

# Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?

STEWART J. SCHWAB\*

In this Article I predict how employment law will change in the future. My task is positive rather than normative. I will not argue that the developments I foresee are good ones to be applauded. Rather, they arise “inevitably” from the way the law will react to changes in labor markets.

Of course, as Professor Ronald Dworkin emphasizes, in developing a theory of law one cannot sharply distinguish between the positive and normative.<sup>1</sup> Dworkin points out that even in describing the current legal framework, one must choose what to highlight and what to ignore, a process based on values.<sup>2</sup> When predicting the future, the winnowing process is even more value laden. Karl Marx’s predictions about the future of capitalism (which at their core involved changes in employment relationships) had this mixed positive and normative quality. In much of his writing, Marx argued in a positive predictive vein that the rise and fall of capitalism was predestined by historical forces.<sup>3</sup> In other writings, Marx normatively applauded the trends he foresaw and tried to hasten their arrival.<sup>4</sup>

To preview my bottom line, I will predict as a positive manner that employment law in the future will pay more attention to efficiency concerns, to the need for firms and economies to be competitive, and to the costs as well as benefits of employment regulation. Those who know my prior work may be skeptical that I disclaim any normative applauding of such trends. At this point, I simply acknowledge the intertwined nature of hope and prediction.

## I. A THEORY OF PREDICTION

Hindsight is 20/20. Explaining past changes in employment law is easier than predicting the future. Take just one example: In the 1980s, a number of states enacted stakeholder statutes that allowed or required corporate directors to consider the interests of workers and communities as well as shareholders.<sup>5</sup> Who could have predicted this flurry of legislative activity? After the fact, most people saw this as

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\* Professor of Law, Cornell Law School. I thank Kevin Clermont, Matt Finkin, and Stephen Garvey for suggestions, and Sam Estreicher and Ken Dau-Schmidt for urging me to undertake the piece.

1. RONALD M. DWORIN, *LAW’S EMPIRE* 34-35 (1986).

2. *Id.* at 52-53.

3. *See, e.g.*, Robert C. Tucker, *Introduction: The Writings of Marx and Engels*, in *THE MARX-ENGELS READER*, at xvi (Robert C. Tucker ed., 1972) (explaining that, according to Marx and Engels, the Marxist “materialist conception of history had conclusively demonstrated that the human historical process was moving toward a worldwide anticapitalist revolution that would usher in socialism or communism”).

4. *See id.* at xxix (explaining that Marx hoped his theorizing was “actively influencing historical events”).

5. *E.g.*, CONN. GEN. STAT. ANN. § 33-756(d) (West 1989); IDAHO CODE § 30-1602 (Michie 1999); IND. CODE ANN. § 23-1-35-1(3)(d) (West 1986); MINN. STAT. ANN. § 302A.251(5) (West 1985).

predictable, if not inevitable. Some applauded it as a wise application of public policy.<sup>6</sup> Others explained it on public choice grounds, suggesting that organized labor combined with incumbent management to grab rents from widely dispersed shareholders.<sup>7</sup> But whether these stakeholder statutes will be rigorously enforced in the future, or perhaps repealed, is harder to say.

Still, predicting the future can be fun. In the short run, no one can prove a scholar wrong about future predictions. The only immediate test is one of credibility: Will anyone pay attention to the predictions, worry about them, or rely on them? This depends in part on whether the predictions are vague or precise. Vague predictions often can be ignored. More precise predictions should be prepared for, if plausible.

In the longer run, clear predictions are a much riskier undertaking than the usual academic task of explaining the past. The predictions, at least if made sufficiently concrete to be interesting, can be falsified. Only some people are willing to harm their reputation in this way. Indeed, one might hypothesize that scholars who are bold enough to predict the future rather than explain the past either have little reputation to lose or have high discount rates and so do not care as much about the future as traditional scholars. This by itself might suggest that readers should not pay too much attention to concrete claims about the future of employment law. The very act of making clear predictions reveals that the person should not be taken seriously.

But the millennium is upon us, and it spawns the task of predictions. The last millennium saw predictions of doom and the coming of Satan.<sup>8</sup> But the predictions were surprisingly few and generally not taken seriously. The established Church was not inclined to test its credibility by making concrete predictions that could be falsified in a short time. Only fringe groups with less stake in the future were willing to make bold predictions. So millenary predictions would seem to have one trait in common: concrete predictions are only made by people with little concern for their future reputations.

In short, when predicting the future one is either vague and conventional, or specific and demonstrably wrong. Of course, it is possible to be both conventional and wrong. Having acknowledged the risks of lacking credibility now and being proven demonstrably wrong in the future, I begin my gaze into the crystal ball.

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6. Ronald Daniels, *Stakeholders and Takeovers: Can Contractarianism Be Compassionate?*, 43 U. TORONTO L.J. 315, 349 (1993) (demonstrating that stakeholder protection arguments apply most forcefully for employees, but only weakly for voluntary creditors); cf. Katherine Van Wezel Stone, *Policing Employment Contracts Within the Nexus-of-Contracts Firm*, 43 U. TORONTO L.J. 353, 375 (1993) (arguing that corporate stakeholder statutes "do not actually give employees any meaningful protection" and urging worker participation regimes instead).

7. Jonathan R. Macey & Geoffrey P. Miller, *Corporate Stakeholders: A Contractual Perspective*, 43 U. TORONTO L.J. 401, 405 (1993) (arguing that "the true purpose of these [non-shareholder constituency] statutes is to . . . benefit a well-organized, highly influential special-interest group, namely the top managers of large, publicly held corporations who wish to terminate the market for corporate control").

8. ROBERT LACEY & DANNY DANZIGER, *THE YEAR 1000: WHAT LIFE WAS LIKE AT THE TURN OF THE FIRST MILLENIUM 179-92* (1999).

## II. BACKGROUND ASSUMPTIONS FOR PREDICTING FUTURE EMPLOYMENT LAW

To predict the future of employment law, one must engage in two rather different sorts of inquiries. First, one must imagine how labor markets will evolve. Second, one needs a theory of how law interacts with the economy in order to predict how future changes in markets will change law.

### *A. Trends in Labor Markets*

Four major trends in employment markets seem central. I claim little originality here. Indeed, some of these trends are becoming clichés. To the extent I am novel here, it will be in questioning the extent of the trends.

#### 1. Globalization

As markets open and telecommunications shrink the world, the economy will become ever more globalized. Synergies as well as competition increasingly will come not only from neighboring companies or from neighboring states, but from workers across the globe. The pace of innovation is accelerating, which implies that a skill that is valued today may not be valued tomorrow.

