EMPLOYMENT AT WILL IN THE UNITED STATES: THE DIVINE RIGHT OF EMPLOYERS

Clyde W. Summers†

> Men must be left without interference . . . to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se.[1]

The Tennessee Supreme Court articulated the employment at will doctrine in 1884, thus endowing employers with divine rights over their employees. This doctrine has been, and still is, a basic premise undergirding American labor law. The United States, unlike almost every other industrialized country and many developing countries, has neither adopted through the common law or by statute a general protection against unfair dismissal or discharge without just cause, nor even any period of notice.

This distinctive aspect of American labor law is more than a minor oddity concerning protection from dismissal. Its tentacles reach into seemingly remote areas of labor law, for at its roots is a fundamental legal assumption regarding the relation between an employer and its employees. The assumption is that the employee is only a supplier of labor who has no legal interest or stake in the enterprise other than the right to be paid for labor performed. The employer, as owner of the enterprise, is legally endowed with the sole right to determine all matters concerning the operation of the enterprise. This includes the work performed and the continued employment of its employees. The law, by giving total dominance to the employer, endows the employer with the divine right to rule the working lives of its subject employees.

It is this assumption which gives American labor law much of its distinctive character. In other countries, employees are viewed as members of the business enterprise. In Germany, for example, the employee-elected works council has, in addition to representation on the supervisory board, codetermination rights over decisions such as work schedules, leaves,

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† Jefferson B. Fordham Professor of Law Emeritus, University of Pennsylvania Law School; J.S.D. 1952, Columbia; J.D. 1942, Illinois; B.S. 1939, Illinois; expertise in labor law and comparative law.

1. Payne v. Western & Atl. R.R., 81 Tenn. 507 (1884).

safety and health measures and guidelines for hiring, transfer and dismissal. If the employer and the works council cannot agree on these matters, the issues are submitted to binding arbitration.[2] In Sweden, the union must be consulted on "any matter relating to the relationship" between the employer and the employees.[3] This includes such matters as a decision to introduce new machinery, sell the company or hire a new managing director. In Japan, the union is consulted on nearly all matters of employee interest and employees are commonly referred to as "members of the family."[4] The general assumption underlying the employer-employee relationship in other countries is that employees are more than mere suppliers of labor. Rather, they are members or partners in the enterprise and are thereby entitled to a voice in the decisions of the enterprise which affect them. This variance in assumptions results in significantly different legal rules and labor relations systems.

There is clearly an ambivalence toward this fundamental assumption in the courts and legislatures of the United States; most labor legislation is intended to protect employees from employer indifference or oppression and the courts have developed some rules which limit employer absolutism. This generates much of the tension and confusion in American labor law and labor relations. To understand the American system, therefore, it is necessary to understand the doctrine of employment at will, its fundamental assumptions, and its ambivalence. More importantly, it is necessary to recognize where that fundamental assumption has shaped our labor law.

I. THE ROOTS OF EMPLOYMENT AT WILL

The English common law, as formulated by Blackstone, viewed the employment relation as a contractual relationship that bound the parties to a continuing relationship. The terms of the contract were those expressly or implicitly agreed to by the parties. According to Blackstone, where the parties did not specify the duration of employment, the law construed it to be a hiring for one year.[5] This presumption of yearly hiring could be rebutted by facts showing a different intent of the parties; different intent might be shown by customs of the industry or the length of pay periods.

The United States largely followed the English common law, but the

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2. *See* Worker Constitution Act, 1972, Sections 87, et seq. *See generally* M. WEISS, LABOUR LAW AND INDUSTRIAL RELATIONS IN THE FEDERAL REPUBLIC OF GERMANY (1987); C. Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 Am. J. Comp. L. 367 (1980).

3. *See generally* Clyde Summers, *Worker Participation in Sweden and the United States; Some Comparison from an American Perspective*, 133 U. PA. L. REV. 893 (1976).

4. Clyde Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT. L. REV. 129, 134 (1993).

5. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES 413.

presumption of annual hiring was not generally adopted. Courts looked to the facts and circumstances of each case to determine the parties' intent, with the most critical fact being the period of payment. Some courts held that where the pay was stated as so much a week, a month, or a year, there was a presumption that the hiring was for the period named.[6] Other courts rejected the use of any presumption and determined whether employment was at will on the basis of facts surrounding the contract. By 1870, the law in the United States was confused, with courts going in diverse directions.[7] In 1877, a treatise writer, Horace Wood, sought to distinguish the English decisions and resolve the contradictions in American law with a dogmatic declaration which is considered to be the source of the American employment at will rule:

> With us, the rule is inflexible, that a general hiring or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is on him to establish it by proof. A hiring at so much a day, week, month or year; no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve."[8]

Wood's Rule, by imposing a blanket presumption that all indefinite hirings were at will, misstated existing law. It explicitly rejected those decisions which held that there was a presumption that employment was for the period of stated pay and imposed the opposite presumption that such employment was at will. It also rejected those decisions where the court determined the intent of the parties without the weight of any presumption; instead, it imposed a blanket presumption of employment at will which no court had imposed before.

Wood's Rule did not win immediate acceptance. For example, in 1891, the New York Court of Appeals applied the pay period presumption, stating, "[i]n this country, at least, if a contract for hiring is at so much per month, it will readily be presumed that the hiring was by the month, even if nothing was said about the term of service."[9] However, four years later the same court, quoting Wood's treatise, held that an employee hired for a stated annual salary could be discharged in mid-year without cause.[10] Because of the prestige of the New York Court of Appeals, this decision

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6. *See* J. CHITTY, LAW OF CONTRACTS 532-34 (10th ed. 1876).

7. For a detailed study of the development of early American employment law, see Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: A Historical Analysis*, 5 COMP. LAB. L.J. 85 (1982).

