

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

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I.

INTRODUCTION

There are times when legal rules and presumptions outlast their usefulness. Conditions, sensibilities and understandings of fairness and justice change over time, rendering certain rules useless, wasteful or even contrary to the goals of a society. However, changing a legal understanding that has been long-settled and accepted should not be undertaken lightly. To change a legal presumption requires significant evidence that the rule is no longer (or possibly never was) beneficial for society. The presumption that employees are terminable "for good cause, for no cause or even for bad cause"¹ is a legal understanding that has been long-settled and accepted in American courts since at least the 1800's.²

1. *Payne v. W. & Atl. R.R.*, 81 Tenn. 507, 518-19 (1884) ("[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without being guilty of an unlawful act *per se*. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer."), *overruled on other grounds*, *Hutton v. Waters*, 179 S.W. 138 (1915). See also *Adair v. United States*, 208 U.S. 161, 175-76 (1908) ("The right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee.")

2. There is already in existence a large body of historical discussion on the origins of the at-will rule in America. See generally HORACE GAY WOOD, *MASTER AND SERVANT* 283-84 (1877); Jay M. Feinman, *The Development of the Employment-at-Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Jay M. Feinman, *The Development of the Employment-at-Will Rule Revisited*, 23 ARIZ. ST. L.J. 733 (1991); Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551 (1990); Andrew P. Morris, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679 (1994). For the purposes of this paper, it is enough

Despite its long tenure, the at-will presumption has come under fire from numerous legal scholars and commentators in the last few decades. Many of these commentators, who I will refer to in this paper collectively as at-will critics, have called for an abandonment of the doctrine, claiming that the rule places employees at the mercy of unscrupulous employers and is inefficient for society.³ The at-will rule is seen by these critics as an invitation for powerful employers to take advantage of the economically disadvantaged employees who lack the ability to adequately defend themselves. They decry the fact that the at-will rule allows employers to discharge employees for personal animosity or mistaken impressions of employee malfeasance, leaving employees with all of the varied costs of being jobless⁴ regardless of the quality of their work. These at-will critics have collectively called for lawmakers to replace the at-will rule with some form of what I will generalize as a just cause rule.⁵

Defenders of the at-will rule have responded to this large body of commentary primarily with arguments concerning the at-will rule's economic efficiency. Richard Epstein, who has led the rule's defense, has argued that at-will should be maintained as the standard default regime because it reflects the dominant practice in the employment market.⁶ The prevalence of at-will in the employment market has been echoed by other at-will defenders, and empirically confirmed by J. Hoult Verkerke who found that approximately 85% of non-union employment contracts reflect

to know that the presumption of employment at-will has been long-settled and accepted in American courts. See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997) [hereinafter Kim, *Perceptions*] ("In the early part of this century, the law governing termination was so well settled that discharges from employment generated very little litigation and virtually no commentary."); J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 838 (1995) [hereinafter Verkerke, *Resolving the Debate*].

3. See, e.g., Janice R. Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REFORM 207 (1983); William B. Gould IV, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 BYU L. REV. 885, 908-12; Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631 (1988); Cornelius J. Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Carl F. Schwarze, *Understanding the Just Cause Defense*, 65 U. DET. L. REV. 527 (1988); Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 70-81 (1988); Jack Stiever & Michael Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REFORM 319 (1983); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: The Time For a Statute*, 62 VA. L. REV. 481, 519-31 (1976); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980) [hereinafter Note, *Good Faith Duty*].

4. I do not intend to downplay the large costs to the employee in being discharged. There are undoubtedly large economic, social, and psychological costs for an employee who has been discharged resulting from loss of pay, loss of status, and loss of a major component in the employee's definition in the eyes of herself and others.

5. See *supra* note 3.

6. See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

at-will discharge terms.⁷ The at-will defenders pointed out that, while the parties could easily alter this default discharge rule in their employment contracts, very few parties have chosen to do so.⁸ Reasoning that a term's prevalence in society reflects its desirability among the parties,⁹ Epstein, Verkerke, and the other at-will defenders argued that the parties prefer the at-will term and thus at-will should remain the default for the sake of efficiency.¹⁰

I believe that the at-will defenders reached the correct conclusion, but used the wrong course to get there. The reasoning of the traditional economic defense of the at-will rule relies on the assumption that employees know the law.¹¹ Epstein stated this clearly when he wrote, "employers and employees know the footing on which they have contracted: the phrase 'at will' is two words long and has the convenient virtue of meaning just what it says, no more and no less."¹² If employees do in fact "know the footing on which they have contracted," then the prevalence of at-will contracts assumed by most defenders and documented by Verkerke provides strong evidence of at-will's desirability.¹³ However, if employees fail to realize they are at-will or fail to understand how the at-will term applies to common discharge situations, then the prevalence of at-will contracts does not necessarily lead to the conclusion that the parties desire that term. In other words, if the assumption of full information proves to be empirically false, then the at-will rule's traditional economic defense is effectively undermined.¹⁴

Empirical evidence on the subject strongly suggests that employees do

7. See Verkerke, *Resolving the Debate*, *supra* note 2, at 867-70 (of the employers that Verkerke surveyed, "slightly more than half of all employers (52%) contract explicitly for an at will relationship. About one-third (33%) use no documents that specify the terms governing discharge. And more than one in seven (15%) contract expressly for just cause protection.").

8. In fact, Verkerke's study indicated that, 75% of the contracts that explicitly discussed discharge terms maintained the at-will term. *See id.*

9. *See, e.g., id.* at 897 ("The survey data thus are the best available evidence of parties' preferences. Those data strongly support the prevailing default rule of employment at will.").

10. *See* Epstein, *supra* note 6, at 947; Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1098 (1989) [hereinafter Freed & Polsby, *Efficiency*]; John P. Frantz, *Market Ordering Versus Statutory Control of Termination Decisions: A Case for the Inefficiency of Just Cause Dismissal Requirements*, 20 HARV. J.L. & PUB. POL'Y 555 (1997); Andrew P. Morris, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901 (1996); Verkerke, *Resolving the Debate*, *supra* note 2, at 870-72.

11. *See* Kim, *Perceptions*, *supra* note 2.

12. Epstein, *supra* note 6, at 955; *see also* Morris, *supra* note 10, at 1929 ("One obvious characteristic of the at-will rule is that the legal responsibilities of the employer are clear—it has none. How then are employees systematically fooled?").

13. *See e.g., id.* *See also*, Verkerke, *Empirical Perspective*, *supra*, note 2, at 867-70.

14. *See generally* Kim, *Perceptions*, *supra* note 2; Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447 [hereinafter Kim, *Norms*].

not understand the at-will employment term and its application. This paper will analyze empirical studies on the subject, focusing on a study conducted by Pauline Kim and my own replication of her study. Kim found that unemployed members of the workforce were unaware of the at-will default rule and unable to apply it to various discharge situations.¹⁵ My replication of Kim's study with employed workers demonstrated that employed members of the workforce reflect a similar confusion about the legal ramifications of at-will employment as their unemployed counterparts. My findings, particularly when combined with Kim's, challenge the assumption of complete understanding among employees that is implicit in the traditional economic defense of the at-will default rule.

There are two very different explanations that potentially follow from the information deficiency found in our data. Critics of the at-will default rule have consistently cited a market failure caused by lack of information as the reason for the at-will term's prevalence in employment contracts.¹⁶ They argue that employees who do not know or understand the relevant laws of job security may not be able to bargain for the job security terms they prefer, allowing the market for jobs to clear at less than optimal terms.¹⁷ In this way, the terms most often reached in a market filled with employees who are ignorant of the background rules of their employment contracts do not actually reflect the parties' preferences at all.¹⁸

Another plausible explanation for the information deficiency found in our data is that employees are rationally ignorant of the at-will default rule. Rational parties remain ignorant of legal rules when those rules do not have any significant effect on them.¹⁹ In the employment context, employees will only become aware of the at-will default rule if they can gain something from that knowledge, such as better treatment from their employers. However, employees would lack the incentive to discover that

15. See generally *id.*

16. See, e.g., Note, *Good Faith Duty*, *supra* note 3, at 1830-33 (arguing that when "inadequate access to information prevents parties from properly valuing the benefits of job security, judicial intervention is justified to ensure a more efficient result."); Cass R. Sunstein, *Rights, Minimal Terms, and Solidarity: A Comment*, 51 U. CHI. L. REV. 1041, 1055-57 (1984) [hereinafter Sunstein, *Rights*] (suggesting that employees misunderstand the level of job security that they possess under the current legal rules); Joseph Grodin, *Toward a Wrongful Termination Statute for California*, 43 HASTINGS L.J. 135, 137 (1990) (same); Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1410-13 (1967) (arguing that the prevalence of at-will contracts is the result of employer misperceptions); Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983) [hereinafter Note, *Protecting Employees*] (same).

17. See Note, *Good Faith Duty*, *supra* note 3.

18. Cf., Ted Cruz and Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of the Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 633, 640 (1996).

19. See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 886 (1992).

they are at-will if their employers generally follow a course of conduct that they do not perceive as adversely affecting them. The employee ignorance found in our data could indicate that employees do not feel a significant risk of unjust discharge.

The difference between these two theories lies in the existence or absence of non-legal control mechanisms directing employers' behavior. Employers will only follow a just cause course of conduct if there are sufficient incentives to do so. If employers lack these incentives, they will mistreat employees, and employee ignorance of the default regime is more likely explained by the at-will critics' story of market failure, since "rationally ignorant" employees would have an incentive to learn rules that adversely affect them. However, if there are sufficient incentives to induce an employer to follow a just cause course of conduct, then rational ignorance is the more plausible explanation for the information deficiency among employees, since employees have no reason to learn the legal rules when their employers already treat them the way they want to be treated. Therefore, the real issue is whether employers have sufficient incentives to follow a just cause course of conduct in the absence of a legal rule requiring them to do so.

Employers already have sufficient incentives to follow a just cause course of conduct. Recent findings on norms as behavior-directing mechanisms strongly suggest that a "no discharge without cause norm" exists in the workplace today and works to prevent employers from unjustly discharging their employees. Further, employers face a great deal of expense in discharging employees, ranging from lost employee morale to replacing and re-training workers. These norms and costs compel employers to treat their employees as just cause employees even though those employees do not legally hold that status.

The at-will debate is really about methods of control, with the proper question being, "will the shift in methods of control work a change for the benefit of both parties or will it only make a difficult situation worse."²⁰ If a "no discharge without cause norm" and the costs associated with replacing employees have already fostered a just cause course of conduct among employers, then the information deficiency among employees is not evidence of a market failure. Rather it is evidence that a just cause rule, with all of the varied costs of implementation, may be neither necessary to control employer behavior nor a desirable term for employees to bargain for.

Part II of this Article will discuss the empirical evidence indicating that an information deficiency exists among employees. Part III will discuss the competing theories that could account for this information deficiency. Part

20. Epstein, *supra* note 6, at 969.

IV will explore the existence and implications of various non-legal constraints on employer behavior. Finally, Part V will conclude that the existence of these constraints indicate that a just cause legal rule may not help employees, and may actually harm them.

II.

EMPIRICAL EVIDENCE OF AN INFORMATION DEFICIENCY AMONG EMPLOYEES

Until recently, there have been very few valuable attempts to produce empirical data on employees' understanding of job security rules. Deborah A. Schmedemann and Judi McLean Parks conducted an empirical study finding that business students and lawyers adequately understand the legal rules regarding job security.²¹ However, it is difficult to believe that graduate and undergraduate students and practicing lawyers are the best sample to determine what the average employee knows about job security.²²

Frank S. Forbes and Ida M. Jones also attempted to determine how much people understand about discharge law using a telephone survey of residents of Omaha, Nebraska.²³ Forbes and Jones found that only a small percentage of their respondents knew that employers could terminate their employees without cause.²⁴ The results of this survey are again somewhat overdrawn, not because of an inadequate sample, but rather because of the inadequate extent to which the respondents were questioned. Respondents were asked "does the employer have the right to fire an employee without giving a reason?" to determine their level of knowledge concerning job security laws.²⁵ This single question is much too vague to adequately determine what the employees believe the employer can do.²⁶ These studies were thus inadequate to accurately gauge employees' understanding of job security terms.

21. See Deborah A. Schmedemann & Judi McLean Parks, *Contract Formation and Employee Handbooks: Legal, Psychological and Empirical Analyses*, 29 WAKE FOREST L. REV. 647 (1994).

22. See Kim, *Perceptions*, *supra* note 2, at 125-26 (critiquing Schmedemann and Park's sample choice).

23. Frank S. Forbes & Ida M. Jones, *A Comparative, Attitudinal and Analytical Study of Dismissal of At-Will Employees Without Cause*, 37 LAB. L.J. 157, 165-66 (1986).

24. See *id.* at 165 ("Only 15 percent of the under 35 age group; 22 percent of the 35-49 age group; eight percent of the 50-65 age group, and 20 percent of the over 65 age group knew that employers hold the right to terminate at any time even without cause.").

25. *Id.*

26. There is no attempt made by Forbes and Jones in this study to determine whether respondents believe that it is illegal to discharge an employee without having a reason, or whether it is illegal to discharge an employee without giving the employee a reason. Further, the question does not press the respondents to indicate what would be considered an adequate reason for discharge (i.e. would personal dislike be an adequate reason or would some sort of malfeasance be necessary).

A. Kim's Empirical Study of the Unemployed

In an attempt to fill this large empirical gap, Pauline Kim conducted a series of studies testing employees' knowledge of the at-will default rule that is prevalent in every state except Montana.²⁷ The surveys presented respondents with eight different discharge scenarios. For example, in one scenario an employer discharged an employee for unsatisfactory job performance, and in another, an employer discharged an employee because the employee refused to participate in illegal billing practices.²⁸ After each discharge scenario, the respondent was asked whether the discharge was lawful or unlawful.

Kim distributed these surveys to unemployed members of the workforce in Missouri, California and New York. She began with a survey conducted in the St. Louis, Missouri area, where she found that unemployment benefit applicants could only answer these questions correctly 51% of the time.²⁹ In order to substantiate her findings, Kim replicated this study in two other states, surveying unemployment insurance applicants in New York and California.³⁰ Kim found that her New York and California respondents demonstrated a similar level of knowledge to that of her Missouri respondents and in some cases demonstrated even more confusion.³¹ After limiting the analysis to what Kim referred to as the six "diagnostic questions,"³² her respondents' average scores on the survey dropped to 39.7%, 41.2%, and 25.2% in Missouri, California and New York, respectively.³³ Given that the questions had only two possible answers, meaning that completely random guesses would average 50%, these scores indicate the respondents' lack of knowledge about the at-will default rule.

Further, Kim found that the mistakes made by her respondents were not random. Rather they reflected a strong over-estimation of job-security protection by respondents in all three states.³⁴ In Missouri, respondents failed to identify unlawful discharges less than 10% of the time, while they were unable to identify lawful discharges more than 60% of the time.³⁵ In

27. Montana has adopted a good cause statute in order to limit employers' ability to discharge employees. See MONT. CODE ANN. § 39-2-903(5) (2001).

28. See *infra* Part II.B.1. (providing a fuller description of the survey instrument used). See also Appendix A.

29. See Kim, *Perceptions*, *supra* note 2, at 133.

30. See generally Kim, *Norms*, *supra* note 14.

31. See *id.* at 458.

32. Limiting the analysis to the six "diagnostic questions" ultimately entailed removing two questions that described discharges that would be illegal regardless of whether the rule was at-will or just cause. See Kim, *Norms*, *supra* note 14, at 470 tbl.3.

