THE MODEL EMPLOYMENT TERMINATION ACT — META — MORE APTLY THE MENACE TO EMPLOYMENT TRANQUILITY ACT: A CRITIQUE

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INTRODUCTION

The Model Employment Termination Act[1] — META — more aptly The Menace to Employment Tranquility Act — is based on a misconceived premise and promise. The Commissioners adopted the Model Employment Termination Act (META or Act) in 1991.[2] Ostensibly, the Act reflects an intent to remedy perceived deficiencies in discharge law as it now exists in the fifty states.[3] I have deliberately omitted the "wrongful" qualifier to discharge, since I find it misleading and prejudicial to the discussion. The Act's supporters use the development of tort, implied contract and breach of the implied covenant of good faith and fair dealing theories which have eroded the traditional at-will employment relationship to signal a time for legislative transformation of discharge law.[4] The resultant Act, proposed by the presumably well-intentioned Commissioners, is

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1. MODEL EMPLOYMENT TERMINATION ACT, *reprinted in* 9A Lab. Rel. Rep. (BNA) ¶ 540:21 (Dec. 1991) [hereinafter META]. The Act was also printed in 7A U.L.A. 71 (Supp. 1991). The reference to Commissioners throughout the paper is to that body that actually voted to adopt the Act by a vote of 39 to 11. *Id*. See Stanley M. Fisher, *Legislative Enactment Process, The Model Termination Act*, 536 ANNALS AM. ACAD. POL. & SOC. SCI. 79, 82–86 (1994), for a more detailed account of the role of the National Conference of Commissioners on Uniform State Laws in the process of drafting uniform and model state laws.

2. META, *supra* note 1.

3. *Id*.

4. *Id.*; *see* Theodore J. St. Antoine, *Employment-At-Will — Is the Model Act the Answer?* 23 STETSON L. REV. 179, 182 (1993) (stating that "courts in over forty-five jurisdictions have used one or more of three main theories to carve out exceptions to the previously all-pervasive principle [at-will]").

woefully inapt. The compromise philosophy[5] so vocally touted is too compromising. In sum, the proponents of META claim the Act is "a fair and well-balanced solution that eliminates the uncertainty resulting from the continuing shifts in the legal environment."[6] I hope to demonstrate that it is neither fair nor balanced. Because the premise is misconceived — uncertainty can be eliminated — the promise falters. Shifts in the legal environment cannot be eliminated since law, like life, is an evolutionary process.

The Commissioners seize the opportunity presented by society's recent penchant for damages suits to promote social legislation. Their response to the runaway jury awards[7] is a statute which exacerbates rather than alleviates the problem. The proponents of the Act propose a social agenda which would alter the fundamental structure of approximately seventy-five percent of employment relationships in the United States.[8] Imposing a "good cause" requirement on every termination subject to the Act would impermissibly intrude upon employers' managerial discretion. Employees with marginal claims would be the beneficiaries of the new legislation, while those employees with substantive claims would see their remedies unjustifiably curtailed. The Act's proponents attempt to shame legislatures and legislators into supporting the Act, making much of the United States' singular adherence to at- will employment.[9] The simplistic assertion by the supporters is not cogent in light of the historical and social differences between the United States and

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5. META, *supra* note 1, Prefatory Note ("The underlying theme or basic philosophy of the Model Act is one of compromise . . . .").

6. *Id.* at 20.

7. *Id.* at 23; *see* St. Antoine, *supra* note 4, at 186 (noting the "jury generosity" across the country in order to engender support for the Act).

8. William L. Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201, 204 (1985) (stating that "approximately 70 to 75 percent of our one hundred million labor force is employed under contracts at-will").

9. META, *supra* note 1, Prefatory Note ("The United States is the last major industrial democracy in the world that does not have generalized legal protections for its workers against arbitrary dismissal."); *see also* St. Antoine, *supra* note 4, at 180 ("The United States remains the last major industrial democracy in the world that has not heeded the call of the International Labor Organization for generalized legal protections against unjust dismissal."). Interestingly, the United States does not typically "heed the call" of the International Labor Organization. In fact, "[a]s of January 1, 1990, the United States had ratified only 7 out of over 160 Conventions." Karen Paull, Note, *Employment Termination Reform: What Should a Statute Require Before Termination? Lessons from the French, British, and German Experiences*, 14 HASTINGS INT'L & COMP. L. REV. 619, 637–38 n.130 (1991) (citing U.S. DEP'T OF STATE, TREATIES IN FORCE 338–39 (1990)).

other countries. The puffery also fails to note the problems and protective posturing that result from regulation.[10]

The ultimate compromise reached by the Commissioners — the proposal of alternative enforcement regimes — exemplifies the inadequacies of the Act. For all the rhetoric about the cost and inefficiency of the current legal system, the Commissioners approved the court system as one of the enforcement mechanisms. Admittedly, the comment indicates, and the reporter for the Act notes, this option would conceivably be chosen by only one or two states.[11] Whether this prediction proves true remains to be seen. To date, no state has adopted the Act. Thus, no state has considered the enforcement options. The fact, however, that the Commissioners could even propose this "solution" belies the efficacy of their intent to replace the uncertainty of employment at will with predictability. Likewise, the alternative procedure which envisions a state run arbitration bureaucracy does not deliver the arbitral benefits promised.[12] Even the "ideal" arbitral model which provides the font of "good cause" standards[13] presents difficulties since the collective bargaining context from which it has been derived is not readily transferable.[14]

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10. LUXEMBOURG: OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, EMPLOYMENT IN EUROPE — 1993, at 176 (1993) [hereinafter EMPLOYMENT IN EUROPE — 1993] (noting the use of fixed-term contracts by countries in order to "by-pass[ ] normal dismissal procedures or severance requirements"). Chapter 7 in particular provides a good synopsis of employment protection and labor force adjustment in the Member States. We should take heed that "extensive restrictions on the ability of firms to adjust their labour force" might lead to problems. *Id.* The following observation is pertinent:

> Such problems [which might stem from government regulations that restrict firm adaptability] do not necessarily imply that government regulation of employment should be abolished. They do imply, however, that the extent and nature of regulations need to be continuously evaluated in light of current economic and labour market realities so that they do not unduly inhibit changes in working arrangements which might be desirable.

Id. at 184.

11. St. Antoine, *supra* note 4, at 195; META, *supra* note 1, app. at cmt.

12. META, *supra* note 1, app. at Alternative A.

13. META, *supra* note 1, app. at cmt. ("The preferred method for enforcing the statutory protection against termination without good cause is through the use of professional arbitrators appointed by an appropriate public agency"); *see* St. Antoine, *supra* note 4, at 189 ("The official comments direct interpreters of the statute to heed the arbitral precedent developed over the past half century . . . .").

14. 2 HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE, § 9.30 (3d ed. 1992) ("[S]tatutory arbitration suffers from disadvantages not present with collectively bargained arbitration.").

Academics claim that META will provide uniformity and replace the uncertainty of employment at will with predictability.[15] This promise is illusory. META is not self-executing but rather requires interpretation. Whether judicial or arbitral interpretation is opted for, the language in META does not provide for simple resolution. Predictability is not enhanced by META as to specific or generic risk. As to specific risk — how a particular case is resolved — the vagaries of adjudications remain under META.[16] As to generic risk — the exposure of employers to litigation — the expansive access will promote filings and it would remain to be seen whether the anticipated increase in claims would offset the perceived economic benefit to employers presently touted.[17]

DISCUSSION

META's primary, if not explicit, purpose is to append a "just cause" or "good cause" provision to the employment contract. Professor St. Antoine, reporter for META, states that "[t]he Act's central tenet [is] that a worker of demonstrated capacity should not be fired without good cause . . . ."[18] What constitutes "good cause" as set forth in META is rife with interpretive variations. What, for instance, is the gravamen of those enumerated relevant factors and

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15. META, *supra* note 1, Prefatory Note; *see* Glenn D. Newman, *The Model Employment Termination Act in the United States: Lessons from the British Experience with Uniform Protections Against Unfair Dismissal*, 27 STAN. J. INT'L L. 393, 435 (1991) ("Its [the Draft Act's] eventual adoption, however, would provide certainty in the law, eliminate exorbitant jury verdicts, and provide American workers with the job security enjoyed by their counterparts throughout the rest of the industrialized world."); Cindy Barber, Note, *Comparison of International and U.S. Employment Termination Procedures: How Far Have We Come? — A Step in the Right Direction*, 19 SYRACUSE J. INT'L L. & COM. 165, 195 (1993) ("The Model Act would offer uniformity among the states and provide stability in employment practices.").

16. Newman, *supra* note 15, at 433 ("[A] more serious problem arises [than would arise from different results which might issue from similar discharge provisions in two separate collective bargaining agreements] if a provision of the Draft Act, which if adopted would affect nearly all employees within a given state, were given different meanings by different arbitrators . . . . Such problems might well arise routinely.").

17. Lewis L. Maltby, *The Projected Economic Impact of the Model Employment Termination Act*, 536 ANNALS AM. ACAD. POL. & SOC. SCI. 103, 117 (1994) (hypothesizing that "[e]mployers' costs would decrease from $2.2 billion to $1.89 billion per year, a savings of $310 million"). The sanctity of the savings calculation is questionable since it is predicated on a whole series of speculations including the number of claimants, the costs of the adjudicatory process, and the amounts of actual awards.

18. St. Antoine, *supra* note 4, at 197.

circumstances noted in Section 1(4) which may bear upon the good cause determination, and what is the exercise of business judgment in good faith?[19] Legislators and constituencies are placated by the Act's reporter who notes "[t]he official comments expressly urge attention to `principles and considerations generally accepted in arbitration' in the interpretation of META. This means that literally thousands of arbitral precedents are available to help flesh out the term `good cause.'"[20] These "precedents" suggest an illusory succor.

Although arbitral literature has enunciated "good cause" or "just cause" standards, the literature has evolved in the collective bargaining context and is not readily transferable.[21] Collective bargaining agreements are unique documents. They differ distinctly from other commercial contracts.[22] Substantial differences exist between the collective bargaining and law of the shop context and non-union situations. For instance, a union is a third party which facilitates the oft-imposed remedy of reinstatement. Additionally, collective bargaining agreements are subject to revision and renegotiation by the parties. External law is neither as malleable nor responsive to the respective parties.

META marketers emphasize that META is a compromise solution.[23] But it is a compromising compromise. Proponents and draft

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19. META, *supra* note 1, § 1(4):

> Good cause means (i) a reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct on the job or otherwise, job performance, and employment record, or (ii) the exercise of business judgment in good faith by the employer, including setting its economic or institutional goals.

Id.

20. Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361, 371 (1994) (footnote omitted).

21. PERRITT, *supra* note 14, at 206 (commenting that "statutory arbitration suffers from disadvantages not present with collectively bargained arbitration"). Perritt comments:

> But in the statutory wrongful discharge setting, the discretion of an arbitrator to give his own interpretation to a statutory term[ ] such as "cause" or "good faith" is troublesome. It is difficult to provide a convenient means of controlling the arbitrator's exercise of discretion in specific cases without vitiating the advantages of arbitration.

Id.

22. *See generally* Jay E. Grenig, *Principles of Contract Interpretation, in* LABOR AND EMPLOYMENT ARBITRATION § 14.01 (Tim Bornstein & Ann Gosline eds., 1988).

