

Comment on *Arm's-Length Intimacy:
Employment as Relationship*

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In *Arm's-Length Intimacy: Employment as Relationship*,¹ Marion Crain makes the following set of observations: People make reliance investments in marriage.² To some extent, family law protects such investments. Some states, for example, provide for equitable division of property upon divorce.³ Similarly, employees make reliance investments in their employer. Yet employment law—specifically through the doctrine of employment-at-will—does not protect employee reliance.⁴ Since work and family share similar investment features, Crain argues that the law should make employment law more like family law.⁵ Specifically, employment law might provide additional rights upon termination: such as hefty notice requirements, the ability of discharged employees in at-will states to sue for emotional distress damages, and even potentially granting employees the right to use firm-owned trade secrets developed during the course of their employment.⁶

Crain's Article is interesting and provocative. By locating similarities, it forces the reader to identify the ways in which work and family differ. In so doing, the paper is a welcome contribution to the literature. Despite these strengths, I think the Article has some weaknesses, which limit its broader applicability.

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1. Marion Crain, *Arm's-Length Intimacy: Employment as Relationship*, 35 WASH. U. J.L. & POL'Y 163 (2011).

2. *Id.* at 169.

3. For a review of the various kinds of termination rights available, see IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 325–53 (5th ed. 2010).

4. Crain, *supra* note 1, at 164–67.

5. *Id.* at 168–69.

6. *Id.* at 203–10.

The Article rests on contestable (and contested) assumptions about how labor markets work. Crain assumes that employers have all the bargaining power.⁷ Since employees face exploitation in Crain's framework, the natural questions posed are (1) what remedies can be applied to mitigate the problems of employees discharged without cause, and (2) why aren't these remedies applied in employment law when they are available in family law? But why assume that the employer exploits the relationship-specific investment by the employee rather than the employee exploiting the relationship-specific investment by the employer? After all, employers invest in workers. When an employee quits, any investment by the employer in that employee is lost. The employer must locate a replacement worker and start all over.

Symmetric application of Crain's proposal means that the employer should be protected from an employee quitting without cause. Maybe the law should force the employee to provide the employer funds for locating his replacement. My hunch is that Crain believes employers can protect themselves and, as such, don't need help from the law. By contrast, employees, Crain assumes, are the powerless party in the relationship. This conclusion flows directly from—and therefore depends on the validity of—the assumption about the distribution of bargaining power throughout the span of the work relationship, or, more specifically, the assumption that workers are the vulnerable party at the beginning, in the middle, and at the end of the relationship.⁸

In addition to contestable assumptions, why does Crain stop at employment law? The obvious next step under Crain's reasoning is to develop a general theory of relationship-specific investment recovery across the board. Imagine a son who takes care of his aging father. He gives up his career goals and provides medical attention and companionship. On his death bed, the father decides to cut the son out of the will, thinking that the son would simply waste his inheritance on foolish pursuits. The logic of Crain's proposal carries over. Maybe the father shouldn't be allowed to cut the son out of the

7. *See id.* at 206 (“Why shouldn't property law protect the more vulnerable party (the worker) who has invested in a relationship when the more powerful party ends it?”).

8. *Id.* at 199 n.161.

will without sufficient prior notice; maybe the son should be able to sue the estate for his “wasted” relationship-specific investment.

As a second example, take a person who volunteers at a church every weekend. The children in the community become attached to the volunteer’s Sunday school lessons. Suppose that the church changes its doctrine in a way the volunteer finds repugnant. Extending Crain’s proposal, does the churchgoer have to provide notice of his departure or else face legal liability? If not, why not? Stated differently, would the world be a better place if every relationship-specific investment triggered a robust set of termination rights for the party on the other side of the relationship?

Working through this series of examples provides a clue for why mandating robust termination rights in employment law might not be a good idea. Robust termination rights create stickier employment relationships and higher administrative costs to implement those protections. The critical question is whether the benefit in terms of protecting the worker’s relationship-specific investment outweighs these costs.

This question is especially salient because courts have already rejected much of Crain’s proposal when made via promissory estoppel claims by employees.⁹ And there is a good reason for this—the fear that every termination will generate a lawsuit. The bump in liability exposure makes labor relatively more expensive and, as a result, means that employers will hire fewer workers.

In short, Crain’s proposal would provide workers a more robust set of mandatory termination protections. It is unclear whether fewer workers with a more robust set of protections (including the ability to file a grievance over a failure to comply with the newly minted termination rights) is a better place than a world where workers have a weaker set of protections but more of them are employed.

