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# A Seed Germinates: Unjust Discharge Reform Heads toward Full Flower

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I. INTRODUCTION

"Seminal" is one of the most overworked words in the legal lexi-

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\* James E. & Sarah A. Degan Professor of Law, University of Michigan. A.B., Fordham College, 1951; J.D., University of Michigan, 1954. The author has recently been selected by the Commissioners on Uniform State Laws to serve as reporter to a committee drafting a model statute on employment termination. This article had been planned long before that appointment. The opinions expressed herein are solely the author's. At this writing the Commissioners have not begun their formal deliberations.

con. But if ever two pieces of writing deserved that appellation, they are the 1967 article by Professor Lawrence Blades<sup>1</sup> advocating judicial development of the tort of "abusive discharge" as a limitation on the doctrine of employment at will, and the 1976 article by Professor Clyde Summers<sup>2</sup> advocating legislation to protect individual employees against unjust dismissal. At the time Blades wrote there was virtually no precedent directly supporting his position, and he may have been unaware of what little did exist.<sup>3</sup> After concluding that the rigidities the consideration requirement would prevent resort to contract theory, Blades argued for the extension of tort law.<sup>4</sup> He relied principally on the notion that even the exercise of a right may be actionable if ulterior purposes or wrongful motives intrude, citing as an analogy the abuse of legal process.<sup>5</sup> Within a dozen or so years following Blades's piece, the highest courts of such influential states as California,<sup>6</sup> Illinois,<sup>7</sup> Massachusetts,<sup>8</sup> Michigan,<sup>9</sup> and New York<sup>10</sup> had drawn upon a variety of both tort and contract doctrines to engraft qualifications on the conventional employment-at-will principle. By now a total of about forty jurisdictions have recognized some modification of the traditional rule.<sup>11</sup> Unlike Blades, who viewed the prospects for legislative reform as "dim" because of the absence of any strong lobby favoring it,<sup>12</sup> Summers considered statutory protection against unjust dismissal a necessity, on the grounds the courts had demonstrated "an unwillingness to break through their self-created crust of legal doctrine."<sup>13</sup> As it has turned out, we have profited from the differing insights of both men. Blades was right that the legislatures would be slow to move, and that a modest extension and adaptation of well-established common law principles would enable the courts to provide at least some measure of relief. Summers was right, as I shall indicate shortly, that accepted legal doctrines permit only a limited and inade-

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1. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).
  2. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).
  3. *E.g.*, *Petermann v. Local 396, Int'l Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (public policy prevents employer from firing employee for refusing to perjure himself on behalf of employer).
  4. Blades, *supra* note 1, at 1420-23.
  5. *Id.* at 1423-24.
  6. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 2d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).
  7. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981).
  8. *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977).
  9. *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980).
  10. *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441 (1982).
  11. [IERM] 9A Lab. Rel. Rep. (BNA) 505:51 (1987).
  12. Blades, *supra* note 1, at 1434.
  13. Summers, *supra* note 2, at 521.

quate response to employees' legitimate claims. Legislation will ultimately be needed.

There are signs the idea is taking root. Bills forbidding wrongful discharge have been introduced in a dozen or more legislatures.<sup>14</sup> A special committee of the Labor and Employment Law Section of the State Bar of California has recommended statutory regulation of unjust dismissal.<sup>15</sup> The individual rights committee of the ABA Section on Labor and Employment Law has drafted a questionnaire regarding the critical issues to be considered in any proposed legislation.<sup>16</sup> The AFL-CIO's Executive Council has discarded organized labor's long-standing ambivalence about the subject by endorsing the concept of wrongful discharge legislation.<sup>17</sup> The Commissioners on Uniform State Laws have decided to draft a model statute.<sup>18</sup> And finally, just twenty years after Blades's trail-blazing article, Montana became the first state to enact a comprehensive law protecting employees against unjust discharge.<sup>19</sup>

In this paper, I shall briefly review the nature and limitations of the theories most frequently invoked by the courts in dealing with wrongful dismissal. I shall then examine the major arguments for and against a general overhaul of the doctrine of employment at will. Lastly, I shall discuss some of the particular questions that will have to be addressed in fashioning a statutory solution.

