplace regulations are consolidated,¹⁸¹ the possibility of multiple forums is unavoidable. However, the law of termination could dramatically reduce the likelihood and magnitude of that outcome. By consolidating all termination claims into a single, universal statute, the law of termination makes it relatively easy to establish a

178. This structure is similar to Title VII, where the procedural requirement is the employer's burden of production and the employee can win by either disproving that reason or proving that unjustified motivations were at play. *See infra* Part IV.A.1.

179. *See supra* note 116 and accompanying text.

180. *See* Blades, *supra* note 18, at 1427–29 (noting the potential for frivolous dismissal suits and therefore arguing that an employee should be required to prove “by affirmative and substantial evidence” that his termination was unjust); Note, *supra* note 104, at 1842 (maintaining that an employee's evidence of unjust dismissal should be required to meet a “reasonable threshold” to avoid the potential for fraudulent, frivolous, or nuisance lawsuits).

181. *See supra* note 16.

single forum for most termination-related disputes.¹⁸² The main issue is to identify the best forum.

Proposals to shift cases away from existing courts have existed for quite some time, with the two most prominent alternatives being mandatory arbitration and, to a lesser extent, specialized labor and employment courts. Although both of these forums have advantages over the current judicial system, their overall costs suggest that existing courts are the best, albeit imperfect, forum for law of termination claims.

Arbitration has long been the darling of just cause proposals.¹⁸³ The appeal of arbitration derives from its promise of a less expensive¹⁸⁴ and quicker adjudication system—particularly in comparison to a judicial model that is often beset with high litigation costs and delay.¹⁸⁵ These potential benefits were part of the reason that Mon-

182. A possible exception involves terminations claims under a collective-bargaining agreement with a mandatory arbitration clause. The law of termination could eliminate this problem by preempting those agreements. A better option, however, would permit arbitration of these types of claims. Although this option would represent an additional possible forum for law of termination claims, that outcome is better than the alternative. This option would keep all collective-bargaining agreement claims in arbitration. In contrast, if the law of termination preempted only termination claims under a collective-bargaining agreement, a single set of facts could result in claims being pursued in multiple forums. See *infra* notes 305–308 and accompanying text. But see *Pyett v. Pa. Bldg. Co.*, 498 F.3d 88, 93–94 (2d Cir. 2007) (holding that collective-bargaining agreement waiver of an individual’s statutory right to a federal forum is unenforceable). Moreover, a union’s experience in arbitrating claims against a given employer neutralizes many of the problems with arbitration. See *infra* note 189.

183. For commentaries on the benefits of resolving employment disputes in arbitration proceedings as opposed to litigating in civil courts, see THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: FINAL REPORT 49–60 (1994), available at http://digitalcommons.ilr.cornell.edu/key_workplace/2 (commonly referred to as the “Dunlop Commission Report”); Befort, *supra* note 2, at 399–404; St. Antoine, *A Seed Germinates*, *supra* note 17, at 77–78; Summers, *supra* note 130, at 482–84.

184. See Lewis L. Maltby, *The Projected Economic Impact of the Model Employment Termination Act*, 536 ANNALS AM. ACAD. POL. & SOC. SCI. 103, 117 (1994) (noting costs of arbitration); Kenneth C. Mennemeier, *Protection from Unjust Discharges: An Arbitration Scheme*, 19 HARV. J. ON LEGIS. 49, 74 (1982) (stating that arbitration “tend[s] to be less formal, expensive, and time-consuming than either litigation or an administrative hearing process”).

185. See Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer’s Impact and Legacy*, 73 DENV. U. L. REV. 1051, 1053 (1996) (arguing that private arbitration may provide “more justice” to employees than the “less efficient” public civil litigation process); David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1563 (2005) (arguing that arbitration may be advantageous to employers and employees because it is less expensive and faster); Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 197 (2001) (“[R]eplacing costly and erratic public litigation with high-quality, private arbitration can enhance the legal and economic situation of workers as much as that of employers.”). Some studies have also indicated that employees may have a higher win rate in arbitration. See Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L.

tana's WDEA made arbitration the preferred, although not required, forum.¹⁸⁶

Arbitration, however, comes with costs of its own. The use of unpublished decisions,¹⁸⁷ the lack of any significant review,¹⁸⁸ and the potential that arbitrators will favor employers, who are repeat players and can influence the selection of arbitrators,¹⁸⁹ makes arbitration far from perfect, especially for individual employees.¹⁹⁰ Moreover, arbitration would undermine employees' current right to a jury trial under many workplace laws.¹⁹¹

Parties may also view arbitration as an inferior option. Although Montana's WDEA encourages arbitration, the vast majority of WDEA claims were litigated in court.¹⁹² The possible reasons for this are varied. Employees typically favor juries because they are often com-

REV. 105, 113–14 (2003) (citing such studies). However, a successful employee may receive a higher award in a judicial proceeding than in arbitration. *Id.* at 115.

186. MONT. CODE ANN. § 39-2-914 (2007).

187. *See* Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure, 52 Fed. Reg. 23,629, 23,631 (June 24, 1987) (recommending publication of federal administrative whistleblower decisions, which “should help narrow the issues for future adjudications, contribute to a sense of fairness in the adjudicatory process, and improve case management”); PERRITT, EMPLOYEE DISMISSAL, *supra* note 1, § 11.20, at 11-77 (noting that the failure to report arbitration decisions reduces predictability and expressing concern about difficulties in determining how to certify and assign arbitrators).

188. *See* 9 U.S.C. § 10 (2006) (allowing vacation of arbitration award only if award was procured through fraud, there was evident partiality or corruption of the arbitrators, the arbitrators engaged in misconduct, or the arbitrators exceeded their powers or so imperfectly executed them that a proper award was not made); *United Paperworkers Int'l Union, v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (holding that “as long as the arbitrator is even arguably construing or applying the [collective-bargaining contract] and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision”).

189. One reason that arbitration has worked well in the collective-bargaining context is that unions are also repeat players. Individual plaintiffs, however, lack the experience and expertise of unions, which eliminates the balance that currently exists in collective-bargaining arbitrations. *See* Sprang, *supra* note 87, at 911 (noting extensive union participation in arbitration process).

190. *See generally* Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 359–90 (2006) (providing arguments against employment arbitration); *see also* Pyett v. Pa. Bldg Co., 498 F.3d 88, 92–94 (2d Cir. 2007) (revealing an instance where employees sought to resolve an employment dispute in federal court and the employer sought to enforce an arbitration clause).

191. 42 U.S.C. § 1981a(c) (2000) (Title VII); 42 U.S.C. § 12212 (2000) (ADA).

192. *See* Leonard Bierman et al., *Montana's Wrongful Discharge from Employment Act: The Views of the Montana Bar*, 54 MONT. L. REV. 367, 373–76 (1993) (finding that 67 out of 1,942 WDEA cases—approximately 3.5%—were arbitrated); Marc Jarsulic, *Protecting Workers from Wrongful Discharge: Montana's Experience with Tort and Statutory Regimes*, 3 EMP. RTS. & EMP. POL'Y J. 105, 118 (1999) (finding, in a five-year sample, that 640 WDEA claims were litigated in court and 67 claims arbitrated).

posed mainly of people who are employees somewhere.¹⁹³ Another reason, according to one survey, is that Montana attorneys preferred court litigation.¹⁹⁴ It is not entirely clear why attorneys held this view, but it may result from an aversion to the unfamiliar—arbitration lacks discovery and juries—and the prospect of lower attorney's fees.¹⁹⁵ Moreover, employers may have been disinclined to arbitrate claims by low-wage workers,¹⁹⁶ who often have difficulty paying for litigation or retaining an attorney on a contingency basis.

In the end, it appears that the problems with arbitration, particularly with regard to the enforcement goals of the law of termination, outweigh its benefits.¹⁹⁷ Arbitration certainly has its merits and represents a reasonable option, but it is unable to provide the unified adjudication scheme that the law of termination needs. The other alternative, a specialized labor and employment court, would provide a single forum, although it would require significant start-up costs.¹⁹⁸

A specialized labor and employment court, which exists in some countries,¹⁹⁹ could provide expert and efficient adjudication of termination and other workplace claims.²⁰⁰ Although the prospect of such a court actually becoming a reality is unlikely, it could provide a single forum that efficiently resolves disputes under the law of termination. Moreover, creation of a new labor and employment court would presumably result in more judges, which would lessen the burden resulting from some termination claims moving out of arbitration and into courts.

193. *Id.* at 119.

194. *Id.*

195. *Id.*; see also Bierman et al., *supra* note 192, at 375 (noting that attorneys also cited perceived bias by arbitrators).

196. Jarsulic, *supra* note 192, at 119.

197. See, e.g., Sprang, *supra* note 87, at 911–13 (criticizing the META's use of arbitration because arbitrators tend to "split the baby" for valid claims and because hearings vary widely in terms of process, evidentiary rulings, and adherence to precedent).

198. Other alternatives include requiring mediation or conciliation before an employee can file a lawsuit, as is required in France and Germany. Summers, *supra* note 130, at 510, 512. A further option is to add law of termination claims to preexisting administrative schemes, such as state unemployment insurance. See generally Janice R. Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REFORM 207 (1983) (arguing for new just cause protection litigated before state unemployment adjudicators). Agencies, however, also raise problems with the right to a jury trial and, like state unemployment adjudications, would maintain much of the fragmented enforcement seen in the current workplace regulatory system.

199. See, e.g., *Arbeitsgerichtsgesetz* [Labour Courts Act], July 2, 1979, BGBl. I at 853 (F.R.G.).

200. Such a court would presumably have jurisdiction over all employment actions, at least ones in which the federal courts would currently have jurisdiction.

Until such a court comes to fruition, however, the best option for enforcing law of termination claims appears to be existing courts. This procedure does not require dramatic changes from current enforcement of most termination disputes and it fosters the law's aim of eliminating multiple forums. Moreover, using the existing judicial system allows a court with a law of termination claim to hear related claims as well.²⁰¹

The risk of this choice of forum is that it will overburden court dockets already faced with a disproportionate number of workplace disputes.²⁰² The law of termination, despite its radical changes, would be unlikely to substantially affect the total number of termination claims.²⁰³ Moreover, by greatly simplifying the substance of termination claims, the law would decrease the burden of resolving any given case. To be sure, the law would shift claims that would otherwise be in arbitration to the courts. This would be problematic if Congress failed to increase the number of judges and judicial resources. Although Congress is typically reluctant to expand the judiciary, it is likely that any Congress willing to enact the law of termination's dramatic changes would also be willing to provide additional judicial resources.