23. META, *supra* note 1, Prefatory Note ("[META is] an equitable trade off of competing interests."); Theodore J. St. Antoine, *The Model Employment Termination Act: A*

ers of META view the limited access of employees to the judicial system as a flaw in the current system.[24] One purpose, therefore, of META is to remedy that perceived deficiency and enable all those who are "unjustly" terminated to prosecute a claim.[25] The employees' interest thereby propounded is improved access to remedies for alleged unjust terminations. The supporters of META balance the improved ability of employees to assert claims with the decreased exposure of employers to unpredictable damage awards. However, the real trade-off is not between employees and employers, but rather between employees with substantive and substantial claims and those who stand to benefit merely because of a newly created right.[26] The trade-off for improved access for the rank and file is that everyone will share the bounty formerly enjoyed by the few. The "losers" or those being compromised are those with the so-called "lottery" claims.[27] However, if one looks to the "lottery" cases, the results are not without reason or cause as the critics of the present system suggest. To classify an award as a lottery result denigrates the claim, the claimant and the system.[28]

To accept the premise that merely increasing access is beneficial without a corresponding inquiry into the merits of the claims of the projected claimants and those whose claims are compromised by the trade-off is incomplete and prompts further inquiries. Is it a conscionable and just trade-off to deny the individual grievously wronged

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Fair Compromise, 536 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 96 (1994) (emphasizing that "[t]he central objective of META is a fair and practical compromise between the competing worthy interests of employers and employees").

24. META, *supra* note 1.

25. Maltby, *supra* note 17, at 108–09 ("Instead of the present lottery system, where most people get nothing and a handful receive six-figure awards, the new approach is based on arbitration whereby all unjustly fired employees can expect to receive some compensation and employers have their liability limited.").

26. Paul H. Tobias, *Defects in the Model Employment Termination Act*, 43 LAB. L.J. 500, 501 (1992) ("Victims of outrageous cruel terminations would receive no more damages than those who are merely treated unfairly.").

27. Maltby, *supra* note 17, at 108–09; see *supra* note 25 for the specific language.

28. JAMES N. DERTOUZOS & LYNN A. KAROLY, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY 40 (1992) ("[A]verages [of jury awards] are inflated because of the existence of a few huge awards, generally involving particularly egregious (and avoidable) behavior on the part of employers."). This observation by the researchers dispels the notion jury awards are *de facto* unjust. Rather than support META's "good cause" standard and its concomitant limitation on damages provisions, the researchers make note that the few aberrant awards correlate to the wrong suffered.

the remedy to which he or she is presently afforded?[29] In substantially circumscribing remedies and damages, META minimizes the distinctions between claimants who are truly harmed and those who are system optimizers. The recurrent contention in pro META commentary is that the rank and file have been denied a forum in which to assert their rights. The prefatory note to META cites the rank and file's limited judicial successes.[30] The reporter for META comments, somewhat reproachfully, that representation is hard to come by for these claimants whose claims are insufficient to "attract the attention of a lawyer looking for a sizable contingent fee."[31] From their protected perch, academics, shielded from economic realities, are ill-equipped to transform the realities of the workplace, especially when the transformation is unabashedly socially motivated. Businesses cannot afford the luxury of endless social niceties and micro-management to assure that every termination is politically correct. The security META proponents seek to provide workers is simply unattainable. The world, including the business environment, is not a stable or secure place for either employers or employees.[32] Change is increasingly more rapid and adaptation is a critical component of survival for businesses and their employees. The industrial giants of the past are dwarfed by the information age industries. Past leaders do not have a right to continued market share independent of their current ability to perform. They must look ahead to assure their continued stature. Likewise, to focus on a worker's "demonstrated capacity" misperceives reality.[33]

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29. META, *supra* note 1, § 7(d) (prohibiting damages for pain and suffering, emotional distress, and punitives). By prohibiting the award of these damages, the claimant who has been grievously harmed will be limited to the same remedy as the claimant with a grievable gripe thereby diluting the efficacy and efficiency of the remedy.

30. META, *supra* note 1, Prefatory Note ("Rank-and-file workers prevail only infrequently.").

31. St. Antoine, *supra* note 4, at 186, 194 ("For impoverished rank and file workers, the amount of any likely recovery will seldom, if ever, be enough to attract capable counsel who must rely on a contingent fee.").

32. EMPLOYMENT IN EUROPE — 1993, *supra* note 10, at 184.

33. St. Antoine, *supra* note 4, at 197; *see* Jon M. Gumbel & Jim Hoover, *Employment Contracts: An Option to Consider*, 41 LAB. L.J. 175, 176 (1990) (urging the utility of specific written agreements in order to avoid disputes). "Once a lawsuit is brought, it is frequently difficult to convince these fact finders that an employee's past performance does not meet today's standards. Judges and juries often fail to recognize that our world economy mandates continued improvement of productivity for survival." Gumbel & Hoover, *supra*, at 176.

Proponents of the Act report that at-will employment is particularly unfair to senior workers who are more vulnerable to discharge.[34] While resort to the life cycle theory of employment is alluring to portray the image that workers who have toiled and dedicated their energies to a firm are opportunistically cast away when their utility has been sapped, it is inaccurate and outmoded. Stewart J. Schwab notes there exists some evidence indicating that career employment is ebbing.[35] If career employment is indeed on the decline, META crusaders will lose another of their heralded justifications for promoting the Act. Even if career employment was not at an ebb, workers have gained considerable statutory protection against opportunistic employer behavior with the passage of the Employment Income and Retirement Act of 1974 (ERISA).[36] ERISA requires accelerated vesting of retirement benefits so that "career" employees cannot be expediently dismissed.[37] Passage of the Age Discrimination in Employment Act (ADEA),[38] as amended by the Older Workers Benefit Protection Act of 1990 (OWBPA)[39] also provides career and older workers protections against potentially unfair discharge. Henry H. Perritt, Jr. notes, "[a]t last count, federal law already prohibited dismissal for 20 specific reasons, with the prohibitions contained in as many separate statutes."[40] Since Perritt's

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34. Jack Stieber & Robert Rodgers, *Discharge for Cause: History and Development in the United States*, 536 ANNALS AM. ACAD. POL. & SOC. SCI. 70, 75–76 (1994) (citing a study by Medoff and Abraham which "found that employees with 30 or more years of service were 3.6 times as likely to be laid off or discharged as employees with only 3–10 years of service").

35. Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment At Will*, 92 MICH. L. REV. 8, 60–61 (1993) ("Some commentators suggest that career employment is becoming a thing of the past. One bit of evidence for this claim is the decline in pension coverage in the 1980s. If life-cycle contracts decline in importance, one might expect parties to call on courts less frequently to enforce perceived opportunism.").

36. Pub. L. No. 93-406, 88 Stat. 832 (1974) (codified as amended at 29 U.S.C. §§ 1001–1461 (1994)).

37. David E. Bloom & Richard B. Freeman, *Trends in Nonwage Inequality: The Fall in Private Pension Coverage in the United States*, 82 AM. ECON. REV. 539, 543 (1992) ("Many changes took place in the 1980's regarding the legal status of different pension rules and provisions . . . . Vesting standards were generally more relaxed, it became more difficult for employers to exclude newly-hired older workers from pension plan participation, and benefit accruals became required after the normal age of retirement.").

38. Pub. L. No. 90-202, 81 Stat. 602 (1962) (codified as amended at 29 U.S.C. §§ 621–634 (1994)).

39. 29 U.S.C. § 626 (1994).

40. Henry H. Perritt, Jr., *Wrongful Dismissal Legislation*, 35 UCLA L. REV. 65, 66

count in 1987, Congress has passed significant federal legislation conferring yet additional statutory rights upon employees. These statutes include: the Worker Adjustment and Retraining Notification Act (WARN);[41] the Americans With Disabilities Act of 1990 (ADA);[42] and the Family and Medical Leave Act of 1993 (FMLA);[43] as well as OWBPA, previously noted. The notion that at-will workers are without significant statutory protections is specious.

In addition to the above enumerated legal and statutory protections, a discharged worker is eligible to receive unemployment compensation for any good cause termination attributable to the employer.[44] The very purpose of unemployment compensation is to afford employees protection from discharge when they lose their jobs through no fault of their own. META, on the other hand, would extend the protection to encompass employees' fault as long as it does not equate to "misconduct." To encourage marginal claims which inevitably would issue[45] from this remedial righteousness and to encourage marginal workers is counterproductive. Workers must assume responsibility for their own plight and take the laboring oar to be enterprising post-termination.[46] It is easy to claim foul play or bemoan one's fate as unjust.[47] However, what is easy for individuals is unbearable for society. Society prospers from industrious individuals

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(1987).

41. 29 U.S.C. §§ 2101–2109 (1994).

42. 42 U.S.C. §§ 12101–12213 (1994).

43. 29 U.S.C. §§ 2601–2654 (1994).

44. Patricia S. Wall, *A Survey of Unemployment Security Law: Determining Unemployment Compensation Benefits*, 42 LAB. L.J. 179 (1991) ("Today all states have adopted unemployment compensation programs to provide payments for workers who become unemployed through no fault of their own.").

45. *See* Maltby, *supra* note 17, at 110 ("Without question, if the model act were adopted, the number of cases would dramatically increase. Substituting a standard that required discharge to be based on just cause for employment at will with narrow exceptions would greatly expand the number of discharged employees with a legally meritorious case.").

46. Wall, *supra* note 44, at 184 ("The purpose of unemployment insurance is to partially replace wage during a limited period of unemployment."). Like workers' compensation insurance, unemployment insurance does not replace wages fully to avoid the problem of malingering. META does not address the problem of malingering and would permit an employee to collect up to three years' wages.

47. ROBERT HUGHES, CULTURE OF COMPLAINT: THE FRAYING OF AMERICA 9 (1993) ("The all-pervasive claim to victimhood tops off American's long-cherished culture of therapeutics.").

who can pick up, move on and build upon their experiences.

A most disturbing possible effect from enacting the META in its present form is the opportunity if not invitation to employers to engage in risk taking behavior since they would be insulated from so-called unpredictable awards.[48] If certain employers or certain industries are more prone to outrageous behavior, the trade-off of holding all employers to a good cause standard could arguably accrue to the benefit of those least likely to be affected by it.[49] To date, research indicates these possibilities have not been assessed.

Leaving aside the serious doubts as to the equitable nature of the trade-offs in META, the fact remains that, on the whole, META is an asymmetric response to the perceived problems in employer-employee relations which pits the employee against the employer. Interposing a "good cause" standard into the employment relationship does not address the legitimate concerns of employers with less than conscientious employees. It merely provides employees a right without assigning to them any concomitant responsibility.[50] Schwab cautions that the "good cause" standard presents problems of proof and that attempting to remedy opportunism by one party results in responsive behavior by the other.[51]

Because META provides that employers and employees can expressly waive the requirement of good cause termination on the condition that the employee receive severance pay as enumerated in Section 4(c) of the Act, employees can in effect hold employers ran-

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48. Maltby, *supra* note 17, at 109.

49. A relatively new insurance product, Employment Practices Liability Insurance, offered through Reliance National is a more targeted response to the perceived problem of unpredictable awards. Although insurance risks are pooled, the application for insurance suggests that the premium will depend on the adequacy of an employer's individual employment practices and claims history. META, on the other hand, does not distinguish between and among employers' practices.

50. PERRITT, *supra* note 14, at 188 ("Undoubtedly, nonunion employees would benefit most from expanded protection against wrongful discharge. Such protection would enhance their economic security without imposing any identifiable costs directly on them.").

