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Hegel and Employment at Will: A Comment

Richard A. Posner

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I applaud Professor Cornell's attempt to bring the thought of Hegel to bear on the contemporary issue of employment at will.[1] Hegel is an important figure in jurisprudence, and one too little known to legal scholars in the Anglo-American orbit; and Drucilla Cornell is a true student of Hegel. But precisely because Hegel is so little known to these scholars—for the easily understood reason that his writings, even when translated into English, are opaque, and alien to the Anglo-American sensibility[2]—anyone who wants to "sell" Hegelianism to Anglo-American jurisprudes would be well advised to wrap it in simpler packaging than Professor Cornell has employed in her interesting but difficult paper. The quotations from Hegel that punctuate the paper are, perhaps unavoidably, not lucid, and some of her own paraphrases of Hegel are Hegelian in style and therefore fully intelligible only to initiates (among whom I do not count myself). We know from the works of Charles Taylor and others—including Cornell herself in a previous article—that it is possible to explain Hegel's thought to an unschooled Anglo-American audience, and I wish Professor Cornell had made a greater effort along those lines.[3]

Her article is far-ranging, and will I am sure be of great interest to students of Hegel's legal thought whether they have any interest in employment at will—that is, employment terminable by either party, employer or employee, without notice or grounds. However, I shall confine my comments to those parts of her article that bear directly

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* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. This is the revised text of remarks delivered at the Conference on Hegel and Legal Theory held at Cardozo Law School on March 27-29, 1988. I thank Drucilla Cornell, Frank Easterbrook, Richard Epstein, William Landes, Edward Lazear, Eva Saks, Cass Sunstein, and participants at the Conference for many stimulating comments and suggestions, and Catherine Van Horn for her helpful research assistance.

1 Cornell, Dialogic Reciprocity and the Critique of Employment at Will, 10 Cardozo L. Rev. 1575 (1989).

2 This is not to deny that Hegel has influenced Anglo-American thinkers, not only indirectly through Marx, but directly—John Dewey being a notable example.

3 See Cornell, Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation, 136 U. Pa. L. Rev. 1135, 1178-93 (1988); S. Avineri, Hegel's Theory of the Modern State (1972); R. Plant, Hegel: An Introduction (2d ed. 1983); A. Ryan, Hegel and Mastering the World, in Property and Political Theory 118 (1984); C. Taylor, Hegel and Modern Society (1979); Rosenfeld, Hegel and the Dialectics of Contract, 10 Cardozo L. Rev. 1199 (1989).

on the controversy over that doctrine. The article uses several strands in Hegel's thought to argue, primarily against Richard Epstein,[4] that employment at will should be outlawed. The natural inference from abolishing employment at will would be to entitle every employee in the United States to retain his or her job—for life—unless an arbitrator or some other neutral adjudicator determined that the employer had good cause to discharge the employee. Every employee would have the type of job rights enjoyed at present by tenured college teachers, civil servants (including public school teachers), and workers covered by collective bargaining agreements. But Cornell's actual proposal is slightly different. It is that statutes be enacted that would specify forbidden grounds for discharging an employee. The list of forbidden grounds, on which Cornell is surprisingly casual, must be specified precisely before one can be sure whether her proposal would curtail the freedom of action of employers substantially. Assuming it would, I disagree with it. I consider it inefficient and regressive. And I doubt whether Hegel can be squeezed hard enough to yield persuasive reasons for it.

I do however grant the force of Hegel's argument, which Cornell emphasizes, that individualism, upon which Epstein founded the ethical part of his argument for employment at will,[5] is socially constructed rather than presocial. Like Hegel, I do not believe that individuals have "natural" rights, whether to make contracts or to do anything else. The natural state of human beings is one not of equality but of dependence on more powerful human beings. Economic freedom in the classical liberal sense is one of the luxuries enabled by social organization. The long life, wide liberties, and extensive property of the average modern American are the creation not of that American alone but of society, that is, of a vast aggregation of individuals, living and dead; and of luck (in geography, climate, natural resources). As between two equally able and hard-working people, one living in a wealthy society and the other in a poor one, the former will have a higher standard of living; and the difference will be due to the efforts of other members, living and dead, of the wealthier society. The individual's "right" to property in such a society is not "natural," because his possessions are a product of social interactions rather than of his skills and efforts alone (and those skills may be, in part or

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[4] See Epstein, In Defense of the Contract at Will, 51 U. Chi. L. Rev. 947 (1984).