## II. JUDICIAL THEORIES OF UNJUST DISCHARGE

During the past decade or so American courts have employed three main theories to soften the worst rigors of what was once the well-nigh universal rule that employers "may dismiss their employees at will . . . for good cause, for no cause or even for cause morally wrong."<sup>20</sup> Those three doctrines include tort—violations of public policy, or "abusive" or "retaliatory" discharge; breach of an express or implied contract; and breach of the covenant of good faith and fair dealing. In addition to the claim of wrongful discharge, employees suing their former employers often add more traditional claims, such as

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14. California, Colorado, Connecticut, Massachusetts, Michigan, Montana, New Jersey, Ohio, Pennsylvania, Virgin Islands, Washington, Wisconsin, and the U.S. Congress. See, e.g., Ann Arbor, [Mich.] News, June 10, 1984, at C5, col. 1; Daily Lab. Rep. (BNA), Sept. 3, 1987, at A-8.

15. Labor and Employment Law News (State Bar of Cal. Lab. & Emp. L. Sec.), Feb. 8, 1984, at 1-46.

16. 1 LAB. LAW. 784 (1985).

17. [IER cases] 1 Lab. Rel. Rep. (BNA), Mar. 3, 1987, at 1.

18. Conversation on September 11, 1987 between the author and Professor William J. Pierce, Executive Director of the Commissioners on Uniform State Laws.

19. Daily Lab. Rep. (BNA), Sept. 3, 1987, at A-8.

20. *Payne v. Western & A.R.R.*, 81 Tenn. 507, 519-20 (1884). See also H. WOOD, LAW OF MASTER AND SERVANT 272-73 (1877).

intentional infliction of emotional distress; defamation and injury to business reputation; fraud and misrepresentation; invasion of privacy; negligence; and tortious interference with contractual relations. I shall not deal with these miscellaneous causes of action.

## A. Tort Theories

### 1. Discharges Contrary to "Public Policy"

The first cracks in the inhospitable "crust" of judicial doctrine that formerly precluded relief against wrongful dismissal came, as one might have expected, in some cases that were simply too malodorous for the courts to tolerate. Typical was *Petermann v. Local 396, International Brotherhood of Teamsters*,<sup>21</sup> where an employee was fired for refusing to perjure himself at the behest of his employer. Not to recognize a cause of action in such circumstances would effectively condone a grave violation of a basic public policy. The public policy exception to the at-will principle spans a spectrum of situations. *Petermann* is at one extreme; the employee was actually discharged for declining to commit a crime. I should like to think that today no court would be so enmeshed in outworn theory that it would hesitate to remedy a dismissal based on an employee's refusal to engage in a clearcut instance of unlawful conduct. Next along the spectrum are cases where employees are fired for performing a public duty, such as serving on a jury<sup>22</sup> or "blowing the whistle" on wrongdoing within a company.<sup>23</sup> Finally, there are situations where the discharge results from the exercise of a legal right or privilege. An employee may have filed a workers' compensation claim,<sup>24</sup> for example, or spoken out against his company's stand on pending legislation.<sup>25</sup>

Surely the crassest (and easiest) of these public policy cases — where criminal conduct has been importuned — will be few and far between. As one moves across the spectrum toward more common situations, the issues become more difficult for the courts. What is the reach of "public policy"? It may be one thing if the "whistleblower"

21. 174 Cal. App. 2d 184, 344 P.2d 25 (1959). See also *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330 (1980) (refusal to join price-fixing conspiracy).

22. *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).

23. Causes of action were recognized in *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980), and *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981), but rejected in *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974), and *Murphy v. American Home Prod. Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86 (1983). Some of these seemingly contrary decisions are reconcilable on their facts.