Finally, aside from identifying a specific forum, the sheer act of funneling all claims through a single adjudicatory process would achieve independent enforcement gains. For instance, a wide variety of administrative and statute of limitations hurdles currently attach to many workplace claims.²⁰⁴ The law of termination, by replacing this patchwork of procedural rules with a single, straightforward complaint procedure would eliminate the potential for conflicting requirements and make it much easier to pursue a claim.

201. Both state and federal courts would possess jurisdiction: federal courts could hear claims brought in state court under removal jurisdiction, 28 U.S.C. § 1441 (2000 & Supp. V 2005), and state courts are presumed to have jurisdiction over federal claims unless Congress explicitly eliminates state jurisdiction. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477–78 (1981).

202. See *Donohue & Siegelman*, *supra* note 4, at 1015–20 (1991) (providing statistical information about employment litigation); *McGinley*, *supra* note 85, at 1485 (stating that federal courts have seen a “tremendous growth” in employment discrimination cases filed in the past twenty years).

203. See *infra* notes 347–349 and accompanying text.

204. See, e.g., *Brake & Grossman*, *supra* note 48, at 887 (discussing procedural hurdles that an employee must meet to bring a claim of employment discrimination). The law of termination would replace all current administrative authority to pursue certain termination claims. See, e.g., *infra* Part IV.A.2 (discussing NLRA). The law could, however, vest authority to pursue claims in a single agency.

E. Limits on Damages

The remedies available under the law of termination are important for the law's effectiveness as well as its political feasibility. Remedies must be meaningful enough to discourage violations and to encourage meritorious lawsuits, yet not so large that the law would create an unpredictable lottery system.²⁰⁵

Damages available in the vast majority of workplace actions include reinstatement, backpay,²⁰⁶ and attorney's fees; those remedies should be available under the law of termination as well. Where the problem of excessive damages becomes most pertinent is with regard to compensatory and punitive awards. Although some workplace laws, such as Title VII,²⁰⁷ limit compensatory and punitive damages, many do not.²⁰⁸ The often unpredictable risk of an extremely large monetary award, even if remote, is serious enough to impose a significant cost on risk-averse employers.²⁰⁹ Moreover, backlash against these awards—whether from the public, employers, or judges—weakens the support for and ultimately the effectiveness of workplace laws.²¹⁰

The need to counteract the costs of unlimited awards necessitates some limitation on law of termination damages. But the cap cannot be too severe. In Montana, for instance, the limitation on monetary damages²¹¹ seems to have produced a scheme that fails to provide enough incentive for attorneys to pursue many meritorious cases.²¹² Adjusting the cap based on an employer's ability to pay, perhaps by tying the cap to the number of employees or some measure of income, would provide a feasible means of introducing predictability into the remedial scheme. Looking to an employer's finances would

205. State common law workplace claims, in particular, may carry the small possibility of very large monetary awards. See THOMAS GEOGHEGAN, *SEE YOU IN COURT* 29 (2007) (arguing that the rise of tort-based employment claims has led to unpredictable lottery claims and increased litigation generally).

206. See, e.g., 29 U.S.C. § 160(c) (2000) (NLRA); 42 U.S.C. § 2000e-5(g) (2000) (Title VII). But see *supra* note 61 and accompanying text (noting that WDEA does not permit reinstatement).

207. 42 U.S.C. § 1981a(b) (2000).

208. See *supra* note 205 (noting the potential for large "lottery" damage awards).

209. Jarsulic, *supra* note 192, at 107; see also St. Antoine, *A Seed Germinates*, *supra* note 17, at 69 (citing examples of substantial actual and punitive damage awards).

210. See *infra* notes 265–271 and accompanying text.

211. See *supra* notes 59–61 and accompanying text.

212. Bierman et al., *supra* note 192, at 375 (describing survey showing that 60% of responding attorneys might advise their clients to skip arbitration provided under Montana law and go directly to court). Similarly, the NLRA also has been criticized for lacking sufficient remedies, particularly where a violation does not warrant backpay. Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLRA?*, 34 FLA. ST. U. L. REV. 1133, 1163–64 (2007).

also help to ensure that punitive damages serve their purpose by exerting a significant cost to the employer that engaged in particularly harmful behavior.²¹³

Title VII has a graduated system of caps that are tied to the number of employees, but its maximum compensatory and punitive award of \$300,000 for the largest of employers is far too low.²¹⁴ One million dollars is probably a reasonable maximum for the most egregious cases against the largest or wealthiest employers at this time, but the amount should be linked to some measure of inflation to avoid a continual decrease in the law of termination's deterrent effect. Moreover, basing the graduated amount on the number of employees is only a rough proxy for an employer's ability to pay; however, given its relatively straightforward application, it is as good an option as any.

This limited remedial scheme would eliminate much of the lottery aspect of current workplace law.²¹⁵ Employers would know the maximum award they would face for a successful law of termination claim. That predictability would allow for better business planning and would reduce the risk and severity of backlash. The limited damage scheme would also enhance the law of termination's political prospects. Employers would obviously support a cap on damages. Perhaps ironically, a cap could also achieve significant backing by unions, which currently face an anemic remedial scheme under the NLRA. The only monetary damage available for terminations that violate the NLRA is backpay.²¹⁶ The law of termination's expansion of monetary remedies—even if capped—would be a significant benefit for unions,²¹⁷ as increased penalties would give employers more incentive to comply with the NLRA, and unions and employees more reason to seek the Act's protection.²¹⁸ Thus, the law of termination's

213. See Paul M. Secunda, *A Public Interest Model for Applying Lost Chance Theory to Probabilistic Injuries in Employment Discrimination Cases*, 2005 WIS. L. REV. 747, 779 n.186 ("It is generally agreed that one of the central purposes of punitive damages is to punish an employer for especially outrageous conduct on the employer's part.").

214. 42 U.S.C. § 1981a(b)(3)(D) (2000).

215. See Befort, *supra* note 2, at 402 (describing current termination litigation as a "uniquely American employment law lottery" under which most employees cannot pursue claims because of expense of litigation, while employers fear high costs of defending such suits); *supra* note 209 and accompanying text. But see Vanessa Ruggles, *The Ineffectiveness of Capped Damages in Cases of Employment Discrimination: Solutions Toward Deterrence*, 6 CONN. PUB. INT. L.J. 143, 155–58 (2006) (criticizing capped damages because they reduce deterrence).

216. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11 (1940).

217. See St. Antoine, *A Seed Germinates*, *supra* note 17, at 69–70 (noting the benefits of just cause termination laws for unions).

218. See *infra* Part IV.A.2.

remedial scheme provides another example of how the law could better enforce the goals of current workplace laws.

F. Waiver

Whether and under what conditions parties may waive claims²¹⁹ is yet another area in which existing workplace laws have taken varied approaches, albeit to a lesser extent than some of the other issues. The waiver question involves two scenarios: pre-dispute and post-dispute waivers. The law of termination would follow the typical treatment of these scenarios, which is to prohibit pre-dispute waivers while allowing post-dispute waivers.

Employees are generally not permitted to prospectively waive their substantive statutory rights, although there are exceptions.²²⁰ The ban on such waivers exists because most workplace rights, absent congressional permission to the contrary, are considered to be a minimum level of protection that parties cannot contract around.²²¹ This rationale applies equally to the law of termination.

The law, like other workplace statutes, would typically prohibit terminations based on many characteristics, such as discrimination, that have long been targets of workplace regulations.²²² As a result, pre-dispute waivers of claims under the law of termination affects not just the employee,²²³ but the public as well. Further complicating

219. "Claims" refers to substantive rights as opposed to waivers of procedural rights, such as mandatory arbitration agreements that waive the right to a judicial forum. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (permitting pre-dispute mandatory arbitration agreements that implicate statutory rights).

220. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974) ("In no event can the submission to arbitration of a claim under the nondiscrimination clause of a collective-bargaining agreement constitute a binding waiver with respect to an employee's rights under Title VII."); *McClure v. Salvation Army*, 460 F.2d 553, 557 (5th Cir. 1972) ("[E]mployment contracts cannot be used to waive protections granted to employees by an Act of Congress."). *But see* META § 4(c) (1999) (allowing pre-dispute waiver of claims if employer agrees to pay a specified level of severance pay to employees terminated for reasons not involving willful misconduct); *id.* § 14 (permitting employers to make continued employment conditional on employees' agreement to § 4(c) waiver).

221. *See Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 117 (2d Cir. 2000) (explaining that employers cannot contract out of statutory workplace protections, such as antidiscrimination laws).

222. *See Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 460 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 2931 (2008) (arguing that post-dispute waivers are not possible under the FMLA because the act was intended to create a minimum floor for all employees); *see infra* notes 263–276 and accompanying text.

223. *See Sprang, supra* note 87, at 905–09 (criticizing META's pre-dispute waiver provision because most employers will be able to force employees to accept severance pay that is often far less than the value of a meritorious wrongful termination claim).

matters is employees' lack of information about their legal rights.²²⁴ This information problem prevents efficient bargaining between the employee and employer—an inefficiency that would result in too many claims being waived.²²⁵ Even a fully informed employee's pre-dispute waiver threatens the success of the law of termination. A pre-dispute waiver would allow an employer to discriminate based on race, sex, religion, and other currently protected characteristics. Because one of the law of termination's primary goals is to better root out discriminatory terminations, pre-dispute waivers would not be permitted.

Post-dispute or retroactive settlements are a different matter. We currently allow settlements, in some form, under most workplace laws.²²⁶ There are exceptions,²²⁷ however, which represent another example of the needless complexity and inconsistency in the workplace regulatory system—problems that the law of termination would seek to minimize through a unitary approach. This approach would permit post-dispute waivers. Such waivers are generally permissible for good reason because, once the dispute has occurred, the employee has much greater knowledge of the harm she suffered and, if represented by counsel, has more information about her legal rights as well.

Congress has already created a suitable model for post-dispute waivers. The Older Workers Benefit Protection Act ("OWBPA") sets forth detailed requirements for post-dispute waivers under the ADEA.²²⁸ Pursuant to the OWBPA, an employee can waive her rights to sue after termination, but only under specific conditions, such as: the waiver cannot apply to later disputes; the waiver was part of a written agreement that specifically refers to ADEA rights; there was specific consideration for the waiver; the employee was advised to consult with an attorney; and the employee was given a specified amount of

224. See Note, *supra* note 104, at 1830–32 (discussing employees' lack of information with respect to their legal rights); *supra* notes 38–43 and accompanying text.

225. An economically inefficient surplus of waivers results from employees not being fully aware of the rights that they are asked to waive. Some of these employees will waive their rights even though they would have refused to do so had they possessed full knowledge, which constitutes an economic surplus of waivers.