[5] See id. at 951-55. I use the past tense because Epstein has since moved away from an effort to ground his jurisprudential views on natural-rights philosophy, and has begun to emphasize utilitarian justifications (more broadly, the kind of pragmatic justifications that I use in this Paper) instead. See Epstein, A Last Word on Eminent Domain, 41 U. Miami L. Rev. 253, 256-58 (1986).

whole, a social product too). I thus stand with Hegel and Cornell, and against Hobbes and (1984 vintage) Epstein, in believing that freedom of contract—the principle that undergirds the institution of employment at will—cannot be defended persuasively by reference to natural liberty.

But this concession will not carry the day for opponents of employment at will. To strip away one of the doctrine's philosophical struts is not to show that the doctrine should be abandoned. It would be odd to conclude that because individual well-being is, in an important sense, a social product, the state has a right to take away the difference between my income and that of the average resident of Bangladesh. Employment at will is a corollary of freedom of contract, and freedom of contract is a social policy with a host of economic and social justifications, even though nature is not of them. Employment at will happens to be the logical terminus on the road that begins with slavery and makes intermediate stops at serfdom, indentured servitude, forced servitude, and guild restrictions. That should be a point in its favor. Hegel himself, as Cornell notes, would have thought employment at will a fine thing. Just the pragmatic success of free markets in "delivering the goods"[6] warrants a presumption in their favor and places on Cornell some burden of making a case for public intervention. She cannot rest on Hegel's demonstration that rights are social rather than natural.

She knows she cannot and is therefore led to place great emphasis on Hegel's belief that the possession of property is essential to a person's sense of himself as a person.[7] Taken literally (but Cornell does not take it literally), this is an odd and not especially plausible idea. Do monks or nuns, or for that matter slaves, actually lack a sense of themselves as persons because they lack property rights? Hegel himself did not think so. Conversely, do the compulsive consumers of modern affluent society—the middle-class Americans for whom shopping is the preferred leisure activity—have as a consequence of their affluence, their property, a deep sense of self?

At the root of Hegel's belief that property is important to personality is the plausible idea that we are scarcely persons unless we are able to intervene in the external world in some way. One who cannot have any effect on his environment may not be aware of himself as a person, that is, aware of himself as being distinct from his environ-

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[6] On which, see, e.g., S. Brittan, How British is the British Sickness?, in The Role and Limits of Government: Essays in Political Economy 219 (1983); A. Ryan, Why Are There So Few Socialists?, in Property and Political Theory, supra note 3, at 194.

[7] Hegel's theory of property is well described in A. Ryan, supra note 3.

ment in a way that a tree is not distinct from its environment. These interventions are constitutive of personality in an additional sense: our sense of ourselves as persons is a function in part of our recollections of past experience, and those recollections are kept fresh by the objects and activities associated with them. That is why it can be a terrible wrench (over and above the inconvenience) to lose one's house and personal possessions in a fire even if they are fully insured.

It may therefore be the case empirically that a person who has no property has a fainter awareness of himself as a separate person than one who does have property. Is it not a purpose of the monastic life to make its adherents feel themselves a part of a larger organism? To Margaret Jane Radin, Hegel's analysis of property implies that heirlooms should receive greater legal protection than cash or other fungible property.[8] This may seem a curious suggestion but bankruptcy law does place at least some of the bankrupt's personal property beyond the reach of his creditors,[9] and maybe the explanation is Hegelian.[10] But Cornell's version of Hegel's theory of property rights is less literal than this, and either version seems remote from employment at will. The employee at will can leave his job whenever he wants and go work for someone else. Far from being a slave of his employer he is not even tied to him by a contract for a fixed term. Employment at will lies, as I have said, at the opposite end of the spectrum from slavery, with contracts for a fixed term in the middle (not in the exact middle, to be sure). It is true that the employee at will can be fired at will, but the consequences of being fired, in our society at any rate, do not include becoming someone's slave; given unemployment insurance and welfare, they do not even include becoming a poor person, in the sense of someone utterly destitute and without property. Most poor people in the United States are wealthy by international standards—at least wealthy enough to retain a lively sense of themselves as persons.