#### 2. Importance of Education and Inequality of Earnings

Education will be increasingly important to workers. The economy is changing ever more rapidly. College education is designed to train workers, in a general way, to be adaptable to change. Past labor markets greatly rewarded workers for their experience or willingness to work hard. Those traits, compared to education and adaptability, will be less valued than they once were.

American society has the largest income inequality in the industrialized world, and (at least until the last year or two) that inequality is growing. Inflation-adjusted income of the bottom eighty percent of households has barely risen in the last quarter century, while the income of the top quintile has exploded. The top quintile now earns almost half the nation's income, and the top five percent alone earns twenty-two percent of the nation's income.<sup>9</sup>

#### 3. Workers Manage Their Careers

Globalization and the emphasis on general education imply that firm-specific skills will be less important than before. While firms will remain large, increasingly they will be reluctant to hire specialized workers for implicit long-term contracts. The risk of the world changing and the skills becoming superfluous will be too great for firms to bear. Firms increasingly will place risk on workers. The worker who manages a portfolio of jobs will increasingly become the paradigm worker. Learning the IBM

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9. SAM ESTREICHER & STEWART J. SCHWAB, FOUNDATIONS OF LABOR AND EMPLOYMENT LAW ch. 1 (2000).

or Dupont way of doing things will be less important in the future than being adaptable to a changing marketplace.

Whether job tenure is decreasing across the American economy is hotly debated by labor economists.<sup>10</sup> Reports of the growth of the contingent workforce can and have been exaggerated.<sup>11</sup> Still, I predict that workers will move between jobs, occupations, and industries more frequently than in the past.

Will this mean the decay of "modern manors," to use Sanford Jacoby's wonderful phrase that describes welfare capitalism in which large firms provide a panoply of benefits to a stable workforce?<sup>12</sup> Not necessarily, although the emphasis will shift even within the large firm, and we will see workers rather than the firm being the locus of many benefits.

#### 4. Women in the Work Force

During the past generation or two, the proportion of working women has exploded. In 1973, fewer than half of the women aged sixteen to sixty-four were in paid employment. By 1998, more than two-thirds were employed.<sup>13</sup> By contrast, the employment-population ratios for men declined slightly over this period, from 82.8% to 80.5%.<sup>14</sup> Noted labor economists Ronald Ehrenberg and Robert Smith have called the rise in the proportion of women working outside the home "[p]erhaps the most revolutionary change taking place in the labor market today."<sup>15</sup> In 1950 less than twenty percent of married women were in the paid labor force; by 1994 it was almost sixty percent.<sup>16</sup> The consequences of this revolution have not been fully addressed by employment law, and it will remain a major agenda item for the future.

##### *B. Theory of How Employment Law Interacts with Markets*

Too often, discussions of employment-law reform leap from the litany of labor-market changes recounted above to analysis of specific laws that have or will be enacted in response. But that leap ignores the complex relationship between law and

10. See, e.g., *id.* at 25-31.

11. Compare RICHARD S. BELOUS, *THE CONTINGENT ECONOMY: THE GROWTH OF THE TEMPORARY, PART-TIME AND SUBCONTRACTED WORKFORCE* (1989) (arguing that core employment is declining and contingent employment increasing), with Henry S. Farber, *Are Lifetime Jobs Disappearing? Job Duration in the United States: 1973-1993*, in *LABOR STATISTICS MEASUREMENT ISSUES* 157-203 (John Haltiwanger et al. eds., 1998).

12. SANFORD M. JACOBY, *MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL* 3-10 (1997).

13. RICHARD B. FREEMAN, *THE US ECONOMIC MODEL AT Y2K: LODESTAR FOR ADVANCED CAPITALISM?* tbl.6 (Nat'l Bureau of Econ. Research, Working Paper No. 7757, 2000) (showing the employment-population ratio for women as 48.0 in 1973 and 67.4 in 1998, while the comparable numbers for men were 82.8 in 1973 and 80.5 in 1998), available at <http://www.nber.org/papers/W7757.pdf> (last visited Nov. 7, 2000).

14. *Id.*

15. RONALD G. EHRENBURG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS* 175 (6th ed. 1997).

16. *Id.*

the economy. Before one can predict specific new employment laws, one needs a theory of how laws respond to market forces. Developing such a theory is a big task. This Article is not the occasion to debate Marx, Weber, or Durkheim. But I will sketch the rival theories.

Some theoretical approaches emphasize that law is a superstructure that reflects the underlying economic order. Others emphasize that the law tries to shape, deflect, or divert the direction of the economy, sometimes successfully. The safest statement is that law and social forces have a multidirectional causal relationship. But at particular moments in history, law can be more or less reflective and less or more refractive.

Employment law has always been a patchwork of particular statutes and common-law rules. Some employment laws reflect or enhance market forces, while others attempt to refract or inhibit market forces. The tension between reflecting and refracting market forces has always been present in employment law and always will be. Or, to switch the metaphor from light to water, some laws channel while others divert market forces.

Employment laws sometimes "go with the flow." For example, some have explained the employment-at-will doctrine as reflecting the needs of the capitalist economic order to control the growing strength of middle managers.<sup>17</sup> Modern defamation law in employment references, which gives employers a conditional but not complete privilege to utter false and defamatory remarks, can be explained as an attempt to improve the efficiency of job matches by encouraging references and minimizing needless or harmful turnover.<sup>18</sup>

In contrast, other employment laws try to divert or resist market forces. The very first Anglo-American employment law, the Statute of Labourers of 1349,<sup>19</sup> had the goal of stopping changes in labor markets. The Black Death of 1348 killed up to a half of the labor force, causing great pressures on the English feudal system of static jobs and compensation. The English Parliament responded by commanding that laborers accept employment at pre-Black Death wages and threatening to imprison workers that left before the end of the employment term. The turn-back-the-clock mentality of this legislation is express,<sup>20</sup> and its long-run futility is clear.<sup>21</sup> Modern examples are the minimum-wage laws, which are commonly explained as reactions

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17. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118 (1976). For a critique of this avowedly Marxist interpretation, see Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679 (1994).

18. See J. Hoult Verkerke, *Legal Regulation of Employment Practices*, 65 U. CHI. L. REV. 115 (1998) (describing defamation law's attempt to minimize problems of churning, scarring, and mismatching through controlling but not choking off employer references); cf. Ramona L. Paetzold & Steven L. Willborn, *Employer (Ir)rationality and the Demise of Employment References*, 30 AM. BUS. L.J. 123 (showing why efficiency-minded employers might continue to give references despite the (often exaggerated) threat of legal liability).