8. HORACE G. WOOD, MASTER AND SERVANT § 134 (1877).

9. Adams v. Fitzpatrick, 26 N.E. 143, 145 (N.Y. 1891) (quoting SCHOULER'S DOMESTIC RELATIONS 698 (4th ed.)).

10. *See* Martin v. New York Life Ins. Co., 42 N.E. 416, 417 (N.Y. 1895).

gave credibility and dominant authority to the employment at will doctrine, and by 1930, the doctrine had become embedded in American law. The doctrine was accepted without question or discussion.

Why did American law take this turn? Various explanations have been proposed, but none are fully persuasive. It is argued that the rule was appropriate to *laissez faire* capitalism,[11] but a principle of limited government intervention can not explain why one presumption rather than another is to be imposed; neutral interpretation of the parties' intent would be more appropriate to *laissez faire*. The Marxian explanation is that most of the cases were brought by middle class managers and white collar workers. The at will doctrine enabled the capitalist owners to deflect the challenge of an emerging managerial professional class.[12] This scarcely explains why the rule persisted when the managers, not the owners, did the hiring and firing. It is suggested that the doctrine, when developed, reflected the dominant pattern of employment which was characterized by short-term employment, with workers constantly changing jobs.[13] But the plaintiffs in the cases were not day laborers; they were predominantly white collar workers who were commonly long-term employees. Nor does it explain why the doctrine stubbornly survived when employment became predominately long-term with vested interests in seniority, pensions and other accumulated benefits.[14]

Apart from these explanations, the premises of the doctrine are quite clear; the employer has sovereignty except to the extent it has expressly granted its employees rights. The doctrine thus expresses and implements the subordination of workers to those who control the enterprise. In the absence of a protective provision in the contract of employment—and only upper level managers have such contracts—workers are totally subordinate. Their terms and conditions of employment can be changed in any way at any time and they can be dismissed without reason and without notice.

II. JUDICIAL ELABORATION OF EMPLOYMENT AT WILL

Wood's Rule, as stated, was only a rule of contract interpretation, a presumption to be applied in interpreting the employment contract. It was not to be applied if, "from the language of the contract itself it is evident

11. *See* Mary Ann Glendon & Edward R. Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C. L. REV. 457 (1979).

12. *See* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

13. *See* Matthew Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733 (1986).

14. For a critique of the explanations offered to explain the development of the employment at will doctrine, see Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679 (1994).

that the intent of the parties was that it should at all events continue for a certain period or until the happening of a contingency."[15] The courts, however, have commonly ignored the presumption language and have enlarged the rule of interpretation into a substantive rule which overrides the parties' intent. Three sample cases are sufficient to illustrate this enlargement.

In *Skagerberg v. Blandin Paper Co.*,[16] the company sought to employ an engineer who had been offered a university professorship. The company promised that if he would reject the professorship, give up his business as a consulting engineer, move to the employer's location, and buy the retiring superintendent's house, he would be given "permanent employment" at a stated salary. The engineer agreed, rejected the professorship, gave up his business, relocated his family, and bought the superintendent's house. Two years later he was discharged without explanation. When he sued for breach of contract, the Minnesota court, in a semantic somersault, held that his employment was at will. The court's logic was simple:

> the words 'permanent,' 'lasting,' 'constant,' or 'steady' applied to the term of employment, do not constitute a contract of employment for life, or for any definite period, and such contracts fall under the rule 'that an indefinite hiring at so much per day, or per month, or per year, is a hiring at will, and may be terminated by either party at any time[17]

The court asserted that the fact that Skagerberg had rejected the professorship, given up his business, moved, and bought the superintendent's house, all in reliance on the employer's promise, added nothing because these actions in no way benefited the Company. The court did not weigh the facts or circumstances to determine the intention of the parties, nor did it apply a presumption. Rather, the court applied a rigid rule that "permanent employment" was "indefinite" employment and "indefinite" employment was, by definition, employment at will. The alchemy of judicial reasoning transformed "permanent employment" to employment at will for the employer and dissolved obligations of estoppel to the employee.

In *East Line & Red River Railroad Company v. Scott*,[18] the employee settled a personal injury claim against the railway in return for the railway's promise that he would have a job "for whatever length of time [the employee] might desire to retain such employment."[19] The Texas court

15. WOOD, *supra* note 8.
16. 266 N.W. 872 (Minn. 1936).
17. *Id.* at 877.
18. 10 S.W. 99 (Tex. 1888).
19. *Id.* at 100.

recognized that the contract gave the employee the right to fix any period, but because he had failed to fix a period prior to being discharged, the contract was indefinite and, therefore, at will. The choice of length of term allotted by agreement of the parties to the employee was thus transferred by the court to the employer.

In *Main v. Skaggs Community Hospital*,[20] the written contract stated that employment could be terminated for "just cause" by giving 60 day's notice. The Missouri court held that since the contract had no specified duration, it was at will and the employee could be discharged without just cause and without notice. Otherwise, said the court, the contract would create a prohibited "obligation in perpetuity." "Just cause" by judicial logic became "no cause."

These cases make clear that in cases of employment by contracts the courts do not apply the elementary principles of contract interpretation. Regardless of what the employer promises or leads employees to reasonably believe, unless the contract specifies a definite term, the employee can be discharged at any time, without reason and without notice. Because employment is rarely for a specified term, except for upper level management and some professional employees, the resulting legal pattern of employment in the United States is employment at will. Such a result betrays the court's underlying assumption that the employer should have absolute power over the employees' jobs; to reach that result, words will be twisted and the parties' intent ignored.

III. JUDICIALLY CREATED EXCEPTIONS

In the 1970's, some courts which were ambivalent about the divine right of employers began to devise various lines of reasoning to limit the harshness of employment at will. These exceptions had the potential to undermine the doctrine and its assumptions and to provide protection to many employees unjustly discharged.

One device was to circumvent the doctrine entirely by allowing at will employees who were discharged to sue in tort rather than in contract. In a path-breaking case, the California court held that discharge of an at will employee because he refused to commit perjury was contrary to public policy, and the employee could sue in tort for loss of wages, emotional distress, and punitive damages.[21] This public policy exception has been widely recognized by other courts. It has been used to protect employees

20. 812 S.W.2d 185 (Mo. Ct. App. 1991).