33. See Kim, *Norms*, *supra* note 14, at 458 & n.48.

34. See *id.* at 456-465.

35. See *id.* at 456-57.

other words, when faced with a situation where the discharge was unlawful, respondents would answer correctly more than nine times out of ten. However, when faced with a situation where the discharge was lawful, respondents would answer correctly less than four times out of ten. After removing the questions describing unlawful discharges from the six “diagnostic questions,” the average error rate soared to nearly 85% for Kim’s Missouri respondents.³⁶

This over-estimation of job security was confirmed in all three states, as respondents in Missouri, New York, and California recorded error rates of 82.2%, 86.1%, and 81.3% respectively when asked about the lawfulness of a pure cost-saving discharge.³⁷ These figures strongly indicate that unemployed members of the workforce believe that, when employed, they have a much greater level of job security than the law provides.

However, Kim’s sample population, consisting entirely of unemployed members of the workforce, creates a cloud of doubt around her data. Although using unemployed members of the workforce likely contributed to high response rates, due to the geographical concentration of the sample and the fact that those applying for unemployment insurance had time to fill out a detailed questionnaire, the sample may not represent the beliefs held by all employees in the workforce, or even all employees actively seeking employment. Kim recognized this necessary assumption stating: “whether the assumption [that both employers and employees understand the terms of their bargain] is a faulty one, however, depends on the extent to which the unemployment insurance claimants surveyed here are representative of active job seekers.”³⁸

In order to defend her sample choice, Kim claimed that unemployment insurance claimants are the most appropriate population to survey because they are actively searching for new employment as opposed to those members of the workforce who are involved in long-term employment relationships.³⁹ Of course, one could argue that all employees are in the market for an improved employment opportunity. The employed and unemployed are separated only by the level of transaction costs that they face in changing jobs. If an employee, who has been happily working for one employer for twenty years, happens upon a similar job opportunity with a salary that triples her own, she will likely decide to work for the new employer. Similarly, if job security terms are valuable to employees,

36. See Kim, *Perceptions*, *supra* note 2, at 133-34.

37. See Kim, *Norms*, *supra* note 14, at 463 n.57 (question I-1 responses).

38. See Kim, *Perceptions*, *supra* note 2, at 140.

39. See *id.* at 127. (“Most workers, most of the time, are not ‘on the market,’ actively searching for alternative employment and comparing the compensation packages offered by different employers. As a result, competitive wages and terms tend to be defined at the margins, by the worker looking for a new job rather than the typical long-term employee.”).

competing firms could use them to entice top employees from their current jobs the same way that they use them to recruit unemployed workers.⁴⁰ Thus, it is at least arguable that the unemployed are not the only members of the workforce who are shopping for favorable employment terms. Furthermore, in a healthy economy with low unemployment levels,⁴¹ those who remain unemployed for a long enough period of time to qualify for unemployment insurance do not accurately represent active shoppers in the employment market at all. Active shoppers in an economy with less than structural unemployment levels are likely to quickly find alternative employment, while those who are applying for unemployment insurance benefits consist only of those who have not found alternative employment.

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Finally, confusion about employment law and lack of employment may be related to unique characteristics of unemployment benefit applicants. According to Verkerke, unemployment benefit applicants may not be the most accurate sample because their experience of recently losing a job may create a bias in their attitude towards discharge.⁴³ We all tend to engage in ego-defensive behavior that allows us to “maintain a positive image of ourselves—an image that depicts us as good, or smart, or worthwhile.”⁴⁴ In the employment context, an employee who has recently been discharged from a position is likely to believe that the discharge was wrongful and thus view herself as good, smart, or worthwhile.

40. See Frantz, *supra* note 10, at 577 (describing how headhunters would use information that current employees are being mistreated and under-compensated in order to offer those employees something better at a different firm.)

41. The unemployment rate in the United States during the relevant time period ranged from a high of 5.8% in April of 1995 that moved steadily downward to a low of 4.1% in late 1999. UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *Archived News Releases for Employment Situation*, available at http://www.bls.gov/schedule/archives/empst_nr.htm (last visited July 8, 2002).

42. *But see* Kim, *Perceptions*, *supra* note 2, at 128 (a claimant must be “available for work” to be eligible for benefits); MO. ANN. STAT. § 288.040(2) (“No person shall be deemed available for work unless he has been and is actively and earnestly seeking work.”).

43. J. Hoult Verkerke, *Employment Contract Law*, in NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 52 (1998) [hereinafter Verkerke, *Employment Contract Law*] (proposing that employment termination itself influences workers’ attitudes and beliefs about their legal rights).

44. ELLIOT ARONSON, THE SOCIAL ANIMAL 98-100 (1972) (noting that this type of behavior can be maladaptive in that it prevents a person from learning from her experience, but is nonetheless prevalent when people are confronted with information that is dissonant from their beliefs). This type of biased reaction among employees is demonstrated in my own data, which reveal that 75% of the respondents who indicated that they had been previously fired from a job also indicated that they had been *unfairly* fired from a job. See *infra* Appendix A, Part II, Question 11. If a strong majority of respondents who had been discharged believed that their discharge was wrongful, it is easy to hypothesize that a sample population consisting primarily of recently discharged workers would indicate that a greater number of discharge situations were unlawful than a population of employed workers. Further, due to their recent experience with discharge, these employees may have a greater incentive to answer in a manner that reflects the way they wish the law was or believed the law should be instead of how they have found it to be in reality.

Further, in a competition-based economy, an employee who is unaware or mistaken about the rules that govern her employment relationship is at a distinct disadvantage to the informed employee in the competition to obtain and maintain desirable employment. It is intuitive that those employees who are unaware or mistaken about the rules that govern their employment relationships are likely to be removed from the employed population through discharge, while those employees who understand the rules will be able to maintain their employment. Kim conceded that this “survival of the fittest” model could have some impact on her sample’s viability, stating: “On the other hand, maybe workers who are better informed about the law, who realize that they have no legal protection against unjust discharge in the absence of contract, can better protect themselves from involuntary termination and are therefore less likely to appear among the unemployed.”⁴⁵ All of these arguments cast doubt on the usefulness of Kim’s data.

B. Replication of Kim’s Study: Focusing on the Employed

Kim’s data cannot be dismissed simply because there are questions about her sample choice. Almost in anticipation to this sort of response, Kim stated: “if skeptics question whether the population surveyed here is truly representative of the workforce, the best way to resolve such doubts is through careful empirical testing of other sample populations, not further speculation.”⁴⁶ In order to test the validity of Kim’s findings for employed workers, I replicated Kim’s study in Nebraska and Virginia using only employed members of the workforce as my sample.

1. The Survey Instrument Used

The survey instrument Kim used to test employees’ understanding of the at-will default rule has been reproduced in Appendix A. In my own study, I chose to use Kim’s survey instrument without changing any part of it in order to make the instrument itself a control factor for the study. In order to accurately test the differences in understanding between employed and unemployed members of the workforce, it was crucial to ask them the same questions posed in a similar format and wording. As with any survey, the wording or ordering of particular questions can have an effect on how respondents answer them. Because both studies use identical surveying instruments, any divergence in our data must be the result of differences in

45. See Kim, *Perceptions*, *supra* note 2, at 142.

46. *Id.* at 155. “Moreover, until such studies produce contrary results, the findings documented here offer uncontradicted evidence that workers systematically overestimate their legal protections against arbitrary and unjust discharge.” *Id.*

sampling, and should be resolved through further study of larger and more diverse sample groups.

The survey instrument is divided into four sections, labeled Parts I-IV.⁴⁷ The first of these sections is intended to directly test “the respondents’ perceptions of legal protection in the absence of any contractual agreement regarding job security.”⁴⁸ This section presents respondents with different scenarios describing employee discharges with varying employer motivations, and asks respondents to determine whether each discharge was lawful or unlawful.⁴⁹ This section contains prefatory instructions that eliminate the possibility of an explicit contract for job security or a firing based on race, sex, national origin, religion, age, or disability.⁵⁰ Questions two and six present discharge scenarios that are legal in either at-will or just cause regimes.⁵¹ Questions five and eight present situations that are examples of unlawful discharges in either the just cause regime, or at-will regime with a narrow public policy exception, that has been accepted in one form or another in many at-will states.⁵² The remaining four questions present situations where the discharge would be lawful under an at-will regime, but unlawful under a just cause regime.⁵³

The greatest weakness in Section I of the survey instrument is that it fails to identify whether respondents do not believe that there is an at-will rule in place, or if they know of the existence of the at-will rule, but do not

47. See *infra* Appendix A.

48. Kim, *Norms*, *supra* note 14, at 454.

49. See *infra* Appendix A.

50. See *id.*

51. See *id.* Question two asks whether the employer may legally fire its employee for unsatisfactory job performance. Question six asks whether the employer may legally fire its employee because of a lack of work. Because these questions present scenarios where the employer may legally fire its employee, even in under a just cause regime, they tend to inflate people’s scores and will often be removed for the sake of more accurate analysis of the survey data. Removing these two questions is what Kim referred to as limiting the analysis to the six “diagnostic questions.” See *supra* note 32 and accompanying text.

52. See *infra* Appendix A. Question five asks whether an employer may legally fire its employee in retaliation for the employee reporting violations of fire regulations to a government agency. Question eight asks whether an employer may legally fire its employee in retaliation for refusing to participate in illegal billing practices. Because these questions present scenarios where the employer may not legally fire its employee, even under an at-will regime with a commonly accepted public policy exception, they also tend to inflate respondents’ scores and will often be removed for the sake of more accurate analysis of the survey data. See, e.g., CAL. LAB. CODE § 1102:5 (protecting employee disclosure of “a violation of state or federal statute, or violation or non-compliance with a state or federal regulation.”); *Schriner v. Meginnis Ford. Co.*, 421 N.W.2d 755, 757 (Neb. 1988) (citing *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569 (Minn. 1987); *Schmidt v. Yardney Elec. Corp.* 492 A.2d 512 (Conn. App. 1985); *Sarrator v. Longview Van Corp.*, 666 F. Supp. 1257 (N.D. Ind. 1987) (holding that an employee may claim damages for wrongful discharge when the employee refuses to participate in criminal conduct, and when the employee acts in good faith and upon reasonable cause in reporting his employer’s suspected violation of the criminal code.).

53. See *infra* Appendix A.

understand its application to specific discharge situations. Kim explained that she purposefully condensed these two questions in order to eliminate the potentially confusing legal term of art, "at-will employment," from the questions, and to prevent questions that ask what it means to be an at-will employee from suggesting the correct responses to questions about the nature of the employment relationship absent a contract specifying job security terms.⁵⁴ The effect of these questions on survey responses may warrant more empirical study.

Section II of the survey consists primarily of questions asking respondents to describe their past employment experiences.⁵⁵ This section tries to capture not only the employees' history, but also their attitudes towards employment law. The questions in this section ask respondents about the information they received about job security before taking their last job. The questions also ask respondents to point out experiences they have had with hiring and firing situations, on both sides of the table. Because a workplace generally consists of an owner or owners and agents who act on their behalf, respondents who indicated that they had previous responsibility for hiring and firing employees serve a dual purpose by providing information about both employee and management perceptions of the state of employment law.⁵⁶

Section III of the survey explores how employers' statements regarding job security terms and policies affect respondents' perceptions of the lawfulness of a cost-saving discharge.⁵⁷ The questions present respondents with four different situations describing employer statements ranging from explicit at-will language to explicit just cause language. The greatest difficulty in using the data collected in this section is that all four of the questions rely on the respondent's response to Question I-1. All of the scenarios conclude with the employee performing satisfactorily for several years and then being discharged by the employer in order to hire another worker at a lower wage. If the employee answered that this was a lawful practice absent explicit contractual language in Question I-1, these questions can be used to determine whether employees believe that different statements made by the employer can create a legal obligation to provide job security protection. However, if the employee answered that discharging the employee to hire another worker for a lower wage was

54. See Kim, *Perceptions*, *supra* note 2, at 130 & n.136.

55. See Appendix A.

56. See *infra* notes 161-162 and accompanying text. This is of course subject to some limitations. Employees may over-estimate their own responsibility in hiring and discharge situations, and may well not have the final say in any of these decisions. However, if those who do have responsibility for hiring and discharge do not understand the employment at-will rules, it could be inferred that the employer herself lacks knowledge of the employment at-will rules.

57. See *infra* Appendix A.

generally unlawful, as was the case for a vast majority of both Kim's and my own respondents, then this section's usefulness is limited to Question III-1, which can be used to determine whether employees are able to recognize at-will terms and understand their consequences at time of discharge.

Section IV of the survey provides demographic information about the respondents.⁵⁸

2. Survey Limitations

Kim approached her respondents in Employment Development Department lobbies where the respondents were waiting to file their claims for unemployment insurance benefits.⁵⁹ This high concentration of potential respondents, held somewhat captive by the waiting lines of the offices, could have contributed to Kim's impressive response rates, which ranged from 85% in Missouri and California to 69% in New York.⁶⁰ In order to contact similarly large numbers of employed members of the workforce, my replication of Kim's study was conducted through employers. I contacted various firms in Nebraska and Virginia for permission to survey their employees. Of the employers contacted, approximately 32%⁶¹ accepted the invitation to participate.

There are several possible reasons for this low response rate. The most troubling hypothesis is the common claim of at-will critics that employers gain from the confusion of their employees, and therefore promote a false image of job security so that their employees will not bargain for legally binding job security.⁶² Although this does not paint very positive picture of employers, this hypothesis is supported by anecdotal evidence from my conversations with declining firms. The overwhelming response of declining firms echoed the sentiments of one declining employer, who

58. *See id.*

59. *See Kim, Norms, supra* note 14, at nn.45-46.

60. *See id.* at nn.36, 45-46 ("Ultimately, I chose the Bay Area because of its accessibility and the presence of several high-volume offices, which made it possible to collect a large number of surveys in a compressed time frame.")

61. I received 25 grants of permission from 79 employers with whom I contacted a member of management who possessed the authority to grant/deny permission to survey. Contacting employers directly proved somewhat difficult, as the decision to grant/deny permission was often passed through many levels of the managerial bureaucracy. This 32% figure may be somewhat inflated as I primarily contacted firms with which I had personal contacts in the management. Of the firms with whom I had no personal contact prior to contacting them for the study, the response rate dropped to 18%. I received 12 grants of permission from the 66 firms with which I had no prior contacts that I contacted for the survey.

62. *See Blades, supra* note 16, at 1412-13; Note, *Good Faith Duty, supra* note 3, at 1831 (citing SPECIAL TASK FORCE, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, WORK IN AMERICA 72-73 (1972)).

stated: “we don’t want to expose [our employees] to that kind of information.”⁶³

However, it is difficult to believe that firms in a competitive market could maintain this conspiracy of silence.⁶⁴ Further, there are many other plausible explanations for a firm to refuse to allow its employees to be surveyed. First, time spent filling out a survey is time that is not spent working.⁶⁵ A cost maximizing firm will want its employees to spend “on-the-clock” time actively working, instead of filling out a survey. While participating employers were offered a breakdown of the information gathered in the study, this information may not have been valuable enough to the firm to offset the lost time and resources involved in participating in the survey. Second, firms often survey their own employees to gather information that aids in the management of their firm. For these firms, additional surveys from outside sources may hinder their own information gathering measures.⁶⁶ In the absence of further empirical testing, it is almost impossible to tell which of these explanations accurately diagnoses the cause of the low response rate.

Regardless of the reasons for the low response rate, the sampling process involved in my survey may be subject to various criticisms. First, the firms were not randomly selected. The firms were instead selected primarily for their accessibility and proximity.⁶⁷ Participating firms ranged in size from four employees to thousands of employees, and from industries as varied as farm machinery production to medicine. However, due to the small number and informal process for selecting the participating employers, they do not represent an accurate cross section of the workforce. Further, there may have been a self-selection bias among the firms who

63. Interview with Human Resources Director of Declining Employer (July 6, 2000). This type of anecdotal evidence is far from conclusive, but does reflect a strong reluctance among employers to inform their employees of the legal job security that they do or do not have. However, it is difficult to say that this response reflects deceptive behavior. It is plausible that the employer recognizes that discussing job security may “rock the boat,” negatively effecting the morale or productivity of the workplace.