51. Schwab, *supra* note 35, at 54 (summarizing Robert Scott's analysis of the effect of default rules in commercial relational contexts). Schwab concludes that, "[l]egal attempts to prevent opportunism by one side invite evasive responses from the other side. Certainly this is true for employment relations. Preventing employer opportunism by a just-cause standard invites increased employee shirking." *Id*. at 55. "[W]hen verification is hard . . . , a just-cause standard makes employers vulnerable to opportunism by shirking workers because the employer cannot verify to a court or arbitrator the reasons it suspects shirking." *Id*. at 56.

som.[52] One can hypothesize that potential abuse by opportunistic employees who near the end of their careers pose the threat of an ADEA suit. META does not purport to protect the employer from this or other employee opportunistic behavior.[53] The employer's substantial investment in the employment relationship should not go unrecognized.[54] If the alleged premise of META has merit, there is no justification for permitting an employee to sever the employment relationship without consequences. Further, nothing in the Act precludes an opportunistic employee from threatening to quit in order to secure a raise or benefit.[55] Once employees vest their rights under META, they can be virtually assured of continued employment or severance.[56]

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52. META, *supra* note 1, § 4(c):

> By express written agreement, an employer and an employee may mutually waive the requirement of good cause for termination, if the employer agrees that upon the termination of the employee for any reason other than willful misconduct of the employee, the employer will provide severance pay in an amount equal to at least one month's pay for each period of employment totaling one year, up to a maximum total payment equal to 30 months' pay at the employee's rate of pay in effect immediately before the termination.

Id.

53. *See* Richard A. Epstein, *In Defense of the Contract At Will, in* LABOR LAW AND THE EMPLOYMENT MARKET 3 (Richard A. Epstein & Jeffrey Paul eds., 1985). Epstein notes:

> Workers are not fungible, and sorting them out may be difficult: resumes can be misleading, if not fraudulent; references may be only too eager to unload an unsuitable employee; training is expensive; and the new worker may not like the job or may be forced to move out of town. In any case, firms must bear the costs of voluntary turnover by workers who quit . . . .

Id. at 30.

54. Schwab, *supra* note 35, at 42.

55. Epstein comments on the responses an employee may have in an at-will situation where the employer makes increased demands:

> As with the employer's power to fire or demote, the threat to quit . . . is one that can be exercised without resort to litigation. Furthermore, that threat turns out to be most effective when the employer's opportunistic behavior is the greatest because the situation is one in which the worker has least to lose.

Epstein, *supra* note 53, at 22–23. The threat to quit (under a META regime) could also be used by an opportunistic employee who makes a calculated decision that the employer's investment in him or her has not yet been recouped and thus he or she is likely to have an employer acquiesce to increased wages or benefits.

56. META, *supra* note 1, § 4(c) cmt. states:

> An employer may secure the power to dismiss an employee for any reason at any time, thus making the employment "at-will", if the employer gets the employee's agreement in an express writing that provides for a specified minimum graduated severance payment in the event of a termination on any grounds other than the employee's willful misconduct.

Competing interests are always at work. They cannot be legislatively eliminated. The imposition of a new system will result in new responses.[57] Employers will terminate employees prior to their rights vesting, will hire part-time employees and independent contractors, will hire fewer employees after more extensive screening,[58] or use contracts of specific duration.[59] The reporter acknowledges the conflicting nature of employers' and employees' interests. In fact, he states the Act is premised on the notion "that both employees and employers have valid, if sometimes competing, interests in the employment relationship which deserve legal protection."[60] While the existence of competing interests is self-evident, the parameters of these interests are not. St. Antoine summarily declares "[e]mployees are entitled to freedom from arbitrary treatment in the workplace. Employers are entitled to maintain efficient and productive operations."[61] These proclamations might not evoke controversy if the parties could mutually determine the extent of their reach. However, they cannot — at least effectively and to the same extent that collective bargaining might permit. Thus, META intensifies rather than alleviates the adversarial nature of these interests.[62]

Id. META, *supra* note 1, § 3(b) provides that employees are covered by the Act if they have worked for the same employer for one year.

57. EMPLOYMENT IN EUROPE — 1993, *supra* note 10, at 176–78.

58. Dertouzos & Karoly comment:

> Wrongful-termination liability is but one of several employment protection policies that would increase a firm's labor costs. The requirement for advance notice, the imposition of automatic worker severance pay, the experience rating of unemployment-insurance taxation, and the potential for litigation over unjust dismissal all would increase the expected cost of termination. Firms would be less likely to fire marginal employees. The ultimate employment effects, however, will depend upon what firms do to avoid the direct costs of the employment-protection policies.

DERTOUZOS & KAROLY, *supra* note 28, at 40–41.

59. META, *supra* note 1, § 4(d) ("The requirement of good cause for termination does not apply to the termination of an employee at the expiration of an express oral or written agreement of employment for a specified duration related to the completion of a specified, task, project, undertaking, or assignment.").

60. St. Antoine, *supra* note 20, at 370.

61. *Id*.

62. Although § 4 of META arguably provides opt-out provisions, their potential effectiveness is disputed. The Comment to § 4 is replete with qualifiers to ensure that resort to these provisions does not "circumvent employees' rights under the Act." Much controversy surrounds the adoption of some of the provisions which depending upon one's viewpoint can be considered "loopholes" or concessions. See Barry D. Roseman, *Summary of Model Employment Termination Act*, *in* 1992 WILEY EMPLOYMENT LAW UPDATE 229,

The Act's bestowal on employees of protection from arbitrary treatment reflects the proponents' belief that employees have a right to a job. To support this proposition the supporters cite, among other justifications, the rights of public sector employees not to be dismissed except for cause[63] as well as the psychological effects of termination.[64] However, neither argument supports their position. The impetus behind the rights afforded public sector employees is protection from arbitrary state action. If anything, this alleged justification would compel a contrary result. Laws jealously safeguard private enterprise and private rights in America. Regulations should not have the effect of blurring the public-private distinction. Likewise, signaling the psychological traumas of discharge skews the focus. If one were allowed to justify laws solely on the basis of protecting people from harm's way,[65] one could imagine the regulatory intrusiveness that would be justified under the guise of protection.

Advocates of the Act are using wrongful termination cases to justify imposing a social agenda controverting fundamental economic and psychological principles.[66] A "wrongful termination" does not

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238–42 (Henry H. Perritt, Jr., ed.) for a discussion of the exceptions and modifications of the Act which he finds to be troublesome. *See also Introduction to Wrongful Discharge*, ACLU Legislative Briefing Series No. 6, at 26–27 (1992) (discussing changes which should be implemented in §§ 4(c) & 4(I) of the Act).

63. *See* 5 U.S.C. § 7503 (1994) (stating that non-probationary employees cannot be removed except for "such cause as will promote the efficiency of the service . . . ").

64. St. Antoine, *supra* note 4, at 181 ("The results [of termination] can be devastating, and not just economically. Numerous surveys attest to the increases in cardiovascular death, suicides, mental breakdowns, alcoholism, ulcers, spouse and child abuse, and impaired social relations that follow the loss of a job.") (footnote omitted).

65. *See generally* Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982). Kennedy offers "[t]he single most important piece in the quilt of arguments in favor of ad hoc paternalism is the pervasiveness of compulsory terms, in contract, in tort and in statutory schemes." *Id.* at 645. I suggest pervasiveness as a justification is no defense of paternalism. It is appealing on a simplistic level to allege that paternalism is justified merely by its existence. However, that begs the question: why is it pervasive?

66. *See* Debra D. Cyranoski, Comment, *The Model Employment Termination Act: A Welcome Solution to the Problem of Disparity Among State Laws*, 37 VILL. L. REV. 1527 (1992) (discussing the arguments opponents of META are likely to raise).

> They [META opponents] might continue to argue that the Model Act thus unfairly imposes an obligation on the part of the employer to retain an employee unless there is good cause for a discharge, but imposes no comparable obligation on the employee's part.
>
> This view, however, contravenes social policy. An employer, by doing busi-

equate to a termination lacking just or good cause. Wrongful connotes illegality and thus the existence of a remedy. Terminations for no reason or bad reasons are, nevertheless, at-will, lawful terminations. These terminations, though, not wrongful, do not satisfy a "good cause" analysis and thus, would not be permitted unless the parties opted out of META.[67] Despite the fundamental distinctions between wrongful and without "just cause," proponents of META point to wrongful terminations in order to promote a regime premised on a notion of good cause. The reporter, not wishing to alienate employers, allows that "[m]ost companies undoubtedly strive to treat their workers fairly."[68] But, he quickly adds, "petty antagonisms can develop and faulty judgments can occur."[69] To transform the way seventy-five million Americans work based on the notion that they should be protected from ostensibly faulty judgments is a remarkable leap. Several disturbing conclusions can be drawn from the reporter's comments. First, that third parties should evaluate employers' termination judgments and that these third parties can ordain these employers' judgments to be faulty. A second cause for contention is that a faulty judgment is an offense that merits regulation. A third troubling consequence is that by dubbing antagonisms as "petty" employees can circumvent the imposition of discharge. The possibilities abound that employers' discretion to operate their businesses will be unjustifiably constrained. Just cause exegesis from arbitral literature offers no refuge to employers anxious to learn the new parameters.[70]

> ness with society, reaps great benefits and profits. In return, an employer owes a duty to society to treat employees, as members of that society, with dignity. Employees should not be merely discarded at the whim of powerful employers. The drafters of the Model Act recognized this social policy . . . . The good cause requirement thus serves as a socially desirable means of achieving uniformity in employment termination law.

Id. at 1554 (footnotes omitted).

The problem with this view is that it loftily espouses a nebulous duty owed by employers: to treat employees with dignity and somehow equates dignity with good cause. Employees as gratuitous grantees of this right to be treated with dignity do not have any duty ascribed to them.

67. META, *supra* note 1, § 4 cmt. ("Section 4 lists ways in which employers and employees may impose significant qualifications on statutory rights otherwise accorded employees.").

68. St. Antoine, *supra* note 4, at 181.

69. *Id.*

70. *See, e.g.*, PERRITT, *supra* note 14, § 9.30 (noting the difficulty in interpreting "cause" and "good faith" in the context of statutory wrongful discharge).

Just cause is an artifact that may work in a collective bargaining context but should not be imposed upon every employment relationship. Nothing at present precludes parties from negotiating a contract and thus removing the employment relationship from the at-will presumption. It is paternalistic to suggest that the sophisticated consumer is incapable of negotiating for him or her self. Richard Epstein, a defender of at-will employment comments "[i]t is simply incredible to postulate that either employers or employees, motivated as they are by self-interest, would enter routinely into a transaction that leaves them worse off than they were before, or even worse off than their next best alternative."[71] The fact is both parties prefer and benefit from the at-will arrangement. William B. Gould IV notes that both employers and employees exercise their prerogative to terminate the relationship equally: "[t]he quit rate and the layoff rate are roughly equivalent at twenty-four percent per year."[72] Because jobs are taken for a variety of reasons they do not all evoke the same level of commitment by employees who enjoy the mobility and flexibility the at-will relationship affords. It is not unusual in the modern two-career family for one spouse to follow another because of a transfer or better opportunity. The employee who would challenge an employer's insistence that he remain on the job does not hesitate to assert his right to quit for good reason, bad reason or no reason at all. To suggest that an employee is so naive as to believe he can quit at will but not be fired at will is disingenuous.[73] Because the relationship is at will, an employee does not have to justify his quitting nor would he sanction such intrusions into matters which he rightly considers his own business. META would likewise not restrain an employee's freedom to assert his or her at-will right to quit. On the other hand, META requires that the employer render a written reason for every termination.[74] This asymmetry of obligation does not bode well for employment relations. Employers are likely to be more circumspect in their relations with employees and employees are likely to be more flaunting of their newly be-

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71. Epstein, *supra* note 53, at 12–13.