21. *See* Petermann v. Int'l Bhd. of Teamsters, Local 396, 344 P.2d 25 (Cal. Dist. Ct. App. 1959). *See generally* Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983).

who were discharged for serving on a jury,[22] for filing claims for workplace injuries,[23] for refusing to join in the employer's illegal practices,[24] for objecting to their superiors about legal violations,[25] and for reporting such violations to public authorities.[26] The exception has also been used to protect employees who have refused to lobby the legislature for legislation sought by their employer,[27] women who have rejected sexual advances of supervisors,[28] and employees who have refused to participate in games involving indecent exposure.[29]

The tort of intentional infliction of emotional distress has also been used to award damages to discharged employees when the discharge was made in an extreme and outrageous manner and caused severe emotional distress. Thus a 60 year old vice-president who was demoted to working in the warehouse to do menial work, such as sweeping and cleaning the warehouse cafeteria, could recover for ensuing psychological problems.[30]

Another device for limiting employment at will was to marshal ordinary contract principles in order to carve out exceptions to the rigid rule that an employment for an indefinite time is a contract at will. The first exception was the "handbook rule," which was articulated by the Michigan Supreme Court in 1980[31] and is now accepted in most states. When an employer distributes to its employees an employee handbook or policy manual stating various rules of conduct, procedures, and benefits, the handbook or manual becomes a part of the employment contract. If the handbook states offenses for which an employee may be disciplined, gives assurances that an employee will not be dismissed without cause, or provides procedures for disciplining employees, then any discharge which does not follow the handbook is a breach of contract. In the words of the New Jersey Supreme Court:

A policy manual that provides for job security grants an

22. *See* Nees v. Hocks, 536 P.2d 512 (Or. 1975).

23. *See* Frampton v. Central Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973).

24. *See* Peterson v. Browning, 832 P.2d 1280 (Utah 1992); Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985).

25. *See* Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980).

26. *See* Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859 (Mo. Ct. App. 1985); Field v. Phila. Elec. Co., 565 A.2d 1170 (Pa. Super. Ct. 1989).

27. *See* Novosel v. Nationwide Ins. Co., 721 F.2d. 894 (3d Cir. 1983).

28. *See* Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984).

29. *See* Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025 (Ariz. 1985).

30. *See* Wilson v. Monarch Paper Co., 939 F.2d 1138 (5th Cir. 1991). *See generally* Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 40 (1988).

31. *See* Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880 (Mich. 1980). *See generally* Deborah A. Schmedemann & Judi McLean Parks, *Contract Formation and Employee Handbooks: Legal, Psychological, and Empirical Analyses*, 29 WAKE FOREST L. REV. 647 (1994).

> important, fundamental protection for workers .... If such a commitment is indeed made, obviously an employer should be required to honor it .... [T]he judiciary, instead of "grudgingly" conceding the enforceability of those provisions, should construe them in accordance with the reasonable expectations of the employees.[32]

The handbook rule does little more than apply the basic contract principle that a person is bound by promises implicit in a course of conduct which creates reasonable expectations in the other party.

Another contractually based exception invokes the implied covenant of good faith and fair dealing, which in American law is an implied obligation in every contract. When a married woman who refused to date her foreman was discharged, the New Hampshire Supreme Court declared that "termination by an employer of a contract of employment at will which is motivated by bad faith or malice...constitutes a breach of the employment contract."[33] The California Court of Appeals, Second District went further to apply the implied covenant to all long service employees.[34] When an employee with eighteen years of service was discharged without cause, the court held that "termination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts."[35] Later a California court applied the covenant to protect employees with as little as seven years service.[36] A Montana court looked to the employee handbook, positive job evaluations, promotions, and oral assurances and found that the employee had an "objectively reasonable belief that he would be fired only for good cause."[37] His discharge without just cause violated the covenant of good faith and fair dealing which was "designed to prevent the abuses of unfettered discretion inherent in a situation of unequal bargaining power."[38]

In these cases, the courts held that a violation of the covenant of good faith and fair dealing was a tort with potentially large damages for awards for emotional distress, pain and suffering, and punitive damages.[39]

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32. Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1264 (N.J. 1985) (citations omitted), *modified*, 499 A.2d 515.

33. Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974).

34. *See* Cleary v. American Airlines, Inc., 168 Cal. Rptr. 722 (Cal. Dist. Ct. App. 1980).

35. *Id.* at 729.

36. *See* Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988).

37. Stark v. Circle K. Corp., 751 P.2d 162, 166 (Mont. 1988) (citation omitted).

38. *Id.* at 167 (citation omitted). *See generally* Monique C. Lillard, *Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context*, 57 MO. L. REV. 1233 (1992).

39. *But see* Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (overruling *Cleary*, 168 Cal. Rptr. 722, on damages).

IV. THE EXCEPTIONS CIRCUMSCRIBED

The development of these exceptions to the employment at will doctrine presented the prospect that the doctrine would became an anachronistic shell, and proposed statutes prohibiting dismissal except for just cause promised to sweep the doctrine totally away.[40] However, this did not happen. The exceptions were narrowly restricted and statutory proposals died aborning. The employer's divine right to dismiss at any time, for any reason, and without notice has survived with vigor.

A public policy exception has been grudgingly applied. In most courts, it is not utilized unless the public policy is clearly expressed in some statutory or constitutional provisions. When a salesman reported to company officials that a product he was selling created serious safety risks to purchasers and their employees, he was discharged as a troublemaker.[41] The court held that because there was no statute clearly mandating that the product be safe, the public policy exception did not apply.[42] Other courts have held that employees could be discharged for dating or marrying a fellow employee because no constitutional or statutory provision was implicated.[43] When an employer demanded, with the threat of discharge, that an employee divorce his wife because she was Catholic, the court could find no "clearly defined mandate of public policy that 'strikes at the heart of a citizen's social right, duties, and responsibilities.'"[44]

Even the presence of a statute or constitutional provision may not be enough. The discharge of a lobbyist for a defense contractor for publicly criticizing defense spending at a news conference was upheld; the constitutional protection of free speech, said the court, did not state a public policy for private employees.[45] In another case, an employee objected to his employer's racial discrimination by stating to a fellow employee, "[b]lacks have rights too."[46] Even though he was protesting the employer's illegal discrimination, he could be discharged for being too sympathetic to African Americans.