But by pushing a little harder the idea that our sense of personal-

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[8] See Radin, Property and Personhood, 34 Stan. L. Rev. 957 (1982) [hereinafter Radin, Property and Personhood]; see also Radin, Time, Possession and Alienation, 64 Wash. U.L.Q. 739, 741 (1986) ("the claim to an owned object grows stronger as, over time, the holder becomes bound up with the object").

[9] See 11 U.S.C. §§ 522(d)(3)-(4), (f)(2)(A) (1982 & Supp. IV 1986).

[10] Radin also suggests using Hegel's theory of property to give tenants a right to renew their leases indefinitely, provided they behave themselves. See Radin, Property and Personhood, supra note 8, at 991-96. This suggestion is much more troublesome. Carried to its logical extreme it would destroy the institution of tenancy by giving the tenant a right almost as extensive as fee simple. It is hard to see how the interests of people who cannot afford to own their homes would be helped by the destruction of tenancy. Existing tenants would benefit, but what of persons who will be seeking rental housing in the future?

ity is embodied in our accustomed possessions and activities we can begin to see a loosely Hegelian argument for job tenure, as for tenant rights. The person who has had the same job for a long time, like the tenant who has lived in the same place for a long time (but under a succession of one-year leases), may develop an attachment such that termination is wrenching. But we are now a long way from the idea that people who lack any property (the monk, the conscript soldier, the slave, the pauper) may in consequence have a precarious sense of self. We are now saying merely that everyone dislikes losing what he had grown accustomed to having. We have turned Hegel into a utilitarian, and a superficial utilitarian, who does not consider the long-range consequences of his happiness-maximizing proposals.

The fact that employment at will is a voluntary relationship on the part of the employee as well as the employer is an embarrassment for the Hegelian analyst. The right of property implies the right of alienation. If I own my labor I should be entitled to rent it on whatever terms I see fit. For reasons that will become clearer later in this paper, the employee at will is likely to have a higher wage than he would if he had an employment contract or other job tenure (including Professor Cornell's proposed "rational grounds" protection). With the higher wage he can acquire additional property. To force him to forgo his preferred wage-tenure package and to accept a lower wage in exchange for greater job security is, one might think, a denial of his personhood. Granted, this analysis would fail if employees did not know that they were employees at will unless they had an employment contract. But surely few employees at will think they have job tenure; losing one's job is not such a low-probability event that people have trouble thinking rationally about it. If, contrary to my belief, ignorance on this score really is a problem, it is one readily curable by the imposition of heavy sanctions on employers who mislead their employees into thinking that they have job protection when they do not.

Of course, any suggestion that one's property right in one's own labor should be freely alienable runs into the fact that one is not allowed in this society to sell oneself into slavery. But it is not clear that the ban against self-enslavement has much to do with notions of essential personhood. It may just be that we cannot think of any reason why a sane person in our society would make a contract to become a slave. However generous the price was for surrendering his freedom, as a slave the person would derive no benefit from the price unless he were intensely altruistic toward his family or others *and* they did not reciprocate his concern—for if they did they would suffer

from seeing him a slave, and his altruistic gesture would fail.[11] And if they are so indifferent to his own welfare as to be untroubled by seeing him a slave, he is unlikely to be so altruistic toward them as to be willing to make such a sacrifice for them.

Our reaction to slavery is both culture-bound and semantically influenced. We are unlikely to say that if in ancient times a captive chose slavery over death he thereby surrendered his personhood. And today when a person does outwardly rather similar things to self-enslavement, but for a good reason—join the army, become a Catholic priest or nun, or even, having robbed a bank, become a "slave" of the state, maybe for life—we do not say that the person has surrendered his or her essential personhood. Slavery has become the name of the forms of involuntary servitude that we abhor; it does not signify the abhorrence of all forms of involuntary servitude. In any event, none of this has anything to do with employment at will, which as I have said is at the other end of the spectrum of "labor contracts" from slavery.