72. William B. Gould IV, *The Idea of the Job As Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885, 893.

73. Epstein, *supra* note 53, at 11 ("An employee who knows that he can quit at will understands what it means to be fired at will, even though he may not like it after the fact.").

74. META, *supra* note 1, § 5(b).

stowed clout. Neither potential response promotes workplace efficiency.

Allowing intrusions into managerial discretion runs afoul of judicial and corporate deference to business judgment and is counterproductive.[75] Although proponents of META attempt to minimize its intrusion into corporate decisionmaking by underscoring the discretion afforded economically based decisions, the reality of intermeddling remains.[76] Terminations for other than economic reasons are subject to a good cause standard. Because the good cause standard is objective, all managerial decisions must potentially survive the biased scrutiny borne of the socially driven underpinnings of META. Employers must justify to a third party decisionmaker that the employee perpetrated the malfeasance and that the malfeasance merited termination.[77] The reference to arbitral literature demonstrates the difficulty in meeting this burden.[78] Viewing termination as industrial capital punishment, arbitrators reluctantly impose such an extreme remedy.[79] Neither META nor its proponents adequately address the ramifications of retaining marginal and undesirable employees. Of course, many of these marginal and undesirable employees might not be hired were it not for at-will employment, thus exposing another potentially detrimental effect

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75. St. Antoine, *supra* note 23, at 97 (acknowledging the arbitrary nature of the line drawing in determining coverage of the statute and the potential and intent to avoid "counterproductive intrusion into intimate personal relationships").

76. *Id.* ("The standard governing terminations for economic reasons is largely subjective. The only limitation is that an employer's business judgment must be bona fide, that is made in good faith.").

77. St. Antoine states:

> The review in the case of a particular employee is essentially objective. The official fact finder must determine whether the employee was guilty of the theft, assault, insubordination, excessive absenteeism, inadequate performance, or other alleged violation that was the basis of the discharge. In addition, was the offense serious enough to warrant dismissal?

Id.

78. *See* FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 661 n.60 (4th ed. 1985) (citing various arbitral references likening discharge to industrial capital punishment).

79. *See, e.g.*, Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972) ("A union must especially avoid capricious and arbitrary behavior in the handling of a grievance based on a discharge — the industrial equivalent of capital punishment."); *see also* Harold H. Schroeder, *Discharge: Is It Industrial Capital Punishment?*, ARB. J., Dec., 1982, at 65 ("Discharge is the ultimate penalty an employer can impose on an employee. It is often considered, by arbitrators and by advocates in arbitration, the equivalent of capital punishment . . . .").

which could flow from adopting META.[80]

Some supporters of META equate a job with one's sense of self or dignity.[81] Because a job is different from other relationships, they argue, governmental regulation is justified. Others view the personal nature engendered in one's work as a reason to limit intrusions.[82] Professor St. Antoine would sanctify the employment relationship by conferring upon it the stature of a "public right."[83] Aside from the new statutory creation, the legal justification for conferring this "right" is not cited. What can be gleaned from the context and impetus of St. Antoine's comments is that the "right" is paternalistically derived from notions of "fairness."[84] Commenting on at-will employment, St. Antoine asserts that "it [at-will] ill comports with other equally prominent traits among Americans, such as their open-handed generosity toward the less fortunate and their passion for fairness in the treatment of all persons."[85] The parallelism posited by St. Antoine is ill suited to the subject of employment

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80. Epstein, *supra* note 53, at 28 ("Where an employer might have been more willing to take risky employees under an at-will rule, he will now be less willing to do so under the for-cause rule because any subsequent demotion or dismissal will be an open invitation to a lawsuit by an aggrieved employee."). Whether the arbitral or judicial alternative of META is adopted, the costs are not limited to the procedural transaction. Employers have sunk costs as to each employee by virtue of recruitment and training which will have to be expended anew should the termination be upheld.

81. *See, e.g.*, Leonard B. Mandelbaum, *Employment At Will: Is the Model Termination Act the Answer?* 44 LAB. L.J. 275, 277 (1993) ("Health and other major fringe benefits are tied to employment. Psychological impacts may be severe since self-worth is usually involved."); *see also* Gould, *supra* note 72, at 892 ("It seems to me that the starting point for evaluation of these issues is the realization that in a modern industrialized economy employment is central to one's existence and dignity . . . . Along with marital relations and religion, it is hard to think of what might be viewed as more vital in our society than the opportunity to work and retain one's employment status."). No one is denying an individual an opportunity to work. The problem is that proponents of META and opponents of employment at-will would transform this opportunity into an inalienable right. Gould's analogizing a job to marital relations does not advance his proposition. Marital relations are by no means immutable. However, the right to choose is worthy of protection whether it be the freedom to choose one's partner or whether it be the freedom to choose where one works.

82. Epstein, *supra* note 53, at 10 ("If government regulation is inappropriate for personal, religious, or political activities, then what makes it intrinsically desirable for employment relations?").

83. St. Antoine, *supra* note 23, at 100 ("META would establish a new public right against wrongful discharge. Like any other public right, it should ideally be enforced by a publicly funded tribunal.").

84. *Id*. at 102 ("This could be one of those happy situations where the fair, humane approach is also good business.").

85. St. Antoine, *supra* note 4, at 180 (footnotes omitted).

relations. Talk about the "less fortunate" and "passion for fairness" prejudices and inhibits meaningful discourse. A world that speaks of rights and fairness but is silent on attendant responsibilities and reciprocity is fanciful.

It is troublesome that some of the more vocal advocates of META distort the realities to plead their case. For instance, a RAND study is cited for the proposition that business incurs hidden costs which may be one hundred times more than legal expenses and adverse judgments.[86] Not only is this statement alarmist, but it also misconstrues the research. In fact, this study is merely a survey of cases filed in California since the RAND researchers concede that more broadly based data is not readily obtainable.[87] Secondly, the RAND study estimates that the average direct legal cost per worker is only ten dollars (settlements and jury verdicts in wrongful termination cases).[88] While the "expected" legal cost of involuntary terminations is estimated to be at the most, $100 per termination.[89] Most important, however, is the implication that adoption of META will reduce these costs. In fact, unbiased research suggests less favorable predictions.[90]

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86. Theodore J. St. Antoine, *The Model Employment Termination Act: A Threat to Management or a Long-Overdue Employee Right, in* PROCEEDINGS OF NEW YORK UNIVERSITY 45TH ANNUAL NATIONAL CONFERENCE ON LABOR 269, 278 (Bruno Stein, ed. 1993) (citing DERTOUZOS & KAROLY, *supra* note 28, at 36–40). "In addition, a recent RAND study indicates that the `hidden costs' incurred by American business in trying to avoid this onerous litigation, including the retention of undesirable employees, may amount to one hundred times more than the adverse judgments and other legal expenses." *Id*.

87. DERTOUZOS & KAROLY, *supra* note 28, at 35 ("Although general information on case disposition is not readily available, a survey of cases filed in California indicates that the potential cost of these suits is quite high.").

88. Dertouzos & Karoly conclude:

> On an annual basis, these aggregate costs summed to over $50 million for California in 1987. However, it is important to recognize that these direct legal costs are trivial on a per-worker basis. A rough computation suggests that California has about 6 million employment-at-will employees. Thus, the average cost per employee is less than $10. Even if one considers the legal expenses on a per-termination basis, the costs appear to be insignificant. Involuntary terminations typically range between 6 and 12% of the labor force. So, the "expected" legal cost is, at the very most, $100 per termination.

Id. at 36.

89. *Id*.

90. Ellen Peirce et al., *Reactions to the Proposed Employment Termination Act*, 1 J. INDIV. EMPLOYMENT RIGHTS 19 (1992). The authors, pursuant to a grant funded by the Human Resource Management Foundation, conducted a survey to assess the reactions of human resource management professionals to the proposed Act. One of their findings was "over 63 percent of the respondents agreed that the act would create expensive bu-

The additional transactions and considerations of wrongful termination protection policies accrue labor costs.[91] Nothing in META suggests that preventative measures and costs will be eliminated. Employers will have more reason to be selective in hiring practices than presently since every termination of a META covered employee is subject to the requirement of a written statement of the reasons for the termination.[92]

The law amply permits recovery for those aberrant situations which merit the appellation of wrongful termination. However, the Act's imposition of a "good cause" requirement on employers, emasculates managerial discretion and business judgment. Every decision to terminate will be scrutinized. A "good cause" or "just cause" provision is an unjust intrusion on an employer's autonomy. The META reporter acknowledges that adopting META would result in "the loss of some degree of flexibility in the operation of a business."[93] However, he hastily ascribes this loss as stemming from "individualistic ideology or even social psychology [rather] than of genuine economic disadvantage."[94] What the reporter means by such vague descriptors as individualistic ideology or social psychology is not revealed. It is also unclear what he considers "genuine" economic disadvantage to be and at what point economic disadvantage becomes genuine.

At-will is the arrangement of choice and mutual convenience. The simple fact is that self interest motivates both employers and employees. Employees have the right to quit and choose to remain on a job for a variety of self-interested reasons. When their self interests are no longer served, they move on.[95] The employer must then find and train a replacement. Because a productive employee is

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reaucratic problems." *Id.* at 26.

91. *Id*. at 44 ("The risk of liability and the associated human-resource adjustments made to reduce this risk will increase the cost of labor inputs.").

92. META, *supra* note 1, § 5(b). "Except when an employee quits, an employer, within 10 business days after a termination, shall mail or deliver to the terminated employee a written statement of the reasons for the termination and a copy of this [Act] or a summary approved by the [Commission; Department; Service]." *Id*.

93. St. Antoine, *supra* note 86, at 272.

94. *Id*.

95. Schwab, *supra* note 35, at 12–13 ("Workers have many types of jobs and many types of relationships with employers. Younger workers typically try several jobs before beginning a long-term attachment to one employer. This variety of relationships may in itself counsel against a uniform legal approach to employment terminations.") (footnote omitted).

an asset, to dismiss him or her is contrary to an employer's interests, an economic reality acceded to by META supporters.[96] The employer's self interest is to maximize its profits. The employee's self interest is to maximize his or her wage. These interests are compatible and optimally served by at-will employment. Employers do not want productive workers to leave[97] and thus workers exert leverage to obtain higher wages. Each party's requests and concessions regularly adjust the balance between the employer's and the employee's needs. The judicially and legislatively derived doctrinal erosions of at-will employment respond to those minimal instances when the balance between employers' self-interests and employees' self-interests is destroyed. However, rather than delimiting the instances of controversy, META would transform every termination into a potential cause of action whereby an individual employee must be given a written reason for termination. The employee, on the other hand, would retain an unfettered ability to quit. A law which ignores the other half of the at-will equation, namely, the employee's right to quit, is inefficient and deleterious.[98]

Some defenders of good cause termination summarily dismiss the mutuality of the right to fire and the right to quit as a "discredited concept in modern contract law."[99] The "mutuality of obliga

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96. St. Antoine, *supra* note 23, at 94 ("Most employers do not set out to mistreat their workers. Apart from any loftier considerations, it is simply bad business. Poor morale hurts productivity, and replacing fired employees is expensive.").