A state court may require that the public policy be found in the state's own laws. When an employee was discharged for refusing to falsify records required by federal food and drug law, the court held that this did

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40. *See, e.g.*, Alan B. Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, 44 INDUS. & LAB. REL. REV. 644 (1991); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for A Statute*, 62 VA. L. REV. 481 (1976).

41. *See* Geary v. United States Steel Corp., 319 A.2d 174, 175 (Pa. 1974).

42. *See id.* at 180.

43. *See* Patton v. J.C. Penney Co., 719 P.2d 854 (Or. 1986).

44. Frankel v. Warkwick Hotel, 881 F. Supp. 183, 186 (E.D. Pa. 1995) (quoting Novosel v. Nationwide Ins. Co., 721 F.2d 894, 899 (3d Cir. 1983)).

45. *See* Korb v. Raytheon Corp., 574 N.E.2d 370 (Mass. 1991).

46. Bigelow v. Bullard, 901 P.2d 630, 632 (Nev. 1995).

not provide a basis for the public policy exception under state law.[47] The state had no obligation to recognize policies of federal law even where there was a relevant federal statute.[48] In addition, the exception may be limited to those situations where the public's health and safety are affected; it may not apply if only the internal affairs of the employer are involved. Employees who have been discharged when they report to their superiors evidence of embezzlement, inflated expense accounts, theft, false record keeping, and kickback schemes of other employees have been denied recovery; these, said the courts, are purely internal company matters not directly affecting the general public.[49] The public policy exception has been whittled down, leaving most unjustly discharged employees with no remedy.[50] The courts, in deciding these cases, give no weight to the employee's interest in continued employment. If the public's interest is not involved, the employer can dispose of its employees as it pleases.[51]

Suits for intentional infliction of emotional distress are seldom successful. The tort is defined as conduct "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community."[52] Courts seldom find that the employer's conduct meets this standard. For example, when a doctor's secretary was brutally beaten and raped by her estranged husband, the doctor discharged her and retroactively canceled her health insurance.[53] The doctor told her that it was solely because she had been the victim of a violent crime.[54] The court held that this did not "rise to

47. *See* Guy v. Travenol Labs., Inc., 812 F.2d 911 (4th Cir. 1987).

48. *See id.*

49. *See, e.g.*, Adler v. American Standard Corp., 432 A.2d 464 (Md. 1981) (holding that no cause of action existed when an employee claimed wrongful discharge for reporting illegal management activities); Fox v. MCI Communications Corp., 931 P.2d 857 (Utah 1997) (deciding that wrongful termination for reporting possible criminal conduct by coworkers does not substantially violate public policy); Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988) (holding that an employee's discharge for reporting possible embezzlement did not violate public policy).

50. Not all courts are so niggardly in applying the public policy exception. An employee who was discharged for refusing to engage in "mooning" at a company picnic was protected because this violated the statute against indecent exposure. *See* Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025 (Ariz. 1985). The discharge of an employee who refused to have sexual relations with a foreman violated the public policy of the statute against prostitution. *See* Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984).

51. The courts do not apply the basic tort principle that intentional injury is prima facie evidence of tort and creates liability unless justified. The unspoken logic may be that there is no injury because the employee has no interest in his job, or that "the king can do no wrong."

52. RESTATEMENT (SECOND) OF TORTS § 46 (1965) (citation omitted).

53. *See* Green v. Bryant, 887 F. Supp. 798, 800 (E.D. Pa. 1995).

54. *See id.*

the level of outrageousness necessary to support a claim."[55] Similarly, in a New York case, an auditor with 23 years of service reported to officers of the corporation that some managers were falsifying records so as to claim large bonuses.[56] He was rewarded by being discharged, publicly escorted from the building, and his belongings taken from his locked desk and dumped on the street beside him. The employer's conduct, said the New York court, "fall[s] far short of [the] strict standard" required by the Restatement of Torts.[57] In another case, an employee was harassed by her supervisor, suspended in front of customers and fellow employees, demoted to a position under a person she had supervised, and received an $11,000 salary cut.[58] As a result of her emotional trauma, she was hospitalized and unable to return to work. The court set aside a jury verdict on the grounds that this did not reach the level of "outrageous" conduct. The dissenting judge observed that "[t]he message that comes through . . . is that the tort of intentional infliction of emotional distress does not exist in the employer-employee context."[59] These cases lay bare the courts' conceptions of how employers are entitled to treat their employees.

Similarly, the handbook rule has given much less protection than first promised. Although it was directly contrary to the employment at will doctrine by protecting employees with indefinite terms, it has not been extended to cases where other forms of assurance of continued or permanent employment exist. Instead, it has been limited to cases in which the employer has distributed a handbook or policy manual. Even this protection has been seriously undercut by allowing employers to escape contractual liability by including in the handbook a disclaimer provision such as: "This Employee Handbook is not intended to create any contractual rights in favor of you or the Company," or "Employment may be terminated at any time, with or without cause and without notice."[60] Although some courts require such disclaimers to be conspicuous and in larger print,[61] others have not. A disclaimer in ordinary type on the last page of a fifty-three page handbook was held sufficient to negate any

55. *Id.* at 802.

56. *See* Murphy v. American Home Prods. Corp., 448 N.E.2d 86, 87 (N.Y. 1983) (finding that plaintiff did not state a valid cause of action for intentional infliction of emotional distress).

57. *Id.* at 90.

58. *See* Kentucky Fried Chicken Nat'l Mgmt. Co. v. Weathersby, 607 A.2d 8 (Md. 1992).

59. *Id.* at 24.