64. See Verkerke, *Resolving the Debate*, *supra* note 2, at 887 n.190. (“Ignoring for the moment the serious antitrust implications such a conspiracy would have for firms, it is difficult to believe that employers would be able to enforce such a labor market cartel The lack of industrial cohesiveness or effective enforcement devices seems likely to doom such a conspiracy to failure.”).

65. This response was common among firms that declined as well as firms that agreed to participate. Interview with Human Resources Director of Participating Employer (July 14, 2000).

66. Interview with Human Resources Director of Participating Employer (July 15, 2000).

67. The first 19 firms selected were chosen primarily because of prior relationships with members of management. The remaining firms were cold called from a list of employers provided by the Charlottesville, Virginia Chamber of Commerce. Charlottesville was selected for its physical proximity as well as for the familiarity with the University of Virginia in the community, which was expected to lend credence to the study in the eyes of local firms. This approach was not intended to, nor do I believe did it, create a systematic bias in the population. Rather, I used this approach in order to advance the goal of collecting a large number of surveys in short span of time.

agreed to participate. Firms that are more honest with their employees and better educate them about employment terms are intuitively more likely to allow their employees to participate in a study concerning legal employment security. On the other hand, firms that better educate their employees may have less need for the information provided to them by the survey and therefore have less incentive to participate.

Second, the firms that participated provided various numbers of respondents. Obviously, with firms of varying sizes, larger firms were able to provide a greater pool of employees to take the survey than smaller firms. However, larger firms were often willing to provide only a sample of their employees in order to avoid the inconvenience of contacting their entire workforce. These sample sizes varied with each employer's specific situation.⁶⁸ Obviously, the firms that provided larger numbers of respondents will have a greater influence on the results of the data. This wide variety of sample sizes may or may not adequately reflect the fact that larger employers' policies have a greater effect on workers' perceptions than the policies of smaller employers.

Further, as respondents generally received the survey at their place of work, the environments in which the surveys were completed were as varied as the firms themselves. Some firms requested that the surveys be filled out after hours, while others distributed them during break periods. Some firms had comfortable meeting rooms in which to sit down and take the survey, while other surveys were taken over the customer counter. While it is unknown whether these differences affected the way in which respondents answered, it is evident that they did affect the response rate of employees who were presented with the survey. Response rates varied from employer to employer from as high as 100% to as low as 10%, with most firms producing a response rate of around 35%. Again, there may have been a self-selection bias among those individuals who participated in the survey. For example, since a written survey was employed, those who could not read English were not able to participate, and people who felt they possessed a good understanding of employment law may have been more apt to put their knowledge on the line by participating.

However, it would be nothing more than speculation to guess how all of these variables could affect the data collected in this study. Until further sampling provides evidence to the contrary, there is no real reason to believe that the sample provided in my study does not adequately represent employed members of the workforce. The consistent responses across different firms with a wide variety of characteristics strongly suggest that the level of confusion reflected in my data is prevalent throughout

68. For example, an agricultural firm may limit the survey to a specific number of farms, or a production plant may limit the survey to a single shift.

employed members of the workforce, regardless of where they work.

3. State Law Involved in the Replication

As stated above, the survey consisted wholly of respondents from Nebraska and Virginia. As in most states, Nebraska and Virginia strongly adhere to the at-will default rule, creating a rebuttable presumption that an employee in these states may be terminated without cause.⁶⁹ Tables 1 and 2 provide a brief overview of the laws governing discharge in these two states.

In Nebraska, “[i]t is well established. . .that when employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause it chooses without incurring liability.”⁷⁰ Nebraska courts, however, have carved out varied exceptions to the at-will default rule.⁷¹ First, the at-will rule can be circumvented by statute.⁷² For example, Nebraska courts have recognized an action for wrongful discharge when the discharge is based on an employee’s refusal to participate in criminal conduct,⁷³ and “when an at-will employee acts in good faith and upon reasonable cause in reporting his employer’s suspected violation of the criminal code.”⁷⁴ Second, an employee’s at-will status may be modified by contractual terms, which can at times include statements made in an employee handbook or even oral representations.⁷⁵ However, this second exception is subject to certain limitations. For instance, the language of the offer must meet the requirements for the formation of a unilateral contract. That is, “the language must constitute an offer definite in form which is communicated to the employee, and the offer must be

69. See e.g., *Johnston v. Panhandle Co-op Ass’n.*, 225 Neb 732, 736, 408 N.W.2d 261, 265 (1987); *Lockhart v. Commonwealth Education Systems Corp.*, 247 Va. 98, 102, 439 S.E.2d 328, 330 (1994).

70. See *Johnston*, 408 N.W. 2d at 265; see also *Jeffers v. Bishop Clarkson Mem’l Hosp.*, 387 N.W.2d 692 (Neb. 1986); *Mueller v. Union Pac. R.R.*, 371 N.W.2d 732 (Neb. 1985).

71. See *White v. Ardan, Inc.*, 430 N.W.2d 27, 30 (Neb. 1988) (“Those instances include where the discharge infringes upon a constitutionally protected interest of the employee and where a statute or contract prohibits an employer from discharging an employee for a particular reason or without cause.”); see also *Schriner v. Meginnis Ford Co.*, 421 N.W.2d 755, 757 (Neb. 1988) (“Under this exception, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy.”).

72. See *id.*

73. See *Schriner*, 421 N.W.2d at 758 (citing *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569 (Minn. 1987)); *Schmidt v. Yardney Elec. Corp.*, 492 A.2d 512 (Conn. App. 1985); *Sarratore v. Longview Van Corp.*, 666 F. Supp. 1257 (N.D. Ind. 1987)).

74. *Schriner*, 421 N.W.2d at 760.

75. See *Johnston*, 408 N.W. 2d at 265; *Hebard v. AT&T*, 421 N.W.2d 10 (Neb. 1988).

accepted and consideration furnished for it.”⁷⁶ Further, an offer of “permanent employment” does not provide the employee with just cause protection. The Nebraska Supreme Court has held that permanent employment “simply means to give a steady job of some permanence, as distinguished from a temporary job or temporary employment.”⁷⁷

Virginia has even fewer exceptions to the at-will default rule. According to the Virginia Supreme Court, “when a contract calls for the rendition of services but the period of the contract’s intended duration cannot be determined from its provisions, either party ordinarily is at liberty to terminate the contract at will upon giving reasonable notice of intention to terminate.”⁷⁸ Virginia courts have found, however, that the at-will rule “is not absolute” and is subject to certain exceptions.⁷⁹ The Virginia Supreme Court has recognized a narrow exception to the at-will rule for “discharges which violate public policy, that is, the policy underlying existing laws designed to protect the property rights, personal freedoms, health, safety, or welfare of the people in general.”⁸⁰ This exception can include discharges in retaliation for an employee’s refusal to participate in illegal activity.⁸¹ However, Virginia courts construe this exception narrowly, limiting claims of wrongful discharge in violation of public policy to employees who are a member of the class of persons that the specific public policy was designed to protect.⁸² This narrow construction has made it very difficult for an employee to successfully bring a claim of wrongful discharge against her employer, absent some kind of contractual obligation.⁸³ Virginia courts also allow the at-will default regime to be modified by contractual terms. Like Nebraska courts, Virginia courts require employer statements concerning job security to meet various requirements before considering them binding on an employer.⁸⁴ Further, Virginia courts agree with Nebraska courts’ interpretation of an offer of

76. *Hillie v. Mutual of Omaha Ins. Co.*, 245 Neb. 219, 224, 312 N.W.2d 358, 361 (1994).

77. *Mau v. Omaha Nat’l Bank*, 299 N.W.2d 147, 150 (Neb. 1980) (concurring with Johnston v. Nat’l Beef Packing Co., 551 P.2d 779, 782 (Kan. 1976)).

78. *Dray v. New Market Poultry Prods., Inc.*, 518 S.E.2d 312, 313 (Va. 1999); *see also* *Doss v. Jamco, Inc.*, 492 S.E.2d 441, 443 (Va. 1997); *Stonega Coal and Coke Co. v. Louisville and Nashville R.R. Co.*, 55 S.E. 551, 552 (Va. 1906).

79. *Bowman v. State Bank of Keysville*, 331 S.E.2d 797, 801 (Va. 1985).

80. *Miller v. SEVAMP, Inc.*, 362 S.E.2d 915, 918 (Va. 1987).

81. *See Lockhart v. Commonwealth Educ. Sys. Corp.*, 439 S.E.2d 328 (Va. 1994) (upholding employee’s claim that she was discharged out of racial discrimination and for her refusal to participate in illegally discriminatory practices).

82. *See City of Virginia Beach v. Harris*, 523 S.E.2d 239, 245 (Va. 2000); *Miller*, 362 S.E.2d at 918; *Dray*, 518 S.E.2d at 313.

83. *See, e.g., Miller*, 362 S.E.2d at 919.

84. *See, e.g., Spiller v. James River Corp.*, 32 Va. Cir. 300, 304-305 (1993) (providing an overview of the requirement that must be met for a statement found in an employee handbook to constitute a promise).

“permanent employment,” finding that it conveys “no indication of duration, and as such the employment will be considered terminable at will unless some contrary indication is gleaned from the intent of the parties.”⁸⁵

TABLE 1
CORRECT RESPONSES TO QUESTIONS IN PART I BY STATE

| Reasons for Discharge | Nebraska | Virginia |
|--|----------|------------|
| * I-1 Employer plans to hire another person to do same job at lower wage | Lawful | Lawful |
| I-2 Unsatisfactory job performance | Lawful | Lawful |
| * I-3 Retaliation for reporting theft of company property by another employee to supervisor | Lawful | Lawful |
| * I-4 Mistaken belief that employee stole money (employee can prove mistake) | Lawful | Lawful |
| * I-5 Retaliation for reporting violation of fire regulations to government agency | Unlawful | Unlawful** |
| I-6 Lack of work | Lawful | Lawful |
| * I-7 Personal dislike of employee | Lawful | Lawful |
| * I-8 Retaliation for refusing to participate in illegal billing practice | Unlawful | Unlawful* |

* Indicates the six diagnostic questions.

** Reflects a liberal interpretation of Virginia case law. The correct answers to these questions may depend on certain contextual factors not given in the question.

85. *Tedder v. Mr. Dunderbak, Inc.*, 5 Va. Cir. 6, 7 (1980) (citing 60 ALR 3d 226, 232-33).

TABLE 2
CORRECT RESPONSES TO QUESTIONS IN PART III BY STATE

| Nature for the Employer Statement | | Nebraska | Virginia |
|-----------------------------------|--|----------|----------|
| III-1 | Personnel Manual states: "Company reserves the right to discharge employees at any time, for any reason, with or without cause." | Lawful | Lawful |
| III-2 | Company sends letter offering "permanent employment." | Lawful | Lawful* |
| III-3 | Personnel Manual states: "If you successfully complete a 90 day probationary period, you become a permanent employee." | Lawful | Lawful |
| III-4 | Personnel Manual states: "Company will resort to dismissal for just and sufficient cause only." | Unlawful | Lawful |

* In Virginia, response to Question III-2 may be a question of fact that would go to a jury because it involves a signed writing.

4. Results of the Replication Survey

My survey data indicate that employees in Nebraska and Virginia do not understand the legal rules that govern their employment relationships. Even after construing case law liberally to give my respondents the benefit of the doubt, the average scores of respondents remained quite low. The low scores of my respondents indicate that the high level of confusion and ignorance found in Kim's data is not limited to unemployed members of the workforce. While Kim's unemployed respondents from Missouri could only answer 51% of the questions in Part I of the survey correctly,⁸⁶ my employed respondents could only answer 53% and 55% of the same questions correctly (in Nebraska and Virginia, respectively). Even when limited to the six diagnostic questions, our results are strikingly similar. Kim found that her Missouri respondents' average score on the diagnostic questions was only 40%.⁸⁷ Similarly, my respondents only averaged scores of 40% and 42% on the diagnostic questions (in Nebraska and Virginia respectively). The low scores of my respondents and the scores of Kim's respondents, reflect a serious confusion about the at-will default rule (as random guesses on these two response questions would have averaged scores of 50%).

Furthermore, respondents in both studies were confused about the same questions to a similar extent. While Kim's unemployed respondents mistakenly indicated that it was unlawful for an employer to discharge her

86. See Kim, *Norms*, *supra* note 14, at 456.

87. See *id.* at 454 tbl. 1.

employee out of personal dislike 89% of the time,⁸⁸ my employed respondents indicated that they held the same incorrect belief 84% of the time. This mirror image of confusion was reflected throughout Part I. The error rate of respondents for Question 1—asking about the lawfulness of discharging an employee to hire another at a lower wage—was 82% and 77% for unemployed and employed respondents, respectively.⁸⁹ For Question 4—asking about the lawfulness of discharge based on a mistaken belief that the employee had stolen money—the error rates for the unemployed and employed respondents were 87% and 85% respectively,⁹⁰ and for Question 8—asking about the lawfulness of discharging in retaliation for refusing to participate in illegal activity—the error rates were 10% and 12% respectively.⁹¹ These numbers indicate that employed members of the workforce understand (or misunderstand) the at-will default rule in a way that is similar to their unemployed counterparts.

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

TABLE 3
NEBRASKA RESULTS
RESPONSES TO PART I OF SURVEY

| <i>Reason for Discharge</i> | <i>Legal Rule</i> | <i>% of Total Responses**</i> | | | <i>Error Rate</i> |
|---|-------------------|-------------------------------|-----------------|---------------------|-------------------|
| | | <i>Lawful</i> | <i>Unlawful</i> | <i># Unanswered</i> | |
| * I-1 Employer plans to hire another person to do same job at a lower wage | Lawful | 19 | 81 | 1 | 81% |
| I-2 Unsatisfactory job performance | Lawful | 95 | 5 | 0 | 5% |
| * I-3 Retaliation for reporting theft of company property by another employee to supervisor | Lawful | 13 | 87 | 1 | 87% |
| * I-4 Mistaken belief that employee stole money (employee can prove mistake) | Lawful | 12 | 88 | 3 | 88% |
| * I-5 Retaliation for reporting violation of fire regulations to government agency | Unlawful | 9 | 91 | 3 | 9% |
| I-6 Lack of work | Lawful | 90 | 10 | 1 | 10% |
| * I-7 Personal dislike of employee | Lawful | 14 | 86 | 2 | 86% |
| * I-8 Retaliation for refusing to participate in illegal billing practice | Unlawful | 11 | 89 | 4 | 11% |

* Indicates the six diagnostic questions.

** N = 314.

TABLE 4
VIRGINIA RESULTS
RESPONSES TO PART I OF SURVEY

| <i>Reason for Discharge</i> | <i>Legal Rule</i> | <i>% of Total Responses**</i> | | | <i>Error Rate</i> |
|---|-------------------|-------------------------------|-----------------|---------------------|-------------------|
| | | <i>Lawful</i> | <i>Unlawful</i> | <i># Unanswered</i> | |
| *I-1 Employer plans to hire another person to do same job at a lower wage | Lawful | 27 | 73 | 0 | 73% |
| I-2 Unsatisfactory job performance | Lawful | 96 | 04 | 0 | 4% |
| * I-3 Retaliation for reporting theft of company property by another employee to supervisor | Lawful | 15 | 85 | 0 | 85% |
| * I-4 Mistaken belief that employee stole money (employee can prove mistake) | Lawful | 19 | 81 | 2 | 81% |
| * I-5 Retaliation for reporting violation of fire regulations to government agency | Unlawful | 11 | 89 | 0 | 11% |
| I-6 Lack of work | Lawful | 91 | 09 | 0 | 9% |
| *I-7 Personal dislike of employee | Lawful | 18 | 82 | 3 | 82% |
| * I-8 Retaliation for refusing to participate in illegal billing practice | Unlawful | 14 | 86 | 2 | 14% |

* Indicates the six diagnostic questions.