24. Causes of action were recognized in *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978), and *Firestone Textile Co. v. Meadows*, 666 S.W.2d 730 (Ky. 1983), but rejected in *Martin v. Tapley*, 360 So. 2d 708 (Ala. 1978), and *Segal v. Arrow Indus. Corp.*, 364 So. 2d 89 (Fla. Dist. Ct. App. 1978).

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

has been subpoenaed to appear at an official inquiry. It may be quite another if he has taken it upon himself to share his good-faith (but erroneous and damaging) suspicions with the media. What inference does one draw if the legislature has not expressly prohibited employer reprisals against employees filing workers' compensation or unemployment insurance claims?<sup>26</sup> One court may be so bold as to draw upon the United States Constitution's First Amendment as a source of public policy protecting employees' speech even against private employers.<sup>27</sup> Other courts may find controlling the traditional view that constitutional rights can ordinarily be asserted only against governmental action.<sup>28</sup> Still other courts have treated the whole concept of public policy as unsuited for judicial application in this context, and instead have declared it a matter to be left to the legislature.<sup>29</sup> Except perhaps in the most egregious circumstances, therefore, common-law principles of public policy provide no guaranteed recourse for the wronged worker.

## 2. "Abusive" or "Retaliatory" Discharges

Beyond the more standard public policy exceptions, some courts have recognized a cause of action when an employer has sought to exploit his position for personal advantage. One celebrated decision sustained a suit by a female worker who was fired for refusing to date her foreman.<sup>30</sup> Other courts, however, have declined to remedy such personal abuse or similar retaliatory conduct.<sup>31</sup> They apparently believe that the public policy exception should not be stretched to cover what essentially are disputes between individuals. Despite commentators' arguments that all unjust dismissals subvert the community's interest in industrial stability and productivity,<sup>32</sup> there is a growing tendency to require that the public policy relied upon be "clearly articulated" and "well accepted,"<sup>33</sup> or even that it be "evidenced by a constitutional

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26. See *supra* note 24.

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

28. *Allen v. Safeway Stores, Inc.*, 699 P.2d 277 (Wyo. 1985); *Barr v. Kelso-Burnett Co.*, 106 Ill. 2d 520, 478 N.E.2d 1354 (1985).

29. *Murphy v. American Home Prod. Corp.*, 58 N.Y.2d 293, 488 N.E.2d 86 (1983); see also *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981).

30. *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974). But cf. *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 296-97, 414 A.2d 1273, 1274 (1980).

31. E.g., *Fawcett v. G.C. Murphy & Co.*, 46 Ohio St. 2d 245, 348 N.E.2d 144 (1976); *Givens v. Hixson*, 275 Ark. 370, 631 S.W.2d 263 (1982).

32. Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1948 (1983).

33. *Clifford v. Cactus Drilling Corp.*, 419 Mich. 356, 367, 353 N.W.2d 469, 474 (1984) (Williams, C.J., dissenting); see also *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025, 1034 (1985).

or statutory provision.”<sup>34</sup> That is not going to help many workers subjected to arbitrary or capricious treatment or personally motivated abuse.

## B. Contract Theories

In the past, not even an employer's assurance of “permanent” employment would change the arrangement from that of an at-will contract.<sup>35</sup> In the early 1980s, however, a number of courts began taking employers at their word. Statements of policy set forth in personnel manuals or employee handbooks, or oral commitments to employees at the time of hiring, were found to constitute, either separately or in combination, an express or implied contract that the employee would not be discharged except for “just cause.” Leading decisions included *Pugh v. See's Candies, Inc.*,<sup>36</sup> in California, *Toussaint v. Blue Cross & Blue Shield*,<sup>37</sup> in Michigan, and *Weiner v. McGraw-Hill, Inc.*,<sup>38</sup> in New York. But many courts continued to regard such employer declarations as merely nonbinding expressions of present intent.<sup>39</sup>

Even in states whose courts accept the new contractual qualification on employment at will, an employer with a careful lawyer should have little trouble in avoiding liability. Unequivocal language in a job application that any resulting employment will be only at will,<sup>40</sup> or a clear and prominent disclaimer in an employee handbook that any policy statements are not legally binding,<sup>41</sup> will generally foreclose employee claims.