97. Schwab comments:

> An employer hurts itself by arbitrarily terminating a productive worker or by causing him to quit because it wastes the recruiting and training investment in the employee. To avoid its own sunk-costs losses, an employer wants to keep good workers and fire only workers who fall below the standard of new entrants.

Schwab, *supra* note 35, at 25–26.

98. *See generally* Epstein, *supra* note 53; Cass R. Sunstein, *Rights, Minimal Terms, and Solidarity: A Comment, in* LABOR LAW AND THE EMPLOYMENT MARKET 97, 107; Sherwin Rosen, *In Defense of the Contract at Will, in* LABOR LAW AND THE EMPLOYMENT MARKET 39, 40–42 (Richard A. Epstein & Jeffrey Paul eds., 1985). All these essays address the efficiency of minimal terms and parties' expectations.

99. St. Antoine states:

> Defenders of the at-will principle may rely on the theoretical argument that any limitation on an employer's power to discharge for any reason must necessarily implicate the employee's "freedom to quit" [citing Epstein]. But that whole analysis pivots on the false equation of an employer's right to fire with an employee's right to leave. There is probably no more discredited concept in modern contract law than the unqualified requirement of "mutuality of obligation" [citing Corbin].

tion" argument they use to refute this, however, is inapt. The question is not one of mutual consideration but rather of terms both parties imply in their relationship and rely on ab initio. The focal point is the formation of the relationship rather than the point of disintegration. What do the parties understand their rights to be at the inception of their relationship? To allow either party to undermine this mutuality of understanding is counterproductive. "[T]he ex ante perspective serves as a guarantee that people will not be able to escape contractual obligations simply because the contract turned out to disadvantage them ex post."[100] The operative mutuality of understanding which fosters mutual respect and trust, essential elements in the employment relationship, is disserved by META's imposing a good cause standard on employers and allowing employees the ex post opportunity to waive it.[101]

Under META, an employee will have a disincentive to be productive. Once an employee's rights vest and an employer has made substantial investments in the employee, the possibility and probability for employee shirking increases. This is particularly applicable under a just cause standard.[102] With the added burden of having to demonstrate to a third party[103] the legitimacy of the termination, an

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St. Antoine, *supra* note 86, at 271.

100. Sunstein, *supra*, note 98, at 107. "Those principles [freedom of contract] are grounded on the assumption that, in a free market, each party who enters into an agreement believes that he or she will thereby be made better off. This suggests that contractual arrangements should be evaluated ex ante, not ex post." *Id*.

101. META, *supra* note 1, at § 4(c). "By express written agreement, an employer and an employee may mutually waive the requirement of good cause for termination, if the employer agrees that upon the termination of the employee for any reason other than willful misconduct of the employee, the employer will provide severance pay . . . ." *Id*.

102. Schwab comments:

> Once the employer has begun to make substantial, asset-specific investments in an employee, the risk of arbitrary firing diminishes. The greater danger of opportunistic behavior — at least, behavior that an appropriate dismissal standard could limit — comes from the employee's side. Because the employer does not want to repeat recruiting and training costs with another employee, the incumbent employee has an opportunity to shirk without fear of dismissal. Shirking at mid-career can occur even if the employer has the right to dismiss at will, but the shirking problem can be exacerbated if the employer must also surmount the hurdle of proving just cause.

Schwab, *supra* note 35, at 47.

103. St. Antoine, *supra* note 4, at 190 (noting that "[a]n objective standard applies, with the arbitrator or other factfinder making the ultimate determination").

employer may be less willing to terminate a marginal employee.[104] Therefore, the "hidden costs" of termination are not destined to be exposed under META.[105] The posited one year requisite to the vesting of the public right not to be terminated except for good cause affords an employer little protection from an erroneous hiring decision or from an opportunistic employee. Increasing the vesting time to two or three years will delay but not eliminate employees' opportunistic behavior. Schwab notes the courts on the whole have not recognized protections against midcareer arbitrary terminations and thus have responded, albeit impliedly, to the shirking problem of midcareer employees.[106]

Because under META retaining one's job is not merit-based, inefficient behavior is likely. META supporters will point to section 4(b) of the Act to discredit this hypothesis. However, the likelihood of 4(b) being a viable option for employers is dubious. The qualifications imposed on the setting of performance standards defeats their alleged utility. At the outset, the standards must be "business-related."[107] Thus, one can imagine the controversy that might attend the

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104. Todd H. Girshon, *Wrongful Discharge Reform in the United States: International & Domestic Perspectives on the Model Employment Termination Act*, 6 EMORY INT'L L. REV. 635, 704 (1992) ("[T]o the extent that just cause imposes an unrealistically rigorous standard of review, applied liberally to most employees through relatively short qualifying periods, as in the Canadian Federal sector, the statutory right could arguably translate into an institutionalization of mediocre performance.").

105. Dertouzos & Karoly proffer:

> Hiring expenses, the magnitude of anticipated dismissal liabilities, and the increased costs of documentation, review and performance evaluation will raise firm costs even if terminations do not actually occur . . . In the aggregate, these new expenses will vary as a function of employment; as a result, most existing firms can be expected, in the long run, to reduce labor utilization in favor of alternative inputs, such as capital.

DERTOUZOS & KAROLY, *supra* note 28, at 41. The authors also discuss the hidden economic costs of an unjust dismissal. *Id*. at 36–40.

106. Schwab, *supra* note 35, at 47–48 (noting the midcareer employee's opportunity to shirk and commenting that "[t]he courts seem to have intuited this fact by refusing, in general, to create contract protections against arbitrary terminations for midcareer workers").

107. META, *supra* note 1, § 4(b). The section provides that:

> By express written agreement, an employer and an employee may provide that the employee's failure to meet specified business-related standards of performance or the employee's commission or omission of specified business-related acts will constitute good cause for termination in proceedings under this [Act]. Those standards or prohibitions are effective only if they have been consistently enforced and they have not been applied to a particular employee in a disparate manner without justification.

application of specific standards to individual employees. Secondly, these standards are only effective to the extent "they have been consistently enforced and they have not been applied to a particular employee in a disparate manner without justification."[108] It is easy to imagine the challenges that will be raised and diversionary tactics used by enterprising individuals to avoid their application. A well-intentioned employer might forgo the pretense of control section 4(b) suggests, since to prevail an employer must ultimately demonstrate to a third party the efficacy of the standards as applied. In light of the comment to section 4(b), "[i]t is the intent of Section 4 not to allow so-called `contracts of adhesion' to be used to waive or otherwise circumvent employees' rights under the Act," the task might prove to be quite daunting.[109]

The behavioral inefficiencies likely to develop from the imposition of a good cause standard are replicated in government civil service with its analogous cause requirement for non-probationary employees.[110] The problem, however, of retaining incompetent employees cannot be as readily absorbed by smaller business.[111] External cues significantly affect and determine behavior. If employees know they will not likely be terminated because it will be difficult for their employer to demonstrate good cause (assuming the employer even resorts to termination), employees can indulge in shirking with somewhat reckless abandon. This is not to disparage human behavior or to signal undue alarm, but rather to reflect reality. The threshold to justify good cause termination under META may not be easy for employers to reach. Because dismissal is viewed as industrial capital punishment,[112] it is the discipline of last resort. Employment relations will thus be twice strained. First, employers

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Id.

108. *Id.*

109. META, *supra* note 1. See generally the comment to § 4 which discusses the qualifications on the statutory rights provided by the Act.

110. Girshon, *supra* note 104, at 677.

111. PHILIP K. HOWARD, THE DEATH OF COMMON SENSE 102–03 (1994). ("Trying to get rid of an inept federal employee, for example, is so difficult that most supervisors don't try."). Howard documents an unsuccessful attempt to discipline and discharge a non-performing civil service employee which definitely raises the specter of the inefficacy of imposing the good cause standard on virtually the entire workforce.

112. ELKOURI & ELKOURI, *supra* note 78, at 661 n.60.

may engage in more offensive behaviors and increase their monitoring and documentation of employees' behavior in order to meet the challenge of justifying a good cause termination, and second, employees left unchecked may expend the minimal effort necessary to avoid termination.[113]

META creates an unprecedented property interest in every job unless parties opt to contract around or out of it. This opt-out potential adds significantly and unnecessarily to transaction costs. The proponents of META endeavor to shame potential constituencies with statistics that claim the United States has been left behind by other industrialized countries in not abandoning the at-will doctrine.[114] Omitted from these bald assertions are distinctions within the various countries that make the claim irrelevant.[115] Likewise, the problems that ensue from implementing an unjust dismissal law and the responsive behaviors utilized by employers to avoid the

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113. Schwab, *supra* note 35, at 23 ("The heart of the employment-at-will argument is that proving cause under what is essentially an unverifiable agreement against shirking places too great a burden on employers, preventing them from effectively using efficiency wages to deter shirking.").

114. Peirce et al., *supra* note 90, at 20 ("The strength of the at-will doctrine in the United States is unique among western industrialized nations, all of which have abandoned the theory, including its originator, Great Britain."); Stanley M. Fisher, *Legislative Enactment Process: The Model Termination Act*, 536 ANNALS AM. ACAD. POL. & SOC. SCI. 79, 87 (1994) ("On 1 June 1993, 32 distinguished scholars, labor law professors, and industrial relations experts endorsed a legislative proposal that would `guarantee American working people a legal right that is already enjoyed by employees in every other major industrial democracy in the world."). It is interesting to note all 32 signatories are identified by their academic affiliation. The diverse interests allegedly represented appear to be overwhelmingly academically skewed, even accounting for the caveat on the proposal stating "[a]cademic affiliations are listed only for purposes of identification." The fact remains that much of the literature has been dominated by a corps of stalwart supporters for a period of almost 20 years. Clyde Summers' (who is Professor at the University of Pennsylvania Law School) article is often cited as focusing the academic inquiry. Clyde Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976). The reporter for META, St. Antoine, professor at the University of Michigan Law School, is an outspoken advocate as well.

115. *See, e.g.*, Fumito Komiya, *Dismissal Procedures and Termination Benefits in Japan*, 12 COMP. LAB. L. 151, 152 (1991).

> Fewer than twenty-five percent of all Japanese employees enjoy the benefits associated with such [lifetime] employment . . . . The implementation of a lifetime employment practice does not alone guarantee employment until retirement age. It is rather the expectation that the company will continue to employ these individuals and they, in turn, will continue to work for the company that makes the system work.

Id.

mandatory regulations are not cited.[116] Many of the countries lack a system of unemployment compensation[117] and thus, in these countries, unjust dismissal law addresses the concern of the displaced worker. These distinctions and problems pale, of course, before the most significant distinction between the United States and other countries — namely, the notion of private enterprise. The academic groundswell would do well to consider the broader implications of jumping on the bandwagon.[118]

META supporters urge that the use of arbitrators will promote predictability. The adoption of the standard of good cause resulted from the drafters' belief that "the more objective term [good cause] ensured greater predictability because of its long arbitral history."[119] Of course, if arbitration is not the option chosen, this alleged benefit would be lost. However, even if a state adopting META chose the use of professional arbitrators — the "preferred method of enforcement"[120] — significant unresolved issues remain. The promise of

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116. EMPLOYMENT IN EUROPE — 1993, *supra* note 10, at 176–79 (noting deregulation tendencies reflected in the expanded use of fixed-term contracts and temporary employment). Among the general conclusions is the observation:

> Increasingly the role of government in regulating the employment policy of firms and their working arrangements is likely to come into question in the Community, if the pressure for adaptability resulting from ever-increasing competition on world markets continues unabated. Job security has declined in virtually all sectors of the economy and even very large, established companies now find it difficult, if not impossible, to guarantee stability of employment.