** N = 198.

The mistakes made by Kim's and my own respondents were not random. Rather, they represent a systematic over-estimation of the amount of job security afforded employees by the law.⁹² My Nebraska respondents could only answer 41% of the Part I questions that described lawful discharge situations correctly. Similarly, my Virginia respondents could only answer 45% of the same questions correctly. In other words, when confronted with a scenario describing a lawful discharge, my respondents mistakenly believed that the discharge is unlawful almost six times out of ten. However, when presented with a scenario describing an unlawful discharge, the results are strikingly different. In Nebraska, my respondents correctly recognized an unlawful discharge situation 90% of the time. Likewise, in Virginia, my respondents correctly recognized an unlawful discharge 88% of the time. In other words, my respondents, when confronted with a scenario describing an unlawful discharge, mistakenly believed that the discharge is lawful only one time out of ten. This discrepancy between the way employees correctly answer questions

92. See also Kim, *Perceptions*, *supra* note 2, at 133.

regarding lawful and unlawful discharge suggests that employees are almost four times as likely to incorrectly believe that a lawful discharge is unlawful as they are to incorrectly believe that an unlawful discharge is lawful, indicating a strong over-estimation of job security.

TABLE 5
COMBINED RESULTS
RESPONSES TO PART I OF SURVEY

| Reason for Discharge | Legal Rule | % of Total Responses** | | | Error Rate |
|---|------------|------------------------|----------|--------------|------------|
| | | Lawful | Unlawful | # Unanswered | |
| * I-1 Employer plans to hire another person to do same job at a lower wage | Lawful | 23 | 77 | 1 | 77% |
| I-2 Unsatisfactory job performance | Lawful | 94 | 4 | 0 | 4% |
| * I-3 Retaliation for reporting theft of company property by another employee to supervisor | Lawful | 14 | 86 | 1 | 86% |
| * I-4 Mistaken belief that employee stole money (employee can prove mistake) | Lawful | 15 | 85 | 5 | 85% |
| * I-5 Retaliation for reporting violation of fire regulations to government agency | Unlawful | 10 | 90 | 3 | 10% |
| I-6 Lack of work | Lawful | 90 | 10 | 1 | 10% |
| * I-7 Personal dislike of employee | Lawful | 16 | 84 | 5 | 84% |
| * I-8 Retaliation for refusing to participate in illegal billing practice | Unlawful | 12 | 88 | 6 | 12% |

* Indicates the six diagnostic questions.

** N=512.

This strong pattern of over-estimation indicates that employees are more than unaware of their at-will status. Not only do they not know about or misapply the at-will doctrine, they hold beliefs about their current level of legal job security that are simply wrong. Employees erroneously believe that the law prevents employers from discharging them in a wide variety of situations where the law does not protect them.⁹³

It would seem intuitive that employees would correct these mistaken beliefs through their experiences with employment law.⁹⁴ Employees who have previously been fired should gain some knowledge of the at-will default rule. Similarly, employees who are given the responsibility to act

93. Assuming *ad arguendo* that employees desire legal job security, this mistaken belief could prevent employees from bargaining for just cause terms, since workers believe that they already possess them, even in the absence of explicit contract terms.

94. See also, e.g., Verkerke, *Resolving the Debate*, *supra* note 2, at 887.

on behalf of their employer in the hiring and firing of other employers should surely know the legal freedom granted to employers to discharge at will. However, my data indicates that these intuitions, like employees' beliefs about job security, are wrong. My data confirms Kim's findings that the over-estimation of job security among her respondents is resistant to change regardless of experience with the law.⁹⁵ Kim found that unemployed workers who had previously been fired scored no better than other workers, and in Missouri actually scored worse, despite their direct exposure to the law.⁹⁶ Similarly, the 95 respondents in my survey who indicated that they had previously been fired from a job averaged 54% on the Part I questions and 41% on the six diagnostic questions, exactly the same score as respondents who lacked this direct contact with the at-will default rule. Kim also found that prior responsibility for hiring and firing other employees had no measurable effect on her respondents' perceptions of the law.⁹⁷ Similarly those who had previous responsibility for hiring and firing in my study scored only 56% on Part I as a whole, and 42% on the six diagnostic questions.

This finding is interesting for two reasons. First, and most obviously, it undermines the commonly held belief that the market, aided by experience factors, will eliminate employee ignorance.⁹⁸ Second, it may indicate that employers are similarly confused about the at-will default rule or that they have chosen not to give their agents the freedom to discharge other employees at-will for one reason or another.⁹⁹

Surprisingly, as indicated in Table 6, none of the experiential factors had any noticeable effect on the accuracy of my respondents' answers. Even the employees who indicated that they had previously sued their employers failed to display any improvement in knowledge, actually scoring worse than their legally inexperienced counterparts.

Likewise, recent hiring experience had no noticeable effect on respondent accuracy. In the *New Palgrave Dictionary of Law and Economics*, Verkerke stated, "[f]uture empirical work should seek to confirm [Kim's] findings using a population of recently employed rather than recently terminated employees. It is possible that employment

95. See Kim, *Norms*, *supra* note 14, at 476 ("Surprisingly, virtually none of the variables that were predicted to have a positive influence on legal knowledge turned out to have any consistently measurable effect.").

96. See *id.*

97. See *id.*

98. See, e.g., Verkerke, *Resolving the Debate*, *supra* note 2, at 887.

99. The implications of these potential explanations for low scores among respondents with previous responsibility for hiring and firing other employees is discussed further *infra* notes 160-62 and accompanying text. This discussion does not take the potential for agency costs into account. For a discussion of agency costs and how these costs do not exceed the potential costs of a mandatory tenure system, see Freed & Polsby, *Efficiency*, *supra* note 10, at 1130-31.

termination itself influences workers' attitudes and beliefs about their legal rights."¹⁰⁰ My sample included 65 employees who had been hired within the last six months. These respondents averaged scores of 53% and 40% on Part I and the six diagnostic questions respectively. Further, my sample included 62 employees who had been at their current job for six to eighteen months. These respondents scored 53% and 40% on Part I and the six diagnostic questions respectively. Both of these scores were actually worse than the scores of the entire sample population, indicating that recent hiring experience does not successfully educate employees of their at-will status.

TABLE 6
EXPERIENTIAL FACTORS AMONG RESPONDENTS
AND RELATIVE SCORES

| | Number | <i>Mean Scores (Standard Deviation)</i> | | |
|---|--------|---|-----------|--------------|
| | | Part I | 6 Lawful | 6 Diagnostic |
| 1. Previous Responsibility For Hiring and Firing* | 184 | 56% (.21) | 44% (.19) | 42% (.16) |
| 2. Previous Union Representation* | 40 | 54% (.14) | 45% (.20) | 41% (.17) |
| 3. Previously Fired From Job | 95 | 54% (.14) | 43% (.21) | 41% (.16) |
| 4. Recent Hires* | | | | |
| a. 2000 Hires | 65 | 53% (.13) | 41% (.20) | 40% (.15) |
| b. 1999 Hires | 62 | 53% (.10) | 42% (.13) | 37% (.13) |
| 5. Previously Sued Employer* | 7 | 54% (.19) | 55% (.23) | 38% (.25) |

* Figures are based on the number of respondents who answered the particular question.

In addition, demographic factors had little, if any, impact on the accuracy of respondents' answers. Men and women each scored 54% on Part I of the survey and differed only by one percent on the six diagnostic questions. Similarly race and age had very little impact on the average scores. Whites generally scored slightly better than minorities, and the 65 and older age group scored slightly worse than younger respondents. However, these differences were very slight. The only truly noteworthy demographic factor was education. While respondents with no high school education averaged 49% on Part I, respondents who had completed graduate school scored 62%. When limited to the six diagnostic questions, the gap between the respondents of differing educational levels persisted; the variation ranged from an average score of 39% for those without a high school diploma to 50% for those who had a graduate degree. However, a

100. Verkerke, *Employment Contract Law*, *supra* note 43, at 52.

score that is no better than random guessing is little for graduate school alumni to brag about.

TABLE 7
DISTRIBUTION OF DEMOGRAPHIC CHARACTERISTICS AMONG
ALL RESPONDENTS AND RELATIVE SCORES

| | | <i>Mean Scores (Standard Deviation)</i> | | | |
|-------------------|-------------------|---|---------------|-----------------|---------------------|
| | | <i>Number</i> | <i>Part I</i> | <i>6 Lawful</i> | <i>6 Diagnostic</i> |
| Entire Population | | 512 | 54% (.13) | 42% (.18) | 41% (.16) |
| Sex* | Male | 264 | 54% (.12) | 42% (.18) | 41% (.16) |
| | Female | 245 | 54% (.13) | 42% (.19) | 40% (.16) |
| Age* | < 25 | 73 | 54% (.12) | 43% (.17) | 40% (.15) |
| | 25 – 34 | 97 | 55% (.19) | 43% (.13) | 44% (.17) |
| | 35 – 44 | 149 | 53% (.14) | 41% (.19) | 40% (.16) |
| | 45 – 54 | 134 | 54% (.13) | 43% (.19) | 40% (.16) |
| | 55 – 64 | 49 | 55% (.12) | 42% (.18) | 42% (.13) |
| | ≥ 65 | 6 | 52% (.05) | 36% (.07) | 36% (.07) |
| Race* | White | 434 | 54% (.13) | 42% (.18) | 41% (.15) |
| | Black | 31 | 50% (.13) | 41% (.19) | 38% (.15) |
| | Asian/P.I. | 7 | 66% (.12) | 69% (.31) | 55% (.16) |
| | Hispanic | 29 | 49% (.13) | 36% (.15) | 41% (.22) |
| | Native Am. | 3 | 50% (.00) | 39% (.09) | 33% (.00) |
| | Other | 2 | 50% (.18) | 42% (.35) | 42% (.12) |
| Education* | No High School | 40 | 49% (.11) | 38% (.19) | 39% (.17) |
| | High School | 146 | 53% (.12) | 40% (.17) | 39% (.14) |
| | Assoc. or Tech. | 49 | 54% (.13) | 43% (.18) | 40% (.16) |
| | Some College | 133 | 53% (.11) | 40% (.16) | 38% (.13) |
| | College | 83 | 56% (.13) | 46% (.18) | 43% (.15) |
| | Some Grad. School | 22 | 60% (.15) | 52% (.18) | 51% (.20) |
| | Grad School | 34 | 62% (.17) | 53% (.22) | 50% (.23) |
| Income* | < \$10,000 | 35 | 53% (.12) | 42% (.17) | 39% (.14) |
| | \$10,000 – 14,999 | 33 | 53% (.14) | 48% (.22) | 42% (.19) |
| | \$15,000 – 24,999 | 86 | 52% (.13) | 41% (.18) | 41% (.18) |
| | \$25,000 – 49,000 | 151 | 52% (.11) | 40% (.16) | 38% (.13) |
| | \$50,000 – 74,999 | 25 | 55% (.16) | 43% (.20) | 43% (.19) |
| | ≥ 75,000 | 6 | 58% (.10) | 44% (.14) | 44% (.14) |

* Figures are based on the number of respondents who answered the particular question.

As in Kim's study, the occupation and industry categories (Questions IV-6 and IV-7) proved too confusing to produce any relevant data.

My data confirms Kim's finding that employees do not understand the at-will default rule that governs their employment relationships. The only place in which my data differed noticeably from Kim's was in how our respondents reacted to the hypothetical employer statements in Part III of the survey. As in Kim's study, such a strong majority of my respondents believed that discharging an employee in order to hire another one at a lower wage was unlawful, that Question 1 was the only question in Part III of the survey to produce any relevant information.¹⁰¹

TABLE 8
NEBRASKA RESULTS
RESPONSES TO PART III OF SURVEY

| <i>Nature of Employer Statements</i> | <i>Legal Rule</i> | <i>% of Total Responses*</i> | | | <i>Error Rate</i> |
|--|-------------------|------------------------------|-----------------|---------------------|-------------------|
| | | <i>Lawful</i> | <i>Unlawful</i> | <i># Unanswered</i> | |
| III-1 Personnel Manual states: "Company reserves the right to discharge employees at any time, for any reason, with or without cause." | Lawful | 58 | 42 | 3 | 42% |
| III-2 Company Sends letter offering "permanent employment." | Lawful | 16 | 84 | 3 | 84% |
| III-3 Personnel Manual states: "If you successfully complete a 90 day probationary period, you become a permanent employee." | Lawful | 17 | 83 | 3 | 83% |
| III-4 Personnel Manual states: "Company will resort to dismissal for just and sufficient cause only." | Lawful | 17 | 83 | 4 | 17% |

* N = 314.

101. If a respondent already believes that a purely cost saving discharge is unlawful, then adding contractual terms that confirm that belief will not have any effect on her. Therefore, I will not analyze the responses I recorded to questions III-2 to III-4, and will instead only focus on the responses to question III-1.

TABLE 9
VIRGINIA RESULTS
RESPONSES TO PART III OF SURVEY

| | <i>Nature of Employer Statements</i> | <i>Legal Rule</i> | <i>% of Total Responses*</i> | | | <i>Error Rate</i> |
|-------|--|-------------------|------------------------------|-----------------|---------------------|-------------------|
| | | | <i>Lawful</i> | <i>Unlawful</i> | <i># Unanswered</i> | |
| III-1 | Personnel Manual states: "Company reserves the right to discharge employees at any time, for any reason, with or without cause." | Lawful | 61 | 39 | 5 | 39% |
| III-2 | Company Sends letter offering "permanent employment." | Lawful | 21 | 79 | 6 | 79% |
| III-3 | Personnel Manual states: "If you successfully complete a 90 day probationary period, you become a permanent employee." | Lawful | 20 | 80 | 6 | 80% |
| III-4 | Personnel Manual states: "Company will resort to dismissal for just and sufficient cause only." | Unlawful | 22 | 78 | 7 | 78% |

* N = 198.

In order to analyze how much effect employees believe an at-will disclaimer has, Kim disaggregated the responses of those who indicated that a pure cost-saving discharge was unlawful in Question I-1 from the rest of the population.¹⁰² In Kim's own words: "More surprising, and more troubling, a very high proportion of these respondents—74%—continued to believe that such a discharge is unlawful even in the face of an employer statement that it 'reserves the right to discharge employees at any time, for any reason, with or without cause' (Section III, Question 1)."¹⁰³ In order to determine if Kim's finding persisted among employed members of the workforce, I similarly disaggregated those respondents who indicated that they believed a pure cost-saving discharge was unlawful. Of these 392 respondents, I found that only 50% of them could recognize an at-will disclaimer and apply it to the given discharge situation. While this percentage is significantly better than the one found in Kim's study, it remains disturbing that half of the respondents could not recognize and apply an explicit at-will disclaimer.

102. See Kim, *Perceptions*, *supra* note 2, at 138.

103. See *id.* at 139.

Assuming *ad arguendo* that it would be desirable to eliminate the information deficiency demonstrated in our data, employee misunderstanding of an at-will disclaimer is troubling, because it indicates that it may be more difficult than expected to overcome the employees' information deficiency. One common way to overcome an information deficiency is to purposefully set the default rules at what the parties would not want in order to "induce knowledgeable parties to reveal information by contracting around the default penalty."¹⁰⁴ In the employment context this would mean setting a just cause default rule so that employers would be forced to bargain for an at-will term, thereby making employees aware of the term.¹⁰⁵ However, if employees cannot recognize the meaning and consequences of an explicit at-will term when it is the only statement in front of them, it is difficult to believe that they will understand its significance when buried in even the simplest of employment contracts.¹⁰⁶

If employees cannot understand the significance of an at-will disclaimer, then a just cause default rule would serve little purpose. Under a just cause default rule, if the optimal term for a majority of employment contracts is at-will, the employer will simply add an at-will disclaimer and the just cause default will not bring the employee significantly closer to full information. Thus, in this scenario, the just cause default rule will create transaction costs without significant information benefits. On the other hand, if the optimal term for a majority of contracts is just cause, again the employer will simply add an at-will disclaimer and the parties will reach less-than-optimal terms. Thus, in this scenario the just cause default rule will again increase transaction costs, but fail to move the parties to the optimal terms.