226. See, e.g., 29 U.S.C. § 626(f) (2000) (ADEA settlements).

227. The issue of waiving claims under the FMLA has created a circuit split that illustrates some of the possible approaches to the issue, as well as the complexity and uncertainty that can exist within a single statute. The Fifth Circuit has held that parties cannot prospectively (pre-dispute) waive employees' substantive rights under the FMLA, but can retroactively (post-dispute) waive claims. *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 321 (5th Cir. 2003). In contrast, the Fourth Circuit has held that the FMLA and its regulations bar both pre-dispute and post-dispute waivers, unless approved by a court or the Department of Labor. *Taylor*, 493 F.3d at 460.

228. 29 U.S.C. § 626(f).

time to consider the offer.²²⁹ These requirements provide greater information to employees about their rights—a particular concern for the law of termination—and protects both employees’ and the public’s interest in rooting out age discrimination by ensuring that waivers of ADEA rights are fair and voluntary.²³⁰ Congress could easily extend the OWBPA’s requirements to the law of termination.

Prohibiting pre-dispute waivers of law of termination claims is needed to make sure that the law has a chance of achieving its enforcement aims, especially in light of the information asymmetries that plague the workplace. Permitting post-dispute waivers under the OWBPA scheme would help to address information problems and encourages settlements. Most important, the law of termination would impose a single waiver standard for all termination claims, and there would be no need to treat waivers differently depending on the jurisdiction or legal theory of the case.

IV. THE LAW OF TERMINATION’S EFFECT ON THE WORKPLACE

A. *Effect on Existing Termination Laws*

The law of termination would have a significant impact on all of the numerous termination laws that currently exist; indeed, the number is so large that it is impractical to discuss all of them. The degree of this impact is governed by the details of each law and its differences with the law of termination’s universal approach. Although many of the law of termination’s advantages come from its universality, some of the differences in today’s laws are purposeful. For example, age discrimination is considered less serious than many other forms of discrimination and therefore gives employers a broader defense for age-related discrimination.²³¹ Although the law of termination would use a single standard for all termination claims, the standard is broad enough to allow for such differences—a judge, for instance, may be more willing to consider an age as a reasonable business justification than race or sex. Thus, the law of termination would be able to take into account varied policy concerns while minimizing the complexity

229. *Id.*

230. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998) (stating that OWBPA’s policy is “to protect the rights and benefits of older workers”); *id.* at 436 (Thomas, J., dissenting) (stating that OWBPA’s policy is to make clear that waivers are knowing and voluntary).

231. *See Smith v. City of Jackson*, 544 U.S. 288, 240 (2005) (“Congress’ decision to limit the coverage of the ADEA by including the [reasonable factor other than age] provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual’s capacity to engage in certain types of employment.”).

that has accompanied those differences under the current system of termination laws.

The potential benefits of the law of termination's universal approach is best represented through two existing statutes, albeit in decidedly different ways. The law of termination's potential impact on Title VII and the NLRA illustrate its possible effect on both the substance and the enforcement mechanisms of existing workplace laws. Such changes are likely to improve achievement of the policies underlying these laws.

That the law of termination can improve the enforcement of existing laws may not be immediately apparent given the severity of its changes to the current system. For example, supplanting Title VII's regulation of terminations with a measure that is not based on worker characteristics would create a seismic shift in the symbolism of American workplace law. The effect on labor law would be similar in degree, but results instead from important changes to the enforcement and jurisdiction of disputes currently falling under the NLRA.

Although Title VII and the NLRA are the only statutes discussed in detail, the effects on these laws provide an illustration of the interplay between the law of termination and other state and federal laws. This dynamic is one that, despite causing great change, promises equally great benefits.

1. Title VII

Supplanting discriminatory termination claims under Title VII may be the most controversial aspect of the law of termination, but also the most beneficial. Title VII is a microcosm of the costs associated with today's myriad workplace laws. The statute currently encompasses a wide array of legal claims, administrative requirements, and remedial provisions—making the requirements and standards of Title VII difficult for employees and employers to understand.²³² It is not surprising, therefore, that it is widely thought that Title VII is generally ineffective in meeting its goal of eradicating discrimination from

232. See Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 933 (1999) ("Title VII's convoluted analytical history . . . has contributed to resentment toward Title VII plaintiffs because it is confusing and fails to instruct defendants properly on how to avoid liability."); Joseph E. Slater, *The "American Rule" that Swallows the Exceptions*, 11 EMP. RTS. & EMP. POL'Y J. 53, 56 (2007) (citing Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2229–30 (1995)) (stating the view among scholars that the procedural structure of discrimination cases is "unnecessarily complex and confusing at best").

the workplace.²³³ Ironically, by eliminating Title VII's application to terminations, the law of termination promises a superior means to reduce workplace discrimination. This change will greatly simplify challenges to discriminatory terminations and lessen the current backlash against Title VII that undermines its enforcement.²³⁴ For these reasons, Title VII is perhaps the best illustration of the law of termination's potential to achieve the goals of today's workplace laws better than the laws themselves.

a. Effect on Title VII Defenses

Title VII's complexity extends to all aspects of a claim. Even something that should be as straightforward as a prima facie case of discrimination has been enmeshed in debates over competing standards.²³⁵ These standards are the legacy of court-created analyses and congressional modifications that, in many cases, have left parties unsure of something as basic as their pleading requirements.

In addition to problems surrounding its prima facie case, Title VII has several different defenses available to employers, each of which with its own distinct requirements. This complexity is troubling because these defenses all seek the same goal of preserving some level of employer autonomy. The law of termination's business justification requirement would maintain that goal, while replacing the various defenses with a single analysis. Indeed, the law's efficiency gains are well-illustrated by its ability to incorporate an employer defense as part of its substantive standard. This single standard would improve enforcement of current Title VII policies and would provide clarity to an area of law that has long been lacking that attribute.

The defenses available in a Title VII action are dependent upon the underlying theory of discrimination. The three primary types of discriminatory termination claims under Title VII are single-motive, mixed-motive, and disparate impact. Single-motive claims allege only one motive for a termination and that motive was intentional, unlaw-

233. See generally Brake & Grossman, *supra* note 48 (arguing that Title VII has failed as a rights-claiming system); McGinley, *supra* note 85, at 1448–90 (describing the failures of Title VII to prevent discrimination in the workplace).

234. An even greater, and more beneficial, change would involve a unified approach to all workplace claims. Yet simplifying hiring, reasonable accommodation, and other non-termination claims implicate issues beyond the scope of this Article. Such a proposal, however, is the subject of a forthcoming article. See Hirsch, *Regulatory Pragmatism*, *supra* note 16.

235. See Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1930–31 (2004) (discussing validity of the *McDonnell Douglas* test and motivating factor standards).

ful discrimination.²³⁶ Mixed-motive claims recognize that an employer had more than one motive for the challenged termination and unlawful discrimination was at least a “motivating factor.”²³⁷ Finally, disparate impact claims involve employer actions that are facially non-discriminatory, but that impose a disproportionate burden on a protected class.²³⁸

(1) *Single-motive Defenses*

Employer defenses to single-motive claims fall under two categories. The first is simply the “I didn’t do it” argument—the employer states that discrimination in no way motivated the termination.²³⁹ This argument is not technically a defense; rather, it is a purely factual rebuttal of the plaintiff’s case that the law of termination would not affect to any significant degree. Under the law of termination, like Title VII, the employer would win if the employee is unable to convince the factfinder that the employer acted based on an unlawful reason.²⁴⁰

The second type of employer response to a single-motive claim involves true affirmative defenses. The most significant is the “bona fide occupational qualification” (“BFOQ”) defense. Title VII expressly permits an employer “to hire or employ” workers based on religion, sex, or national origin—but not race—if that classification is a “bone fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”²⁴¹ Generally, the BFOQ defense is narrow and requires that the classification relate to the “essence” of the business.²⁴² This BFOQ test is quite similar to, albeit narrower than, the law of termination’s reasonable business justification.²⁴³ Indeed, any successful BFOQ defense would necessarily

236. See *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 711 (6th Cir. 2006) (describing briefly single-motive claims).

237. *Id.*

238. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (describing such practices as “fair in form, but discriminatory in operation”).

239. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (providing an example of this defense).

240. See *supra* Part III.C.

241. 42 U.S.C. § 2000e-2(e)(1) (2000).

242. See *Dothard v. Rawlison*, 433 U.S. 321, 333 (1977) (citing *Diaz v. Pan Am. World Airways*, 422 F.2d 385, 388 (5th Cir. 1971)) (noting also that an employer could prove that it reasonably believed all or substantially all members of a classification would be unable to safely and efficiently perform the job duties).

243. The law of termination would give more leeway to employers to terminate based on race, which the BFOQ defense expressly prohibits. 42 U.S.C. § 2000e-2(e)(1). Yet, given the difficulty of arguing that a race-based termination is related to a valid business reason, the practical effect of that change would be negligible.

satisfy the law's reasonable business justification standard. For example, an employer that is able to show that a sex-based termination was reasonably necessary to the essence of its business would be able to show that the termination had a reasonable business justification.

Religious discrimination claims also have a unique defense that permits an employer to avoid liability if it can prove that discrimination based on an employee's religious observation or practice is necessary to avoid an "undue hardship" on the business.²⁴⁴ This defense is broad as the Supreme Court has defined undue hardship in religious discrimination claims as anything beyond a *de minimis* cost.²⁴⁵ The law of termination's business justification defense would likely make it harder to show undue hardship, although that change may be warranted. The *de minimis* standard is often viewed as overly deferential to employers' interests in religious discrimination cases; the law of termination could address that criticism on a case-by-case basis, while avoiding the strong employer opposition that has thus far stymied more specific legislative solutions.²⁴⁶ In the end, however, religious claims account for a small percentage of Title VII actions.²⁴⁷ Of more relevance are the defenses available in mixed-motive and disparate impact cases.

(2) *Mixed-motive Defenses*

The second major class of employer defenses under Title VII is associated with mixed-motive claims. Such claims occur when an employer relied on both legitimate and illegitimate reasons. The Supreme Court first recognized mixed-motive claims under Title VII in its 1989 *Price Waterhouse v. Hopkins*²⁴⁸ decision. In *Price Waterhouse*, a majority of Justices also established a defense to mixed-motive claims: once an employee proves that the employer relied in part on an illegitimate motive, the employer can avoid liability by proving that it would have made the same decision absent that motive.²⁴⁹ In 1991,

244. *Id.* § 2000e(j).

245. *See, e.g.*, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (involving employer's refusal to accommodate employee's request not to work Saturdays and subsequent termination of employee for refusing to work on Saturdays).

246. *See, e.g.*, Workplace Religious Freedom Act, S. 677, 109th Cong. § 2 (2005) (attempting to change definition of undue hardship to "significant difficulty or expense").