Id. at 184.

117. Girshon, *supra* note 104, at 653 n.78 (noting that half of the 36 ILO members studied did not have unemployment insurance systems and that "[i]n many of these countries, severance payments awarded in wrongful discharge cases are made in lieu of unemployment insurance").

118. PERRITT, *supra* note 14, at 194 ("Imposing a just cause standard, however, can engender opposition on the ground that it would make private employment like public employment. Employees would enjoy something resembling civil service tenure. Such a standard represents a revolutionary change in the law of private sector employment."); *see* Barber, *supra* note 15, at 193 (noting, "[i]n recent years, however, substantial unemployment in Europe, for instance, has weakened some of the termination policies because of the belief that requiring employment termination to be `socially justified' was a disincentive to new employment"); *see also* EMPLOYMENT IN EUROPE — 1993, *supra* note 10, at 192 (predicting that the record of level of unemployment reached in 1985 (10.8%) could be surpassed by the end of 1994).

119. St. Antoine, *supra* note 4, at 190.

120. META, *supra* note 1, Prefatory Note ("Finally, the preferred method of enforcement is the use of professional arbitrators, appointed by an appropriate state administrative agency, instead of courts and juries. This should provide much speedier, more informal, more expert, and less expensive proceedings.").

predictability is inconsistent with the fact that arbitral awards typically lack precedential value.[121] Another hallmark of arbitration is that it affords the parties with a means of private dispute resolution evidenced by the fact that awards are not routinely published. Both of these arbitral characteristics detract from the thesis of predictability. Significant differences exist between the newly envisioned arbitral system and the collective bargaining context that is used to justify it. The trade-off of the new arbitral system is precisely the characteristic that is used to promote it: predictability.[122]

Besides predictability, arbitration is touted as providing "much speedier, more informal, more expert, and less expensive proceedings."[123] This statement is premised on the concept of private arbitration. Under META, however, arbitration would assume a different likeness. Robert Coulson, writing as President of the American Arbitration Association, laments some of the defects.[124] The Act's arbitration scheme would seem likely to result in arbitration administered, financed and staffed by a state agency. It is not likely that arbitrators would be selected by the parties, as is true in private arbitration. If such a law is adopted, arbitrators would probably be state employees or contractors, probably local attorneys, since they would have to know the state law of employment relations.

A more essential defect in the Act may be that it does not cover violations of state or federal antidiscrimination statutes. These are the more common and highly charged complaints as to terminations. They would, presumably, continue to be filed in court, subjecting employers to the jury trials they might like to avoid.

These observations underscore the deficiencies of META and confirm that META's defects would supplant problems rather than alleviate them. The promise of efficiency, upon examination, is illusory. Paul Tobias notes "[i]f the META provided a purely optional voluntary remedy, it might serve a useful purpose. However, its mandatory and preemptive features make it difficult for most em-

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121. Jay E. Grenig, *Stare Decisis, Res Judicata, and Collateral Estoppel*, *in* LABOR AND EMPLOYMENT ARBITRATION § 15.02 (Tim Bornstein & Ann Gosline eds., 1990).

122. PERRITT, *supra* note 14, at 197–98 (discussing the problem of arbitrators interpreting statutory terms outside the context of collective bargaining).

123. META, *supra* note 1, Prefatory Note (commenting that the preferred method of enforcement is professional arbitrators for the reasons cited).

124. Robert Coulson, *Will the Model Employment Termination Act Provide a Remedy for the Employment Discrimination Logjam?*, 2 J. INDIV. EMP. RIGHTS, 1, 5 (1993).

ployee advocates to support."[125] Aside from the academics and a small vocal corps of supporters, the virtues of the META have not been hailed by employee advocates, employers or legislatures.[126]

META advocates urge that META would provide a forum to those arbitrarily and unjustifiably dismissed. Zealous supporters of META herald the Act as championing the rights of the wrongfully or unjustly discharged who, according to the proponents, are "unprotected."[127] Stieber and Murray estimate that approximately 2.9 million at-will employees are discharged yearly and somewhere between 145,000 and 290,000 would be entitled to reinstatement.[128] The methodology and extrapolations to derive those numbers defy logic; yet Stieber and Rodgers take the Commissioners' incorporation of the estimate of 150,000 as validation of those figures.[129]

The notion of what is arbitrary and unjustified is assessed in the context of arbitrators reviewing dismissals subject to a "just cause" standard and thus does not provide a useful or valid basis for extrapolation. Though the at-will regime in theory permits dismissal for no cause each at-will termination *ipso facto* is not (yet!) unjust or "without just cause." Stieber and Rodgers have no problem in unqualifiedly concluding that decisions rendered for discharged nonunion employees who have the right to appeal will yield the same results as their union counterparts. Thus, they conclude that because approximately fifty percent of grievants subject to collective bargaining units are reinstated, fifty percent of those presently discharged at will would yield the same result.[130] This wholesale opti-

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125. Tobias, *supra* note 26, at 503.

126. St. Antoine notes:

> To date, META, or bills based at least in part upon it, have been introduced in about ten states. Quick or easy passage seems unlikely anywhere . . . .
>
> [C]ounsel for the AFL-CIO have expressed concern about META's acceptance of employer-sponsored alternative dispute-resolution procedures and about the possibility of federal preemption of state legislation. Union lobbyists have exhibited no enthusiasm for the bills that have been introduced around the country.
>
> Legal counsel for management . . . have not rushed to go on record in support . . . .
>
> Curiously, plaintiffs' attorneys are the most outspoken opponents of META.

St. Antoine, *supra* note 20, at 380–81.

127. Lewis L. Maltby, *The Decline of Employment At Will — A Quantitative Analysis*, 41 LAB. L.J. 51 (1990) ("There are approximately 150,000 workers in the United States who are unjustly discharged every year.").

128. Stieber & Rodgers, *supra* note 34, at 78.

129. *Id*.

130. *Id*. at 77.

mism is naive at best. Even if we conceded the validity of the estimates for the sake of argument, other problems are evident. Arbitration in collective bargaining is a unique phenomenon. Perritt identifies one such distinction. It involves the transfer of decisionmaking authority from employers that "may not be a problem in the collective bargaining context where union and management negotiators can change or make more definitive the basic document that arbitrators are interpreting."[131] This distinction is not the only one that makes the arbitral reference inapt. Nevertheless, Stieber is happy to note the 150,000 number is conservative despite its being erroneously premised on a static market[132] and his not allowing for distinctions that inexorably attend to non-collectively bargained arbitration. Stieber also fails to allow for employer and employee behavioral adaptations to the implementation of the new standard.

Forum access is quantitatively but not qualitatively expanded. Of the two million non-probationary, non-union, non-civil service employees discharged annually, the Commissioners estimate 150,000 to 200,000 would have legitimate claims under a good cause standard.[133] If this estimate were accurate, this would greatly increase litigation in the workplace. Nothing would confine the cases that were brought to those that were conceivably meritorious. Even if the 150,000 to 200,000 were an accurate predication, 100% of all terminations could be brought and most likely would be brought if the adopting legislature followed the reporter's admonition that the public right be publicly funded.[134] The value in having disincentives for bringing non-meritorious suits is obvious and defeated by META. The present system relying on the plaintiff's bar and a system of contingency fees provides a check and weeds out many, if not most, non-meritorious claims.

The proponents of META suggest that this is somehow unfair and every terminated employee should be afforded a forum. Premising new legislation on what is unfair is a dangerous precedent to embark upon. At some point everything is unfair to someone. Where does one draw the line? Furthermore, as previously discussed,

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131. PERRITT, *supra* note 14, at 206.

132. Maltby, *supra* note 127, at 51 n.3 (citing Stieber). "The number 150,000 is based on very conservative assumptions and should be taken strictly as a lower limit on the number of wrongful discharges." *Id*.

133. META, *supra* note 1, Prefatory Note.

134. St. Antoine, *supra* note 23, at 100.

unemployment compensation addresses the perceived "unfairness problem." Although state statutory schemes vary, generally speaking, employees who are dismissed with good cause attributable to the employer are eligible for benefits.[135]

The validity of the projected number of legitimate claims by Stieber is dubious. As noted above the decisional data is derived from the collective bargaining sector which does not allow for ready comparison, no less extrapolations. For one thing, the arbitral forum may be used by the union or employer for other than ostensible purposes (e.g., political ends). Also, prior to utilizing arbitration, unions and employers have access to a grievance procedure encompassing various stages and elaborateness. Thus, both the grievance machinery and the union operate to control and screen those issues brought to arbitration. Therefore, to premise and predict estimates of the number of legitimate claims that might be brought pursuant to a META regime, on the basis of numbers imported from the collective bargaining context, is spurious. Furthermore, because arbitration favors the privacy of the parties most decisions remain unreported. Analysis which relies on reported decisions alone is suspect and incomplete.[136]

The burden that ensues from creating a right is patent. The Fact Finding Report issued by the Dunlop Commission notes, "the annual rate of employee suits against employers [in 1991] was *five* times the number of twenty years earlier — and this was before the Americans With Disabilities Act of 1990, the Civil Rights Act of 1991, and the Family Medical Leave Act of 1993 had come into effect."[137] The Dunlop Commission Report further notes that "[w]hile a considerable portion of such government action potentially affords legal relief to employees with meritorious claims, every such action imposes legal costs on the targeted employers, many of whom turn out to be fully in compliance with the law."[138] The Dunlop Commission Report discusses the possibilities of reforming the enforcement

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135. *See generally* Wall, *supra* note 44.

136. Grenig, *supra* note 121, at § 15.05 ("[T]he total of all published awards represents a very small percentage of all decisions rendered and there is no assurance that what is published represents a true sample of all decisions rendered.").

137. U.S. DEP'T OF LABOR AND COMMERCE, FACT FINDING REPORT, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 112 (1994) [hereinafter Dunlop Commission Report].

138. *Id.*

mechanism for employment law through the use of alternative dispute resolution (ADR), among other options, but does not apparently question the efficacy of the surfeit of employment laws that account for the 430% rise in employment law litigation.[139] Similarly the Report and Recommendations decries the statistics.[140] While the objective of encouraging settlements through ADR is laudable, it becomes less attractive to a plaintiff if the opportunity for monetary compensation is present. This is confirmed by the fact discharged workers prefer damages to reinstatement.[141]

META mirrors the impetus that spawned the multitude of federal mandates enacted since 1981. A recent *Wall Street Journal* editorial listed twenty-seven statutes that were passed from 1981–1990.[142] Happily, this bias toward expansive regulation, with a noticeable lack of inquiry into its effects, appears to have halted. Unfortunately, regulations and their bureaucracies are not easily displaced. Fortunately, META has not yet been enacted in any state. Because META does not adequately address the problems it purports to identify, it would be ill advised for a state to adopt it. Tobias

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139. *Id.* at 113–14, 134.

140. *See generally* U.S. DEP'T OF LABOR AND COMMERCE, REPORT AND RECOMMENDATIONS, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 43 (1994) [hereinafter Dunlop Commission Recommendations]. A germane comment on the regulatory overview of employment law programs:

> Despite the fact that a number of recent statutes have encouraged alternative methods of dispute resolution in federal employment statutes, both administrative and judicial backlogs have sharply risen. The EEOC, for instance, reports an inventory of nearly 97,000 complaints in FY 1994. This figure represents a backlog of 18.8 months, a sharp increase from the prior year's 12.2 months.

Id. at 44 (footnotes omitted).