The inability to comprehend an at-will disclaimer's significance demonstrated in both Kim's and my own data also suggests that the employees' mistaken beliefs about their legal job security are strongly held. According to social psychology, people will tend to accept information that confirms their beliefs while discounting or even disregarding information that conflicts with those beliefs.¹⁰⁷ This type of reaction was documented in

104. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 94 (1989).

105. Many at-will critics who believe that the market has failed because of an information failure among employees have supported this idea of an information forcing default. See, e.g., Peter Stone Partee, *Reversing the Presumption of Employment At Will*, 44 VAND. L. REV. 689, 710 (1991).

106. See Kim, *Perceptions*, *supra* note 2, at 146 ("Respondent's ability to process written information, particularly when it contradicts their preconceived beliefs about the law, appears to be quite limited.")

107. For an in-depth discussion about how people acknowledge information that confirms their beliefs, while ignoring information that contradicts them, see THOMAS GILOVICH, *HOW WE KNOW WHAT ISN'T SO* 49-72 (1991); RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 180-83 (1980).

Robert Ellickson's study of cattle ranchers in Shasta County. Ellickson found that when he informed ranchers that liability laws were not as they believed them to be, "the cattlemen treat the receipt of these reports not as occasions for updating their beliefs about law but rather as occasions for railing about the incompetence of courts and insurance companies."¹⁰⁸ Further, people tend to engage in ego-defensive behavior, ignoring information that may threaten their sense of security. As acceptance of an at-will disclaimer forces the employee to recognize that they are vulnerable to employer opportunism, employees may resist such disclaimers.¹⁰⁹ Regardless of whether these internal defense mechanisms adequately explain the confusion among employees found in my study, it is apparent from my data that this confusion will not easily be remedied.

C. The Impact of Findings on the Traditional Economic Defense of At-Will

It is apparent that further empirical research on the subject of employee knowledge of the at-will rule is necessary. Many questions about employee perceptions and misconceptions have yet to be answered. Different samples of the workforce must be taken and different questions must be asked if legal scholars want a more complete understanding of what employees believe their legal job-security to be.

While I do not claim that my data provides the definitive answer to this complex empirical question, the striking similarity between Kim's data and my own leads to the conclusion that legal scholars must now acknowledge that employees are confused about the legal background upon which they base their employment relationships. My data shows that this high level of confusion is not limited to unemployed members of the workforce. Rather, I have found that employed members of the workforce demonstrate a level of confusion that is almost identical to that of their unemployed counterparts, a confusion that is virtually unaffected by experience or demographic station. This widespread confusion documented in two independent studies with highly disparate samples is persuasive evidence that legal scholars can no longer assume that employees "know the footing on which they have contracted."¹¹⁰

According to traditional economic models, a competitive job market will generally push the parties to employment contracts towards full information.¹¹¹ In these models, job security is simply one option in a larger

108. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 115 (1991).

109. See ARONSON, *supra* note 44, at 98-100 (explaining that people tend to engage in ego-defensive behavior that allows them to "maintain a positive image of ourselves—an image that depicts us as good, or smart, or worthwhile.").

110. Epstein, *supra* note 6, at 955; see also *supra* note 12.

111. See Frantz, *supra* note 10, at 596; Epstein, *supra* note 6 at 955.

compensation package in the same way that insurance benefits or health club memberships are options. Employers use these options as well as wage rates to bid for employees' services in much the same way that automobile manufacturers bid for customers by altering prices and option packages. Ultimately, an employer's policy concerning discharge becomes part of the equation calculated by job-seekers when choosing between potential employers.¹¹² If employers are truly competing for employees, informational deficiencies will not persist because these deficiencies create profit-making opportunities for those competing employers who are willing to correct them.¹¹³ Therefore, in a competitive job market, if employees really value job security terms, market pressures would push employers to publicize their job security policies, eliminating employee ignorance and attracting employees who want protection but for their ignorance of the term.¹¹⁴

However, if my data are any indication, the job market has not pushed employees toward a full understanding of job security terms. This information deficiency creates a problem for at-will defenders, who have assumed that both employers and employees possess adequate information to bargain to the most efficient terms.¹¹⁵ At-will defenders must now recognize that at least one of the parties to employment bargains is misinformed about the legal default rules upon which that bargain is made.¹¹⁶

III.

COMPETING THEORIES ACCOUNTING FOR THE INFORMATION DEFICIENCY

A. Market Failure

Evidence of an informational deficiency seems to be a windfall victory for at-will critics, providing the last piece of the puzzle for those critics who have claimed that a market failure caused by imperfect information is the real reason for the at-will term's prevalence.¹¹⁷ Ted Cruz and Jeffrey J.

112. See Verkerke, *Resolving the Debate*, *supra* note 2, at 873 ("workers are likely to choose among potential employers in part on the basis of their policies concerning discharge.").

113. See Frantz, *supra* note 10, at 596 ("These firms will disseminate information about termination records to the extent that the potential gains for the sale of just cause protection outweigh the costs of dissemination."). Therefore, it is in a competing employer's best interests to make employees aware of all of the options that they offer, as well as the options that are not offered by other employers.

114. See, e.g., *id.* (arguing that the job market is competitive and therefore information failures in the job market cannot last long); see also Epstein, *supra* note 6, at 955.

115. See *supra* notes 6-10 and accompanying text.

116. See Kim, *Perceptions*, *supra* note 2, at 147.

117. See *supra* note 3 and accompanying text.

Hinck explain how a lack of information leads to a market failure in the following way: “efficient market pricing depends on accurate information; to the extent that parties are misinformed or uninformed, they are less likely to be able to behave in accord with their true preferences, and hence the market fails.”¹¹⁸ According to at-will critics, misinformed employees may be unable to compare the option packages offered by employers, and therefore may be unable to push employers to offer them optimal terms.¹¹⁹ Without full information, employees may not be able to adequately bargain for their preferred terms with their employers concerning job security. This casts doubt on the dominant practice’s efficiency. If the dominant practice’s efficiency can no longer be taken for granted, then the dominant, at-will default no longer deserves default status simply because a majority of parties tend to choose it.¹²⁰ Instead a majority of contracting parties may be choosing the dominant term because a failing market is clearing at less-than-optimal terms.

With the traditional economic argument that the parties to a bargain generally have a greater understanding of their preferences than third parties effectively neutralized by employees’ apparent ignorance of the terms of the bargain, the at-will critics seem to have, at the very least, gained a great deal of ground on the defenders. These critics assume that if employees were able to obtain full information about job security terms and their current at-will status, they would recognize the value of just cause protection and bargain for it.¹²¹ Based on this assumption, they call for judicial intervention, in the form of a just cause legal rule, to ensure that the parties reach the efficient result that the market has somehow failed to achieve.¹²²

118. Ted Cruz & Jeffrey J. Hinck, *Not My Brother’s Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 640 (1996).

119. See, e.g., Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 632 (1979) (misinformed consumers cannot contract in their own best interests because they lack the ability to rank the purchase choices that are offered).

120. See David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment At Will Versus Job Security*, 146 U. PA. L. REV. 975, 1025 (1998).

121. See, e.g., Note, *Good Faith Duty*, *supra* note 3, at 1832.

122. See, e.g., *id.* at 1830 (“When high costs of bargaining prevent negotiation between individual employees and employers, and inadequate access to information prevents parties from properly valuing the benefits of job security, judicial intervention is justified to ensure a more efficient result.”); Schwartz & Wilde, *supra* note 119, at 632 (“The existence of imperfect information is thought to justify legal intervention, according to conventional understanding, because consumers cannot contract in their own best interests without the data to rank the purchase choices that markets offer.”); Sunstein, *Rights*, *supra* note 16, at 1057 (arguing that at-will defenders cannot rely on freedom of contract to justify their position because employees suffer from “information failure” and are apt to make poor decisions).

B. Rational Ignorance

An alternative theory, which I believe provides a more persuasive explanation for the apparent information deficiency among employees, is rational ignorance. “[T]he ‘rationally ignorant party’ is one who is involved in small one-shot or infrequent transactions, making it irrational to incur the costs of learning the default rules.”¹²³ For an example of rational ignorance try to recall the last time you read all of the disclaimers and warranty information when you purchased a kitchen appliance such as a blender or a toaster. Chances are, there is no last time, because if you are like most consumers you have never read this information. Yet most people feel satisfied with their kitchen appliances and their kitchen appliance warranties. Consumers do not endure sleepless nights worrying about their toasters because the market has managed to reach efficient terms even without fully informed consumers.

Rationally ignorant parties remain ignorant of a legal rule’s existence or lack thereof because the rule does not have any significant effect on them.¹²⁴ Information is never perfect because the market only pushes parties to gain information that is valuable or useful to them.¹²⁵ Gaining a working understanding of legal rules is costly for parties.¹²⁶ Legal information does not have value in and of itself; its only value exists in its ability to improve a party’s ability to make decisions and direct behavior. If the information has no effect on a party’s decision (i.e. does not alter the equation used by the consumer to calculate a good’s usefulness), then that information is not valuable to her, and the market will not push her to gain that information. Therefore, the ignorance of the legality of a particular event (in this case arbitrary discharge) is rational if either the probability of that event’s occurrence or the costs of that event’s occurrence are low.

According to George J. Stigler: “An example is the difference between searching a haystack to find the sharpest needle in it and searching the

123. Kim, *Perceptions*, *supra* note 2, at 154; *see also, e.g.*, Melvin Aaron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 214 (1995) (describing how human rationality is bounded by limited information and limited information processing causing people to settle for satisfactory decision making); George J. Stigler, *The Economics of Information*, 69 J. POL. SCI. 213 (1961) (creating a model under which an actor will search until the cost of further search equals the marginal returns from further searching).

124. *See* Barnett, *supra* note 19, at 886.

125. *See* Schwartz & Wilde, *supra* note 119, at 630 (recognizing that information is never perfect regardless of the market).

126. *See* Stephen P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 770-71 (1993) (describing how even when the costs of reading a clause are low, the costs of absorbing and understanding how the words apply to an actor’s behavior can still be quite high).

haystack to find a needle sharp enough to sew with.”¹²⁷ If the seamstress finds a needle sharp enough to sew with, it is not worth her time or effort to continue searching the haystack for the sharpest needle. Similarly, in the context of the at-will debate, if an employee with an at-will contract term has roughly the same probability of being arbitrarily discharged as an employee with a just cause contract term, then searching for the most protective just cause terms is not worth the employee’s time and effort; it is about as useful to that employee as searching for the sharpest needle is to the rational seamstress. In other words, if a just cause legal rule would not meaningfully cut down on the employees’ chances of being arbitrarily discharged because those chances are already low, then employees have no rational reason to learn about their lack of legal job security protection and competing employers have no incentive to inform them of their misconceptions. If this is the case, the ignorance demonstrated in my data does not indicate that employees need to be protected by a just cause legal rule. Instead, it may indicate exactly the opposite: that a just cause legal rule would not provide employees with appreciably greater job security protection than the current at-will default rule.

C. *The Difference Between the Two Competing Theories*

In determining which of these two theories is more plausible, it is important to remember that an information deficiency does not mark the end of the traditional economic model’s usefulness. An information deficiency does not even necessarily indicate a market failure, unless of course you are in the market for information, which is another issue altogether. The only thing that an information deficiency proves is that we can no longer assume that the dominant practice in society is the correct one.¹²⁸ According to John P. Frantz, “even if . . . employees are unable to bargain for tenure protection because of an informational deficiency or collective action problem, it does not necessarily follow that fully informed or unified employees would find it profitable to bargain for such protection.”¹²⁹

In this statement lies the true difference between the traditional economic theory of at-will employment and the at-will critics’ theory. There is an implicit assumption in the explanation of market failure posited by at-will critics that there is no mechanism for restraining employers from

127. See Stigler, *supra* note 123, at 213.

128. See Kim, *Norms*, *supra* note 14, at 506-07. (“Given the evidence that workers do not know the default rule, the prevalence of at-will arrangements in the real world can no longer be taken as proof of their efficiency. On the other hand, the mere fact that workers believe they have something akin to just cause protection offers no guarantee that incorporating such a rule into the law would be more efficient.”).

129. Frantz, *supra* note 10, at 589.

unjustly discharging employees outside a legal rule. In contrast, there is an implicit assumption in the explanation of rational ignorance that employers are somehow restraining themselves from unjustly discharging employees despite the lack of a legal rule. Therefore, in order to determine which story is a more realistic explanation of the information deficiency found among employees, one must determine whether employers have adequate non-legal incentives to restrain them from unjustly discharging their employees. In other words, would a just cause legal rule significantly affect an employee's chances of being unjustly discharged by her employer? If it would, then the market failure story is much more plausible. If it would not, then employees who remain unaware of their at-will status are acting rationally, and more importantly, a just cause legal rule would be inefficient for society.

While at-will critics claim that employees are in need of just cause protection because their estimation of the risk of being arbitrarily discharged is too low,¹³⁰ the best evidence suggests that the probability of being arbitrarily discharged is, in fact, so low that employees who dismiss their chances of being dismissed arbitrarily are acting rationally.¹³¹ Mayer G. Freed and Daniel D. Polsby have endeavored to determine an employee's risk of being arbitrarily discharged under an at-will rule.¹³² Using the estimates of Cornelius Peck,¹³³ a noted critic of the at-will rule, they determined that the probability of an at-will employee being dismissed or disciplined for reasons that an arbitrator, using the union just cause standard, would overturn is only .0154%.¹³⁴ Further, the probability of being disciplined or dismissed for reasons that would allow such an employee to recover a settlement from her employer is only .5769%.¹³⁵ Using more recent and potentially more realistic figures taken from Jerry Frug,¹³⁶ Freed and Polsby calculated that the probability of an at-will employee being arbitrarily discharged is actually only .2083%.¹³⁷ Even

130. See, e.g., PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 78 (1990); Freed & Polsby, *Efficiency*, supra note 10, at 1103-30; Partee, supra note 105, at 705; Note, *Employer Opportunism and the Need for a Just Cause Standard*, 103 HARV. L. REV. 510, 524 (1989) [hereinafter Note, *Employer Opportunism*]; Note, *Protecting Employees*, supra note 16, at 1830-32.

131. See Freed & Polsby, *Efficiency*, supra note 7, at 1106-07; Jerry Frug, *Why Courts Are Always Making Law*, FORTUNE, Sept. 25, 1989, at 247.

132. See Freed & Polsby, *Efficiency*, supra note 10.

133. See Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8-10 (1979). "It should be noted that Professor Peck estimates both the number of dismissals and the number of disciplinary actions." Freed & Polsby, supra note 10, at 1107 n.8.

134. See Freed & Polsby, supra note 10, at 1106.

135. See *id.*

136. Jerry Frug, *Why Courts Are Always Making Law*, FORTUNE, Sept. 25, 1989, at 247 (estimating the number of wrongful discharges per year at 150,000).

137. See Freed & Polsby, *Efficiency*, supra note 10, at 1107.

with Peck's more extreme .5769% estimate, Freed and Polsby calculated that this risk translates to an average employee loss of 74 cents per week, less than two cents per hour, for not bargaining for just cause protection.¹³⁸ Freed and Polsby as well as other legal scholars have thus concluded that employees who choose not to contract for just cause to protect themselves from this minute possibility of being arbitrarily discharged are behaving rationally.¹³⁹ For this same reason, employees who do not invest in learning about the extent of their legal job security are also behaving rationally.

IV.