19. The Statute of Labourers, 23 Edw. 3 (1399) (Eng.).

20. "[Workers must] take only the Wages, Livery, Meed, or Salary, which were accustomed to be given in the places where he oweth to serve, the xx. year of our Reign of England, or five or six other common years next before." *Id.* § I.

21. See generally ROBERT R. PALMER, *ENGLISH LAW IN THE AGE OF THE BLACK DEATH*, 1348-81 (1993).

to the harshness of unregulated markets, which would allow workers to work for near-starvation wages.

The reflect/refract schizophrenia of employment laws make it difficult to predict how the laws will evolve to changing market forces, even if one is confident how market forces will evolve. I predict, however, that in the next decade or more, employment law will increasingly emphasize its channeling rather than diversionary role. To a greater extent, employment law will be designed to help firms and workers adjust to the major changes in labor markets, rather than be designed to fight the structural changes themselves. In doing so, employment law will further emphasize such issues as efficiency in the employment contract, cooperation between parties, and enlargement of the joint-surplus pie between workers and employers. In large part, this shift in employment law's goals itself will be a reaction to globalization. More frequently will the argument be heard and accepted that a country cannot afford extravagant employment-law protections when other countries are only providing efficient protections. The "race to the bottom" argument can be overstated, but it will more often be heard by policymakers.

Increasingly employment-law policymakers will ask whether firms and workers can afford the benefits or protections. This practice places a natural check on regulation. For example, suppose workers value a benefit at one-hundred dollars that would cost employers ninety dollars to provide. One would expect employers to voluntarily provide the benefit (deducting wages by ninety to one-hundred dollars), thus making a legal mandate unnecessary. Of course, it is hard for policymakers or scholars to put precise valuations on benefits. But the absence of a voluntarily provided benefit suggests that the numbers are reversed—workers value the benefit less than it costs the employer to provide. Mandating the benefit in such a case harms workers. Their wage will fall by one-hundred dollars, more than they value the benefit. To the extent the wage cannot fall by the full cost, employers will have to absorb some of the cost. This will make them less competitive than firms in other jurisdictions not subject to the mandatory-benefit law.

In the United States and United Kingdom in recent years, there has been much talk of a "third way" in politics.<sup>22</sup> The goal is to break the polarity between efficiency and equity. Some declare that being fair is efficient. The flip side is that being efficient is fair. Increasingly, I predict, this latter claim will be heeded. Paying workers their value, and paying attention to meritocratic claims, will increasingly be justified both on grounds of efficiency and fairness. Well-operating labor markets produce the largest pie. Increasingly lawmakers will respond to the idea that good employment laws are those that help labor markets produce the largest pie. It is unfair to intervene in labor markets to assist some while hindering others, if that shrinks the overall pie.

Anthony Giddens, a close advisor to United Kingdom Prime Minister Tony Blair, has emphasized the primacy of efficiency in the third way:

Public policy has to shift from concentrating on the redistribution of wealth to promoting wealth creation. Rather than offering subsidies to business, government should foster conditions that lead firms to innovate and workers to become more efficient in the global economy.<sup>23</sup>

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22. ANTHONY GIDDENS, *THE THIRD WAY AND ITS CRITICS* 3 (2000).

23. *Id.*

Giddens even uses a watery metaphor to make the point: "The state should not row, but steer: not so much control, as challenge."<sup>24</sup> Prime Ministers Blair and Germany's Gerhard Schröder, in a joint paper articulating the third way, likewise emphasize that laws must enhance rather than thwart markets: "The essential function of markets must be complemented and improved by political action, not hampered by it."<sup>25</sup>

Law will still have a role to play in a polity that responds to efficiency-based arguments. Not all markets function well, and labor markets have well-known problems. But employment laws increasingly will have to be justified as responding to market failure, reacting to a situation where workers in fact value the benefit more than it costs employers, though some market failure prevents employers from providing the benefit. Such market failures include collective goods problems or asymmetric-information problems. As I explain at the end of the piece, unequal bargaining power is not a market failure and does not justify mandating employment benefits.

This assertion—that employment law will increasingly be used to enhance markets rather than thwart them—is merely a prediction. It could be wrong. Protectionism is a common political reaction to the perceived threats of globalization, and a protectionist surge could arise again. Much of that protectionism could take the form of labor-standards legislation that would differ in spirit from the legislation that I predict is more likely. The recent hostility toward the World Trade Organization shows the potential power of the political forces resisting globalization.<sup>26</sup>

Globalization has been thwarted by protective policies before. The golden age of globalization prior to World War I ended with a spate of protective legislation enacted as a backlash to the unsettling features of interdependent economies. In their instructive history of that era, Kevin O'Rourke and Jeffrey Williamson warn that political backlash can occur if insufficient attention is given to the immediate losers in globalization:

Politicians, journalists, and market analysts have a tendency to extrapolate the immediate past into the indefinite future, and such thinking suggests that the world is irreversibly headed toward ever greater levels of economic integration. The historical record suggest the contrary.

. . . [The interwar deglobalization occurred because] a political backlash developed in response to the actual or perceived distributional effects of globalization. The backlash led to the reimposition of tariffs and the adoption of immigration restrictions . . . .

. . . The record suggests that unless politicians worry about who gains and who loses, they may be forced by the electorate to stop efforts to strengthen global economy links, and perhaps even to dismantle them.<sup>27</sup>

The noted economist Martin Feldstein has predicted another spate of protectionist

24. *Id.* at 6.

25. TONY BLAIR & GERHARD SCHRÖDER, *EUROPE: THE THIRD WAY—DIE NEUE MITTE* (1999), *quoted in* GIDDENS, *supra* note 22, at 6.

26. *E.g.*, Linda Keene, *Gas, Broken Glass and a City in Dismay*, SEATTLE TIMES, Dec. 1, 1999, at A15.

27. KEVIN H. O'ROURKE & JEFFREY G. WILLIAMSON, *GLOBALIZATION AND HISTORY: THE EVOLUTION OF A NINETEENTH-CENTURY ATLANTIC ECONOMY* 286-87 (1999).

policies in Europe, caused by the recent creation of the euro and the European Central Bank.<sup>28</sup> To his mind, Europe is a larger-than-appropriate currency area, and a single monetary policy throughout Europe will cause pockets of chronically high unemployment. The political response, he warns, may be to blame the United States and "it would not be difficult to imagine Europeans arguing that they should not have to compete with American firms that do not provide the European-level social benefits to their employees, [and] have longer working hours . . ."<sup>29</sup> A protectionist war would lead to policies that thwart employment markets rather than bolster them.