A greater problem is the employer's unilateral deletion of a job

34. *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 573, 335 N.W.2d 834, 840 (1983); see also *Adler v. American Standard Corp.*, 290 Md. 615, 432 A.2d 464 (1981).

35. See, e.g., *Edwards v. Kentucky Utils. Co.*, 286 Ky. 341, 150 S.W.2d 916 (1941); Note, *Employee Handbooks and Employment At-Will Contracts*, 1985 DUKE L.J. 196, 200-04.

36. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981). *Accord* *Cleary v. American Air Lines, Inc.*, 111 Cal. App. 3d 443 (1980); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983); *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489 (Ky. 1983).

37. 408 Mich. 579, 292 N.W.2d 880 (1980).

38. 57 N.Y.2d 458, 443 N.E.2d 441 (1982).

39. *Mau v. Oklahoma Nat'l Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980); *Heideck v. Kent Gen. Hosp.*, 446 A.2d 1095 (Del. 1982); *White v. Chelsea Indus.*, 425 So. 2d 1090 (Ala. 1983).

40. *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986); *French v. Dillard Dep't Stores, Inc.*, 285 Ark. 332, 686 S.W.2d 435 (1985). But cf. *Tirano v. Sears, Roebuck & Co.*, 99 A.D.2d 675, 472 N.Y.S.2d 49 (1984).

41. *Woolley v. Hoffman-LaRoche, Inc.*, 99 N.J. 284, 289-91, 491 A.2d 1257, 1260, *modified on other grounds*, 101 N.J. 10, 499 A.2d 515 (1985); *Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081 (1984). But cf. *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985) (unclear); *Schipani v. Ford Motor Co.*, 102 Mich. App. 606, 302 N.W.2d 307 (1981) (subsequent assurance); *Ferraro v. Koelsch*, 124 Wis. 2d 154, 368 N.W.2d 666 (1985) (same).

security guarantee previously contained in an employee handbook or other policy statement. As to subsequently hired employees, of course, there should be no doubts about the efficacy of the revocation.<sup>42</sup> The bothersome question concerns incumbent employees, who have operated under the protective provision for some period of time. If the employer has retained the power, either expressly<sup>43</sup> or impliedly,<sup>44</sup> to change working terms and personnel policies unilaterally, that would seem to be dispositive. If such a reservation of power cannot be found, the question becomes even stickier. Where is the consideration for the employee's surrender of an existing right? Yet an employer can fairly argue that *all* the terms of employment are inherently variable, and that consideration can be found in the employer's continuation of (or, better, increase in) pay and other benefits.<sup>45</sup> Such an approach would not seem at odds with the proposition that an employer could not fire at his whim a particular individual while he still has in effect a "just cause" guarantee as part of his overall personnel policy. Naturally, if a given employee could demonstrate that she had specifically and detrimentally relied on her employer's assurances of job security, for example, by declining alternative work opportunities, that might immunize her against a later withdrawal of the safeguard.<sup>46</sup>

Apart from the employer's capacity to eliminate or restrict contractual rights, another deficiency in the contract approach is that policy declarations are likely to be confined to the more enlightened business firms, and that oral assurances or other individualized guarantees are likely to be confined to middle-level or higher ranking management

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42. See *supra* notes 40 & 41 and accompanying text.

43. See *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 619, 292 N.W.2d 880, 894-95 (1980).

44. See *Bullock v. Automobile Club*, 146 Mich. App. 711, 720-21, 381 N.W.2d 793, 797 (1985), on appeal as Dkt. No. 78027, Mich. Sup. Ct.