247. U.S. Equal Employment Opportunity Commission, Charge Statistics, <http://www.eeoc.gov/stats/charges.html> (last visited Nov. 17, 2008) (indicating that religious discrimination claims made up only 3.4% of Equal Employment Opportunity Commission charges filed in fiscal year 2006).

248. 490 U.S. 228 (1989).

249. *Id.* at 244–45. The plurality held that the employer may be liable if improper bias was a "motivating part" in the challenged employment practice. *Id.* at 258. Two concur-

Congress amended this affirmative defense by mandating that an employer would still be liable for violating Title VII even when it proved that it would have made the same decision absent a discriminatory motive,²⁵⁰ but limiting the remedy in those instances to declaratory relief, certain injunctive relief, costs, and attorney's fees.²⁵¹

The law of termination would alter Title VII's mixed-motive defense by employing a complete defense to liability similar to the *Price Waterhouse* analysis.²⁵² Eliminating Title VII's limited remedial provision, although not trivial, would not prove fatal. An absolute affirmative defense loses some of the symbolic force of imposing liability, albeit limited, on all employers that rely on impermissible factors. Yet, as a practical matter, the monetary remedies currently available under Title VII's mixed-motive affirmative defense are so weak that they provide little incentive for plaintiffs to pursue cases that involve a strong employer defense.

(3) *Disparate Impact Defenses*

One of the most complicated claims under Title VII provides, perhaps ironically, the most straightforward comparison with the law of termination. Disparate impact claims are unique because, unlike other Title VII claims, they do not require a showing of intent. Instead, a *prima facie* disparate impact case consists of proof that an otherwise neutral employment practice disproportionately burdened a protected class of employees.²⁵³ If an employee proves this *prima facie* case, the employer may show that the practice at issue is "job related for the position in question and consistent with business necessity."²⁵⁴ If the employer satisfies this defense, it will avoid liability unless the employee can demonstrate that the employer refused to

ring Justices would have required that improper bias be a "substantial factor." *Id.* at 259–60 (White, J., concurring); *id.* at 265–66 (O'Connor, J., concurring). In the Civil Rights Act of 1991, Congress codified the plurality's "motivating factor" standard. 42 U.S.C. § 2000e-2(m).

250. *Id.*

251. *Id.* § 2000e-5(g)(2)(B).

252. *See supra* notes 121–125 and accompanying text.

253. 42 U.S.C. § 2000e-2(k)(1); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Typically, the plaintiff must identify a specific employment practice that caused the disparate impact, although in certain instances the plaintiff need only point to the employer's general decision making process. 42 U.S.C. § 2000e-2(k)(1)(B)(i) (stating that a particular practice need not be identified if elements of the decision making process cannot be separated).

254. 42 U.S.C. § 2000e-2(k)(1)(A).

use an alternative practice that met its business goal, but lacked a disparate impact.²⁵⁵

The meaning of the job-related and business necessity defense—in combination with the alternate practices rebuttal—is susceptible to multiple interpretations,²⁵⁶ but generally mirrors the law of termination's reasonable business justification requirement. Both standards focus on the extent to which an employer's stated motivation is reasonably necessary for the normal operation of its business; thus, in most instances, the outcomes under both standards will be the same. The most significant difference is the burden of proof under each standard. In contrast to the law of termination's substantive standard, which places the burden of proof on the employee, the employer has the burden of proving business necessity under Title VII.²⁵⁷ This difference will be relevant in close cases, although an employer will generally present the same type of evidence under either standard. Accordingly, the law of termination will do little to affect employers' responses to potential disparate impact situations.²⁵⁸

b. Effect on Discrimination Claims Generally

The most controversial effect of eliminating Title VII's explicit prohibition against discriminatory terminations would be the symbolic impact. Replacing Title VII's express antidiscriminatory language with the general law of termination would take away some of the advantages that come from a clear statement of policy to root out discrimination in the workplace. That cost, however, appears to be lower than the benefits of the change.

Although the symbolism of Title VII's express ban on discrimination still serves a purpose, it is less important than when the statute was enacted. The social norms against discrimination, although far from perfect, are well established. Unlike in 1964, employers today are aware that discrimination is contrary to public policy, if not their

255. *Id.*; see also *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (explaining the requisite elements of the employer's defense and how the employee can rebut with the alternative practice argument).

256. For commentary on the ambiguities and different interpretations of the business necessity defense, see Ernest F. Lidge III, *Financial Costs as a Defense to an Employment Discrimination Claim*, 58 ARK. L. REV. 1, 27 (2005); Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479, 1516–20 (1996).

257. 42 U.S.C. § 2000e-2(k)(1)(A).

258. This analysis also applies to the BFOQ defense. See *supra* notes 241–243 and accompanying text.

own sensibilities.²⁵⁹ Thus, the most current pressing need is not symbolism, but a workable regulatory scheme that actually results in less discrimination.

The stress on pragmatism over symbolism diverges from recent developments in Europe. Although European countries have long had general unjust dismissal laws, they are now adding explicit antidiscrimination measures.²⁶⁰ One reason for this change has been the large influx of immigrant workers to Europe, which has generated more workplace discrimination.²⁶¹ In contrast to the United States, which has grappled with a heterogeneous workforce for some time, the threat of discrimination in Europe is growing. As that threat grows, the symbolic benefit of explicit antidiscrimination regulations grows as well. Indeed, Europe's experience illustrates the need for policymakers to consider contextual differences—both across jurisdictions and over time in a single jurisdiction—when making regulatory decisions.

The question, then, is how we can best reduce discriminatory practices in the current American workplace. The general law of termination, although radical in its elimination of Title VII's express prohibition against discriminatory terminations, would better satisfy that statute's antidiscrimination goals. For instance, the reasonable business justification requirement would continue to prohibit most terminations that currently violate Title VII. Discrimination generally would not constitute a reasonable business justification; thus, most terminations that are unlawful under Title VII would also violate the law of termination.²⁶² Moreover, the law of termination could provide a more effective means to eliminate discriminatory terminations. This efficiency gain²⁶³ derives from the creation of simpler streamlined regulations, decreased backlash, and reduced disincentive against hir-

259. See David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 948 (1996) (citing survey results to support assertion that "overt discrimination has lost all social acceptance").

260. Scarponi, *supra* note 135, at 705 (describing action under European Community ("EC") treaties).

261. *Id.* (noting also that one of the EC's goals is to harmonize workplace rules of member states).

262. See McGinley, *supra* note 85, at 1514 (explaining that employer would have to prove that it treated employees similarly to satisfy just cause standard). Like Title VII, this analysis could permit certain types of affirmative action programs. *Johnson v. Transp. Agency*, 480 U.S. 616, 626 (1987).

263. This represents "Kaldor-Hicks" economic efficiency, under which an alternative is considered more efficient than the status quo if the winners under the alternative would be willing to compensate the losers, although actual compensation is not necessary. See Daniel A. Farber, *What (If Anything) Can Economics Say About Equity?*, 101 MICH. L. REV. 1791, 1795 (2003) (explaining "Kaldor-Hicks" economic efficiency analysis).

ing workers in a protected class.²⁶⁴ The latter two reasons—backlash and employer resistance to hiring workers in a protected class—are particularly telling examples of the law of termination’s potential benefits.

It is an unfortunate irony that deeming certain characteristics as especially worthy of protection inevitably fosters resentment from those not sharing those traits. The existence of backlash and types of opposition, although lamentable, are important and should not be discounted by those interested in rooting out discrimination.²⁶⁵ Hostility to antidiscrimination laws creates real hurdles to their enforcement.²⁶⁶ Employees who lack characteristics that Title VII was primarily intended to protect often harbor deep resentment against the perception that other employees have special rights.²⁶⁷ That perception is also shared by many employers, judges, and members of the public. Moreover, employers frequently claim that they are reticent to hire members of a protected class because such employees are difficult to fire.²⁶⁸

No matter the veracity of these sentiments, their existence decreases employment opportunities for protected workers.²⁶⁹ Opposi-

264. Eliminating at-will as the default also would provide employees who want to oppose discrimination or pursue a Title VII action with more protection against employer retaliation. See Estlund, *supra* note 20, at 1678–79 (stating that at-will termination makes employees reluctant to speak-out against an employer’s discriminatory conduct for fear of retaliation); *supra* note 21 and accompanying text.

265. See Befort, *supra* note 2, at 408–09 (noting that a unitary termination standard could reduce resentment against antidiscrimination laws, which would reduce both tension at work and societal conflicts); McGowan, *supra* note 94, at 164–67 (noting that leaving certain workers unprotected by antidiscrimination laws can lower employment of protected workers and create resentment from unprotected workers).

266. See Nancy Levit, *MegaCases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 421 (2008) (citing studies showing that diversity training can create backlash and negatively effect minority workers’ opportunities for promotion); McGinley, *supra* note 85, at 1490 (stating that backlash “influence federal judges to limit the protections of antidiscrimination statutes . . . [and] is partially responsible for both the curtailment of federal statutory civil rights and the growth of state common law exceptions to the employment at will doctrine”); cf. Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings*, 70 BROOK. L. REV. 1287, 1299–1302 (2005) (stating that employees’ willingness to follow workplace rules is tied to their beliefs about whether the rules are ethical).

267. See Estlund, *supra* note 20, at 1679–81 (explaining the resentment among members of unprotected classes); Oppenheimer, *supra* note 259, at 948 (citing 1987 survey results showing that 34% of white respondents objected to federal enforcement of antidiscrimination laws protecting black workers and 33% of white respondents had no interest in the issue).

268. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 262–66 (1992); Estlund, *supra* note 20, at 1680.

269. “Protected” workers or employees refers to individuals who are minorities under a particular Title VII classification. Although reverse discrimination claims are available

tion to discrimination cases extends to litigation as well. Studies have shown that employee claims brought under an antidiscrimination statute generally have a significantly lower chance of success than other claims.²⁷⁰ Although this disparity may have multiple causes, it is difficult to dismiss backlash as a major factor. Indeed, it would be unreasonable to expect all factfinders and judges to be immune from the hostile sentiments shared by so many others.

The law of termination would directly address this problem by maintaining current prohibitions against discriminatory terminations under a rule that applies equally to *all* employees, no matter their characteristics. Replacing Title VII's explicit protection for certain characteristics—which fosters the misguided perception that only certain individuals are protected²⁷¹—with a reasonable business justification rule would significantly reduce, although not eliminate, the focus on discrimination in termination cases.²⁷² The resulting decrease in backlash would, among other things, remove many of the hurdles to a successful argument that a termination was improperly motivated by discrimination.²⁷³ Placing all termination claims under the same framework would also reduce employers' perception that it is more difficult to fire protected employees.