Professor Cornell lays great stress on what she calls "reciprocal symmetry" in personal relations: "The image is of two people looking one another in the eye, knowing the other is looking back. No one is on top."[12] This would appear to be an apt description of a regime of freedom of contract. The employer and employee meet as free individuals, and can strike any deal they want; presumably it will be mutually advantageous. It may or may not involve job tenure, as the parties prefer. If, perhaps by virtue of a statute, the employee could dictate the terms, he would be on top, and this would violate reciprocal symmetry. Cornell infers from reciprocal symmetry a quite different principle, not obviously related to it at all: that each of us is entitled to demand that someone who proposes to harm us, as by firing us, have and give us a compelling reason for doing so. Yet each of us is harmed every day by the actions of unknown others and harms unknown others by our own actions, if only through the action of competition in economic and other marketplaces. It would be absurd to require that all the harmed (The jilted boyfriend? The writer whose book is reviewed unfavorably? The consumer faced with an increase in the price of anchovies? The loser in a tennis match?) be given notice and a hearing. Granted, losing one's job may be a greater

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[11] Notice the curious implication of this point: sacrifice is likely to be more rational, the less grateful the person on whose behalf the sacrifice is made to the person making the sacrifice; in other words, the existence of a reciprocal relationship may actually make sacrifice less rather than more likely. There is some merit to this odd, counterintuitive suggestion: parents are more likely to make sacrifices on behalf of their children than vice versa.

[12] Cornell, supra note 1, at 1587.

blow; but it is a known risk; and one who desires—and is willing to pay for—protection against it can negotiate for an employment contract, or enter the sector of the work force where such protection comes with the job.

Let us pause for a moment and consider conditions in that sector. For the truth is that many millions of American workers have job tenure. Does their experience suggest that universalizing the practice would improve human relations? Does the union worker have a greater sense of personality than the nonunion worker? Does the civil servant have a greater sense of personality than his counterpart who works without tenure in a private-sector job? Do public school teachers have a greater sense of personality than private-school teachers? Even if there is something, perhaps much, to the Hegelian notion that property is a part of personality, or to the notion that people should interact on terms of reciprocal symmetry, it is far from clear that Professor Cornell's proposal would if adopted cause these notions to be more fully actualized than they already are. It would, however, curtail the freedom of contract.

Another objection to entitling a person to demand a reason for being fired is that it logically entails a right (of the employer) to demand a reason for quitting—and if this seems to be pushing logic too hard, consider that in the Netherlands neither party to an employment relationship can terminate the relationship without cause, and workers can be sent to jail for trying to do so.[13] The relationship of the just-cause principle to slavery is nowhere clearer than in this example; the employee who could not show just cause for leaving his employment might be forced to spend his whole life in a job he hated.[14] Nevertheless, what is sauce for the goose should be sauce for the gander. Professor Cornell does not deny that an employee can sometimes hurt his employer, and hurt him badly, by quitting without notice or just cause. She thinks a discharge will on average hurt the employee more than a quit will hurt the employer, but this is not clear; the employee may be compensated ex ante for this risk (for example, by being paid a higher wage). Even if she is right, it would not provide a powerful justification for denying the employer a remedy in those cases where the quit really does hurt him.

She makes a good argument against employment at will (or at least against an argument made in favor of employment at will), and it

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[13] Martin, The Economics of Employment Termination Rights, 20 J.L. & Econ. 187, 188-89 (1977).

[14] This is unlikely, of course; the costs of monitoring the effort of an unhappy worker would be too high. This is one reason why slavery has gone out of fashion.

is hardly important that the point owes nothing to Hegel. One argument used to defend employment at will is that the employment relationship is typically one of bilateral monopoly.[15] (I already hinted at this in my reference to the key employee, whose quitting hurts the employer.) The employee develops skills that are specialized to the particular job he is doing for the particular employer for whom he is doing it. As a result he would be less productive working for another employer; and knowing this, his current employer may be able to threaten him, explicitly or implicitly, with discharge if he demands a wage equal to his marginal product for this employer. But precisely because this employee is more productive than a new replacement would be, he can threaten the employer with quitting if the employer does not pay him his full marginal product. It is a game of chicken, likely to end in a stand-off, in which case both parties are protected against overreaching by the other.