I anticipate the objection that any mandatory benefit for workers whose cost is not completely transferred to workers through lower wages can, in effect, make labor more expensive and, as a result,

9. Robert A. Hillman, *The Unfulfilled Promise of Promissory Estoppel in the Employment Setting*, 31 RUTGERS L.J. 1, 2 (1999) (“[A]lmost half of the 299 promissory estoppel cases decided on the merits were employment cases, but employees won only six times, or 4.23%, of the employment cases.”).

decrease employment. As noted above, the relevant consideration is whether the social value of the mandatory benefits outstrips the cost.¹⁰ The answer to that question depends on the extent of the excessive relationship-specific investment employees routinely make. As to the magnitude of this problem, Crain does not offer any empirical evidence.

Part I of this Comment discusses whether the bargaining power assumption Crain uses is justified. Part II makes the slippery slope argument, asking whether it makes sense to layer a general theory of relationship-specific reliance remedies on top of the current legal system. Part III suggests that more choice might be best in both family law and employment law. The law might make both sets of behavior amenable to dual off-the-shelf alternatives, one of which protects reliance investments and one of which does not. That is to say, the law might allow parties to select up front the “reliance” package of termination rights or the “at-will” package of rights. Even with this choice (which already exists in employment law and in family law, to some extent, with the growth of covenant marriage), the default package will matter because many parties won’t bother to opt out. Here I suggest the current asymmetric treatment of employment and family law could very well reflect majoritarian preferences and, as a result, be the efficient default rule. Part IV concludes.

I. BARGAINING POWER AND HOLD-UPS

For a long time, economists have thought about investments in relationships.¹¹ When one party commits resources specifically to a relationship, they have more to lose if the relationship terminates. As such, the counter-party has an incentive to engage in a hold-up,

10. Note, in particular, that this is not a statement against mandatory terms as such, but rather a question about the benefit of these particular mandatory terms. It is well-known that mandatory terms can serve other social values (such as, for instance, principles of anti-discrimination). Mandatory terms can also be efficient by, for instance, preventing wasteful signaling. See Philippe Aghion & Benjamin Hermalin, *Legal Restrictions on Private Contracts Can Enhance Efficiency*, 6 J.L. ECON. & ORG. 381, 381–83 (1990).

11. See generally OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975); OLIVER HART, *FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE* (1995).

refusing to continue the relationship unless the investing party pays over a higher share of the gains from continuing to trade. Crain locates the root of the hold-up problem: relationship-specific investment that makes switching partners difficult.¹² As noted, she sees analogous potential for hold-ups in family law and employment law.

Economists, naturally I suppose, focus on the efficiency consequences of hold-ups. Fearing exploitation *ex post*, parties will be reluctant to make relationship-specific investments *ex ante*. The literature focuses on mechanisms parties can use to mitigate hold-up threats, such as relational contracts and the *ex ante* allocation of property rights.¹³

Crain discusses situations that are in some ways at odds with the economic model. In employment, she sees employees making investments without fully understanding that precisely those investments facilitate exploitation by the employer.¹⁴ In marriage, Crain focuses attention on one spouse committing to the joint cause, giving up their career for the family under the illusion that things will work out.¹⁵ Economists generally see too little relationship-specific investment; Crain sees too much.

The difference in conclusions stems from a difference in assumptions. Economists assume forward-looking, rational behavior.¹⁶ Parties anticipate the hold-up threat and react to limit their exposure to the threat. Crain sees a more complex calculation, part delusion, part healthy optimism, and part hope and wishes.¹⁷

That said, Crain's assertion of excessive reliance and the economic theory about underinvestment are not necessarily inconsistent. Pauline Kim, for example, finds empirical evidence

12. See generally Crain, *supra* note 1, at 164–66.

13. On using relational contracts generally, see W. Bentley MacLeod & James M. Malcomson, *Implicit Contracts, Incentive Compatibility, and Involuntary Unemployment*, 57 *ECONOMETRICA* 447 (1989). On using property rights, see Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 *J. POL. ECON.* 1119 (1990).

14. See Crain, *supra* note 1, at 170–71.

15. *Id.* at 173–74, 189–90.

16. On the economist's use of rationality, see Gary S. Becker, *The Economic Way of Looking at Life*, NOBELPRIZE.ORG, http://nobelprize.org/nobel_prizes/economics/laureates/1992/becker-lecture.pdf (last visited Mar. 29, 2011).

17. Crain, *supra* note 1, at 190–92.

suggesting that employees in at-will states believe they can only be fired for cause.¹⁸ Operating under this mistaken belief, it becomes rational for employees to invest in the employer. The reason is that the employee incorrectly perceives that the law provides some protection. The problem is not that employees fail to anticipate the hold-up problem, but rather that the decision is made under wrong assumptions about the legal consequences when the employer engages in such behavior.