60. *See generally* Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 INDUS. REL. L.J. 326 (1991).

61. *See, e.g.*, Nicosia v. Wakefern Food Corp., 643 A.2d 554 (N.J. 1994) (finding that a disclaimer must be placed in a prominent position); Dell v. Montgomery Ward & Co., 811 F.2d 970 (6th Cir. 1987) (holding that a "sign off sheet" explaining the terms of employment was sufficient to alert an employee to his at will status).

protection by provisions in the handbook.[62]

Developments in Michigan, whose supreme court gave birth to the handbook rule in 1980, dramatically illustrate the unfulfilled promise held out by this exception to the employment at will doctrine. In 1991, the Michigan Supreme Court cut the legs off the handbook exception by expressly limiting its earlier decision to its specific facts and holding that the listing in the handbook of certain offenses as cause for dismissal did not preclude dismissal for other reasons.[63] It upheld the discharge of an eight year commission salesperson for an unexplained absence despite the employers assurances that as long as salespersons generated sales and were honest, they would have a job. Another decision held that a statement in a printed form signed by an employee when applying for a job which stated that employment could be terminated with or without cause or notice overrode the handbook that was subsequently given to the employee and deprived it of any binding effect to protect the employee.[64] In addition, an employer could revoke any promise of job security by simply issuing a new manual with a disclaimer clause.[65] As a practical result, in Michigan, it is the handbook rule, not employment at will, which has become an empty shell.

The covenant of good faith and fair dealing held the greatest promise of giving protection, not only to long service employees, but to other employees who reasonably believed they would not be unjustly discharged.[66] The covenant however, has been effectively applied in employment cases only in Alaska, California, Delaware, Idaho, and Montana.[67] It has been expressly rejected in other states as inherently inconsistent with the doctrine of employment at will.[68] California, which was the leader in applying the doctrine, has severely limited it. First, the California Supreme Court held that recovery could not be in tort, but only in contract with its lesser damages.[69] Then, the court held that an employer

62. *See* Anderson v. Douglas & Lomason Co., 540 N.W.2d 277 (Iowa 1995) (holding that a company handbook does not create contractual rights).

63. *See* Rowe v. Montgomery Ward & Co. Inc., 473 N.W.2d 268, 275 (Mich. 1991).

64. *See* Reid v. Sears, Roebuck & Co., 790 F.2d 453, 461-62 (6th Cir. 1986) (applying Michigan law).

65. *See* Scholz v. Montgomery Ward & Co., 468 N.W.2d 845, 849 (Mich. 1991) (holding that a signed disclaimer overrode an earlier conversation whereby the employer agreed not to terminate the employee because she could not work on Sundays).

66. For a discussion of these cases, see Lillard, *supra* note 38.

67. *See id.* at 1259. It states that fourteen states used it "in some form," but acknowledges that this is a generous characterization. *See id.* at fn. 155. An examination of the cases she describes in her Appendix confirms her generosity. Only the five states mentioned clearly relied on the covenant of good faith to hold a discharge wrongful.

68. *See, e.g.*, Murphy v. American Home Prods. Corp., 448 N.E.2d 86, 92, 58 N.Y.2d 293, 305 (1983).

69. *See* Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988).

need not show that there was in fact good cause for discharge, but only that it acted in good faith.[70]

What has emerged is that judicially created exceptions to the rigid employment at will doctrine, which had the potential for providing employees, especially long time employees, with substantial protection from unfair dismissals, have been so grudgingly applied by most courts, that they are little more than paper shields against arbitrary employer actions. The dominant judicial perspective is that employers should have unfettered freedom to determine who should be employed and that workers are subordinate to the employer's decisions—however arbitrary they may be.

This, perhaps, paints too bleak a picture, for there is a marked ambivalence in the law. First, not all courts have so grudgingly applied the exceptions. In California, the courts have, at times, liberally applied one exception after another so that employers complained of the many and costly judgments won by employees.[71] In Montana, employers confronted with large damage awards for violations of the covenant of good faith sought refuge in a statute which prohibited discharge without just cause, but limited damages to lost wages.[72] Second, since 1890, unions have negotiated collective bargaining agreements which prohibit dismissal without just cause. By 1950, over ninety percent of all collective bargaining agreements included such provisions. These clauses, liberally interpreted to give employees effective protection, have been regularly enforced without question through arbitration and the courts. However, it must be noted that less than ten percent of private sector employees are protected by collective agreements.[73] Third, statutory exceptions are commonplace. The National Labor Relations Act of 1935 prohibited all discrimination in the employment areas of hiring, promotion, work assignment, and dismissal because of union activities.[74] The Civil Rights Act of 1964 similarly prohibited discrimination because of race, creed, nationality, and sex,[75] and now discrimination is prohibited because of age[76]

70. *See* Cotran v. Rollins Hudig Hall Int'l, Inc., 948 P.2d 412 (Cal. 1998).

71. *See* J. DERTOUZOZ ET AL., THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION 26-27(1989) (stating that in tort actions a wrongfully discharged employee can recover damages for emotional distress and punitive damages. In cases discharged employees won in California, the median damages award was $177,000, with the ten highest recoveries averaging nearly $4 million).

72. *See* Jonathan Tompkins, *Legislating the Employment Relationship: Montana's Wrongful-Discharge Law*, 14 EMPLOYEE REL. L.J. 387 (1998).

73. *See* U.S DEPT. OF LABOR, *Bureau of Labor Statistics News Release*, Jan. 19, 2000.

74. *See* National Labor Relations Act, 49 Stat. 449 (1935) § 8(3) (current version at 29 U.S.C.A. § 158 (1999)).

75. *See* Pub. L. No. 88-352, 78 Stat. 253, § 703 (1964) (current version at 42 U.S.C.A. § 2000a et seq. (1999)).

76. *See* Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1999).

and disability.[77] In addition, dozens of federal and state statutes have clauses prohibiting retaliation against those who seek to enforce a statute, complain of violations, or testify in proceedings under a statute.[78]

The near universal acceptance of just cause protection in collective agreements, where they exist, and the multitude of legislatively mandated exceptions to employment at will, sharpen the question, why does this doctrine from the nineteenth century still have such resonance in the courts today?