EXISTENCE AND IMPLICATIONS OF NON-LEGAL CONSTRAINTS ON EMPLOYER BEHAVIOR

Of course, the missing piece of the puzzle is evidence of the existence of non-legal behavior-ordering mechanisms that adequately constrain employers from arbitrarily discharging their employees. A legal centrist would argue that people could not possibly behave in such an efficient manner without some form of purposeful law directing their behavior.¹⁴⁰ How then have employers, without legal coercion, achieved this low level of arbitrary discharges?

A. Norm Theory

One possible explanation lies in the theory of norm-directed behavior. Legal scholars have developed norm theory to explain situations where people seem to order themselves without reliance on the law.¹⁴¹ Norms,

138. See *id.* at 1126-27.

139. See *id.* at 1107 ("All of these probabilities are low enough that a person who disregarded them would not be acting unreasonably."); see also Frantz, *supra* note 10, at 595 (arguing that it cannot be concluded that employees who choose not to bargain for just cause in order to avoid this .21% risk are acting irrationally).

140. See Robert D. Cooter, *Against Legal Centrism*, 81 CAL. L. REV. 417, 428 (1993) [hereinafter Cooter, *Centrism*] (reviewing ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991)) ("Legal centrism' is the belief that laws must be made deliberately for them to be rational. The belief in legal centrism is such an ingrained prejudice that we often do not notice it in ourselves or in others.").

141. There is a great deal of literature on norms and their effects on behavior in many different contexts. This paper will give only a short and simple overview of some of these ideas for clarification before discussing the applicability of norm theory to the employment relationship. For a more in-depth discussion of norms and their effect on behavior see Robert C. Cooter, *Law, Economics & Norms: Decentralized Law for a Complex Economy: the Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996) [hereinafter Cooter, *Decentralized Law*] (providing a detailed description of what a norm is and how norms can influence behavior in society); Lisa Bernstein, *Law, Economics & Norms: Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) [hereinafter Bernstein, *Merchant Law*] (arguing that people may act outside of contracts because of social norms, commercial customs and a concern for relationships, trust, honor, and decency); Eric A. Posner, *The Regulation of Groups: The Influence of*

which I will define as “rules or standards enforced solely by private (that is non-state) actors,”¹⁴² develop informally, through repeated interactions over time, eventually becoming standards or rules that govern relationships between people.¹⁴³ Ellickson, who brought the study of norms as behavior-ordering mechanisms to the forefront with his book *Order Without Law: How Neighbors Settle Disputes*, hypothesized that “members of close knit groups develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workday affairs.”¹⁴⁴ These norms, when internalized and consistently followed by the parties, create a great deal of value for the parties whose behavior they order. Parties can use norms to settle disputes, allowing those governed by those norms to dispense with expensive formalities such as writings, bonds and attorneys, all of which ultimately create a net drain on the value of the parties’ various transactions.¹⁴⁵

1. *The Existence of a “No Discharge Without Cause” Norm*

It is apparent from the low number of arbitrary discharges that “no discharge without cause” is a “norm” in the sense that it is a regularity.¹⁴⁶ Critics of the at-will rule have recognized this, and used the regularity of “no discharge without cause” in employment relationships as evidence that the at-will default rule has outlasted its usefulness. These at-will critics believe that a just cause legal rule will be better for society because it will more closely reflect the expectations and actual practices of parties in the employment relationship.¹⁴⁷ Stating that the at-will default “has become

Legal and Nonlegal Sanctions on Collective Action. 63 U. CHI. L. REV. 133 (1996) [hereinafter Posner, *Groups*] (describing norms’ usefulness for society as avoiding necessity for inefficient formal means of enforcement); Jay M. Feinman, *Relational Contract and Default Rules*, 3 S. CAL. INTERDISC. L.J. 43 (1993) (claiming that social norms are one of the greatest motivating factors in human decision making).

142. Edward B. Rock & Michael L. Wachter, *Law, Economics, & Norms: The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1914 n.1 (1996); see also Eric A. Posner, *Law, Economics & Norms: Law, Economic & Inefficient Norms*, 144 U. PA. L. REV. 1697, 1699 (1996) (hereinafter Posner, *Inefficient Norms*) (“a norm is like a law, except that a private person sanctions the violator of a norm, whereas a state actor sanctions the violator of a law.”).

143. See Kim, *Norms*, *supra* note 14, at 481; see also, e.g., Cooter, *Decentralized Law*, *supra* note 141, at 1666 (describing the emergence of norms as being the result of payoffs to actors who must have many repeated transactions with one another). See generally ELLICKSON, *supra* note 108 (providing an in-depth discussion of the factors involved in creating norms as well as the effects of the existence of these norms).

144. See ELLICKSON, *supra* note 108, at 167.

145. See Posner, *Groups*, *supra* note 141, at 155-56.

146. Fully 99.79% of employees are not arbitrarily discharged in a given year according to the Freed and Polsby estimates, making “no discharge without cause” very “regular” behavior for employers. See Freed & Polsby, *Efficiency*, *supra* note 10, at 1107.

147. See Leonard, *supra* note 3, at 680-83; Summers, *supra* note 3, at 1105; Gould, *supra* note 3, at 911; and Grodin, *supra* note 148; see also Kim, *Norms*, *supra* note 14, at 498 n.215 and accompanying

incongruous with our social norms," they call for some form of legal just cause protection for employees.¹⁴⁸

However, this argument fails to recognize the value that the social norms themselves add to the relationship. Instead of an indication that the law must step in to protect unsuspecting employees from arbitrary discharges, evidence of a norm of "no discharge without cause" indicates that legal protection is unnecessary because the norm provides adequate protection for employees, even in the absence of the law.¹⁴⁹ This latter understanding is further bolstered if "no discharge without cause" is more than an observable regularity, but is rather a felt sense of obligation that goes well beyond a mere regularity.¹⁵⁰ Robert D. Cooter describes the difference between the two as follows: "men take off their hats when they enter a church and when they are in a boiler room. But doffing one's hat in a boiler room is a mere regularity involving response to external incentives. In contrast, removing one's hat in church involves a felt norm which is a response to an internalized obligation."¹⁵¹

Recently, legal scholars, led by Edward B. Rock and Michael L. Wachter, have suggested that the employment relationship is governed, at least in some aspects, by norm-based rules.¹⁵² Rock and Wachter claim that "the norm governing termination is 'no discharge without cause.'"¹⁵³ According to Cooter, one can empirically test for the existence of an internalized norm through a two-step process. "First, formulate the hypothesis that a norm exists. To do so, state the norm in canonical form and describe the community in which it allegedly exists."¹⁵⁴ In this case, a "no discharge without cause" norm allegedly exists in the community of

text.

148. See, e.g., Joseph Grodin, *Toward a Wrongful Termination Statute for California*, 42 HASTINGS L.J. 135, 138 (1990).

149. See Rock & Wachter, *supra* note 142, at 1950 (arguing that "the extended discussion of the employment-at-will doctrine shows that the existence of a norm and a substantively inconsistent legal rule may, in fact, be optimal" in contradiction to the "deeply felt and widely held intuition that if the patterns of behavior that contracting parties follow differ from the legal rules, the legal rules should change.").

150. See Kim, *Norms*, *supra* note 14, at 483-84.

151. Cooter, *Centrism*, *supra* note 140, at 426; see also, Cooter, *Decentralized Law*, *supra* note 141, at 1656.

152. See Rock & Wachter, *supra* note 142, at 1921-22 (acknowledging certain regularities in firms that they believe are adopted by the parties to solve strategic problems in the employment relationship: Wages increase with seniority; a business downturn results in employee layoffs rather than wage reductions: if layoffs occur, junior workers lose their jobs before senior workers; discharges are for cause; if an employer catches an employee shirking, the employer will discharge the employee rather than reduce his wages; and if the firms discharge older workers before younger workers, they do so through voluntary retirement mechanisms in which the firm buys out the 'contract' of the older workers. See also generally Kim, *Norms*, *supra* note 14, at 480-86.

153. Rock & Wachter, *supra* note 142, at 1930.

154. See Cooter, *Decentralized Law*, *supra* note 141, at 1665.

those involved in employment relationships. "Second, to test whether the hypothesis is true or false, collect information from the community concerning the internalization of the norm. The hypothesis that a customary norm exists in a community is true if a sufficient number of its members internalize the norm."¹⁵⁵

While Kim referred to her respondents' poor scores as evidence of confusion,¹⁵⁶ I believe the answers from respondents in both of our studies reflect the employees' internalization of the no discharge without cause norm. To internalize means "to incorporate (as values or patterns of culture) within the self as conscious or subconscious guiding principles through learning or socialization."¹⁵⁷ According to this definition, the internalization of a norm does not require conscious effort, or even the person's knowledge; internalization of a norm can be wholly subconscious. Therefore, evidence that people believe employers *should not* discharge employees without cause would provide evidence of conscious internalization. In the same way, evidence that people believe that employers *cannot* discharge employees without cause is evidence of subconscious internalization of this norm.

Focusing on behavioral outcomes, it is quite apparent that employers feel constrained not to fire at will even though they are legally permitted to do so.¹⁵⁸ The empirical evidence shows that only .21% of employees are arbitrarily discharged annually.¹⁵⁹ According to this statistic, 99.79% of the time, employers do not discharge at-will, even though they are legally permitted to do so. An employer who does not discharge at will must in some way feel constrained not to, even if only by her own laziness.

If these behavioral outcomes are not sufficient evidence of employer internalization of the norm, my data, as well as Kim's, provides empirical evidence that is highly suggestive that employers have also internalized the no discharge without cause norm.¹⁶⁰ As discussed above, employees who had previous responsibility for hiring and firing other employees demonstrated no greater knowledge of the at-will default than the average employee. There are two potential explanations for the high level of confusion found among this subset of employees, both of which suggest that employers have internalized the no discharge without cause norm.

155. *See id.*

156. *See generally* Kim, *Norms*, *supra* note 14.

157. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 611 (10th ed. 1993).

158. *Cf.*, Kim, *Norms*, *supra* note 13 at 484 ("I know of no study offering direct evidence that employers feel constrained not to fire at will, even though they are legally permitted to do so.").

159. *See supra* note 137 and accompanying text.

160. Of Kim's 675 respondents, 240 (35.5%) report that they had previous responsibility for hiring and firing other employees. *See Kim, Norms, supra* note 13, at 514 Table C-2. Of my 512 respondents, 184 (35.9%) reported similar experience. *See supra* Table 6.

The first explanation is that employers are also unaware of the at-will default rule. This explanation is bolstered by Verkerke's finding, in his interviews of 221 employers, that "a nontrivial number of employers do not know the law."¹⁶¹ Employer ignorance of the at-will rule, like employee ignorance, can be seen as both rational and as evidence of the internalization of the "no discharge without cause" norm. It would be irrational for employers to explore the legal outer limits of a behavior in which they never intend to participate. As a rational actor, I would not explore the legality of self-mutilation when I have no intention to participate in that type of behavior. In other words, the non-legal sanctions for learning this information are too high. Similarly, it is rational for employers who never intend to discharge without cause to remain ignorant of their legal right to discharge at-will. Instead of investing resources in gaining a legal understanding of the at-will default rule, employers have chosen to accept that employees are not to be arbitrarily discharged and have thus internalized the norm of no discharge without cause.

The other potential explanation for the high level of ignorance among employees who have the authority to hire and fire other employees is that employers understand the at-will rule, but do not want their agents to exercise that right. Employers realize the high costs involved in arbitrary discharge of their employees, and therefore must find ways to constrain their agents from doing so. This explanation seems logical given the large number of at-will employers who place job security provisions in their handbooks, but supplement them with legally binding at-will disclaimers.¹⁶²

Regardless of which explanation is more plausible, they are both highly suggestive of employer internalization of the "no discharge without cause" norm. The first explanation describes subconscious internalization of the norm, while the second describes conscious internalization of the norm. If strong majorities of both employees and their employers have internalized the norm, then, according to Cooter's empirical test, "no discharge without cause" is more than a regularity; it is an internalized norm, capable of directing behavior.

2. *The Implications of a "No Discharge Without Cause" Norm*

Employers generally do not fire employees without having a reason to do so, and employees come to expect that standard of behavior from their employers. In other words, employers have a felt norm—a sense of obligation—not to arbitrarily discharge their employees. This norm gives employees, who are legally at-will, a great deal more job security than one

161. See Verkerke, *Resolving the Debate*, *supra* note 2, at 874, n.153.

162. See, e.g., *Bailey v. Perkins Rests., Inc.*, 398 N.W.2d 120, 121 (1986) (describing one such disclaimer).

might expect. If the employer violates the norm often, she may be subject to feelings of guilt and, more importantly, to non-legal sanctions from her employees as a body. Current employees may begin to look for alternative employment and gossip that the employer is a bad actor may spread among current employees as well as to prospective job applicants. This type of fallout and gossip can put the employer at a disadvantage when competing to hire and retain top employees. On the other hand, if the employer follows the “no discharge without cause” norm consistently, her employees will be encouraged to make greater investments in the employment relationship than they would with less job security. In other words, the employee who knows she will have a job next year as long as she pulls her weight, is much more likely to invest in the relationship with her employer than the employee whose job security is day-to-day. The norm of no discharge without cause thus benefits both employer and employee; the employer maintains employer loyalty without incurring the costs involved in becoming legally bound by a just cause term,¹⁶³ and the employee avoids the danger of arbitrary discharge without incurring the costs of becoming informed and bargaining for new contract terms.¹⁶⁴

The fact that no discharge without cause is the dominant employer practice, and that most employees, both with and without previous authority to discharge other employees, believe it to be legally binding on their employers, provide strong evidence that the parties have internalized that norm. If both parties to the employment bargain have internalized the norm, as my data suggests, then the “no discharge without cause” norm will direct behavior even in the absence of a legal rule. Instead of a signpost for a change in the law, an internalized norm of no discharge without cause is evidence that a legal rule may not be necessary to ensure correct behavior.¹⁶⁵ Therefore, confusion over the legal rule is not evidence that employees may be unable to adequately protect themselves. Rather it is evidence that they may not need to protect themselves at all, because the norm is doing that work for them.

Further, there is a great deal of law and economic research on norm-regulated relationships indicating that third party enforcement may be inefficient for these systems.¹⁶⁶ Parties tend to implicitly decide to be

163. See *infra* notes 181-197 and accompanying text.

164. See Rock & Wachter, *supra* note 142, at 1922-27 (the norms of the Internal Labor Market solve certain strategic problems in long-term relationships between employer and employees—by working as a mechanism to constrain opportunism by both parties and to encourage the parties to make optimal match specific-investments).

165. See also generally, Rock and Wachter, *supra* note 130.

166. See, e.g., Bernstein, *Merchant Law*, *supra* note 141, at 1804 (arguing that enforcing rationally allocated extralegal obligations costs the parties in efficiency); David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1850-63 & n.149 (1991) (arguing that courts should try to distinguish between customs that are efficient to use as non-legal

regulated by either legally enforceable rules or norm-based rules depending on the rule's comparative efficiency for the parties.¹⁶⁷ Relying on non-legal sanctions, such as norms, creates few additional costs for the parties, as opposed to the high process and error costs of legal enforcement.¹⁶⁸ Thus, parties may rationally choose not to have the relationship-preserving norms that they follow used by the legal system to decide their cases.¹⁶⁹

One of the most often cited examples of this behavior is found in the computer software industry. While software houses behave as though they were bound to warranty statements, they consistently disclaim any legally binding warranty agreements.¹⁷⁰ Reliance on norms instead of legal rules in this instance allows the consumer to receive what they want (free repairs on the software that they purchase) without the manufacturers bearing an increased risk of nuisance suits, and the increased expenses of legal defense and erroneous judgments.¹⁷¹ In the same way, relying on norms to enforce no discharge without cause allows the employees to receive what they want (job security) without the employers bearing the increased expenses of legal enforcement.¹⁷²

"In sum, wealth maximizing courts should defer to groups' resolutions of internal disputes, just as courts in the administrative law context defer to agency determinations. Normatively, such a deferential attitude simplifies the courts' task, while improving their accuracy."¹⁷³ If the parties to employment contracts have chosen, explicitly or implicitly, to allow norms instead of laws to regulate employer discharge policies, then the most efficient response from the courts is to respect that arrangement.