But what if most, if not all, firms do not terminate employees without cause, even when they have the option to do so? We can hypothesize a number of reasons why this might be true. Arbitrary firing might reduce the morale of the other workers in the plant. Firing without cause sacrifices any investment the employer made in the worker. Firing without cause might make it harder to recruit new workers. Firing without cause could provoke litigation under, say, Title VII.¹⁹ And defending such a case is harder without some record of subpar performance, as opposed to reliance solely on right to discharge at will.²⁰

If relatively few arbitrary and unexpected discharges occur, it follows that employees' perception about protections in at-will states is consistent with actual firm practice, even if it is inconsistent with the law on the books.

Simply stated, we do not have any empirical evidence about the prevalence of random discharges, discharges unprovoked by inadequate performance, downturns in the business cycle, changes of ownership, etc. The solution Crain proposes (making employment law look more like family law) presupposes some significant set of cases where employees rely; this reliance makes them vulnerable; and firms exploit this vulnerability. The issue is how often this sequence of events happens. One can't look at litigated cases and conclude it happens a lot. The selection bias is too great. Since we

18. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110–11 (1997).

19. A full development of these arguments can be found in RICHARD A. POSNER, *OVERCOMING LAW* 306–09 (1995).

20. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (holding that “an employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person”).

don't have a way to gauge the extent of the problem, it is hard to judge the benefit from deploying legal remedies to solve the problem. And, making employment law mirror family law is not costless.

To see this, do the following thought experiment: Suppose that terminating an employee became as difficult as terminating a marriage. Divorce is messy, even with the advent of no-fault divorce.²¹ Usually, though not always, there are lawyers involved. Often the parties dislike each other, making the process even more unpleasant.²² A fired and jaded employee might file suit for a violation of the package of termination rights, even if no violation occurred. Wanting to avoid the headache, an employer might refuse to terminate anyone or, in the alternative, wait until the worker has performed so poorly that a cause-based firing could not be credibly challenged. The proposal thus weakens the firing threat, which dampens incentives for all employees to perform on the job.

II. A GENERAL THEORY OF RECOVERY FOR RELATIONSHIP-SPECIFIC/RELIANCE INVESTMENT

Reliance in relationships is ubiquitous. Children rely on parents; roommates and friends rely on each other; partners in a gay couple that is not allowed to marry make investments in their relationship; contractual parties deploy resources relying while the terms of the deal are still under negotiation; and community leaders learn skills that match up with the specific needs of their community, relying on the fact that they will continue to work in that community. Less seriously, we might say that a store owner who decides to stock a particular item to satisfy the needs of a specific customer has made a reliance investment, or that an organizer of a dinner party makes a reliance investment when he starts dinner, thinking that the guests won't cancel at the last minute.

21. See Crain, *supra* note 1, at 167 (stating with respect to marriage law that “[n]otice and waiting periods are standard fare at marital dissolution to ease the transition and encourage couples to salvage marital relationships, temporary support and alimony are available to dependent spouses, and fault is still relevant in many states”).

22. Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 42 WAKE FOREST L. REV. 441, 442 (2008) (“Many divorces, however, are quite acrimonious, and the parties often feel angry, betrayed, and vengeful.”).

All the relationships I describe above might be characterized as “at-will.” One can terminate a friendship without showing cause. A community leader can decide to up and leave his community without notice. For the most part, before offer and acceptance, either contracting party can walk away from a deal without incurring liability.²³ Gay couples can separate without filing for divorce. A customer can switch grocers, even if the grocer has stocked items solely to satisfy his needs. One is not legally compelled to provide notice before ducking out of a dinner party.

Why treat any of these relationships differently from the way we treat marriage? If Crain is right that family law and employment law should be treated the same, maybe the legal test should simply be whether reliance occurs that allows for hold-ups. If so, the context should be irrelevant.

For two reasons, I think context-based line-drawing is appropriate when one considers relationship-specific investment, holdup threats, and ex post exploitation. First, layering on a reliance remedy is costly. Claims must be processed to sort out fraudulent from meritorious claims. Second, being able to end a relationship hassle-free is a benefit. Imagine, as noted in the introduction, a world where every jilted friend could file a lawsuit or where notice was legally compelled before one could unexpectedly cancel on a dinner invitation.

I see the objection that my parade of examples is unrealistic. The clear response is that we should only allow for reliance-based remedies when (1) the reliance is consequential (a big deal), and (2) exploitation and hold-ups are common. Crain’s argument is that employment and marriage meet those conditions.