141. *See, e.g.*, Genevieve Eden, *Unjust Dismissal and the Remedy of Reinstatement*, 2 J. INDIV. EMP. RIGHTS 183, 196 (1993) (reporting the results of a study of arbitral decisions of unjust dismissal complaints in the nonunion sector under the Canada Labour Code and noting the tendency toward the award of monetary compensation). Eden notes, "from the information available, when discharged workers initially filed their complaints, they appeared to seek a remedy of monetary compensation more often than reinstatement." *Id*. She later suggests that "non-union workers may be less inclined to seek reinstatement given lack of union protection against possible reprisals by employers on their return." *Id.* The Canadian experience provides a useful insight into the viability of reinstatement, the preferred remedy of META. "Reinstatement is the preferred remedy for terminations in violation of this Act." META, *supra* note 1, § 7(b)(3) cmt. If META is unlikely to achieve the goal of reinstatement, the utility and compromise nature of META is even more suspect. The employee and the arbitrator appear to be the primary beneficiaries of the Act.

142. *Mandate Mania*, WALL ST. J., Jan. 9, 1995, at A14 (Editorial).

enumerates ten "flaws" he perceives in the Act.[143] Obviously, one person's flaw might be another person's ideal. However, the real obstacle that should preclude passage of META is that not only does it not deliver as promised, but adoption of the Act would do little to address the perceived flaws in current termination law.

In order to marshal support for the Act, META proponents point to the costs under the present system of retaining undesirable employees.[144] The implication is that these costs will be eliminated upon the adoption of META. However, the problem of inefficient employees will only be magnified under a META regime. Under META incompetent employees are entitled to severance. Nothing suggests that these incompetent employees would be precluded from obtaining unemployment compensation as well. Thus employers would subsidize their severance, their unemployment claims, and be burdened with the costs of retraining replacements. Further, the reporter urges that a new tax be levied to enforce the newly bestowed right against wrongful discharge, commenting that "[l]ike any other public right, it [a new public right against wrongful discharge] should ideally be enforced by a publicly funded tribunal."[145] While a tax may be a facile solution to propose, it is not a facile concept to implement, and an even a less facile reality to live with. The detrimental consequences likely to befall business from the imposition of another tax and another tier of regulation should not be minimized.

Furthermore, nothing in META suggests it will eliminate retention by employers of undesirable employees. On the contrary, the problem is compounded since every undesirable employee, by virtue of the conferring of a property right in his or her job, has a potential cause of action under META against his or her employer. Thus, costs will escalate, not decrease. Employers will utilize individual term contracts, to the extent possible, since META does not reach them, thus increasing transactions costs.[146]

The parties' use of waivers will have a particularly deleterious effect. First, waivers will subject an employer to claims of coercion.

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143. Tobias, *supra* note 26, at 500.

144. *See* Fisher, *supra* note 1, at 83 n.18 (citing a RAND survey which suggests the costs of retention of undesirable employees could amount to 100 times more than the adverse judgment and other legal expenses).

145. St. Antoine, *supra* note 23, at 100.

146. META, *supra* note 1, § 4(d) cmt..

The likelihood of this scenario is even touted by the reporter.[147] Second, even if a waiver is found to be knowing and voluntary, an employer is required to pay an employee severance pay unless an employee is dismissed for willful misconduct. Because incompetence does not equate with willful misconduct, and willful misconduct is not defined in the Act, the employer's loss is further compounded by the additional disputes and claims that may be brought pursuant to the Act.

Expanded arbitral review by the courts multiplies costs. Not only will more suits be brought, but with less deference to arbitral decisions as evidenced in permitting judicial review for prejudicial error,[148] more decisions will be subject to review. Likewise the provision of the Act that enables an employer to request a declaratory judgment regarding the existence of good cause imposes a transaction cost which thwarts marketplace efficiency.[149]

The focus of any legislation should be on codification and simplification rather than to foster further disintegration. Commenting on Congressional and states' legislative enactments over the past fifty years that have receded from at-will employment, Gould defines the present challenge: "to provide that the law mirror these societal developments in a sensible and rational way."[150] META fails to meet the challenge. A statute that imposes a new regime on seventy-five percent of the private workforce[151] is neither sensible

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147. St. Antoine, *supra* note 23, at 99–100 ("Despite understandable concerns about these waivers, well-accepted theories like economic duress and contracts of adhesion may enable the courts to remedy the worst abuses."); St. Antoine, *supra* note 20, at 377 ("Much as we prize freedom of contract in the abstract, industrial realities counsel against too ready an acceptance of employee waivers of statutory rights . . . . [I]n assessing any alternative scheme for disposing of claims, the courts should not only look closely for any coercion on the employer's part . . . .").

148. *See* META, *supra* note 1, § 8(c) (detailing the limits of the court's review of an award). Under the META, if the arbitrator committed a prejudicial error of law, an award could be vacated or modified by the reviewing court. This exceeds the court's usual review of arbitrator's decisions which is highly deferential; *see* Tobias, *supra* note 26, at 502 ("The META adds `prejudicial error of law' as a ground of appeal, which in effect destroys the argument that arbitration is a speedy process. Hotly disputed cases will undoubtedly be routinely appealed, thus adding an additional year or more to the process.").

149. META, *supra* note 1, app., see Appendix, Alternative A § 6(e) and Alternative B § 5(e) (allowing an employer to obtain a declaratory judgment regarding the existence of good cause).

150. Gould, *supra* note 72, at 917.

151. ACLU Legislative Briefing Series No. 6, *supra* note 62, at 2 (noting that about

nor rational.

Perritt urges that "[a]ny wrongful discharge statute should force all legal claims related to a discharge into a single proceeding, and should preclude relitigation of the discharge in any other forum."[152] A serious drawback of META is that while it preempts some common law tort and contract claims, claimants can utilize other forums to assert other claims, thus negating the purported benefit to employers.[153] This "legitimate grievance" of employers — namely exposure to multiple forums — is noted but dismissed with a summary comment that "at least META attempts to lighten the employer's burden by requiring arbitrators to respect the rulings made earlier in other proceedings."[154] The significance of the relief allegedly afforded by the META — respect for earlier rulings — is dubious in light of traditional arbitral precepts. These arbitral icons include the lack of precedential value afforded prior awards attributable in part from the private resolution of the dispute between the parties and the fact that opinions are not customarily published.

Proponents urge that META will provide uniformity to employment termination law.[155] However, because META is a model as opposed to a uniform act, adoption, if at all, can be selective, thereby defeating the alleged purpose of predictability and uniformity. The Commissioners apparently felt some pressure to complete their task of approving an act.[156] Thus a consensus could only be achieved for a Model Act. State legislatures do not have the same political or social urgencies. Reason and deliberateness must guide future legislation.

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60 million of the 80 million people employed in the private sector of the American economy are employed at will).

152. PERRITT, *supra* note 14, at 200.

153. META, *supra* note 1, § 2(e). This section states:

> This [Act] does not displace or extinguish rights or claims of a terminated employee against an employer arising under state or federal statues or administrative rules or regulations having the force of law [or local ordinances valid under state law], a collective-bargaining agreement between an employer and a labor organization, or an express oral or written agreement relating to employment which does not violate this [Act]. Those rights and claims may not be asserted under this [Act], except as otherwise provided in this [Act]. The existence or adjudication of those rights or claims does not limit the employee's rights or claims under this [Act], except as stated in Section 7(d).

Id.

154. St. Antoine, *supra* note 23, at 99.

155. Cyranoski, *supra* note 66, at 1529 ("The primary purpose of the Model Act is to provide uniformity in employment termination law among the states that adopt it.").

156. Roseman, *supra* note 62, at 232 n.8.

The Dunlop Commission notes the disintegrative approach that has characterized employment law to the present. "There has seldom, if ever, been a systematic overview of this statutory structure and the resulting detailed regulations and court interpretations that flow from employment law. Congress and its committees have considered the legislation piecemeal."[157] Whether state legislation or federal legislation is ultimately opted for, the goal of any legislation must be integrative.

If we continue to multiply rights, no one will need to be responsible.[158] We will be bankrupt both financially and morally.[159] Simply to declare a right to be enforced at public expense is irresponsible.[160] The national focus needs to be realigned to serve objective societal needs with a correlative distancing from the dissolute fragmented claims of a society of victims.[161] META fosters, rather than distances, the victimization impetus embodied by META to the ultimate detriment of society. Although conceptually a federal law might be appealing, a country premised on individuality should not unnecessarily impose broad regulatory regimes which impede enterprise and inhibit free markets.

Perritt eloquently and succinctly proposes the appropriate parameters of employee dismissal legislation.[162] The focus of any leg

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157. Dunlop Commission Recommendations, *supra* note 140, at 43.

158. HUGHES, *supra* note 47, at 10 ("In these and a dozen other ways we create an infantilized culture of complaint, in which Big Daddy is always to blame and the expansion of rights goes on without the other half of citizenship — attachment of duties and obligations."). See generally *id*. 1–18 for development of this proposition.

159. Howard comments:

> Rights have taken on a new role in America. Whenever there is a perceived injustice, new rights are created to help the victims. These rights are different: While the rights-bearers may see them as `protection,' they don't protect so much as provide. These rights are intended as a new, and often invisible, form of subsidy.

Howard, *supra* note 111, at 117.

160. St. Antoine, *supra* note 86, at 286–87 ("As a matter of principle, the new public right to be free from unjust dismissal, like any other public right, ought to be enforced at public expense.").

161. HUGHES, *supra* note 47, at 10 (commenting on the consequences to society from looking within one's self and quoting Goethe, "[e]pochs which are regressive, and in the process of dissolution are always subjective, where the trend in all progressive epochs is objective").

162. Perritt focuses the inquiry:

> The important policy question for employers, employee representatives, labor lawyers and the legislatures is not whether employer dismissal authority should be restricted. Such restriction has been increasing for fifty years and it is un-

islation should integrate judicial limitations and strive to balance competing needs and values. Although META crusaders speak of compromise, the Act is glaringly out of kilter. Society is disserved by passage of piecemeal legislation. META does not fulfill the promise of satisfactory compromise. To accede to legislation promoted by an insular and vocal sector is shortsighted.[163] Meaningful dialogue has to be promoted. Academics might provide useful oversight but should not determine the ultimate balance to be struck among those parties with substantive interests namely: employers, trade unions, non-union employees, defense and plaintiff's attorneys.[164]

Aside from serious reservations as to the desirability of another tier of regulation, the viability of enforcement presents an even greater problem. Even the reporter of META is wary of "a new permanent staff of civil servants."[165] The extent of the enforcement difficulties should not be underestimated. The Department of Labor [DOL] presently administers approximately 180 laws.[166] "Currently, there are approximately 20 major adjudication procedures and a considerable number of minor procedures in operation at the Department," to deal with the different enforcement and penalty structures of the various statutes.[167] The Equal Employment Opportunity Commission's (EEOC) backlog in 1994 was 97,000 cases.[168] The ADA's wholesale recognition of 43,000,000 disabled Americans has strained limited resources.[169] These statistics demonstrate the

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> likely to be reduced — although the wisdom of existing restrictions is likely to be debated. The important questions are: (1) how new restrictions should be integrated with old ones, and (2) whether it is feasible to strike the balance between individual liberties and economic interests on the one hand, and the societal need for efficient enterprise on the other, in a way that adequately provides for both.
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> So far, the dialogue about legislation has had too narrow a focus.

Perritt, *supra* note 40, at 66.