The law of termination could decrease workplace discrimination in other ways as well. For example, several studies have shown that minority employees tend to discount the frequency of discriminatory acts against them.²⁷⁴ In a form of cognitive dissonance, these employ-

under Title VII, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976), the general perception is often that only minorities are protected.

270. See, e.g., Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44, 48 table 1 (2003) (finding statistically significant decreases in win rates for civil rights employment cases versus non-civil rights cases).

271. See Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719, 732 (1991) (arguing that exceptions to at-will doctrine were created in part due to the perception among judges "that only white males under the age of forty lacked some kind of job protection").

272. Employees may still argue that the employer was motivated by discrimination, but only as evidence that a reasonable business justification did not exist.

273. See Estlund, *supra* note 20, at 1682 (suggesting that a background rule of just cause and fair treatment may help enforcement of antidiscrimination policies); McGinley, *supra* note 85, at 1518 (explaining that it would eliminate the need to prove the employer's intent and instead focus the inquiry on the employer's behavior). *But see* Julie C. Suk, *Discrimination At Will: Job Security Protections and Equal Opportunity in Conflict*, 60 STAN. L. REV. 73, 75 (2007) (arguing, based on French experience, that universal just cause protection may increase discriminatory hiring).

274. See Brake & Grossman, *supra* note 48, at 887–88 & n.140 (discussing how stigmatized groups often under perceive discrimination and citing studies); Laura Beth Neilsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litiga-*

ees may be sensitive to discrimination faced by their class, but remain disinclined to believe that they, personally, were victims of discrimination.²⁷⁵ This discounting hinders enforcement of Title VII because it means that some victims will not oppose discriminatory acts.²⁷⁶ The law of termination alleviates much of this problem because even those employees who fail to perceive discrimination as the motive for their termination are likely aware that there was no reasonable business justification for the decision. Thus, these employees would be much more likely to pursue a claim under the law of termination than Title VII.

Other employees, in contrast, may file discrimination claims even though no discrimination actually occurred. When an employee views a termination as unjust, she will often seek a reason and a remedy. Particularly when employers provide no information about their motivation, discrimination often provides the most readily available answer.²⁷⁷ This search for an explanation results in unmeritorious claims that give employees false hope, impose unnecessary litigation costs on employers, waste judicial resources, and often overshadow valid discrimination claims by making judges suspicious of all such cases.²⁷⁸ The law of termination would address this problem by requiring the employer to state a business justification, which would reduce the need for employees to come up with their own, often unmeritorious, explanations.

The law of termination's potential effect on Title VII is deceptively simple. Legally, the proposal would greatly simplify termination claims that allege discrimination. This simplification improves enforcement, but it also alters the perceptions of employers, employees, and judges. This shift promises to alleviate hostility against claims of discrimination and, in turn, make it easier for employees who are truly victims of discriminatory acts to seek redress.

tion as a Claiming System, 2005 WIS. L. REV. 663, 682–83 (discussing reasons why employees may underreport discrimination).

275. See Brake & Grossman, *supra* note 48, at 887–95 (explaining this phenomenon); Jolls, *supra* note 39, at 1356–59 (discussing negative bias generally and employees unawareness that they are personally being subjected to general risks and harms in their workplace).

276. See K.A. DIXON ET AL., *A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB* 15 (2002) (finding that only 3% of employees who perceived unfair treatment sued their employer).

277. See Fischl, *Workplace Justice*, *supra* note 21, at 262 (stating that it is the “unfairness of the discharge itself that leads the employee to suspect a racial or gender aspect”).

278. *Id.* (“[T]he need to repackage unjust dismissal claims as discrimination claims needlessly racializes many employment disputes while at the same time trivializing the real but subtle and complex role of racial domination in the workplace.”).

2. NLRA

Another dramatic change under the law of termination would be its impact on terminations motivated by employees' collective activity. The National Labor Relations Board ("NLRB"), pursuant to its enforcement of the NLRA, currently has exclusive authority to regulate most private-sector collective activity²⁷⁹—an authority that the proposed law would eliminate with regard to terminations. Thus, the NLRA and other exclusive administrative schemes raise further issues concerning the law of termination's impact.²⁸⁰ In addition to replacing existing statutory prohibitions against terminations, the law of termination would also eliminate a significant portion of certain agencies' enforcement power and jurisdiction. The NLRB is an extreme example of this usurpation; although many agencies either enforce or adjudicate private causes of action under a statute,²⁸¹ few do both. Thus, the law's elimination of NLRA termination claims is among the most extreme changes from an enforcement standpoint. The extraordinary nature of this change poses special risks, but promises extraordinary benefits as well.

Before addressing the law of termination's effect on NLRA enforcement, it is important to identify its substantive impact. In one respect, the replacement of NLRA termination cases is no different than any other workplace law. Take, for example, an employer that terminated employees for the purpose of encouraging or discouraging union activity—a motivation that Section 8(a)(3) of the NLRA expressly prohibits.²⁸² A challenge to this action under the law of termination would generally provide the same outcome as NLRA litigation, as union animus would not constitute a reasonable business

279. See *supra* note 49 and accompanying text.

280. Other agencies with exclusive authority to prosecute statutory claims include the Occupational Safety and Health Administration's enforcement of the Occupational Safety and Health Act, 29 U.S.C. §§ 659–60 (2000), the Office of Special Counsel's enforcement of the Hatch Act (banning certain political activity by public employees) and violations of federal workplace rules brought before the Merit Systems Protection Board ("MSPB"), 5 U.S.C. §§ 1212, 1216 (2006); 5 C.F.R. § 734.102 (2008). In contrast, although the Equal Employment Opportunity Commission ("EEOC") has authority to enforce Title VII through investigations and prosecution of cases, 42 U.S.C. §§ 2000e-4, -5, -12 (2000), the EEOC lacks exclusive enforcement authority, as Title VII relies primarily on private enforcement. Eisha Jain, Note, *Realizing the Potential of the Joint Harassment/Retaliation Claim*, 117 YALE L.J. 120, 127 (2007).

281. See, e.g., 5 U.S.C. § 1204(a) (providing the MSPB with authority to hear private causes of action within its jurisdiction).

282. 29 U.S.C. § 158(a)(3) (2000) (making it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization").

justification. Moreover, if the employer were motivated by both antiunion and legitimate reasons, the mixed-motive analysis under the law of termination would be identical to the NLRA's analysis.²⁸³ Under both, the employer could escape liability if it can show that it would have taken the same action absent the unlawful motivation.²⁸⁴

More significant is the law of termination's impact on Section 8(a)(1) of the NLRA. Section 8(a)(1) prohibits employer actions that have the likely *effect*, no matter the employer's intent, of interfering with employees' NLRA rights.²⁸⁵ At first blush, the law of termination's business justification defense could severely undermine Section 8(a)(1) claims, as employers' intent is often a crucial factor in establishing a reasonable business justification. However, Section 8(a)(1) jurisprudence has developed certain protections for employer autonomy that fits well with the law of termination analysis. Under longstanding NLRB and Supreme Court precedent, Section 8(a)(1) requires a balance of employees' rights and employers' business interests.²⁸⁶ Even when an employer's action substantially interferes with employees' ability to exercise their rights under the NLRA, the NLRB will not find a violation of Section 8(a)(1) if the employer has a strong business justification for the action.

For instance, an employer will not violate Section 8(a)(1) when it shuts down a plant because of union animus, even though that action will typically chill employees' willingness to unionize.²⁸⁷ The rationale is that employers' autonomy to decide whether to stay in business

283. See *supra* notes 121–125 and accompanying text.

284. See *supra* notes 121–125 and accompanying text.

285. 29 U.S.C. § 158(a)(1). Section 7 of the NLRA protects employees' right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid or protection . . ." *Id.* § 157. Those rights are enforced through Section 8(a)(1), which provides that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. *Id.* § 158(a)(1). An employer violates Section 8(a)(1) when its conduct tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights; evidence of intent is unnecessary. *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995).

286. *Textile Workers Union of Am. v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965) ("[I]t is only when the interference with [Section] 7 rights outweighs the business justification for the employer's action that [Section] 8(a)(1) is violated.").

287. See *id.* ("[A]n employer has the right to terminate his business, whatever the impact of such action on concerted activities, if the decision to close is motivated by other than discriminatory reasons."). The decision to close a plant may, under limited circumstances, violate Section 8(a)(3). See *id.* at 274–76 (noting the possibility of such a violation).

trumps that decision's effect on employees' labor rights.²⁸⁸ In contrast, where business interests are low relative to employee interests, employer actions that interfere with employees' NLRA rights will violate Section 8(a)(1).²⁸⁹ This analysis fits perfectly with the law of termination's reasonable business justification requirement as both focus on the strength of an employer's rationale for terminating an employee.

The effect on the NLRA's enforcement is far more extreme. The law of termination would remove all termination cases from the NLRB's jurisdiction, despite the agency's exclusive authority over such cases under current law. Although dramatic, this change aptly demonstrates the benefits of the law of termination.

The NLRB is supposed to provide expert enforcement of the NLRA's policies;²⁹⁰ however, its performance has long been the subject of criticism.²⁹¹ Problems include the NLRB's limited remedial authority, delay, and the political makeup of the agency, all of which undermine enforcement of the NLRA's goals. The law of termination would do much to improve this situation. For example, the effectiveness of the NLRB's current remedies—particularly its reinstatement orders—would significantly benefit from the law of termination. Typically, the vast majority of employees who were awarded a right to reinstatement no longer work for their employer two years later.²⁹² In contrast, employees reinstated under collective-bargaining agreements, which almost always contain just cause protection, have much higher success rates.²⁹³ This is not surprising, as the protection

288. *Id.* at 269 (“Whatever may be the limits of [Section] 8(a)(1), some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of [Section] 8(a)(1), whether or not they involved sound business judgment.”).

289. *See, e.g., Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 805 (1945) (holding that employers cannot completely restrict workplace discussions among employees during non-work time).

290. *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 885 (D.C. Cir. 1988) (“Congress has charged the Board, a special and expert body, with the duty of judging the tendency of electoral flaws to distort ‘the employees’ ability to make a free choice.’” (quoting *Amalgamated Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1563–64 (D.C. Cir. 1984))).

291. For a discussion regarding some of the criticism against the NLRB, see Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530–31 (2002) [hereinafter *Ossification*]; Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262, 268–74 (2008).

292. *See* Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 28–30 (citing studies showing that only 21% of employees with reinstatement orders from the NLRB still worked for their employers two years after the order).