Following her study of the unemployed, Kim dismissed Rock and Wachter's claim that the norms of the internal labor market are self-

customs, as contrasted to customs that should also be enforced in a legal or contractual manner); Cooter, *Decentralized Law*, *supra* note 141, at 1678 (arguing that excessive or premature formalization of a norm through lawmaking is inefficient because legal rules lack the flexibility of norms); Posner, *Groups*, *supra* note 141, at 136 (arguing that legal enforcement of voluntary contracts does not maximize the contracts' value to the parties and that rules that duplicate a group's own norms will generally undermine self-regulation).

167. See generally Posner, *Groups*, *supra* note 141.

168. See Charny, *supra* note 166, at 404-06.

169. See Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CALIF. L. REV. 261, 272 (citing David Otten, *Warranty Pirates*, BYTE, Mar. 1983, at 22).

170. See David Otten, *Warranty Pirates*, BYTE, Mar. 1983, at 22. ["In a published letter to a trade magazine, the president of Signature Software Systems acknowledged that the firm in fact was willing to—and de facto did—guarantee the efficacy of its programs to users, but nevertheless used a particular broad-based warranty disclaimer and licensing form because it had been previously litigated by another firm and thus definitely interpreted by a court."]

171. See Bernstein, *Merchant Law*, *supra* note 141, at 1790.

172. See *infra* notes 181-197 and accompanying text.

173. Posner, *Groups*, *supra* note 141, at 159-60 (footnotes omitted).

enforcing. Claiming that Rock and Wachter's argument "boils down to a variant of the traditional economic defense of the at-will rule: because the parties have chosen norms over contract, norms must be self-enforcing (and therefore more efficient),"¹⁷⁴ Kim argued that the findings of her study challenge the assumption that parties consciously choose norm enforcement.¹⁷⁵

While my data confirms Kim's premise that workers do not readily distinguish between law and norms in perceiving their job security,¹⁷⁶ I do not agree with her conclusion that parties have not implicitly chosen norm-enforcement over legal enforcement.¹⁷⁷ According to Kim, Rock and Wachter's analysis requires the assumption that the parties can distinguish between the law and their present system of enforcement.¹⁷⁸ My data, like Kim's, casts significant doubt on this assumption, as my respondents tended to believe that the "no discharge without cause" norm was the law. However, this assumption is not necessary to my analysis. The only assumption required is that employees know that their employer generally will not discharge them without cause. If they know that, which I believe they must, then their ignorance of the legal rule demonstrates an implicit choice to rely on norm-enforcement. At the very least, their ignorance demonstrates a choice not to invest in information about their job-security status. Although the parties may not bargain in the shadow of the law as Rock and Wachter describe,¹⁷⁹ my data leads me to agree with their conclusion that "the extended discussion of the employment-at-will doctrine shows that the existence of a norm and a substantively inconsistent legal rule may, in fact, be optimal."¹⁸⁰

B. Rational Cost-Saving Motivations

Of course, there may still be those who remain skeptical of the idea that norms possess the persuasive influence to hold employers' behavior in check without supplemental legal sanctions. One may point out that we still choose to legally enforce contracts even though there is a strong norm against breach in society. Indeed, if you take the norm argument to its logical extreme, there is no reason to legally enforce contracts at all.

However, the termination of the employment relationship can be readily distinguished from a breach of contract. In a typical contract breach

174. Kim, *Norms*, *supra* note 14, at 504.

175. *See id.*

176. *See id.*

177. *See id.* at 505.

178. *See id.* at 504-06.

179. *See* Rock & Wachter, *supra* note 142, at 1952 ("The shadow of the law is critical to well-functioning norms.").

180. *See id.* at 1950.

situation, the economic incentives of the breaching party run opposite to the norms of society. While societal norms call for the party to fulfill her end of the bargain, her economic incentives provide motivation for her to breach the contract. In this way, a typical contract breach situation forces the potential breacher to choose between her reputation, and her own economic best interests. This conflict of interests may indicate that legal enforcement is necessary to ensure the party follows the desired norm. Conversely, in a typical discharge situation, the norms of society and the employer's own economic incentives coincide. Employers governed by the at-will legal default rule are assumed to be rational actors. Rational actors have the incentive to avoid behavior that imposes net costs on them. Therefore, if discharges without cause create a net cost for the employer, then the employer's economic incentives will supplement the societal norms that push the employer to avoid arbitrary discharges, making a legal rule less necessary than in a typical breach of contract situation.

1. The Existence of Employer Losses Resulting from Discharge

For years, at-will critics have argued that rational employers would prefer a just cause legal regime because it would increase the efficiency of the firms.¹⁸¹ Claiming that arbitrary discharges create high costs for employers, they premise their arguments “on the notion that job security will increase employee morale, and loyalty, facilitate greater continuity among the workforce, and reduce the amount of resources wasted in training employees who are then terminated.”¹⁸²

One of the primary arguments made by at-will critics is that employers under-value the greater benefits of employee loyalty that will be created by a just cause legal rule.¹⁸³ At-will critics point to numerous empirical studies that suggest that employees who have a greater sense of job security are happier employees, and these happier employees are consequently more productive than their insecure counterparts.¹⁸⁴ From this premise, they conclude that a just cause legal rule would actually benefit employers by increasing employee production.

Even, assuming *ad arguendo*, that employees with job security are more productive than employees without, my data strongly undermines this

181. See, e.g., WEILER, *supra* note 130, at 64; Leonard, *supra* note 3, at 677; Note, *Good Faith Duty*, *supra* note 3, at 1834 (arguing that wasted training, as well as the loss of continuity and experience among workers are all costs to employers created by the at-will default rule).

182. Frantz, *supra* note 10, at 571.

183. See, e.g., Leonard, *supra* note 3, at 676-77.

184. See, e.g., Freed & Polsby, *Efficiency*, *supra* note 10, at 1129, (arguing that more tenure equates to more job satisfaction, and more satisfaction equates to greater productivity); Schwarze, *supra* note 3, at 544 (same).

argument. As discussed above, my data strongly indicates (and Kim's data confirms) that most employees currently believe that they have legal job security. Eighty-four percent of my respondents indicated that they believe that they cannot be discharged because their employer has a personal dislike for them,¹⁸⁵ and 77% of them indicated that they cannot be discharged in order for the employer to hire someone else at a lower wage.¹⁸⁶ According to the data, employees currently believe they have even greater job security than a just cause legal rule with an allowance for rational discharges would give them.¹⁸⁷ Therefore, implementation of a just cause legal rule would have no impact whatsoever on employees' "sense" of job security. It would only cause legal reality to more closely reflect their perceptions. Without changing employees' sense of job security, a just cause legal rule cannot increase employee morale, and consequently will have no impact on production levels. This greatly undermines the at-will critics' argument that job security benefits employers by increasing employee production.

At-will critics further argue that arbitrary discharge is a wasteful and inefficient practice that creates many other unnecessary costs for the employer and that these costs justify implementing a just cause legal rule.¹⁸⁸ According to this argument, when an employer arbitrarily fires an employee, she loses the investment that she made in seeking out and training that employee.¹⁸⁹ Further, the employer loses the benefits of continuity and experience created by a low turnover rate.¹⁹⁰ Mysteriously, while claiming that a just cause legal rule would be beneficial to the employer because it would save her all of the above costs, these very same at-will critics also argue that employers under an at-will rule "have no incentive to avoid unjustified dismissals."¹⁹¹ These two arguments obviously cannot co-exist, as they are mutually exclusive. An employer cannot at the same time incur great costs by arbitrarily discharging employees—costs that allegedly could be saved if a just cause legal rule

185. See *supra* Table 5.

186. See *id.*

187. I assume in this line of argument that a just cause legal rule, if implemented, would include an allowance for economically rational discharges. Because Montana is the only state to officially move to a just cause default rule in the United States, I believe the Montana definition of just cause is the most relevant definition to this discussion. According to Montana's good cause statute, "'Good cause' means reasonable job related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason." MONT. CODE ANN. § 39-2-903(5) (1987). The allowance for discharges based on other "legitimate business reasons" seems to indicate employers would not be liable for discharges based on economically rational motivations.

188. See, e.g., Schwarze, *supra* note 3, at 544; Note, *Good Faith Duty*, *supra* note 3, at 1834.

189. See Schwarze, *supra* note 3, at 544.

190. See Note, *Good Faith Duty*, *supra* note 3, at 1834.

191. *Id.* The author does qualify this statement in that employers will avoid inefficient discharges, but claims that this will rarely occur because "under the existing rule the risks of wrongful discharge are borne almost exclusively by employees." *Id.*

was implemented—and still have no incentive to avoid these costs by avoiding arbitrary dismissals, with or without the legal rule. Costs to the employer, created by discharge, are by their very definition incentives to avoid arbitrary discharges.

This faulty reasoning of at-will critics can only be explained by a failure to distinguish between a just cause course of conduct and a just cause legal rule. At-will critics claim that a just cause legal rule will create net savings for an employer by describing the savings created by a just cause course of conduct. This argument assumes the conclusion that a just cause legal rule will have a positive impact on employer behavior (i.e., will cut down on arbitrary discharges). What such critics fail to take into account is that a just cause course of conduct can exist in the absence of a just cause legal rule (and in fact does exist, as is empirically demonstrated by the low, .21% rate of arbitrary dismissals).

At-will defenders do not dispute the findings of their critics that arbitrary discharges impose high and unnecessary costs on employers. In fact, they readily point out the expenses that employers who discharge their employees will incur. First, the employer will face a reputation loss when it arbitrarily discharges employees, alienating the firm's top employees.¹⁹² Second, the employer will lose the potential benefits that can be gained from the match-specific investments made by both the employer and the employee.¹⁹³ Third, the employer incurs the additional costs of finding, screening, and training a replacement for the discharged employee.¹⁹⁴ Finally, the employer also bears the risk that the replacement will be less productive while losing the benefits of continuity and experience in its workforce.¹⁹⁵

Employer costs of discharging employees, whether arbitrary or not, are considerable. John J. Hogan has estimated that turnover costs for managerial personnel range between \$17,000 and \$20,000 per employee.¹⁹⁶ Further, in a more recent study, Patrick Dunn has estimated that turnover costs average about 1.5 times the annual salary of the discharged employee

192. See, e.g., Frantz, *supra* note 10, at 570; Epstein, *supra* note 6, at 968, Charny, *supra* note 166, at 396.

193. See, e.g., Frantz, *supra* note 10, at 582-83 (citing the human capital model of employment, which indicates that employees become more valuable to their employer over time due to match specific investments made by the parties).

194. See, e.g., Epstein, *supra* note 6, at 973-74; Verkerke, *Legal Regulation of Employment Reference Practices*, 65 U. CHI. L. REV. 115, 141 (1998) [hereinafter Verkerke, *Regulation*].

195. See, e.g., Epstein, *supra* note 6, at 973-74. (pointing out that workers are not fungible and employers run the risk that the replacement will be less well-suited for the job); Verkerke, *Regulation*, *supra* note 194, at 138-40 (describing the losses that can be experienced by an employer through what he refers to as "mismatching.").

196. See John J. Hogan, *Turnover and What to Do About It*, 33 CORNELL HOTEL & RESTAURANT ADMIN. Q. 40, 40 (Feb. 1992).

across varying occupations and industries.¹⁹⁷ Evidence of high turnover costs, borne primarily by employers, serves as evidence that both at-will defenders and critics are correct that arbitrary dismissals do in fact impose high costs on employers.

2. *The Implications of Employer Losses Resulting From Discharge*

The evidence that arbitrary dismissals impose high costs on employers is not a liability for at-will defenders, as at-will critics contend.¹⁹⁸ Once one separates a just cause course of conduct from a just cause legal rule, this information becomes an at-will defender's strongest argument. The evidence of greater profits for employers who abide by a just cause course of conduct brought forth by both defenders and critics of the at-will rule does not argue for a just cause legal rule's efficiency, but rather for its lack of necessity. If employers face high costs in arbitrarily dismissing their employees, they would seem to have no incentive to violate a just cause course of conduct. Without an incentive to arbitrarily discharge employees, there is no need to create a legal rule that prevents employers from discharging at-will. In the words of Freed and Polsby, "employers do not need additional reasons for avoiding self-inflicted wounds."¹⁹⁹ Employers will not discharge without just cause because it is irrational for them to do so. In this way, the rational profit-maximizing nature of employers will provide adequate deterrence to arbitrary discharges, even in the absence of a legal rule.

V.

A NEW DEFENSE FOR THE AT-WILL DEFAULT RULE

The existence of a "no discharge without cause" norm and the various costs of discharge borne by the employer lead to the conclusion that the rational ignorance story is more plausible than the market failure story posited by at-will critics. The true difference between the two stories is the existence of adequate non-legal constraints on employer behavior. Employers are currently constrained from unjustly discharging their employees both socially and economically. Employers face guilt and informal sanctions from peers and employees when they violate the strong "no discharge without cause" norm that has been internalized by employers and employees. Further, employers face economic repercussions for

197. See Patrick Dunn, *Pre-Employment Referencing Aids Your Bottom Line*, 74 PERSONNEL J. 68, 68 (Feb. 1995).

198. See *supra* notes 181-190 and accompanying text.

199. See Freed & Polsby, *Efficiency*, *supra* note 10, at 1106.

discharging their employees, forcing employers to limit their discharges to only those that are necessary. These constraints make it unnecessary for a vast majority of employees to invest in learning about their at-will status because they have little chance of being arbitrarily discharged and thus little reason to bargain for just cause protection.

If the at-will debate is really about methods of control, with the proper question being “will the shift in methods of control work a change for the benefit of both parties or will it only make a difficult situation worse,”²⁰⁰ then the existence of effective non-legal control mechanisms has significant meaning for that debate. They indicate that there may be no market failure preventing the parties from reaching optimal employment terms. More importantly, they suggest that a just cause legal rule may be neither necessary to control employer behavior nor a desirable rule for employees to bargain from.

When employers possess adequate incentives to avoid unjust discharges, then an employer’s decision to discharge an employee, while not perfect, is a good proxy for having a just cause to discharge. At-will critics have claimed that the goal of employment law should be to limit the employer’s discretionary power in order to prevent bad faith discharges.²⁰¹ However, this claim assumes that the court system will be able to differentiate between situations that do and do not merit discharge more accurately than the employer. Living in an imperfect world, both systems of enforcement are likely to make some mistakes, and the question is whether employers or third parties are more likely to err.²⁰² If the employer has no economic or norm-based incentives to avoid arbitrary discharges, the court is clearly in a better position to make the decision, because the employer lacks the correct motivation to eliminate arbitrary discharges. However, because the employer in a vast majority of cases internalizes significant costs when it discharges an employee, the court and the employer have the common goal of avoiding arbitrary discharges. This makes the question one of ease of information gathering. The employer is much closer to the specific situation, creating a strong presumption against government intervention.²⁰³ The employer is in a much better position than a court to observe factors such as market conditions, employee morale and personality dynamics created within the firm by different employees.²⁰⁴

200. See *supra* note 20 and accompanying text.

201. See Note, *Good Faith Duty*, *supra* note 3, at 1840.

202. See Frantz, *supra* note 10, at 568.

203. See Sunstein, *Rights*, *supra* note 16, at 1051.

204. Because monitoring is costly and detection rates are low, firms must make identified instances of mal/nonfeasance costly so that the expected penalty (probability of detection times actual penalty) is sufficiently high to deter employee shirking. See Rock & Wachter, *supra* note 142, at 1925. This type of calculation requires information that is only known by those in the firm, such as the probability of shirking detection and benefits derived from shirking, which cannot easily be verified by a court. These

Further, the employer has a greater understanding of the idiosyncratic goals of the firm.²⁰⁵ The employer has both the correct motivations and the greatest amount of information, making the employer's decision to discharge not only a good proxy, but quite possibly the most accurate proxy for an appropriate reason to discharge.