My point is that the context—family or work—is important because it is the context that evidences the likely extent of the problem. And so, per se rules based on context rather than a general reliance-based theory are preferable. If I am right, the question for

23. Despite the general presumption against pre-contractual liability, several scholars have shown conditions under which it might be desirable. See Lucian Arye Bebchuk & Omri Ben-Shahar, *Precontractual Reliance*, 30 J. LEGAL STUD. 423 (2001); Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481 (1996); Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249 (1996).

Crain is whether there exists systematically collected, empirical evidence supporting the proposition that the hold-up by employers of employees is a big problem.

III. CHOICE

Although marriage and employment share commonalities, there are differences. At the beginning of the relationship—at least on average, I suspect—one is more likely to love a spouse than to love an employer. And love might cloud one's judgment about potential hold-up problems. Given that spouses won't protect themselves *ex ante*, it might make sense for the law to provide protections *ex post*. Many employees, on the other hand, might view their job as a job, a place to earn a paycheck. What matters is not that some employees "love" their job like some spouses "love" their partner. What matters is the proportion of people who mistakenly commit specific resources to a relationship and, in so doing, expose themselves to possible exploitation. If relatively more people make this mistake in marriage than in employment (because marriage, on average, involves more emotional commitment than employment), family law termination protections should be more robust than employment law termination protections. Unfortunately, what these relative percentages are is an empirical question—and an empirical question that we don't know the answer to.

Even assuming that marriage and employment are the same, it does not necessarily follow that employment law should mimic family law. Maybe marriage law should mimic employment law instead. Perhaps marriage law should be divorce at-will, termination without any waiting periods or court documents or hassle, something even administratively easier than no-fault divorce.

And we might do better. Maybe the law should facilitate to a greater extent a range of check-the-box options for employment and marriage. In marriage, we might build off the covenant marriage idea. At the start of marriage, parties select which bundle of family law rights apply on divorce. People seeking to induce lots of relationship-specific investment could choose the "reliance-protection" package. Others could choose the "at-will" package. The reliance-protection package might fit couples that planned to privilege one spouse's

career. The at-will package might work better for couples anticipating two careers.

Employment law, of course, already offers a range of alternatives. As noted above, Crain's argument is that employers, where possible, select at-will employment, thereby maintaining the option of firing without cause. No employer ever selects the "for cause" alternative without being forced to do so. This line of reasoning is again based on the assumption that, in any employment relationship, employers have the bargaining power.²⁴ This assumption, at least to me, is not self-evident—at the very least it is not self-evident in every sector and for every kind of worker.

For example, in non-union firms, there exists heterogeneity in the kinds of health and pension benefits offered. If employers always have all the bargaining power, why don't all firms offer the stingiest benefits? Crain's assumption implies that there should not be any differentiation in benefits among firms. If firms have all the bargaining power, any firm that offered more generous benefits than their competitors could slash the benefits without losing existing or potential future workers. The employer who refused to do so would face higher costs and presumably have a tougher time surviving in the market.

Yet even with a more robust check the box system, the default makes a difference. Scholars recognize defaults matter because many parties won't bother to opt out. And, as is well-known, a majoritarian default eliminates the need for most parties to do so, saving on contracting costs.²⁵ Notably, a majoritarian default might generate much the same rules we have now, with family law, on average, offering more termination protection than employment law. The default choice might weigh (1) the harm from misfiring reliance and exploitative hold-ups, (2) the importance of an easy administration of termination, and (3) value that flows from reducing frictions or stickiness in the relationship. When factor (1) is relatively more important than factors (2) and (3), the default should protect the

24. See Crain, *supra* note 1, at 165–67.

25. Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1631–32 (2009); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989).

reliance. When factors (2) and (3) are relatively more important than factor (1), the default should be set at-will. It is unclear, but surely possible, that mistakenly placed reliance is more prevalent in marriage than in employment. Likewise, given that over a lifetime, most people will have many more employers than spouses, reducing the administrative cost of termination might tilt the default in employment toward at-will absent the violation of some other social value. Finally, we might not want employment relationships to be as sticky as marriage relationships because of the external benefits that flow from the movement of labor between employers.

In the end, I am not sure how to set the respective default rules for marriage and employment. My point is simply this: without more information, one cannot conclude that the current asymmetric setup is incorrect.

IV. CONCLUSION

As noted in the introduction, Crain's paper is interesting. It poses a good question. Without some empirical support for the assumptions underlying it (that firms have all the bargaining power; that employers routinely exploit employee reliance; that the administrative cost of granting additional termination rights are small relative to the benefit the additional rights will provide, etc.), it is hard for me to support a transformation of employment law into family law. Nonetheless, choice between different sets of termination rights is probably best for family and employment. More interesting, I suppose, is that the current defaults, which treat work and family differently, might actually be appropriate.