293. *See id.* at 38–39 (noting one study finding that approximately 75% of reinstated employees protected by a collective-bargaining agreement remained with their employer two years later).

against unjust dismissals reduces the ability of a resentful employer to retaliate against the employee. Indeed, employers may take positive action, such as emphasizing to its managers the need to avoid retaliating against returning employees, out of concern of avoiding further liability.²⁹⁴

More directly, the available remedies under the law of termination—even with its limited damages²⁹⁵—would be far superior to the current financial penalties available to the NLRB. The NLRB's sole monetary remedy is backpay; the agency lacks the authority to award fines, compensatory damages, or punitive damages.²⁹⁶ By permitting at least limited compensatory and punitive damages, the law of termination would make it more costly for an employer to terminate employees because of their collective activity and would increase employees' incentive to challenge such terminations.²⁹⁷ This change is particularly important when terminated employees are able to find new work quickly, because they would likely receive only a small or nonexistent backpay award.²⁹⁸

By taking these cases out of the NLRB's jurisdiction, the law of termination could also avoid the delay that is often associated with the agency's adjudicatory process.²⁹⁹ Moreover, judges, rather than NLRB members who have explicitly partisan appointments, would hear law of termination actions. It is impossible to completely eliminate politics from litigation, but the NLRB's constant reversals of its own cases and its often openly political opinions would be significantly reduced.³⁰⁰

Removing termination claims under the NLRA does raise a potential problem concerning the NLRB's authority over election and other representational issues. Because a union can object to an election outcome based on antiunion terminations, the NLRB often adjudicates termination allegations as part of a representational proceeding. These claims are important because terminating employ-

294. Fischl, *Workplace Justice*, *supra* note 21, at 267.

295. *See supra* Part III.E.

296. 29 U.S.C. § 160(c)(2000); Estlund, *Ossification*, *supra* note 291, at 1552.

297. *See supra* notes 206–212 and accompanying text.

298. *See NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1316–17 (D.C. Cir. 1972) (discussing interim earnings deduction).

299. *See, e.g.*, NLRB, SEVENTY-FIRST ANNUAL REPORT OF THE NATIONAL LABOR BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 2006 table 23 (2006), *available at* http://www.nlr.gov/nlr/shared_files/brochures/Annual%20Reports/Entire2006Annual.pdf (indicating that, in Fiscal Year 2006, the median number of days from the filing of a charge to a Board decision in unfair labor practice cases was 739 days).

300. *See Amber & Triplett*, *supra* note 165, at AA-3 (discussing a group of controversial NLRB rulings).

ees due to their support for a union is among the most serious types of election misconduct.³⁰¹ Thus, the NLRB must be able to consider such claims. The problem is the possibility that a single termination would be argued in two separate proceedings; in one, the termination would be part of a union's case for overturning an election, and in the other, the termination would be the basis for a law of termination claim. That problem, however, is not serious.

In this situation, the NLRB would be permitted only to consider the termination as evidence for its representation decision; it would not have jurisdiction to provide a remedy to the employee. Moreover, the NLRB's or court's initial finding on the employer's motivation for the termination would likely settle the issue, despite the possibility that it would arise in a subsequent proceeding. For example, an NLRB finding that the employer was not motivated by union animus would likely suppress all but the most frivolous law of termination claims. In contrast, an NLRB finding that the employer retaliated against an employee's union conduct would generally lead to settlement of any subsequent law of termination action. The possibility of duplicative arguments or inconsistent outcomes would exist, but the probability is low and is a small price to pay for a scheme that otherwise greatly simplifies termination disputes.³⁰²

A final issue with the law of termination's assumption of union-related terminations is its effect on collective-bargaining agreements. Currently, claims that a termination violated a collective-bargaining agreement are either arbitrated³⁰³ or litigated in federal court under Section 301 of the Labor Management Relations Act ("LMRA")³⁰⁴—a cause of action that currently preempts state breach of contract claims.³⁰⁵ Substantively, the law of termination does little, if anything, to change Section 301 claims, as a termination in violation of a contractual provision would presumptively fail the reasonable business justification requirement.

301. See *Jim Baker Trucking Co.*, 241 NLRB Dec. (CCH) 121, 122 (1979) (concluding that employer's unlawful terminations made a fair election impossible, as the "threat of termination is a serious unfair labor practice, [and] the effectuation of such a threat is even more serious"), *enforced*, 626 F.2d 866 (9th Cir. 1980).

302. The problem could be solved by placing exclusive federal authority over all workplace claims under a single statute and agency. See Hirsch, *Regulatory Pragmatism*, *supra* note 16, at 28 ("The solution . . . is a universal law of the workplace—a federal law that would establish the exclusive governance scheme for all workplace matters.").

303. See *Pyett v. Penn. Bldg. Co., Inc.*, 498 F.3d 88, 93–94 (2d Cir. 2007) (considering arbitration provisions in collective-bargaining agreements).

304. 29 U.S.C. § 185(a) (2000).

305. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

The law of termination, however, would affect the means of enforcing termination provisions under collective-bargaining agreements. Under the law, all terminations, including those arguably in violation of a collective-bargaining agreement, must be arbitrated³⁰⁶ or brought in a court with competent jurisdiction.³⁰⁷ This enforcement scheme has several consequences. First, because termination claims would no longer fall under the LMRA, the law of termination avoids LMRA preemption conflicts that plague state-law-based just cause proposals.³⁰⁸ Second, state court jurisdiction over law of termination cases would raise the possibility that claims involving a collective-bargaining agreement—which only federal courts can hear—could be brought in two different forums.³⁰⁹ Joinder rules, however, would permit parties to attach a law of termination claim to any related LMRA-governed claims, ensuring that the entire dispute would be heard in the same, federal, forum.³¹⁰ Moreover, the problem could be completely avoided by limiting jurisdiction over law of termination claims to federal courts.³¹¹

In sum, the benefits of the law of termination apply to both union and nonunion employees. Indeed, union employees would likely see particularly large benefits from the law because its efficient and effective enforcement scheme promises great gains over NLRA adjudication. Although the law would radically alter the enforcement of terminations currently governed by the NLRA, the result of that transformation would be improved protection for employees' rights to engage in collective action.

B. Effect on Workplace Regulatory System

Although the aim of this Article is not to advocate an unjust dismissal protection on its merits, identifying the possible costs and bene-

306. *See supra* note 182.

307. *See supra* Part III.D.

308. *See, e.g.*, MONT. CODE ANN § 39-2-912(2) (2007) (exempting employees covered by collective-bargaining agreements); A.B. 3017, 1984 Leg., Reg. Sess. § 2888(a) (Cal. 1984) (requiring exhaustion of internal procedures); H.B. 5155, 82d Leg., Reg. Sess. § 2(c) (Mich. 1983) (excluding unionized employees); A.B. 1832, 199th Leg. § 1 (N.J. 1980) (excluding employees covered by collective-bargaining agreement with relevant grievance and arbitration procedure).

309. For example, if a related set of facts involved both termination and non-termination claims under a collective-bargaining agreement, a state court would have jurisdiction over the law of termination claim, but not the other claims. However, if the law of termination also covered discipline and other similar adverse employment actions, *see supra* note 17, this problem would largely dissipate because most related non-termination violations would involve these types of actions.

310. FED. R. CIV. P. 18 (joinder rules).

311. *See supra* note 201.

fits of the law of termination is important. Any change as dramatic as the law of termination comes with costs, and it is worth considering whether the change would do more harm than good. Moreover, awareness of the possible costs and benefits, even if they are difficult to quantify, helps to create a roadmap for pragmatic policymaking. These considerations should inform both the creation of the law of termination and subsequent evaluations of the law.

The costs and benefits of the law of termination are highly dependent on the specifics, including the law's procedural and substantive requirements, burdens of proof, remedies, and enforcement procedures. Even with such details spelled out, however, it is difficult to gauge precisely the winners and losers.³¹² If there is any prediction approaching certainty, it is that employers and employees will achieve gains in some instances and losses in others. For instance, employers would face the potential for more termination suits, yet benefit from caps on damages and more predictable litigation.³¹³ Some employees, conversely, may be worse off if the chance of winning an employment lawsuit lottery is diminished, while others may benefit if the opportunity to challenge an unreasonable dismissal is enhanced, albeit with a lower maximum for monetary damages.

More important than an attempt to predict individual winners and losers, however, is the need to identify the possible system-wide gains over today's workplace regulations. This Article argues that, taken alone, the likely improvements in the enforcement of current workplace policy goals makes the law of termination worth the effort. Yet, other considerations are important as well.

1. *Benefits of the Law of Termination*

The most obvious gain from the universal law of termination would be the dramatic reduction in the complexity of existing workplace regulations. As noted above, the system's current patchwork of laws significantly increases the costs of compliance and enforce-

312. See Don Bellante & Philip K. Porter, *A Subjectivist Analysis of Government-Mandated Employee Benefits*, 13 HARV. J.L. & PUB. POL'Y 657, 665 (1990) (noting that because of imperfections in objective and subjective valuations of actors in the workplace, "scientific observers are never able to make valid judgments about the optimality of any package" of government-mandated employee benefits).

313. See Krueger, *supra* note 13, at 645-46 (arguing that in states where courts have significantly eroded the at-will default and employers face the potential of large damage awards, employers are less resistant to a state just cause law which could reduce the "considerable uncertainty over the ownership of job property rights and over the penalties for violations of those rights" under state common law).

ment.³¹⁴ This complexity also creates uncertainty that leaves parties, especially employers, with little guidance on how to handle possible terminations. Thus, the primary goal of the law of termination would be to simplify the current termination regulatory system—a change that would both improve enforcement and reduce compliance costs.

The law of termination would also begin to address the reality that most terminations, whether made with or without cause, can create significant hardships for employees. The loss of a job often leads to mental and physical health problems, as well as disruptions in family and social relationships.³¹⁵ Indeed, the social costs associated with the loss of jobs was a major factor in the enactment of the WARN and its notice requirements for mass layoffs.³¹⁶

Further, by increasing employees' knowledge of, and willingness to enforce, their legal rights,³¹⁷ the law of termination would not only help individual employees, but could also lead to social gains. Workplace information asymmetries are particularly detrimental to anti-retaliation measures. Employees' ignorance of their rights³¹⁸ undermines their willingness to oppose or blow the whistle on employer conduct that may be damaging to society.³¹⁹ Solidifying and clarifying employees' protection against unwarranted terminations would likely increase their resistance to harmful employer actions.³²⁰

Businesses may also benefit from the law of termination. A broad protection against unjust dismissals is likely to encourage employers to inform workers of performance issues as they arise. Distaste for confrontation often leads managers to avoid talking to an employee, if

314. See *supra* Part I.

315. See St. Antoine, *A Seed Germinates*, *supra* note 17, at 67 & n.71 (noting mental and physical health problems and citing studies).

316. See 29 U.S.C. §§ 2101–09 (2000) (codifying WARN); *Watson v. Mich. Indus. Holdings, Inc.*, 311 F.3d 760, 765 (6th Cir. 2002) (noting that costs associated with widespread layoffs in the 1970s and 1980s prompted the WARN's enactment).