### III. FUTURE TRENDS IN EMPLOYMENT LAW

The last section made my major predictions. I identified various trends in labor markets: globalization, the increased importance of education, increased worker-managed careers, and the great importance of women workers. I then predicted that employment laws would reflect, channel, and capitalize on these trends, rather than divert, resist, or thwart them. Assuming those predictions are correct, this section highlights a few specific areas in which employment law will change in order to promote efficiency in the workplace in the face of changing labor markets.

#### *A. Just-Cause Protection*

As workers become more adaptable and flexible, the need and desire to stay with one firm will lessen. It will become a more common occurrence for workers to shift jobs. One important consequence of this is that the momentum behind just-cause protection for all workers will fade. Just-cause protection is critical only when the incumbent job is clearly better for the worker than other jobs. A worker suffers less damage from being terminated from a particular job that, with higher turnover, he probably would have left in a few years anyway.

On the other side, employers will increasingly resist just-cause protection. As more highly skilled, educated workers dominate the workplace, employers will have greater difficulty in distinguishing consummate performances from mediocre performances by workers. Clear rules of workplace performance are harder to determine. With telecommuting, even the requirement that a good worker shows up on time becomes less obvious. Imagination, adaptability, and foresight are matters of degree. Verifying before a court that a worker does not meet the standards of performance (which is what a just-cause system requires employers to do) will become more difficult in the workplace of the future.

In the future then, just-cause protection will benefit workers less and will cost employers more. We will see less erosion of the at-will doctrine from common-law courts, and the state legislatures will be unlikely to adopt a just-cause statutory regime along the lines of the Model Employment Termination Act.<sup>30</sup>

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28. See MARTIN FELDSTEIN, *THE EUROPEAN CENTRAL BANK AND THE EURO: THE FIRST YEAR 10* (Nat'l Bureau of Econ. Research, Working Paper No. 7517, 2000), available at <http://www.nber.org/papers/W7517.pdf> (last visit Nov. 7, 2000).

29. *Id.*

30. MODEL EMPLOYMENT TERMINATION ACT, 7A U.L.A. 428 (1991).



If this prediction is correct, then the United States will remain an outlier in the industrialized world, which uniformly forbids employers from terminating workers without just cause. What about the idea that globalization causes a convergence of standards? In the case of grounds for termination of employment, I predict that the rest of the world will move more towards the United States, rather than vice versa (although I do not predict the adoption of the at-will model elsewhere; that would be too extreme a development). Unemployment rates in the United States are significantly below most other industrialized countries, and have been since the 1980s.<sup>31</sup> Europeans are looking for ways to make their labor markets more flexible,<sup>32</sup> and the best way to do so is to give employers more latitude in terminating workers.

Just-cause advocates in the United States have long had difficulty explaining why, if just cause is a benefit that workers value highly, so few nonunion workplaces offer it.<sup>33</sup> If workers value job protection, a firm could gain a competitive advantage by offering it in return for a lower wage. Why does the market not provide this benefit? In the global era, advocates of employment laws will increasingly be called upon to give an answer along these lines, for fear that otherwise the law would put firms at a competitive disadvantage.

One explanation is that an asymmetric-information problem exists. If a single firm offered just-cause protection, it would attract two types of workers: good workers who happen to value just cause highly for reasons unrelated to job performance; and bad workers who fear being dismissed under at-will standards. If it cannot screen out the bad type of worker, the firm will be at a competitive disadvantage.<sup>34</sup> Thus, the explanation goes, workers value just-cause protections by more than it would cost employers to provide, if only employers could determine who are high-cost users of the protection. The mandatory just-cause protection will solve this market failure and thus improve the competitive position of American employers.

While this explanation is of the form that increasingly is needed to justify regulation, in this case it rings hollow.<sup>35</sup> The cure of mandating just cause for all seems worse than the asymmetric-information disease. Most just-cause advocates

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31. REBECCA M. BLANK, NO EASY ANSWERS: LABOR MARKET PROBLEMS IN THE UNITED STATES VERSUS EUROPE 11 fig.1 (Jerome Levy Economics Institute of Bard College Public Policy Brief No. 33, 1997); see also ESTREICHER & SCHWAB, *supra* note 9, at app. D (2000).

32. BLANK, *supra* note 31, at 9 ("In frustration, many Europeans have looked to the United States, with its lower unemployment rates, as a model of labor market flexibility.").

33. See, e.g., Mayer G. Freed & Daniel D. Polsby, *Just Cause For Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1097 (1989) (declaring that at-will supporters "confront[] an immediate problem"). "In the private sector and in the absence of unions, employment is almost always at will . . ." *Id.*

34. For arguments along these lines, see Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953, 1958-59 (1996); David I. Levine, *Just-Cause Employment Policies in the Presence of Worker Adverse Selection*, 9 J. LAB. ECON. 294 (1991).

35. See J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 842 (1995) (drawing on empirical evidence to argue for employment-at-will as the default rule in indefinite term employment contracts).

recognize this, and continue with fairness-based arguments for just cause.<sup>36</sup>

### B. Unemployment Insurance

With increased job turnover, employment law in the future will increasingly be asked to assist job transitions and ameliorate the harshness of job change. The classic program to undertake these tasks is unemployment insurance ("UI"). In the United States, experienced workers who lose their jobs through no fault of their own are entitled to temporary, partial reimbursement for lost wages.<sup>37</sup> The benefits typically last up to twenty-six weeks, and replace fifty percent of wages up to a cap.<sup>38</sup> Benefits are sometimes extended during periods of high unemployment.<sup>39</sup> What changes can we expect in the UI system in the future? The major thesis of this Article is that employment laws will increasingly have to justify themselves on efficiency grounds, and like any insurance program, UI has several efficiency issues.

Moral hazard is perhaps the most obvious efficiency issue with UI. When people are insured against the bad consequences of an event, they take less care to make sure the event does not occur. Economists refer to this problem as the moral hazard of insurance.<sup>40</sup> Applied here, the problem is that UI benefits reduce the concern with unemployment. Persons take less care to avoid being terminated, and take less effort to find new jobs. Almost all empirical studies show that UI increases unemployment.<sup>41</sup> This is an expected consequence of the moral-hazard problem. The greater unemployment is not necessarily a complete social cost, however. Because UI cushions the period of unemployment, workers can afford to reject low paying jobs and can wait for a better job match.<sup>42</sup>

The UI system already employs the standard techniques of deductibles and co-insurance to overcome moral hazard. Unemployed persons typically must wait a week before collecting benefits (the deductible), and receive only fifty percent of their prior wages up to a cap of one-half to two-thirds the average wage (co-insurance).<sup>43</sup> Since 1987, UI benefits have been taxed as ordinary income, which eliminates the distortion

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36. Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 65-66 (1988) ("For most commentators, it is a matter of simple justice.").

37. STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW 709 (2d ed. 1998) ("In the main, unemployment insurance is designed to provide temporary, partial wage replacement to experienced workers who become unemployed through no fault of their own.").

38. *Id.* at 706.

39. *Id.* at 707-08.

40. See generally Y. Kotowitz, *Moral Hazard*, in 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 549 (John Eatwell et al. eds., 1987).

41. Ronald G. Ehrenberg & Ronald L. Oaxaca, *Unemployment Insurance, Duration of Unemployment, and Subsequent Wage Gain*, 66 AM. ECON. REV. 754, 764-66 (1976).

42. *Id.* (estimating that an increase in UI benefits from forty percent to fifty percent of income would prolong unemployment by one-and-a-half weeks, but would increase post-unemployment wages by seven percent, for men aged forty-five to fifty-nine who did not quit voluntarily or return to their previous employer).

43. WILLBORN ET AL., *supra* note 37, at 706.

between earned income and UI income.<sup>44</sup> Further, all states require beneficiaries to search actively for work and accept suitable employment when found.<sup>45</sup> While protests are sometimes heard that these limitations on benefits unfairly put the burden of unemployment on the poor,<sup>46</sup> it is likely that they will remain in effect as UI programs are increasingly held to the standards of private insurance.<sup>47</sup>

Experience rating is perhaps the most distinctive feature of American UI. The system is financed by an employer payroll tax, in which firms that terminate more workers face higher UI taxes than firms with better "experience."<sup>48</sup> The degree of experience rating varies considerably by state.<sup>49</sup> All states have maximum and minimum tax rates, which limit experience rating.<sup>50</sup> Employers already at the maximum tax rate face no disincentive to terminate more workers, while employers already at the minimum cannot reduce their taxes by retaining more workers.<sup>51</sup> All states give some benefits that are not "charged" to individual employers.<sup>52</sup> These include benefits to workers who quit rather than are fired, and who enroll in approved training rather than actively look for work.<sup>53</sup> Noncharged benefits can range from one percent to thirty-two percent of all benefits.<sup>54</sup> The greater the level of noncharged benefits, the weaker the experience rating.<sup>55</sup>

The argument for experience rating is that it encourages employers to offer stable employment as well as to police the system for improperly awarded benefits.<sup>56</sup> Imperfect experience rating provides incentives for "wait" unemployment, whereby a firm temporarily lays off workers during a business downturn while planning to rehire the same workers when conditions improve.<sup>57</sup> The laid-off workers collect UI but do not actively search for other work. In effect, firms using this strategy let the UI system subsidize their workers during slack times, compared to a firm that retains

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44. *Id.* at 718.

45. *Id.*

46. Joseph M. Becker, *The Location of Financial Responsibility in Unemployment Insurance*, 59 U. DET. J. URB. L. 509, 541-43 (1982) ("There have been many proposals to modify the provisions of unemployment insurance so as to perform some of the functions that would otherwise have to be performed by welfare programs.").

47. For a provocative argument that UI should not only be held to the standards of private insurance, but should become private insurance, see Michael B. Rappaport, *The Private Provision of Unemployment Insurance*, 1992 WIS. L. REV. 61 (1992) (arguing that a private system would be better at overcoming the obstacles of moral hazard, vagueness-of-contract terms, prediction-of-unemployment levels, and avoidance of catastrophes). While the private provision of UI might be consistent with my market-enhancing thesis, I do not predict that it will occur in the foreseeable future.

48. ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION, UNEMPLOYMENT INSURANCE IN THE UNITED STATES 73 (1995), *quoted in* WILLBORN ET AL., *supra* note 37, at 713.

49. *Id.* at 78.

50. *Id.* at 73.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. WILLBORN ET AL., *supra* note 37, at 717-18.

its workers through good and bad times. Considerable empirical evidence suggests that UI, with its imperfect experience rating, causes about one-half of all temporary layoff unemployment, which in turn is about one-half of all job losses.<sup>58</sup> Imperfect experience rating creates distortions between industries as well. For example, in the construction industry, where layoffs are common, workers receive \$1.66 in UI benefits for every \$1.00 in UI taxes paid by construction employers.<sup>59</sup> By contrast, in the finance, insurance, and real estate sector, where employment is more stable, workers receive only \$.40 for every \$1.00 in taxes paid by their employers.<sup>60</sup>

Greater experience rating would reduce these distortions between industries and the social wastefulness of wait unemployment. As the pressures for efficient employment laws increase, then, we might expect a push towards greater experience rating.

At the extreme, perfect experience rating is identical to mandatory severance pay. Perfect experience rating would imply that whenever an employer lays off a worker, its taxes go up by exactly the amount of unemployment benefits the worker receives. Mandatory severance pay is unheard of in the United States, although it is common in Europe.<sup>61</sup> While UI is a program that receives relatively little criticism in the United States now, I nevertheless could see it being supplanted first by ever-increasing experience rating, and eventually by mandatory severance pay.

The difficulty with increasing experience rating for UI is that cases always exist where it seems right for workers to receive UI, but the termination seems to occur through no fault of the employer. In these cases, there is pressure not to charge the employer for benefits. For example, consider the situation where one spouse quits work in order to follow the other spouse who has accepted a better job in another city. The UI system has had difficulty adapting to the rise of two-career marriages. If turnover becomes more common in the future, we should expect more spousal quits. Employers will strongly object to being charged unemployment benefits in such a situation, and yet the goal of assisting the spouse in the job search will be great. Situations like this example will prevent the system from being fully experience rated.

Child-care issues present similar problems for UI and any effort to increase experience rating. As the role of working women becomes more salient, the UI system will be forced to respond. Suppose a worker misses work because of child-care problems and so is dismissed for absenteeism.<sup>62</sup> While absenteeism is a classic example of misconduct that ordinarily disqualifies a dismissed worker from unemployment benefits, workers with child-care problems present a more sympathetic

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58. Martin Feldstein, *The Effect of Unemployment Insurance on Temporary Layoff Unemployment*, 68 AM. ECON. REV. 834, 834 (1978).

59. WILLBORN ET AL., *supra* note 37, at 718.

60. *Id.*

61. Compare Thomas C. Kohler & Matthew W. Finkin, *Bonding and Flexibility: Employment Ordering in a Relationless Age*, 46 AM. J. COMP. L. 379, 385 (Supp. 1998), with John Pencavel, *The Appropriate Design of Collective Bargaining Systems: Learning From the Experience of Britain, Australia and New Zealand*, 20 COMP. LAB. L. & POL'Y J. 447, 481 (1999).