Another virtue of the non-legal enforcement mechanisms discussed above is that they allow the parties to avoid the high costs involved in legal enforcement of a just cause rule. One should not assume that because a just cause legal rule will have no effect on the behavior of average employer, the just cause legal rule would also create no costs for her. An employer under a just cause legal rule will incur great costs in generating verifiable information,²⁰⁶ in litigating wrongful discharge claims,²⁰⁷ and in retaining shirking employees,²⁰⁸ even if she never violates a just cause course of conduct. Employers can and will ultimately push these costs back upon employees, hurting the very people that the just cause legal rule was intended to help.²⁰⁹

On the other hand, the non-legal control mechanisms—both the norms of the internal labor market and the economic incentives of rational employers—provide optimal deterrence to arbitrary discharges at low costs. Therefore, the goal of employment law should not be to limit employer discretion. Rather, in a vast majority of cases, employment law should allow employers to weigh the costs and benefits of a particular discharge without legal interference since non-legal control mechanisms direct them

sorts of calculations are crucial to deciding whether cause exists for a particular discharge, and are most accurately made by an employer who has first-hand information.

205. For a somewhat overstated example of this, imagine a restaurant that has the idiosyncratic goal of promoting environmental awareness, in addition to maintaining a profitable enterprise. The employer here is in a much greater position than a court to determine whether an employee advocating slash and burn farming methods to customers constitutes sufficient cause for discharge. The employer has internalized many of the costs of discharging the employee, and must decide if those costs are exceeded by the idiosyncratic costs of allowing this type of behavior. This calculation would be difficult if not impossible for a court to make without excessive costs.

206. See Frantz, *supra* note 10, at 561-63; see also MICHAEL J. DUANE, THE GRIEVANCE PROCESS IN LABOR-MANAGEMENT COOPERATION 74 (1993); Cheryl S. Massingale, *At-Will Employment: Going, Going . . .*, 24 U. RICH. L. REV. 187, 202 (1990).

207. See J. DERTOUZOS, E. HOLLAND & P. EVENER, THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION 44-47 (Rand Corp. Institute for Civil Justice No. R-3602-ICJ, 1988) (in wrongful discharge cases in California, the average claimant received approximately \$125,000 in damages, and attorney's fees averaged approximately \$164,000); Millon, *supra* note 120, at 1002-03 (describing how litigation costs can encourage opportunistic litigation); D. Rosenberg & S. Shavell, *A Model in Which Suits Are Brought for their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 3-4 (1985) (describing how, given rational actors, a plaintiff can create a net gain for herself by filing a complaint any time that the defendant's costs of defense are greater than the costs of filing).

208. See Frantz, *supra* note 10, at 560-61.

209. See Jeffrey L. Harrison, *The New Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327 (1984); see also, Note, *Employer Opportunism*, *supra* note 130, at 510.

to optimal behavior.

A. Caveat

There are, however, exceptions to this rule. When an employer ignores economic incentives to avoid arbitrary discharges or when the employer's rational incentives run exactly opposite of the behavior society would desire, the goals of the employer and society diverge. According to Freed and Polsby's estimates, these exceptions occur in .21% of employment relationships annually.²¹⁰ However, the fact that a few employers ignore the rational incentives to avoid discharge does not create the need for a legal rule. Rather, employers who fail to recognize the negative impact of their discharges, and choose to discharge out of personal animosity or mean-spiritedness, are the exceptions that prove the rule. In such cases, the economic incentives described above do their work to eliminate these irrational employers from the market through self-imposed costs. Despite the moral vice of their discharges, a legal rule is unnecessary as these irrational employers internalize the costs and usually weed themselves out.²¹¹ If the job market is competitive, it will punish employers for their irrational behavior and work to eliminate these employers from the market even in the absence of a just cause legal rule.

However, there are also situations when the employer's rational incentives direct it to discharge its employees without just cause.²¹² These are circumstances where the employer can externalize some of the costs of its personal or business-related behavior by discharging its employees. I refer to employers in these situations as "moral monsters," as the situation usually involves some kind of underhanded dealings. For example, it may be cheaper to discharge an employee who is paid on commission and has just completed a large sale than it is to pay the employee her commission.²¹³ Other circumstances involving the moral monster involve whistle-blowing situations or times when the employee refuses to participate in illegal practices. Questions I-5 and I-8 of my survey instrument describe these types of fact patterns.²¹⁴ Of course, the most common example of the

210. See *supra* note 137 and accompanying text.

211. See, e.g., *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988). This case involved an employee who after a long tenure with his employer reported that a candidate being considered for a supervisory position was being investigated by the Federal Bureau of Investigation. After this candidate was hired, Foley was discharged, allegedly for the statements made about the candidate. The California Supreme Court found that even though the discharge was morally questionable, the employer internalized the cost, and therefore the court chose not to judicially sanction the employer.

212. See Note, *Employer Opportunism*, *supra* note 130, at 517-18.

213. See, e.g., *Fortune v. National Cash Register Co.*, 364 N.E. 2d 1251 (Mass. 1977). Fortune, a salesman who received bonus payments for sales made, was discharged shortly after being credited with a \$5,000,000 sale, preventing him from receiving the full amount of bonus payments due him.

214. Question I-5: "Employee is a cook and sees several violations of fire regulations at the

opportunistic moral monster is the employer who threatens to discharge an employee who refuses to provide sexual favors.²¹⁵ While cases such as these are outliers, they do require qualification of the model presented above. These discharges are morally questionable, but they are also rational (i.e., the employer would gain more than she would lose from the discharge), preventing the economic considerations discussed above to stop them.

These cases do not create a need for a blanket rule of just cause protection for all employees. Rather, these cases, due to their small number and similar characteristics, can be dealt with more efficiently, and more effectively, through narrowly tailored exceptions to the at-will default rule.²¹⁶ Many states have adopted various forms of a public policy exception to prevent employers from using discharge as a lever to manipulate employees to violate the law and, at times, the employees' own consciences.²¹⁷ These narrow exceptions to the at-will rule help capture the moral monster while imposing minimal costs on the average employer. Each particular exception to the just cause rule has both pros and cons, which are beyond the scope of this paper. I believe that a broad, blanket, just cause legal rule is too blunt an instrument to use to catch the moral monster, as it will create unnecessary costs for the vast majority of employers who are following a just cause course of conduct. Instead of making a broad rule in favor of just cause, and allowing courts to carve out exceptions for things such as economic necessity, the courts should maintain an at-will regime and allow for specific exceptions to be carved out in order to deal with possible sources of abuse by opportunistic employers.

restaurant. Employee complains to supervisor of the violations, then reports them to a government agency. Employee is discharged for reporting the violations." Question 1-8: "Employee discovers that Company has been violating the law by charging customers for services which were not actually provided. Employee is discharged because he refuses to participate in Company's illegal billing practices." See Appendix A.

215. See, e.g., *Donald Schriver, Inc. v. Fair Empl. & Housing Comm'n*, 220 Cal. App.3d 396 (1986).

216. See Note, *Employer Opportunism*, *supra* note 130, at 518 (explaining why "the existence of opportunism as an economically rational basis for discharging employees does not necessarily justify imposing a general good cause standard.").

217. See, e.g., *Nees v. Hocks*, 536 P.2d 512 (Or. 1975) (upholding wrongful discharge claim of employee who was fired for not asking to be excused for jury duty); *Ambroz v. Cornhusker Square Ltd.*, 416 N.W.2d 510 (Neb. 1987) (upholding wrongful discharge claim of employee who was fired after his employer gave him an illegal polygraph test); CAL. LAB. CODE § 1102:5 (protecting employee disclosure of "a violation of state or federal statute, or violation or non-compliance with a state or federal regulation.").

VI. CONCLUSION

If a market is competitive, economic theory says that market forces will move people towards full information. However, this statement must be qualified in that the market will only move people toward full *useful* information; that is, information that enables them to bargain for their preferred terms. Empirical evidence strongly indicates that parties to employment contracts do not have full information about the legal background upon which their employment contracts are made. While this empirical evidence undermines the traditional economic defense of the at-will rule—that the at-will term’s prevalence in employment contracts indicates its desirability to the parties—it does not indicate that the at-will default rule is inefficient. In fact, it tends to support the opposite conclusion.

There are two potential explanations for the lack of information documented in my study. The first explanation, which is offered by at-will critics, is that some type of market failure has occurred, preventing the parties from obtaining the most efficient job security terms. The second explanation, which I believe is more plausible, given the competitive job market, is that employee ignorance of the at-will default rule is rational because the at-will rule has very little effect on employer behavior. Employees who are not affected by the at-will rules’ existence, because norms and economic incentives prevent their employers from discharging at will, are not pushed by the market to become informed about the at-will rule and its application to their employment relationship.

My conclusion is that non-legal, behavior-directing mechanisms already provide optimal deterrence to arbitrary discharges in the absence of a just cause legal rule. Both the “no discharge without cause” norm and the employer’s own wealth-maximizing incentives prevent an employer from discharging an employee without cause, regardless of whether the legal rule is at-will or just cause. Employees live in a world where the bottom line matters, and a just cause legal rule provides no real benefit to employees if their employers already follow a just cause course of conduct. Therefore, they will remain ignorant of a just cause legal rule’s absence until employer behavior provides them with an incentive to learn about it. The rational ignorance found in my study does not indicate that employees need to be protected by a just cause legal rule. Rather it indicates that employees are already protected by the employers own incentives, making a just cause legal rule, with its varied costs of enforcement, inefficient for employees and for society as a whole.

VII.
APPENDIX A

Appendix A: Survey Employed
Survey Questions Regarding Legal Knowledge

This survey is part of a research project concerning job security being conducted by the University of Virginia School of Law. Your responses are anonymous and will be kept confidential. **Your employer will not be allowed to see your individual responses.**

Thank you for taking the time to fill out this survey. It should take approximately 10 minutes to complete.

PART I

This section describes different cases in which an employee is discharged for his job. For each case, you will be asked whether the discharge was lawful or unlawful.

In each case, the employee is NOT represented by a union and the employee was NOT discharged because of his or her race, sex, national origin, religion, age or disability.

Also, there is no formal written or oral agreement between the employee and employer stating the terms of the employment.

Answer Each Question according to whether you believe a court of law would find the discharge to be lawful or unlawful, NOT what you would like the result to be.

1. Company discharges Employee in order to hire another person to do the same job at a lower wage. Employee's job performance has been satisfactory. The discharge is:
lawful ___ unlawful ___
2. Company discharges Employee because of unsatisfactory job performance. The discharge is:
lawful ___ unlawful ___
3. Employee is discharged because he reported to his supervisor that another employee has been stealing company property. The discharge is:
lawful ___ unlawful ___
4. Employee is discharged because Company mistakenly believes Employee has stolen money. Employee is able to prove in court that Company is mistaken. Employee's job performance has been satisfactory. The discharge is:
lawful ___ unlawful ___
5. Employee is a cook and sees several violations of fire regulations at the restaurant. Employee complains to supervisor of the violations. Then reports them to a government agency. Employee is discharged for reporting the violations. The discharge is:
lawful ___ unlawful ___
6. Company discharges Employee because there is no longer enough work. The discharge is:
lawful ___ unlawful ___
7. Employee is accused of dishonesty. Supervisor knows that

Employee is not dishonest, but discharges him anyway, because he dislikes Employee personally. Employee's job performance has been satisfactory. The discharge is:

lawful _____ unlawful _____

8. Employee discovers that Company has been violating the law by charging customers for services which were not actually provided. Employee is discharged because he refuses to participate in Company's illegal billing practices.

lawful _____ unlawful _____

PART II

The questions in this section ask about your beliefs and experiences regarding job security. "Your most recent job" means your current job, or, if you are unemployed, your last job (other than temporary or contract work).

1. What year were you hired for your most recent job ____
2. Before you accepted your most recent job, did the employer give you a copy of an employee handbook or personnel manual?
Yes ____ No ____ Don't Remember ____
3. Before you accepted your most recent job, did the employer give you any written description of its policies for discharging employees?
Yes ____ No ____ Don't Remember ____
4. Before you accepted your most recent job, did the employer tell you verbally what its policies were for discharging employees?
Yes ____ No ____ Don't Remember ____
5. Before you accepted your most recent job, did anyone else (for example, a friend or family member) tell you about the employer's policies for discharging employees?
Yes ____ No ____ Don't Remember ____
6. Before you accepted your most recent job, did you hear from anyone (for example, a friend or family member) whether the employer treats its employees fairly or not?
Yes ____ No ____ Don't Remember ____
7. Do you believe the law tends to favor employees or employers or its neutral?

| | | |
|------------------|---------|------------------|
| Favors employees | Neutral | Favors Employers |
| 1 | 2 | 3 |
| 4 | 5 | |
8. Have you ever been responsible for hiring and firing employees?
Yes ____ No ____
9. Have you ever been represented by a union?
Yes ____ No ____

10. Have you ever been fired from a job?

Yes ___ No ___

11. Do you believe that you have ever been unfairly fired from a job?

Yes ___ No ___

12. Have you ever sued an employer?

Yes ___ No ___

PART III

In each case below, the employee is NOT represented by a union and the employee was NOT discharged because of his or her race, sex, national origin, religion, age or disability.

Answer each Question according to whether you believe a court of law would find the discharge to be lawful or unlawful, NOT what you would like the result to be.

1. Company's Personnel Manual states that "*Company reserves the right to discharge employees at any time, for any reason with or without cause.*" Employee performs his job satisfactorily for several years. The Company discharges Employee in order to hire another person to do the same job at a lower wage. The discharge is:

lawful ____ unlawful ____

2. Company sends a letter to Employee offering "*permanent employment.*" Employee accepts the offer and performs his job satisfactorily for several years. The Company discharges Employee in order to hire another person to do the same job at a lower wage. The discharge is:

lawful ____ unlawful ____

3. Company's Personnel Manual states that "*If you successfully complete a 90 day probationary period, you become a permanent employee.*" Based on this statement, Employee leaves his current job to work for Company. Employee passes the probationary period and performs his job satisfactorily for several years. The company discharges Employee in order to hire another person to do the same job at a lower wage. The discharge is:

lawful ____ unlawful ____

4. Company's Personnel Manual states that "*Company will resort to dismissal for just and sufficient cause only.*" Based on this statement, Employee leaves his current job to work for Company. Employee performs his job satisfactorily for several years. The Company discharges Employee in order to hire another person to do the same job at a lower wage. The discharge is:

lawful ____ unlawful ____

PART IV

This section asks you for some basic background information so that we will have an accurate picture of the types of people who have answered this survey.

1. Sex: Male
 Female

2. Age: under 25
 25 – 34
 35 – 44
 45 – 54
 55 – 64
 65 or over

3. Race: White
 Black
 Asian or Pacific Islander
 Hispanic origin
 Native American
 Other

4. Education: No high school diploma
 High School diploma or equivalent
 Associate or technical degree
 Some college, no degree
 College degree
 Some graduate school, no degree
 Graduate degree

5. Average Annual Earnings (at your most recent job): Less than \$10,000
 \$10,000 to \$14,999
 \$15,000 to \$24,999

- _____ \$25,000 to \$49,999
_____ \$50,000 to \$74,999
_____ \$75,000 and over
6. Occupational Group
- _____ Professional, Technical or managerial
_____ Clerical or administrative support
_____ Service
_____ Sales
_____ Production (craft workers, operatives, laborers)
7. Type of industry:
- _____ Agriculture
_____ Construction or Mining
_____ Manufacturing
_____ Transportation or Public Utilities
_____ Wholesale or Retail Trade
_____ Finance, Insurance or Real Estate
_____ Services
_____ Government