317. See *supra* notes 37–49 and accompanying text.

318. See *supra* note 37 and accompanying text.

319. Protections for whistleblowers or prohibitions against retaliating against employees for opposing discrimination serve society's, as well as an individual employee's, interests. See *Stebbins v. Univ. of Chicago*, 726 N.E.2d 1136, 1140 (Ill. App. Ct. 2000) (stating that the tort of retaliatory discharge "aims to strike a proper balance among employers' interests in operating their businesses efficiently, employees' interests in earning a livelihood and society's interests in seeing its public policies carried out"); *Green v. Ralee Eng'g Co.*, 960 P.2d 1046, 1052 (Cal. 1998) (stating that California's whistleblower statute shows the "Legislature's interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated").

320. See *Estlund*, *supra* note 20, at 1675–78 (arguing that employees are more likely to challenge and question adverse employment actions when they are not subject to summary discharge without cause).

they talk to them at all, until termination is inevitable. The law of termination's procedural requirements, in combination with the need to identify a reasonable business justification, would prompt managers to document and communicate performance shortcomings with employees *before* termination occurs. This could increase productivity, as some poorly performing employees would improve their work effort to avoid termination.³²¹ The law's requirements may also spur other employment practices that benefit businesses.³²² Great Britain's wrongful termination laws, for example, have led to an expansion of internal dispute resolution and "more efficient recruitment and discipline practices."³²³

The potential gains from the law of termination's reasonable business justification requirement are revealed, in part, by employers' occasional support for unjust dismissal measures. That support is not the norm, but may occur when current workplace regulations become, from employers' perspective, distasteful enough to seek an alternative. For instance, Alan Krueger conducted a study showing that states with more common law exceptions to the at-will default doctrine have an increased likelihood of seeing proposals for just cause legislation.³²⁴ His explanation for this finding is that employers may be supportive, or less resistant, to a just cause regime in states where significant erosions of the at-will default pose a risk of large damage awards.³²⁵ Krueger argues as well that employers' support for a just cause rule may result from their desire for more consistent and precisely defined legal requirements.³²⁶ This concern is significant because many state common law termination regimes create substantial

321. Employers that recognize the potential benefits of informing workers early about problems are obviously free to do so now, as is the case in some workforces. Without a requirement that employers discuss poor performance with workers, however, managers' psychological resistance to confronting employees, among other factors, limit this practice.

322. See Weiler, *supra* note 185, at 189 (noting prospect of damage awards "provides employers with a very strong incentive *not* to violate" employee rights).

323. McGinley, *supra* note 85, at 1522 (explaining that job security laws passed in Great Britain led to the formalization of employment procedures).

324. Krueger, *supra* note 13, at 655-56 (noting up to a quadrupling of probability that unjust dismissal law will be proposed).

325. *Id.* at 653 (noting also the similarity in the support by employee- and employer-groups for just cause dismissal laws and workers' compensation legislation); see also PERRITT, EMPLOYEE DISMISSAL, *supra* note 1, § 11.04, at 11-19 (arguing that employers "historically have favored legislation as an alternative to common law liability when it seemed that legislation would permit greater predictability of outcome and limit the size of damage awards").

326. Krueger, *supra* note 13, at 653 ("[M]any employers are willing to support unjust dismissal legislation and accept a 'just cause' firing requirement in exchange for the implementation of a strict standard for employees to recover punitive damages and a consistent, well-defined legal definition of unjust dismissals.").

uncertainty regarding employees' rights to their jobs and the penalties employers face for violating those rights.³²⁷ In the face of such uncertainty, unjust dismissal legislation represents a more economically efficient option, as it can create more predictable results, particularly when it caps damage awards.³²⁸

Although Krueger's conclusions are not above criticism,³²⁹ his study shows the potential advantages of an unjust dismissal law versus the complexity and uncertainty of today's workplace rules. His focus on the practical implications of workplace laws, particularly on the behavior of employers, is also an excellent example of the type of pragmatic consideration that policymakers should regularly take into account.

2. *Costs of the Law of Termination*

Numerous objections to an unjust dismissal law exist, yet the primary focus has been the possible impact of such a law on the economy, employer autonomy, and litigation trends.³³⁰ It is difficult to accurately forecast the effects of proposals such as the law of termination; however, both anecdotal and empirical evidence indicate that predictions of significant harm are vastly overstated.

Virtually every industrial country other than the United States protects employees against some form of unjust dismissal.³³¹ Indeed, the first country to provide such protection, in 1917, was Mexico³³²—a country that many have cited as a significant threat to American jobs.³³³ There does not appear to be evidence that just cause protections in these countries have created severe burdens on employers.³³⁴ Indeed, some studies have shown a strong correlation between job se-

327. See *id.* at 646, 650 (noting the uncertainties surrounding employees' rights and potential damage awards).

328. See *id.* at 646 (stating that uncertainty inhibits economic efficiency).

329. See generally Jack Stieber & Richard N. Block, *Comment on Alan B. Krueger, "The Evolution of Unjust-Dismissal Legislation in the United States,"* 45 *INDUS. & LAB. REL. REV.* 792 (1992) (commenting on Krueger's findings).

330. See *supra* note 13.

331. See *supra* note 139 and accompanying text.

332. See International Labour Organization, Profiles of National Legislation, Mexico, <http://www.ilo.org/public/english/dialogue/ifpdial/info/termination/countries/mexico.htm> (last visited Nov. 17, 2008) (profiling Mexico's unjust dismissal law).

333. See, e.g., Larry Swisher, *Offshoring Services Work Could Eliminate 2.4 Million Jobs in U.S. Cities, Report Says*, *Daily Lab. Rep.* (BNA), Feb. 26, 2007, at A-10 (describing how offshoring service jobs to countries such as Mexico will negatively affect employment rates of American workers).

334. Cf. St. Antoine, *A Seed Germinates*, *supra* note 17, at 77 (stating that inquiries into employers' motivations for layoffs or reassignments "hardly imposes an oppressive burden on employers. All they need do is establish almost any sort of rational, verifiable crite-

curity and productivity.³³⁵ Moreover, virtually every state in this country has created significant exceptions to the at-will default.³³⁶ That numerous countries and states have maintained some form of protection against unjust dismissals indicates that the law of termination would be unlikely to create significant harm to the United States economy.

Another objection to unjust dismissal prohibitions is that they eliminate employers' ability to manage their businesses. However, the law of termination's structure dampens this concern. The law's substantive standard only prevents employers from terminating employees without a reasonable business justification. That requirement leaves a large degree of deference to the employer.³³⁷ Indeed, many collective-bargaining agreements, which often provide significant job protection, contain management rights clauses that specifically guarantee an employer's extensive right to operate the business without interference.³³⁸

The existence of just cause protection in the vast majority of American collective-bargaining agreements is illustrative.³³⁹ The union experience indicates that employees generally prefer just cause even if the trade-off is a decrease in wages.³⁴⁰ The costs to employers

tion—seniority, skills, past productivity, etc.—as the basis for their job determinations, and they are practically impervious to challenge”).

335. *Id.* at 69 & n.79 (citing studies). Although one could argue that employers would voluntarily provide more job security if it increased productivity, that argument ignores other factors involved with termination decisions. Most important is that the supervisors and managers often place more emphasis on autonomy and other issues that directly affect them, rather than productivity, profitability, and other general business goals, which have a less direct impact on their work lives. *See, e.g.,* McGinley, *supra* note 85, at 1488 (explaining that economic analysis of employer behavior is sometimes based on “questionable assumptions” about employer interests); Schwab, *supra* note 26, at 26 (describing differences between supervisors' and shareholders' interests and that “[p]ersonality conflicts and power trips may lead supervisors to fire valuable and productive employees”).

336. Morriss, *At-Will*, *supra* note 23, at 682 & n.8 (noting that all but two states limited employment at-will as of 1993).

337. *See supra* notes 137–138 and accompanying text.

338. *See Summers*, *supra* note 130, 501–02 (explaining some of the possible retained rights of management under collective-bargaining agreements); *cf.* St. George Warehouse, Inc., 341 NLRB Dec. (CCH) 904, 907, 927 (2004) (finding employer's proposal for broad management rights clause—which would allow it complete discretion over hiring, promotions, discipline for cause, demotions, transfers, layoffs, recalls, setting productivity standards, contracting with third-parties to supply personnel, closing, expanding, or relocating its facility, ceasing any job, and changing methods of operation—to be lawful).

339. *See Abrams & Nolan*, *supra* note 14, at 594 n.1 (noting that 94% of collective-bargaining agreements reviewed by the Bureau of National Affairs in 1983 contained a just cause or cause provision).

340. *See St. Antoine*, *A Seed Germinates*, *supra* note 17, at 68 (stating that lower wages for greater job security is a “time-honored tradeoff among unionized workers”). Just cause

of collectively bargained just cause provisions also seem insignificant, as employers almost never seek to eliminate such measures in negotiations.³⁴¹ Similarly, one study that gave a particularly large estimate of the costs to employers of just cause litigation and liability, qualified that calculation by noting that such costs “are dwarfed in comparison with standard expenses incurred as a result of labor turnover.”³⁴²

A further concern with unjust dismissal protection is the possibility that it would substantially increase litigation. It is difficult to accurately predict the litigation effect, as it is dependent upon highly uncertain variables such as the extent to which employers change their termination practices in response to the new law, employees’ willingness to use the new cause of action, employees’ ability to find a new job, and judges’ interpretation of the new law. However, the most probable outcome would look very similar to the status quo, as the law of termination would be unlikely to significantly increase the number of termination-related claims.³⁴³ Indeed, the law could actually decrease the level of such litigation.

Although this result may seem counterintuitive, it is not surprising given the current state of our workplace regulatory system. As noted, numerous potential causes of action exist and any employee who wants to dispute her termination can easily pursue multiple claims. Replacing those claims with a single law would essentially streamline litigation that is already occurring. Moreover, many employers have adopted a de facto just cause regime in an attempt to avoid liability under the current system of workplace laws.³⁴⁴ The law

protection could lower the demand for labor because it is more expensive and could increase the supply of labor because jobs are more attractive with the additional security—this increase in supply places downward pressure on wages. *Id.* (citing Harrison, *supra* note 35).

341. *Id.*

342. JAMES N. DERTOUZOS & LYNN A. KAROLY, RAND INST. FOR CIVIL JUSTICE, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY 36 (1992). Other studies have estimated much lower costs than the RAND study. See David H. Autor et al., *The Costs of Wrongful-Discharge Laws*, in 2 ECONOMICS OF LABOR AND EMPLOYMENT LAW 322, 323, 326 (John J. Donohue III ed., 2007) (criticizing conclusions of RAND study).