The conclusion that the employee's specialized skills protect him from overreaching by the employer at the same time that they create the temptation for overreaching can be reached by an alternate route. Suppose a worker would be more valuable if he developed skills specialized to this employer. If the employer incurs the full costs of developing these skills in the worker, the worker can hardly complain if the employer refuses to pay him the higher marginal product made possible by the employer's own investment in the worker's skills; and to the extent that the worker (by threatening to quit) can extract any part of that higher marginal product in the form of a higher wage, the employer had been "had." Conversely, if the worker pays for the acquisition of these skills himself (maybe by accepting a lower wage initially), he will be at the mercy of the employer, who can expropriate the worker's investment by refusing to pay him his full marginal product; if the worker quits, he will have lost his entire investment, since by definition the skills are worth nothing in another employment.

Consideration of these alternatives leads to a prediction that the costs of developing specific human capital (as skills specialized to a particular employer are called) will be shared between worker and employer.[16] That way, neither party has as much to gain or lose from a termination of the employment relationship, and hence there is less incentive to engage in bluffing and other gaming, and less turnover.

But in either case the assumption is that the worker develops specialized skills; and, as Professor Cornell rightly points out, not

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[15] See Epstein, supra note 4, at 973-76.

[16] See G. Becker, Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education 29-31 (2d ed. 1975).

every employee is so fortunate. This is a good point, but incomplete. If the employee lacks specialized skills, he loses a club over his employer's head, it is true, but by the same token the employer loses a club over the employee's head. The employee's wage will be as high in another job as it is in this one, since his skills, such as they are, are by hypothesis mobile. Of course, if there were a vast labor surplus, the wages of unskilled labor would be very low, but this situation would not be alleviated by job tenure.

There are other reasons to doubt whether employment at will is exploitive. The employer who encourages employees to develop a specialized skill and then takes advantage of their resultant immobility by refusing to compensate them adequately will find that he has to pay higher wages to induce people to work for him in the future. (A similar concern with reputation may restrain key employees from taking advantage of their employer's vulnerability by walking off the job without notice, or by demanding a raise not to do so.) The employer will also find that his employees are highly susceptible to the enticements of labor unions. One of the curious byproducts of the universal "rational cause" rule that Cornell proposes is that it would weaken labor unions by giving every worker the kind of protection that he can get from a union only at the cost of having to pay union dues. Yet I had thought that Cornell (a former union organizer) was a supporter of unions for reasons that went beyond the tenure provisions in collective bargaining contracts.

The case for the just-cause or rational-cause principle[17] is a weak one, it seems to me; in addition there is a case against it that Cornell largely ignores. First, it is a costly principle. While not every employer in the United States is an effective profit-maximizer (and hence cost-minimizer), a free-market institution as persistent and widespread as employment at will is presumptively more efficient than an alternative imposed by government. The reason it might be more efficient is not hard to find. Litigation, even when conducted before arbitrators rather than before judges and juries, is costly. Apart from these direct costs of legally enforceable universal tenure rights there are the indirect costs, potentially enormous, from the weakening of discipline in the workplace when workers can be fired only after a costly and uncertain proceeding. The sum of these costs should not be underestimated. If they did not outweigh the benefits to workers, why would employers not offer just-cause protection voluntarily, the

[17] I realize that Professor Cornell distinguishes between these two methods of abrogating employment at will. But the differences do not appear to bear on my criticisms of her proposal.

way they offer other fringe benefits? Are the employers that do offer such protection—government agencies, unionized firms, and universities—the most efficient producers in the marketplace?[18]

We should consider the likely incidence of the costs of the just-cause or rational-cause principle. Consumers would be hurt, because these costs would be passed on (in part) to consumers in the form of higher product prices. Less obviously, workers would be hurt too. In figuring what he can afford to pay, an employer considers not only the direct costs of labor but indirect costs as well (such as the employer's social security tax, unemployment insurance premiums, and workers' compensation insurance premiums), of which the costs of the just-cause or rational-cause principle would be one. The higher the indirect costs, the less the employer will be willing to pay the employee in the form of wages and fringe benefits. Now in a sense just-cause protection is a fringe benefit, so the worker does not lose out completely, but it is by definition a benefit he did not want as much as he wanted a higher wage, or else the employer would have offered it to him, provided only that the employer is a rational maximizer of his own self-interest.