62. I present the situation in gender-neutral terms, but the burden of this situation typically falls on women workers. This is another example of how UI is slowly adapting to the needs of women workers.

case. In *McCourtney v. Imprimis Technology, Inc.*,<sup>63</sup> the court held that absenteeism due to child-care problems should not be disqualifying.<sup>64</sup> The dissenting judge complained that the holding put the employer in a catch-22 position of putting up with excessive absences or paying for the resulting unemployment.<sup>65</sup> The judge emphasized that "other social welfare programs have been developed to handle the child care issue," and that the UI program should not be burdened with it.<sup>66</sup> One response is to allow the worker to obtain benefits, because she fits squarely within UI's goal of financially supporting workers who involuntarily lose their jobs and need time to find more suitable work, but not charging them to the employer, because it cannot control the problem. By not charging particular employers with benefits, however, this Solomonic solution reduces the degree of experience rating. The better result would be to charge employers with the unemployment caused when they cannot accommodate the needs of working parents. This would induce employers to internalize the conflict between family and work and encourage them to offer accommodation. I predict that the UI system will increasingly react to the increased importance of women workers and the increased salience of work/family conflicts by forcing employers to internalize some of these costs. A modest way of doing so is by charging employers with the costs of unemployment benefits when workers with difficult child-care arrangements are terminated.

Another unique feature of American UI is that the worker must be entirely without work before qualifying for UI.<sup>67</sup> In several European countries, by contrast, UI systems give partial benefits to workers whose hours have been reduced because of slack work.<sup>68</sup> This encourages work sharing rather than layoffs. Some labor historians attribute the American decline in work sharing and the rise in the use of temporary layoffs during downturns to the creation of the UI system in the late 1930s.<sup>69</sup> I doubt this idea will catch on in the United States, however. It would be hard to distinguish legitimate situations where work hours involuntarily declined from situations where workers happily agreed to, say, half-time hours so long as UI benefits allowed greater than half-pay.

### *C. Emphasis on Default Rules in ERISA and Privacy Law*

Default rules, as opposed to mandatory rights and obligations, will become a more important part of employment law in the future. Default rules often are better than mandatory rules in enabling workers and employers to tailor individually their relationship in mutually beneficial ways. Default rules also help workers to manage their own careers. Thus, I predict that employment law will increasingly allow workers to waive rights. Employment law will increasingly be seen as providing a template that many or most parties will want. But the law will recognize that this

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63. 465 N.W.2d 721 (Minn. Ct. App. 1991).

64. *Id.* at 725.

65. *Id.*

66. *Id.*

67. See SUSAN N. HOUSEMAN, *JOB SECURITY V. LABOR MARKET FLEXIBILITY: IS THERE A TRADEOFF?* 3 (Upjohn Inst. for Employment Research, Staff Working Papers, Spring 1994).

68. *Id.*

69. *Id.*

template cannot apply to all workers, and workers will be allowed to deviate from it.

### 1. ERISA Regulation

The trend towards default rules and employee choice is already seen in pension and other benefits regulation. First, many fringe benefits and levels are now offered as "cafeteria plans" or "flexible spending accounts," whereby individual workers can opt for some benefits or benefit levels and reject others (in return for greater wage compensation).<sup>70</sup> This option immediately allows workers greater control over the fruits of their labor. Second, there has been a dramatic move in the last decade or two towards defined-contribution pension plans rather than defined-benefit plans.<sup>71</sup> Under the older defined-benefit model, which is still the norm in the largest firms, an employer promises a specific benefit, based typically on a fraction of final salary, in retirement. It is the employer's obligation to insure that the funds are there to pay that amount in retirement. Major sections of the Employee Retirement Income Security Act ("ERISA")<sup>72</sup> regulate employers to insure that workers receive that promise. These include detailed funding requirements<sup>73</sup> and termination insurance if a defined benefit pension plan cannot pay its obligations.<sup>74</sup>

Under a defined-contribution plan, by contrast, an employer promises to pay a specified amount into each worker's account each year. That amount will be invested. But the employer makes no promise that a certain amount of money, or indeed any money at all, will be available upon retirement. That depends on whether the investments do well, which in turn depends on stock market performance. The risk is now on the employee. With this risk, employees increasingly have the power to direct where their investments are made.

A more extreme form of devolving pension risk towards the worker comes in 401(k) plans, which are increasingly prevalent.<sup>75</sup> Under these plans, an employee decides how much of his or her salary should be contributed to a pension fund. Workers who worry about the future tend to put large amounts into these plans; other workers who need the money now put in less. Employers like 401(k) plans for reasons wholly apart from the fact that, like defined contribution plans generally, the risk is on the worker rather than the firm. After all, inefficiently placing risk on workers will mean higher wages and higher overall costs on firms. But it happens that workers who contribute large amounts into 401(k) plans are also better, more conscientious workers. The desire to save for a rainy day correlates highly with other

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70. See PETER J. WIEDENBECK & RUSSELL K. OSGOOD, *CASES AND MATERIALS ON EMPLOYEE BENEFITS* 988-90 (1996).

71. WILLBORN ET AL., *supra* note 37, at 774 (reporting that over two-thirds of pension plan participants were in defined benefit plans in 1975, while fifty-eight percent were in defined contribution plans by 1991).

72. The Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001-1461 (1994 & Supp. IV 1998).

73. *Id.* §§ 1081-1086.

74. *Id.* §§ 1301-1461.

75. See RICHARD A. IPPOLITO, *PENSION PLANS AND EMPLOYEE PERFORMANCE* 131-39 (1997).

attributes that characterize a good worker bee.<sup>76</sup>

## 2. Privacy Law

A second application of the increasing primacy of default rules will appear in privacy law. Much talk has been made of the privacy problems of workers, both at work and off-the-job.<sup>77</sup> Privacy protection claims range from drug tests to intentional infliction of emotional distress.<sup>78</sup> Workers often complain of being constantly monitored at work. In this technological age, supervisors can determine the number of keystrokes per minute that secretaries make, can tape-record the conversations of sales people, and generally make workers feel the oppression of Big Brother throughout the work day.