343. See *supra* note 104, at 1842 (maintaining that changes in termination law are unlikely to increase litigation because “expanded liability may deter future abusive or retaliatory discharges, thus limiting the number of potential claims . . . [and] the development of clear standards of what constitutes an unjust discharge will encourage out-of-court settlement”).

344. See PERRITT, EMPLOYEE DISMISSAL, *supra* note 1, § 11.27, at 11-116 (“[M]ost employers respond to the patchwork quilt of employee protection . . . with something close to an internally imposed just cause requirement. If employers thus already suffer the detriments of just cause protection, they might as well have the benefits of caps on damages and the other procedural trade-offs in the model act.”). But see Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Work-*

of termination would merely codify that trend. It would also make employers more reticent to terminate employees in close cases,³⁴⁵ and fewer terminations means less litigation.

Finally, the law's informational requirements may result in fewer terminations. Because many current lawsuits result from employees looking to explain their termination, the law's requirement that employers state the reason for their termination decisions would dissuade some, although certainly not all, employees from pursuing a claim.³⁴⁶ Additionally, the mandated warnings about performance problems would prompt some employees to improve their work effort, thereby avoiding termination and the litigation it could generate.

There is a dearth of empirical evidence on the link between the availability of termination claims and litigation rates—not unexpectedly, given the complex nature of American workplace law. However, Montana's experience in moving from a common law regime to the WDEA's just cause protection is informative, albeit imperfect. Like most states, Montana had several common law claims available to a discharged employee, including tort actions for violations of public policy and the doctrine of good faith and fair dealing.³⁴⁷ The availability of a tort-based, rather than contractual, good faith and fair dealing claim³⁴⁸ was unusual and made Montana's common law regime less employer-friendly than most states. Because of their dissatisfac-

place, 36 INDUS. L.J. 84, 95 (2007) (explaining that some employers are returning to an at-will termination regime to preserve flexibility in employment contracts).

345. See McGinley, *supra* note 85, at 1519 (noting that just cause law's potential increase in costs to business would discourage terminations lacking cause); Summers, *supra* note 130, 507–08 (explaining how collective-bargaining protections against unjust discipline have deterred employers from sanctioning union workers without justification). Such a threat may also deter employers from terminating employees where the justification issue is close; that effect on marginal decisions is surely a cost, but one that is offset by the benefits of the law.

346. The law could also result in more informative job recommendations. See Robert B. Fitzpatrick, *The Future of Employment Discrimination Law as the United States of America Enters the 21st Century*, 1997 ALI-ABA COURSE OF STUDY, CURRENT DEVELOPMENTS IN EMPLOYMENT LAW 885, 892 (1997) (explaining the positive effect that a just cause standard would have on job references). That information could lead to more defamation suits by employees, although employees who are inclined to challenge that information would have most likely done so through a claim under the law of termination.

347. See, e.g., *Keneally v. Orgain*, 606 P.2d 127, 129 (Mont. 1980) (public policy); *Gates v. Life of Mont. Ins. Co.*, 638 P.2d 1063, 1066–67 (Mont. 1980) (good faith).

348. See, e.g., *Guz v. Bechtel Nat'l Inc.*, 8 P.3d 1089, 1112 (Cal. 2000) (providing an example of how other states apply only contract law to employee termination claims, not tort law). This distinction is important, as the damages available are solely contractual and do not include tort awards for emotional distress or punitive damages. *Id.* at 1095. Montana had rejected other claims commonly available in most states, however, such as a claim that a termination violated an implied contractual provision. *Reiter v. Yellowstone County*, 627 P.2d 845, 849 (Mont. 1981).

tion with this regime, Montana employers generally supported enactment of the WDEA and its preemption of those common law claims.³⁴⁹ Although Montana has a somewhat unusual common law history, its post-WDEA experience should provide some sense of the law of termination's impact on national litigation trends.

That impact appears to be small. One study of the WDEA showed that the number of wrongful termination claims brought before and after the statute's enactment was virtually identical.³⁵⁰ Importantly, when litigation did occur, WDEA cases took significantly less time than pre-WDEA cases.³⁵¹ Perhaps surprisingly, the shorter duration does not look to be the result of the WDEA's preference for arbitration, as few litigants—either employers or employees—sought arbitration. Rather, by streamlining termination-related claims and simplifying legal standards, the WDEA may have made it easier to resolve disputes.³⁵² Similarly, the WDEA's cap on damages³⁵³ may have contributed to the shorter timeframe by reducing employees' incentive to engage in expensive and time-consuming litigation.³⁵⁴ Whatever the reason, the WDEA appears to have *reduced* litigation, not increased it, and it certainly did not result in the significant costs that some have associated with just cause protection.³⁵⁵ Thus, moving from a system with numerous wrongful termination claims to a single unjust dismissal claim does not seem to harm—and could benefit—adjudicatory resource concerns.

The WDEA's impact on Montana's economy also appears benign. Perhaps because the WDEA decreased the potential for large awards and simplified the previous common law system, its impact on busi-

349. *See supra* notes 55–68 and accompanying text.

350. *See* Jarsulic, *supra* note 192, at table 1 (approximating the number of termination cases prior to and after WDEA's enactment). Jarsulic examined court decisions involving terminations that occurred between 1983 and 1995, although he was unable to obtain all cases. *Id.* at 110–11. According to his data set, there were approximately 0.41 terminations per month before the WDEA's enactment that resulted in a court decision, and 0.43 terminations after the WDEA's enactment that resulted in a court decision. *See id.* at table 1 (listing the number of termination cases before and after the WDEA's enactment by year, which can be divided to determine approximate number of termination cases each month). In addition, Jarsulic estimated that his sample missed more pre-WDEA cases than post-WDEA cases. *See id.* at 111 n.24. Thus, it is possible that there were fewer cases brought under the WDEA than the previous common law regime.

351. *See id.* at table 1 (reporting that the median duration of wrongful termination litigation was four years before the WDEA and two years after the WDEA).

352. *Id.*

353. MONT. CODE ANN. § 39-2-905 (2007); *see also* Jarsulic, *supra* note 192, at 112–17 & tables 2–3 (noting the limitations on damages and providing statistics).

354. *Id.* at 112.

355. *See supra* note 342 and accompanying text.

nesses and employment levels in Montana has been positive. For instance, stock prices for publicly traded companies centered in Montana increased as passage of the WDEA became more likely—a result that mirrored employers' support for the legislation.³⁵⁶ Similarly, the WDEA appears to have increased employment in Montana, completely negating the negative employment effect associated with the earlier rise in common law termination claims.³⁵⁷ Studies looking at other types of unjust dismissal claims across the United States confirm that such litigation is unlikely to have a significant negative effect on the economy.³⁵⁸

Although impossible to determine with certainty, implementation of a broad reasonable business justification requirement for all terminations is unlikely to negatively impact the national economy, most businesses, or the court system—to the contrary, the law could have a positive effect. Given the likely benefits of the law of termination,³⁵⁹ the lack of any significantly harmful consequences provides further support for a radical modification of our current approaches for regulating terminations.

V. CONCLUSION

Today's termination regulatory scheme is broken. It consists of multiple statutes, regulations, and common law rules derived from federal, state, and local governments. Even when these laws cover similar aspects of the employment relationship, they often impose different requirements. Moreover, the laws' enforcement schemes are as fractured as the laws themselves. The same set of facts can often prompt multiple claims that must be pursued in different forums. The result is a system of laws that is difficult to understand, follow, and enforce.

Nowhere is this problem more acute than the laws governing terminations. Although encompassing a single workplace action, the

356. Steven E. Abraham, *Can a Wrongful Discharge Statute Really Benefit Employers?*, 37 INDUS. REL. 499, 515–16 (1998).

357. See Bradley T. Ewing et al., *The Employment Effect of a Good Cause Discharge Standard in Montana*, 59 INDUS. & LAB. REL. REV. 17, 26–28 (2005) (finding that creation of common law wrongful discharge actions lowered Montana's annual rate of employment growth by an average of 0.46 percentage points per year and that the WDEA increased employment growth rate by 0.47 percentage points per year).

358. See, e.g., Autor et al., *supra* note 342, at 337–38 (finding no significant effect on employment levels or wages caused by public policy and good faith exceptions to at-will default, while finding that implied contract exception had small negative impact on employment and small positive impact on wages).

359. See *supra* notes 314–329 and accompanying text.

morass of federal, state, and local laws has created a confusing and often ineffective governance system. This complexity, however, is unnecessary. Terminations, in particular, provide an opportunity to cut through the thicket of laws and establish instead a relatively straightforward scheme to govern the end of the employment relationship.

The path to salvation is tied to the one common theme shared by today's disparate set of termination laws—the need to provide some level of protection for employers' business autonomy. The proposed solution is to create a universal law of termination that would reflect the concern for employer autonomy via a requirement that all terminations have a reasonable business justification. This requirement explicitly protects the concern for business autonomy in existing laws, without their discordant patchwork of standards. By implementing a single standard that governs all terminations, the law of termination would be much easier to understand, follow, and enforce than the current system.

More generally, the law of termination would integrate governance of terminations both vertically and horizontally. Vertical integration would occur by replacing all state governance of terminations with exclusive federal authority. This change would virtually eliminate the potential for termination claims to fall under multiple jurisdictions and forums. Moreover, the law would horizontally integrate termination claims by replacing all current federal laws regulating terminations with the reasonable business justification requirement. This would eliminate the complex federal system of termination standards and ensure that enforcement of the law occurs through a single scheme. The effect of those changes would be a substantial reduction in the extraordinary complexities of current termination laws and superior achievement of those laws' policy goals—ironically by replacing those laws with a single law of termination.

The law of termination is no panacea, as the complexities of the workplace make any regulatory system inherently imperfect. This reality underscores the need for policymaking to seek not perfection, but pragmatism. Policymakers should avoid overly idealistic notions of their regulatory power and instead attempt to assess likely outcomes. This pragmatic approach is severely lacking in the current workplace regulatory system. Little, if any, consideration has been given to how the system as a whole works and whether it can be improved. The law of termination partially fills that gap.

Although it is unlikely that a proposal this ambitious would ever be fully adopted, it advances an important point: the goal of workplace regulation should be actual enforcement, not theoretical aspira-

tion. Thus, even limited pragmatic reforms—such as eliminating some of the federal/state overlap or streamlining regulations within a given jurisdiction—would be a step in the right direction and lay the groundwork for more efficient and effective rules in the future. In contrast, the failure to make any attempt at pragmatic rulemaking would maintain and possibly expand the ineffectiveness of our workplace regulatory system. The law of termination is an attempt to avoid that fate.