This may be explained as an example of judicial lethargy, an unwillingness to upset existing precedent. The New York Court of Appeals flatly rejected all tort and contract exceptions as devices to circumvent "established doctrine," stating that "such a significant change in our law is best left to the Legislature."[79] But it was the New York court's reversal of its own decision and adoption of the employment at will rule that gave impetus to its general acceptance. In other areas of the law, the New York court has frequently upset long-settled rules. Moreover, other courts demonstrated a willingness to innovate by creating exceptions, but instead of generously expanding them, niggardly constricted them.

The courts are not alone in continued acceptance of employment at will. Legislative proposals to prohibit discharge without just cause have been introduced in many states and in Congress during the last twenty years, but only Montana has adopted such a statute.[80] In 1991, the Commissioners on Uniform State Laws, the same group that produced the Uniform Commercial Code, recommended a Model Employment Termination Act for state legislation, but no state legislature has seriously considered, much less, adopted it.[81]

The question, now more broadly stated, is, why does employment at will have such survivability in American labor law? Employment at will draws its strength from the deeply rooted conception of the employment relation as a dominant-servient relation rather than one of mutual rights and obligations. The employer, as owner of the enterprise, is viewed as owning the job with a property right to control the job and the worker who fills it. That property right gives the employer the right to impose any requirement on the employee, give any order and insist on obedience, change any term of employment, and discard the employee at any time. The employer is sovereign over his or her employee subjects.

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77. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-14 (1999).

78. *See generally* M. Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REFORM 277 (1983).

79. Murphy v. American Home Prods. Corp., 448 N.E.2d 86, 89, 94 N.Y.2d 293, 301 (1983).

80. *See* Tompkins, *supra* note 72.

81. For discussion of this proposal, see Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361 (1994).

V. OTHER MANIFESTATIONS OF EMPLOYER SOVEREIGNTY

To be sure, this conception of the employment relation does not dominate all of American labor law. Countless statutes and courts have created rules to curb employer absolutism. But perpetuation of employment at will, with its toleration of injustice, signals the continued presence of a deep current in American labor law. This conception of the employment relationship and its underlying assumptions surfaces at a number of points, giving American law some of its unique characteristics. A few illustrations should suffice.

(1) The National Labor Relations Act, in section 8(a)(50), expressly prohibits an employer from discriminating in employment to encourage or discourage membership in a union. In the *Darlington*[82] case, the employer bitterly opposed the union's organizing efforts and threatened to close the mill and go out of business if the employees voted for union representation. When the union won the representation election, the company made good on its threat, closing the plant and dismissing hundreds of employees. The Supreme Court held that the employer had the absolute right to go out of business, even though motivated solely by its dislike of unions and its desire to punish the employees for joining the union. "A proposition that a single businessman cannot choose to go out of business if he wants to," said the Court, "would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent."[83] The explicit words prohibiting the employer from discriminating against its employees because they supported the union were not enough. The Court thus held that an employer, with the meanest motive, with maximum pain to its employees, and with the most vivid object lesson to workers generally, could discharge all its employees, liquidate the assets, and carry away the cash to invest elsewhere. The Court reached this result by reading into the statute a strong presumption of employer unilateral control and absence of any employee stake in the enterprise. The assumption undergirding employment at will overrode the explicit statutory protection.

(2) The National Labor Relations Act requires an employer to bargain in good faith with the majority union "with respect to wages, hours, and other terms and conditions of employment."[84] The statutory intent was to give employees a voice in matters which directly affected them. In *First National Maintenance*,[85] a multi-establishment employer closed one of its establishments without any notice or discussion with the union representing its employees, dismissing all thirty-five employees. The Supreme Court

82. Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263 (1965).
83. *Id.* at 270.
84. 29 U.S.C.A. § 158(d) (1999).
85. First Nat'l Maintenance Corp., v. NLRB, 452 U.S. 666 (1981).

acknowledged that the employer's decision had a direct impact on the workers' employment but disingenuously declared that it "had as its focus only on the economic profitability of the contract."[86] Then, invoking the spirit of *Darlington*, the Court added that it was "akin to the decision whether to be in business at all."[87] The Court not only explicitly rejected that the employees' elected representative should "become an equal partner in the running of the business enterprise," but denied that employees had any legitimate interest in the profitability of the enterprise.[88] They were to be treated as hired hands with no stake in the enterprise. The court emphasized the "employer's need for unencumbered decisionmaking," stating that, "[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business."[89] Despite the statutory obligation to bargain with the employees' representative, management retained the prerogative to make this decision which vitally affected the working lives of its employees by depriving them of their jobs without even listening to the employees' representative. This is a virulent expression of the presumption which underlies employment at will—the sovereignty of the employer to dispose of its subjects' jobs, with no duty to listen or explain.

(3) Under the Supreme Court's decision in *NLRB v. Mackay Radio & Telegraph Co.*,[90] an employer, during a strike, can hire replacement workers for the strikers, and when the strikers offer to return to work, the employer can refuse to return them to their jobs and elect to keep the replacements in their place. The effect is to deprive a striking employee of his job, even though the statute emphatically states that he remains an employee while on strike, and to give preference to a subsequent employee solely because he worked during the strike. This runs squarely against section 8(a)(3) of the National Labor Relations Act, which prohibits discrimination for engaging in union activity. The Court justified the employer's discrimination against those who strike on the basis of the employer's "right to protect and continue his business."[91] This is not a right stated, or even implied, in the statute, but drawn, like the right to go out of business in *Darlington*, from the Court's assumption that the employer's property rights in the enterprise have priority over the employees' right to engage in concerted activity protected by the statute and the employees' interest in continued employment. It would fit more comfortably into the statutory scheme to say that when the employer and the elected

86. *Id.* at 677.
87. *Id.*
88. *Id.* at 676.
89. *Id.* at 678-79.
90. 304 U.S. 333 (1938).
91. *Id.* at 345.

representative of its employees come to an impasse, operations should cease. This, of course, would assume that employees are members of the enterprise essential to its operation. The Court's assumption is the opposite. The decision to continue operations is legally vested in the employer; the employees have no legally protected interest and are disposable by replacement workers.