163. *Id*. at 70 ("There is only one group which seems strongly to support wrongful dismissal legislation of the type most frequently discussed: academic lawyers."); *see also* PERRITT, *supra* note 14, at 88 ("One group has strongly supported wrongful dismissal legislation for may years: academic lawyers.").

164. Perritt, *supra* note 40, at 70–72.

165. St. Antoine, *supra* note 4, at 195.

166. Dunlop Commission Recommendations, *supra* note 140, at 45.

167. *Id.*

168. *Id.* at 44.

169. St. Antoine, *supra* note 4, at 194; *see* 42 U.S.C. § 1981(a), Findings and Purposes; *see also* James H. Coil III & Charles M. Rice, *The Tip of the Iceberg: Early Trends in ADA Enforcement*, 19 EMPLOYMENT REL. L.J. 485, 486 (1994) (noting the

problems which result from enacting legislation without anticipating the real consequences.

The current political trend is to halt the escalating unforeseen effects and unwieldy administrative burdens of regulation. Numerous articles in recent months have appeared in newspapers documenting Congressional attempts to pass regulatory reform legislation. One article estimates the cost of current regulation at $6,000 per household.[170] META reflects the kind of runaway regulatory legislation that inhibits private enterprise. The enforcement alternative provided by administrative proceedings offered by the Commissioners attests to the fact that they do not fathom the inherent problems which flow from a beneficent bestowal of rights. Perritt notes the difficulties that an agency can have in coping with the number of grievances which inevitably result from creating free forum access.[171] The sheer volume of cases to be anticipated by creating this new public right to a job, while not the only problem, is not avoided by opting for the arbitral forum.

Without conceding the merits of additional regulation, a federal proposal might be a more compelling option.[172] A caveat, of course, is that any purported regulation must necessarily be circumscribed (and responsive to specifically identified market inefficiencies), since sanctioning increased federal intrusion into the workplace displaces individual accountability and responsibility and encroaches on private enterprise. A manifest flaw in META's approach to the per-

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EEOC received 16,050 complaints during the first 14 months the ADA was in effect — 17% of all new charges filed during the period causing "the agency to predict that ADA charges will ultimately constitute 30 percent of [its] caseload").

170. David McIntosh & Murray Weidenbaum, *Will Clinton Let Republicans Help Him?*, WALL ST. J., Feb. 23, 1995, at A14.

171. PERRITT, supra note 14, at 205 ("The earlier experience of the Equal Employment Opportunity Commission (EEOC) shows that a free administrative forum for employment grievances can become completely overwhelmed by the number of cases."); *see also* Coil & Rice, *supra* note 169, at 486 ("The high number of ADA charges is also a reflection of the difficulty employers are apparently having coping with the challenges encountered with this huge new pool of protected workers."). If META were enacted by all the states, it would arguably "protect" 1.74 times the number protected by the ADA.

172. Tobias advances the federal alternative:

> National legislation would ensure uniformity among the states. . . . It would enable litigants who have federal discrimination claims, `unfair' discharge claims, and closely related state common law claims to combine them in one action. A federal unfair discharge act, rather than state laws modeled after META, is a better solution to the problem.

Tobias, *supra* note 26, at 503.

ceived problem is that it endeavors to socially engineer and virtuously manage the workplace. In so doing, it evidences rather than mitigates the problem.

Exposing the weakness in META does not foreclose other possibilities. Schwab proposes an interesting solution that responds to the "extreme" situations evidenced by awards attracting media and academic attention. Under the rubric he proposes, good cause protection would not be a blank check to employees but rather protect them from opportunistic employers.[173] This delimiting of cause reflects the trend in current judicial decisions and thus would codify present law. Limiting the good cause inquiry to whether the firing contravened the life-cycle commitment or was opportunistic would comport with notions of fundamental fairness and justice. The provision would not simply add a right to the ever expanding arsenal of rights but would legislatively affirm judicial decisions and thus more accurately reflect societal values rather than transform them.[174]

Another avenue not meaningfully explored is the possibility of integrating legislation with the current unemployment compensation system to minimize bureaucracy.[175] Perritt briefly outlines the advantages of such an approach, noting "[t]he principal disadvantage of integrating unemployment compensation in wrongful dismissal adjudication is that most employers and most employment lawyers lack confidence in the quality of unemployment system adjudication."[176] Proposed legislation to date is premature, inefficient and problematic. The META does not adequately address the perceived needs and identified concerns of the constituencies affected.[177] The alleged virtue of META, that it reflects a compromise, is dubious. The compromise is, in fact, not an acceptable compromise. Aside

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173. Schwab, *supra* note 35, at 51 ("My point, in short, is that just-cause protection should be limited to an inquiry into whether the employee was fired in breach of the life-cycle commitment to pay seniority-based wages and benefits or for other opportunistic reasons.").

174. PERRITT, *supra* note 14, at 194.

175. Perritt, *supra* note 40, at 74 (discussing Professor Bellace's proposal to integrate wrongful dismissal protection with the unemployment compensation system to "avoid additional government bureaucracy, and relieve the courts of a flood of new cases").

176. PERRITT, *supra* note 14, at § 9.31. Chapter 9 provides an overview of wrongful dismissal legislative possibilities.

177. *See* Tobias, *supra* note 26 (discussing flaws in META); William L. Mauk, *Model Employment Termination Act Is Flawed*, TRIAL, June, 1991, at 28, 32 (discussing flaws in META).

from a corps of academics who have actively promoted META's virtues, other academics and observers suggest a more complete response to the problem of employee dismissal law.[178] The proffered options for enforcement procedures evidence the unacceptability of the compromise. A decision by a state to utilize a particular alternative would evince vastly different philosophies regarding the proposed reach of the remedy. Given the dichotomies that inure to the various alternatives, the efficacy of the solution is suspect. In fact, a state that chose the court system option, albeit the least favored option by the Act's supporters, would "lose" the Act's alleged benefits — namely — uniformity, predictability and cost effectiveness. The compromise may be a marketing strategy to attract the support of states with specific reservations and requirements which, but for the existence of these options, would not even consider adoption of the Act.

Surveying the recent literature, most notably law reviews and the Annals, the proponents of META signal an urgency regarding its adoption. The sense of urgency yields to caution and reason from those more removed from the scene.[179] Human resource professionals when queried about their perceptions of the Act's effects were less than enthusiastic about the intrusion into managerial prerogatives.[180] Robert B. Fitzpatrick, a frequent author and lecturer, comments "META, while a laudable effort to address the need for re-

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178. Perritt, *supra* note 40, at 66.

179. Peirce et al., commenting on the results of their study summarize their survey results as follows:

> In summary, human resource management professionals in our sample held relatively negative attitudes toward the proposed ETA [Employment Termination Act]. They saw the proposed act as weakening management, costly, and unlikely to promote job security or work force productivity. Drafters of the current proposal would be well-advised to pinpoint specific management objections and consider possible revisions to increase management acceptance.

Peirce et al., *supra* note 90, at 29.

180. Peirce et al., discussed their findings and conclude:

> The clear message from our survey results is that a majority of human resource managers do not see the proposed ETA as compatible with management's best interests. Perhaps their perceptions are shaped by the belief that the proposed act will significantly limit managerial prerogatives to terminate at will . . . . Survey responses suggest that human resource managers are unwilling to forgo the flexibility afforded by employment at will, in particular, if they perceive that states are limiting punitive damage awards in certain wrongful discharge lawsuits.

Id. at 28.

form, fails to strike the appropriate balance between the rights of individual employees and the needs of the business community."[181]

Perhaps the fear that the courts will address employers' concerns about the unpredictability of awards accounts for the perceived urgency in passing META.[182] It is curious that recent retrenchment in jury awards is cited by META proponents as an aberration.[183] The promise of predictability META holds out is less alluring if employers' fears of exposure to unpredictable awards are allayed by the courts. Even California, which hardly reflects the tenor of judicial decisionmaking in the United States, has retreated and confined the application of one of the three oft-cited doctrines eroding the doctrine of employment at-will. In *Foley v. Interactive Data Corp.*,[184] the court announced that good faith and fair dealing would be confined to a contract remedy versus the more expansive tort remedy, thus significantly reeling in the reach of the remedy.

While the supporters of META seize upon the sensational awards to solicit employer approval, they selectively ignore and criticize those decisions which do not reflect the social policy the META engenders.[185] The proponents conveniently dismiss and discount decisions which are not aligned with their position. Judicial incursions that have halted the unbridled application of the aforementioned doctrines are summarily attributed to the effects of employers' demolition of contract theories and courts shrinking from assuming activist roles in promoting the covenant of good faith and fair dealing.[186] The espousal of activism by META endorsers is, how-

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181. Robert B. Fitzpatrick, *Employment At-Will: Time for an Unjust Dismissal Statute, in* 2 ADVANCED EMPLOYMENT LAW AND LITIGATION 681, 687 (1994).

182. Maltby, *supra* note 127, at 53 n.14 ("[T]he recent decision in *Foley v. Interactive Data Corp.* restricting damages in unjust discharge cases based on the covenant of good faith and fair dealing to contract damages can be read as a sign that the pendulum has now started to reverse direction.").

183. Fisher, *supra* note 1, at 86 (citing Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988)).

184. 765 P.2d 373 (Cal. 1988).

185. St. Antoine, *supra* note 86, at 278 (citing the large jury verdicts and noting that "remedies against employers are too random and often excessive . . . ").

186. St. Antoine comments:

> Accordingly, even the most generally applicable exception to at-will employment — the contract claim — is a fragile vessel at best, very much subject to employer demolition. And over time the courts have tended to impose a variety of qualifications on its exercise. In addition, as a practical matter, policy declarations of just cause safeguards are likely to be confined to the more enlightened business firms . . . .

ever, selective and cause specific. When judicial activism would promote employee rights it is heralded.[187] Those courts which properly defer to the legislature are deemed timid.[188] There is tension, though, between this call to activism when it comes to repealing at-will employment and the promise of predictability and uniformity in the post META era of employment relations.

CONCLUSION

The deficiencies of current discharge law as enumerated by the Act's endorsers — lack of predictability, lack of uniformity and high costs[189] — are not ameliorated by META. Instead of providing a responsive and integrative solution to perceived defects in the at-will doctrine as applied, META proposes a regime that would compromise substantive claims, emasculate managerial discretion and beneficently bestow a cause of action to every employee subject to the Act. No system — court or arbitration — can bear to countenance the flood of claims likely to flow from the bestowal of the public right of "good cause" discharge on seventy-five million people. Society has yet to fathom the consequences of the most recent recognition of rights conferred by the ADA and the FMLA. Caution is well advised before any proposal — federal or state — is adopted.

Perritt succinctly states the legislative mission. "Simplification is in everyone's interest."[190] The recent Report and Recommendations issued by the Dunlop Commission echoes this sentiment.[191] The dissatisfaction over uncertainty and proliferation of remedies[192] that spurred the termination law debate lingers with META.

Id. at 276 (citations omitted). St. Antoine chides the judiciary, stating, "Most courts, like New York's, are going to shrink from being so activist as to transform the covenant [good faith and fair dealing] into an outright repealer of employment at will." *Id*. at 277.

187. *Id.* at 276–77.

188. *Id.* at 274–75.

189. St. Antoine, *supra* note 4, at 187.

190. PERRITT, *supra* note 14, at 190.

191. Dunlop Commission Recommendations, *supra* note 140, at 53 ("[T]here is a long-term need to review, codify and consolidate employment law and its administration.").

192. PERRITT, *supra* note 14, at 189.