Unfortunately for advocates of increased privacy regulation, the efficiency benefits as well as the costs of monitoring are readily apparent. In this competitive age, advocates of regulation will have to answer why workers and employers cannot decide the optimal level of monitoring on their own. Under the premise that workers are in charge of their careers, they should be empowered to decide whether to opt for a workplace with more or less monitoring, with the accompanying more or less wages or other benefits. If the employer has clearly warned about high levels of monitoring, workers will not be heard to complain about invasions of a reasonable expectation of privacy.

Privacy law already reflects this emphasis on contract. In the private sector, at least, workers rarely succeed in their claims unless they can show that the employer held out the expectation of respecting privacy and then breached the expectation.<sup>79</sup> There are remarkably few private-sector privacy cases.

Public-sector workers generally have greater privacy protections. This distinction between public- and private-sector rights will increasingly be seen in the future. Government employers are not under the same competitive pressures as profit-seeking private-sector firms. Two important differences flow from this. First, government employers, not interested in maximizing profits, have less market pressure to consider the value that workers place on employer privacy. Second, in this global age, lawmakers are fearful of making employers less competitive by imposing unnecessary costs on them. This fear does not apply to government employers. Thus, I predict that extensive privacy protections for government workers will continue, but that these protections will not spill over to the private sector.<sup>80</sup>

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76. *Id.*

77. See generally MATTHEW W. FINKIN, *PRIVACY IN EMPLOYMENT LAW* (1995 & Supp. 1999).

78. *Id.*

79. A well-known case that can be understood on contract grounds is *Rulon-Miller v. IBM Corp.*, 208 Cal. Rptr. 524 (Cal. Ct. App. 1984). There, the court affirmed a judgment of \$300,000 for an employee who was fired for dating a worker at a competitor's firm. *Id.* at 527. The court emphasized, however, that IBM had held itself out through internal memoranda as a company that respected employee privacy. *Id.* at 530.

80. But see Samuel Issacharoff, *Reconstructing Employment*, 104 HARV. L. REV. 607, 616-17 (1990) (book review) (arguing that courts resolving employment claims of private-sector workers routinely look to public-sector cases for guidance).

*D. Mandatory Health Insurance?*

One major distinction between the United States and most other industrialized countries is in the provision of health care. Most countries use some form of government-provided health insurance, where eligibility accrues on the basis of citizenship or residency. In the United States, government-provided health insurance exists for the poor (through Medicaid) and the elderly (through Medicare). Most other Americans, however, get health insurance through employers or not at all. So in the United States, then, health insurance is an employment-law issue.

The U.S. Congress has already enacted regulations about employer-provided health insurance through ERISA. ERISA preempts almost all state efforts to regulate pensions and health insurance and other so-called welfare plans, on the theory that a single national law is required.<sup>81</sup> The preemption argument is defended on two grounds: First, a "race to the bottom" problem prevents states from placing extensive benefits requirements on employers for fear they will leave for other, more employer-friendly states.<sup>82</sup> Second, state regulation imposes large administrative costs, as large employers would have to comply with different and sometimes conflicting state regulations.<sup>83</sup>

In place of the preempted state regulation, ERISA gives extensive procedural regulation both of pension and of health-insurance and other so-called welfare plans, as well as extensive substantive regulation of pensions, but provides little substantive regulation of health insurance.<sup>84</sup> The procedural regulations, common to pensions and health insurance, include notice and disclosure requirements.<sup>85</sup> This regulation is easy to justify on market-channeling grounds, in that its purpose is to improve information flows so that employees know the tradeoffs they are making when choosing among employers and plans. Of course, even information-enhancing regulation can be overdone, but the inefficiencies are likely to be less than for substantive regulation. I predict, then, that the ERISA notice and disclosure requirements will remain.

ERISA also regulates pensions in a substantive way, through vesting, contribution, insurance, and other requirements. By contrast, ERISA has few substantive requirements for health-insurance plans. The result is a gap in regulation for health insurance, because ERISA preempts direct state regulation and does not replace it with substantive federal regulation.<sup>86</sup>

A laissez-faire attitude toward employer-provided health insurance may be consistent with a market-enhancing or wealth-maximizing objective. Indeed, this may explain the hesitation of Congress to enact substantive health-insurance regulations, despite the hue and cry over the subject. On the other hand, unregulated health insurance can suffer from substantial adverse-selection problems. Employers that offer generous health insurance may be swamped by job applicants who are poor

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81. 29 U.S.C. § 1144(a) (1994). See generally, WILLBORN ET AL., *supra* note 37, at 843.

82. Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 94 (1996).

83. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98-99 (1982).

84. WILLBORN ET AL., *supra* note 37, at 843-44.

85. *Id.* at 843.

86. *Id.* at 843-44.



health risks. Lawrence Summers has sketched an argument whereby an economy which mandates that employers provide health insurance is more efficient than one that refuses to solve the adverse-selection problem and does not mandate insurance.<sup>87</sup> Following this argument, I predict that employment law in the future will mandate that employers provide employees with health-insurance coverage. Details of the program will matter, however. Small employers may be exempted. The legislation must coordinate mandates for spouses working for different employers. Finally, the law may allow opt-outs or add-ons in certain instances, in an attempt to overcome a problem that free government-provided insurance may crowd out preferable private insurance.<sup>88</sup>

#### *E. Greater Portability of Benefits*

The American reliance on employer-provided health insurance has put great pressure on the employment/nonemployment line. Extensive regulation is required to police the line. The Consolidated Omnibus Budget Reconciliation Act ("COBRA")<sup>89</sup> was enacted to force employers to offer departing employees the opportunity to continue in the health-insurance plan for eighteen months, so long as the employee paid the usual employer premium.<sup>90</sup> More recently, the Health Insurance Portability and Accounting Act ("HIPAA")<sup>91</sup> was enacted to force the second employer to accept new employees into the health plan, even if they have pre-existing conditions that are expensive to insure.<sup>92</sup> Both COBRA and HIPAA are attempts to avoid the problem of employees being locked into bad job matches.<sup>93</sup> A well-functioning labor market would allow employees to move to jobs where they are more valuable, without fear of losing health insurance. Because these statutes have a plausible market-enhancing policy rationale, I predict that they will be bolstered in the future.

The lack of mandatory paid maternity leave is another area where the United States differs dramatically from international norms. The European Union has issued a directive, for example, mandating that member states enact legislation that provides for fourteen weeks paid maternity leave.<sup>94</sup> The new International Labour Organization

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87. Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AEA PAPERS & PROCEEDINGS 177 (1989).

88. Sam Peltzman has made an analogous argument that "free" public schools lead to a low-quality trap because parents, who in the absence of public schools would willingly pay for high-quality education, will opt for lower-quality public education that comes free. Sam Peltzman, *The Effect of Government Subsidies-in-Kind on Private Expenditures: The Case of Higher Education*, 81 J. POL. ECON. 1 (1973).

89. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (codified as amended in scattered sections of 7, 10, 15, 29, 33, 40, 42, and 47 U.S.C.).

90. *Id.*

91. Health Insurance Portability and Accounting Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, and 42 U.S.C.).

92. *Id.*

93. WILLBORN ET AL., *supra* note 37, at 877-80.

94. Council Directive 92/85/EEC, 1992 O.J. (L 348) 1. Article 8.1 directs member states to take the necessary measures to ensure that workers "are entitled to a continuous period of

("ILO") convention also calls for fourteen weeks paid maternity leave, up from twelve weeks under its 1952 convention.<sup>95</sup> The United States enacted the Family Medical Leave Act ("FMLA") in 1993,<sup>96</sup> which requires employers to give twelve weeks *unpaid* leave for childbirth (and also for a serious health condition of the employee, spouse, parent, or child).<sup>97</sup> The increased salience of women in the workplace, I predict, will put great pressure on Congress to increase the FMLA mandate. When Congress mandates *paid* maternity leave, however, the form of regulation will have to change. A mandate that employers pay women workers who go on maternity leave will create incentives for employers not to hire women of child-bearing age. Almost all countries mandating health insurance, then, establish a state fund financed by general or payroll taxes, and do not attempt to experience rate the tax by charging higher rates to employers with many workers on maternity leave.

Why is experience rating of unemployment benefits a good idea, while experience rating of maternity benefits is a bad idea? The answer is that the critical decision is in the hands of the employer, in the case of unemployment, and the hands of the worker, in the case of maternity leave. Appropriate policy wants the employer to think twice about terminating a worker, and the increase in UI taxes will force the employer to do so. Appropriate policy does not want to punish employers who hire workers who go on maternity leave, and so does not want an experience-rated tax.

#### IV. THE DECLINING RHETORICAL FORCE OF UNEQUAL BARGAINING POWER

In the vision that I have put forth, employment regulation will increasingly have to be justified as correcting a market failure or otherwise helping firms and the economy remain competitive. Less persuasive will be arguments based on the concern that individual workers have little bargaining power and thus must take whatever terms are dictated by employers. I accept the characterization that individual workers largely take terms dictated by employers, but the terms that employers dictate are themselves

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maternity leave of at least 14 weeks." *Id.* at 4. Article 11.2(b) requires member states to ensure that workers on maternity leave receive "an adequate allowance." *Id.*

95. See Convention (No. 183) Concerning the Revision of the Maternity Protection Convention (Revised 1952), June 15, 2000, at <http://ilolex.ilo.ch1567/public/english/docs/convdsp.htm>. Maternity leave shall be not less than fourteen weeks, *id.* art. 4(1), with at least six weeks' compulsory leave after childbirth, *id.* art. 4(3). Cash benefits are required. *Id.* art. 6(1). If based on prior earnings, benefits should be at least two-thirds of prior pay (caps are permissible). *Id.* art. 6(3). If based on other methods, benefits should be comparable on average to 2/3 of prior pay. *Id.* art. 6(4). A member state whose economy and social security system is insufficiently developed shall be deemed in compliance with the cash benefits requirement if it provides maternity benefits no lower than those for sickness or temporary disability. *Id.* art. 7(1). The ILO's prior convention on maternity protection mandated twelve weeks' paid leave, but the level of benefits was specified in less detail than under the current convention. Convention (No. 103) Concerning Maternity Protection (Revised), June 28, 1952, art. 3(2), 214 U.N.T.S. 321, 326.

96. Family Medical Leave Act (FMLA) of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601-2654 (1994 & Supp. IV 1998)).

97. 29 U.S.C. § 2612(a) (1994).

dictated by the workings of increasingly competitive labor markets. This is not to say that labor markets are perfect. I have outlined ways in which they fail, which include such things as externalities, collective goods, and information asymmetries. But unequal bargaining power is not a market failure. Increasingly, policymakers in Congress, state legislatures, and the courts will see that unequal bargaining power is not by itself an argument for regulation. My argument is not that unequal bargaining power is a meaningless concept (although it is notoriously slippery).<sup>98</sup> Rather, I argue that unequal bargaining power is not a good reason for intervening in labor markets, and that in the future its rhetorical power will decline.

For example, suppose a health-insurance plan exists that each worker would value at one-hundred dollars and that costs an employer ninety dollars per worker to provide. In a well-functioning market, the pension would be provided as employers compete with each other to attract workers. Wages would fall to cover the employers' extra costs.<sup>99</sup> The law does not have to intervene in this well-functioning market in order to have health insurance provided. Not all labor markets function well, however. Adverse selection may prevent employers from offering health insurance to all workers, for fear that they will be swamped with unhealthy workers. For example, suppose unhealthy workers cost \$270 to insure. Employers cannot distinguish unhealthy from healthy job applicants, although the applicants know which they are (and unhealthy applicants, knowing their status, value health insurance at \$300). If so, no employer can remain competitive while offering health insurance to all workers. Net social gains might improve if employment law intervenes in the market and mandates health insurance.<sup>100</sup>

The conclusions about intervention or nonintervention do not change if we now add to the story the fact that the employer is a monopsonist with extreme bargaining power over the workers. In the simple story (before we introduce the two-types-of-worker, adverse selection problem), the monopsonist will offer health insurance to all workers. The motive is no longer the fear of competition from other employers. Rather, the motive is to "exploit" the workers all the more by reaping another ninety-nine dollars from them. The monopsonist, who by definition reaps all the gains of trade, will trade in order to reap. It will offer a pension plan and reduce wages by ninety-nine dollars. There is no need for the law to intervene to insure the provision of health insurance. Now, the monopsonist may be unable to offer health insurance because of adverse selection problems. But that is a problem of adverse selection, not unequal bargaining power.

Reducing the rhetoric of "unequal bargaining power" will change political discourse, for much of employment law uses it and the related concepts of "protecting

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98. See, e.g., Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

99. The fall in wages would be between ninety dollars and one-hundred dollars, with the exact amount depending on the slope of the supply and demand curves with and without the health-insurance plan.

100. Adverse-selection problems in providing health insurance, using the numbers I discuss in the text, are nicely illustrated in Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177 (Papers & Proceedings Supp. 1989).

the little guy” and “preventing employer exploitation,” as rationales for intervention. But if my major prediction proves true—that employment law increasingly will attempt to guide, channel, and enhance markets rather than thwart, divert, or counteract market—then the decline of “protecting the little guy” rhetoric will occur as a corollary.