(4) The employees' status in the transfer of undertakings provides another manifestation of the underlying premise that the employer has sovereign power over the workplace, and employees are subjects without rights. The transferor and transferee employers have absolute power to determine the employees' rights or lack of rights. The transferor has no continuing obligation to the employees; after the transfer they cease to be the transferor's employees, and the transferee has no obligation to hire them. If the transferee retains any of the employees, it can dictate new terms and conditions of employment. The transferor and transferees can agree that the employees shall continue to be employed under existing terms, but such agreements are rare.

The presence of a collective agreement with the transferor which prohibits discharge without just cause gives the employees no added rights to continued employment with the transferee, for the transferee is not bound by the transferor's agreement. In *Howard Johnson Co. v. Detroit Local Joint Executive Board*,[92] the transferor had a collective agreement which prohibited discharge without cause and provided for arbitration of discharges. When the transferee refused to continue many of the employees, the union sought arbitration of their discharge. The Supreme Court held that the transferee had the right not to hire any of the transferor's employees, and that it was not bound by the transferor's collective agreement to arbitrate. The fact that the agreement provided that it would be binding on "successors, assigns, purchasers, lessees or transferees" could not bind the transferee to the substantive terms of the agreement or the arbitration clause, unless the transferee expressly agreed to be bound. If the transferee hires half of its staff from employees dismissed by the transferor, it must recognize and bargain with the union for a new agreement. But if the transferee does not hire a majority of the employees, not only does the collective agreement cease to exist, but union representation ceases to exist as well.[93]

(5) In the interpretation of the collective agreement, analysis begins with the premise that, except for the collective agreement, the employer has the prerogative of unencumbered decision making on all matters concerning the enterprise. The collective agreement is conceived as only

92. 417 U.S. 249 (1974).

93. *See* NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272 (1972).

circumscribing those prerogatives; the employer remains free to act except as limited by express or implied provisions in the agreement.[94] Most arbitrators, in interpreting the agreement, follow this "reserved rights" theory, which states that the employer retains all rights except those conceded expressly or impliedly by the terms of the agreement, although arbitrators are quite ready to find implied obligations of employers where the facts warrant. The burden, however, is on the union or employee to show that the employer agreed to the limitation of its prerogative. This is the presumption of the Wood's Rule writ large.

(6) The priority given to employer control is illustrated by the "obey and grieve" rule generally followed in arbitration. If the employer gives an order which directly violates the agreement, the employee still has a duty to obey unless obeying would risk serious bodily injury.[95] If the employee refuses to obey the wrongful order, there is "just cause" to discharge. Arbitrators hold that the employee should obey and file a grievance, even though winning the grievance gives the employee only a paper remedy, for the only sanction on the employer is an arbitrator's slap on the wrist, a declaration that the order violated the agreement. The employer's wrongful order, in effect, takes priority over the employee's rights.

(7) The conception that the employer is lord and master leads to significant restrictions on the employee's right of privacy.[96] To claim a right of privacy, a person must show a reasonable expectation of privacy. The employer, simply by announcing in advance that employees' lockers will be searched, that employees will be subjected to drug testing, or that employees' private affairs will be investigated, may claim that employees who continued working after such an announcement had no reasonable expectation of privacy. Employee consent may also be a defense to invasion of privacy, and employees at will can be caught in a "catch 22." In *Jennings v. Minco Technology Labs, Inc.*[97] the court refused to enjoin random drug testing, holding that it did not invade privacy because only those consenting were tested. Those who did not consent were discharged as employees at will. Another court held that discharge for refusal to consent was not contrary to public policy, because "[t]he right by its very name is a private right, not a public right."[98]

In the absence of consent, the invasion of privacy must be justified,

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94. *See* M. HILL & ANTHONY SINCROPI, MANAGEMENT RIGHTS (1986).

95. *See* James A. Gross & Patricia A. Greenfield, *Arbitral Value Judgments in Health and Safety Disputes: Management Rights Over Workers' Rights*, 34 BUFF. L. REV. 645 (1985).

96. *See generally* Matthew W. Finkin, *Employee Privacy, American Values, and The Law*, 72 CHI.-KENT L. REV. 221 (1996); Pauline T. Kim, *Privacy Rights, Public Policy and the Employment Relationship*, 57 OHIO ST. L.J. 671 (1996).

97. 765 S.W.2d 497 (Tex. Ct. App. 1989).

98. Luck v Southern Pacific Transp. Co., 267 Cal. Rptr. 618, 635 (Cal. Ct. App. 1980).

and in determining justification the interests of the employer in conducting its business must be weighed against the employee's interest in privacy. In balancing these interests, courts frequently load only one side of the scale. An employer, investigating whether an employee was collecting compensation illegally for a work injury, used a telephoto lens to take pictures through an open window inside the employee's home, had an investigator pose as a process server to get inside the home, and also sent a letter to the employee's doctor to get medical information. The court, without weighing the degree of intrusion on the employee's privacy against the employer's need, found no unreasonable intrusion of the employee's privacy because "privacy was subject to the legitimate interest[s] of his employer."[99]

The court's heavy hand on the employer side of the scale is epitomized by *Baggs v. Eagle-Picher Industries, Inc.*[100] In *Baggs*, the Sixth Circuit acknowledged that drug testing invaded privacy because it "can reveal a host of private medical facts about the employee, including whether he or she is epileptic, pregnant, or diabetic."[101] Also the method of taking urine invaded the employee's privacy and is "an intrusion that a reasonable person might find objectionable."[102] These employee interests, however, carried no weight. The drug testing was upheld with the blanket license that, "a Michigan employer may use intrusive or even objectionable means to obtain employment related information."[103]

Even when the court considers the employee's privacy, it may be dismissed as worthy of little weight. In another work injury case, the investigator masqueraded as a marketing researcher, gaining repeated access into the employee's home. The court minimized the intrusion by saying that the investigator never entered the house without permission and the visits were short, although the "permission" was obtained by fraud.[104] With similar dismissive reasoning, a court held that requiring a male employee to provide a urine sample under the direct observation of a female supervisor did not violate the employee's right of privacy.[105] "[T]he intrusiveness of the search was slight,"[106] said the court, "nothing more than a momentary bashfulness" and taking the urine was not significant, since it

99. Saldana v. Kelsey-Hayes Co., 443 N.W.2d 382, 384 (Mich. Ct. App. 1989) (citation omitted).

100. 957 F.2d 268, 274 (6th Cir. 1992).