Just-cause protection would increase unemployment.[19] Employers would search longer before hiring a worker, because the cost of firing the worker if he did not pan out would be higher.[20] Therefore it would take longer to find a new job, which would increase the unemployment rate because most unemployed people are people searching for a new job to replace the one they have just lost. Second, and more serious, would be the effect on new hires. Just-cause (or rational-cause) protection raises the cost of labor to employers, and therefore reduces their demand for it; they hire less, automate more, relocate plants to foreign countries that do not have such protection. The

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18 One is amused to be told by another advocate of abolishing employment at will that we need not fear that abolition would be inefficient, because "[u]nder the British system, for example, industrial tribunals determine whether an employee has been improperly discharged." Leonard, A New Common Law of Employment Termination, 66 N.C.L. Rev. 631, 677 (1988).

19 For empirical evidence, see Martin, supra note 13, at 199-201. The unemployment effects of European job-security laws are discussed in E. Lazear, Job Security and Unemployment (Hoover Institution Working Paper in Economics No. E-87-47, Oct. 1987) (available at Cardozo Law Review).

20 This effect should be mitigated some, however, by the fact that just-cause protection usually does not start until some probationary period is completed. Cornell's proposal would allow for such periods.

Of course, if irrational firing of workers is widespread, a just-cause statute could lower the unemployment rate by dramatically reducing job turnover. But this seems highly unlikely, see DeFranco, Modification of the Employee at Will Doctrine—Balancing Judicial Development of the Common Law with the Legislative Prerogative to Declare Public Policy, 30 St. Louis U.L.J. 65, 70-72 (1985), and is not argued by Cornell.

brunt of the disemployment effect of job protection is invariably borne by newcomers to the work force and other marginal workers; and most of these will be women, nonwhites, or handicapped—the very workers that Cornell would most like to protect, in the interest of reciprocal symmetry or "horizontality." Employers in a regime of just-cause or rational-cause protection will be less willing to take chances on problem workers or workers who lack an impressive job history, since it will be harder to correct mistakes in hiring than under a system of employment at will.[21]

Professor Cornell does not see these problems, I conjecture, because she has committed that arch-sin that we "liberals" (in the sense of classic, not welfare-state, liberalism) are always being accused of: the sin of "reification." She has reified the employer, instead of treating the employer as a nexus of relationships with suppliers, workers, shareholders, managers, and consumers.

Another objection to the just-cause or rational-cause principle is that it would make discharges more painful and humiliating than they need be. When a worker is fired with no reasons given, at least he is not stigmatized by a determination that he is a bad worker. Under Cornell's proposal, fewer workers would be fired (and fewer hired either—my previous point) but those that were fired would be branded as bad workers and might have difficulty finding replacement jobs. This might be all to the good from the standpoint of efficiency but I would not expect Cornell to take quite so cold-blooded a view of the matter!

If experience in the unionized sector is a guide, we can expect arbitrators to react to the possibility of stigma by refusing to let employers fire employees for anything short of egregious misconduct. If they do this it will weaken the objection just made but strengthen the objection based on impairment of workplace discipline.

Cornell's proposal is underinclusive, not only because there is no justification for confining it to discharges and excluding quits, but also because business decisions other than to discharge workers may have greater consequences for employment than discharge decisions. An example is lay-off decisions, which are excluded from Cornell's proposal[22] even though lay-offs have a far greater aggregate impact on workers than discharges. But it is also overinclusive, because many

[21] Still another wrinkle is that if temporary and part-time workers are exempted from the just-cause law, as has been the pattern with European job-protection laws, see E. Lazear, supra note 19, at 7-9, employers will tend to substitute such workers for full-time workers.

[22] She does, however, propose that employers be required to give advance notice of layoffs. See Cornell, supra note 1, at 1622.

workers do not need the protection of just-cause or rational-cause protection. Henry Ford fired Lee Iaccoca without a statement of reasons or an effort to establish just cause; should the law have given Iaccoca job protection that he could have negotiated for had he been willing to accept a lower salary?