101. *Id.* at 273.

102. *Id.*

103. *Id.* at 275.

104. *See* Turner v. General Adjustment Bureau, Inc., 832 P.2d 62 (Utah Ct. App. 1992).

105. *See* Fowler v. New York City Dep't of Sanitation, 704 F. Supp. 1264, 1273, 1270 (S.D.N.Y. 1989).

106. *Id.* at 1273.

was only a "waste product."[107]

In *Smyth v. Pillsbury Co.*,[108] the employer encouraged employees to communicate with each other by e-mail, repeatedly assuring them that all messages would be confidential and would not be intercepted or used against them. In spite of these assurances, an employee was dismissed when an e-mail message was intercepted which had "inappropriate and unprofessional" comments derogatory of management. The court stated, inexplicably, that the employee had no reasonable expectation of privacy in e-mail, and even if he did, a reasonable person would not find the interception highly offensive. In another case an employer ordered its employees not to associate with a former employee who had been discharged on unproven charges of sexual harassment and fighting.[109] The court held that forbidding employees to associate with a friend off the job was not highly offensive.

As these cases indicate, in the courts' view, an employee's right of privacy is a hollow shell against the lead weight of the employer's claim to conduct business as it pleases. The employer's interest is presumed to be of compelling weight without serious inquiry as to whether its interest is worthy of protection. This is the same conception of the employment relation which underlies employment at will—the sovereignty of the employer and the subservience of the employees.

VI. CONCLUSION

There is a pervasive ambiguity in American labor law regarding the rights and status of individual employees. The cases discussed here reflect but one face of that ambivalence. There is an opposing face reflected in those court decisions which apply the exceptions in order to protect employees from unjust dismissal. Also, the employers' prerogative power has historically been circumscribed by protective legislation and qualified by collective bargaining legislation. The central point here is to emphasize that the conception of the employment relation as one of employer dominance and employee subservience continues to be a powerful, if not a prevailing, force in American labor law. It breaks through to qualify and undermine those judicial decisions and legislative provisions designed to recognize employees' rights in their jobs and their voice in the workplace.

Labor legislation in the United States is often half-hearted. Statutory minimum wages are not enough to support a single worker, much less a family. Health and safety legislation looks good on paper but is woefully

107. *Id.* at 1270.
108. 914 F. Supp. 97 (E.D. Pa. 1996).
109. *See* Glasgow v. Sherwin-Williams Co., 901 F. Supp. 1185 (N.D. Miss. 1995).

lacking in enforcement. The Family Medical and Leave Act[110] enables parents to take leave for childbirth and for child and family care, but it is unpaid leave which many workers cannot afford to take. The Plant Closing Law[111] requires only large employers to give sixty days notice, and provides no severance pay. The United States has no statutory paid holidays or vacations, no statutory severance pay or sick pay, and no mandatory medical insurance. Although many employers provide these, the great majority of workers lack one or more of these protections which are commonplace in other industrialized countries.

The lack of legal protection could be remedied through collective bargaining, for collective agreements regularly prohibit discharge without just cause, provide living wages, sick pay, severance pay, paid holidays and vacation, and often medical insurance. But collective bargaining laws are not adequately enforced and are not able to overcome virulent employer anti-unionism. With less than ten percent of private sector workers covered by collective agreements, the collective bargaining system does not provide a model for those not covered. One of the sources of this weakness is the continued conception of employers as masters of the enterprise which gives them wide scope for their anti-unionism. It is employment at will and its fundamental assumption which is the major barrier to establishing a system of collective bargaining.

The one form of relatively effective legal protection of workers is the prohibition of discrimination against identified minorities—race, creed, nationality, sex, age, and disability. But these laws limit employer prerogatives only to the extent of requiring that all employees be treated equally. Members of the protected classes, like all other employees, can be discharged without just cause, paid less than a living wage, denied sick pay, paid holidays and vacation, and medical insurance.

Discerning trends in the law is risky, the trend may be more in the eye of the beholder, but the trend in the last ten years has been toward more employer dominance. The courts' cutting back on exceptions to employment at will, and the legislatures' failure to even consider proposed statutes are indicative. One of the sources of this trend is the importation into labor law of misconceived market economics which equate a labor market to the market for fish. The focus is on the individual labor market, ignoring the different potentials of a collective labor market. In the individual labor market the employer's property rights in the enterprise give the employer dominant economic power to control the workplace. Arguments cast in terms of misconceived market economics are thus used to validate the divine right of employers and the subjection of the

110. 29 U.S.C. § 2601.

111. Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101.

employees. So long as these arguments have currency in the courts and the legislatures, the bridge will not be to the twenty-first century but to the nineteenth century.

On August 4, 1982, France overhauled its law applicable to shop rules to set up a disciplinary procedure that employers are required to follow.[112] The date of August 4 to publish the act was not selected by accident. It was a reminder and an echo of the night of August 4, 1789, during the French Revolution, when the nobility was stripped of the privileges it enjoyed under the kings. In American labor law, the monarchy still survives.

112. Act respecting workers freedom in the undertaking, August 4, 1982 (No. 82-689) Vol. Legislation 1, International Encyclopedia for Labour Law and Industrial Relations.