45. Cf. *Enis v. Continental Ill. Nat'l Bank & Trust Co.*, 795 F.2d 39, 41 (7th Cir. 1986). This position would appear analogous to the view of a number of courts that consideration for the employer's promise of job security lies in the employee's continued rendition of services. See, e.g., *Woolley v. Hoffman-La Roche, Inc.*, 99 N.J. 284, 301-03, 491 A.2d 1257, 1267, *modified on other grounds*, 101 N.J. 10, 499 A.2d 515 (1985); *Watson v. Idaho Falls Consol. Hosps.*, 720 P.2d 632 (Idaho 1986); *Cook v. Heck's, Inc.*, 342 S.E.2d 453, 459 (W. Va. 1986). For the view that a job protection provision *cannot* be rescinded without "independent" consideration, see *Stack v. Allstate Ins. Co.*, 606 F. Supp. 472, 477-78 (S.D. Ind. 1985). In *Bankey v. Storer Broadcasting Co.*, Dkt. No. 84-1296, the U.S. Court of Appeals for the Sixth Circuit certified to the Michigan Supreme Court, Dkt. No. 78200, the question whether an employer who has created a "just cause" employment contract can later unilaterally alter the employment relationship as to existing employees to permit discharge at will.

46. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979); cf. *Scott v. Lane*, 409 So. 2d 791, 794 (Ala. 1982); *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 105, 483 N.E.2d 150, 155 (1985).



personnel. That leaves the rank-and-file worker in the small, marginal plant or shop — the very person who probably needs protection the most — bereft of contract rights.

### C. Good Faith and Fair Dealing

Potentially the most expansive judicial qualification of the employment-at-will doctrine is based on the covenant of good faith and fair dealing.<sup>47</sup> The principle was first elaborated as to employment contracts in the leading Massachusetts case of *Fortune v. National Cash Register Co.*<sup>48</sup> The facts, as a jury was permitted to find them, were appalling. A veteran salesman of twenty-five years had been working for some time on a five million dollar order. Just after the sale was consummated, he was fired. By special verdict a jury determined that the employer had acted in "bad faith." The Supreme Judicial Court of Massachusetts concluded the jury could properly have found that the employer's reason for terminating the salesman was to deprive him of a portion of the full commission due him. Such action was deemed a breach of the covenant of "good faith and fair dealing" imposed by law on the parties to any contract.

*Fortune* plainly suggests a substantial extension of the traditional contract doctrine of good faith and fair dealing. Ordinarily it has not been seen as a catch-all safeguard against any arbitrary conduct on the part of a contracting party, such as an unjust dismissal, but rather as a fairly specific duty imposed by law that neither party do anything which will interfere with the other's performance of its contractual obligations or which will interfere with the right of the other to receive the benefits of the agreement.<sup>49</sup> The doctrine has not been concerned with the right to terminate a contract as such. Furthermore, resort to a novel articulation of the good faith concept was hardly necessary in *Fortune*. Good faith could have been invoked concerning the nonpayment only, without regard to the discharge itself. Or the classic principle that full or substantial performance entitles a contracting party to the agreed price would have served quite adequately.<sup>50</sup>

At least one California court has indicated that the covenant of

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47. Arguing for a broad reading of the covenant that could well eviscerate the whole at-will doctrine is Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980). Coming close to this view is *Crenshaw v. Bozeman Deaconess Hosp.*, 693 P.2d 487 (Mont. 1984); see also *Gates v. Life of Montana Ins. Co.*, 196 Mont. 178, 638 P.2d 1063 (1982); *Dare v. Montana Petroleum Mktg. Co.*, 687 P.2d 1015 (Mont. 1984).

48. 373 Mass. 96, 364 N.E.2d 1251 (1977). See also *Maddaloni v. Western Mass. Bus Lines, Inc.*, 386 Mass. 877, 438 N.E.2d 351 (1982); *Buyse v. Paine, Webber, Jackson & Curtiss*, 623 F.2d 1244 (8th Cir. 1980) (Minnesota law).

49. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); 3 A. CORBIN, CORBIN ON CONTRACTS §§ 570-71 (1960).

50. 3A A. CORBIN, CORBIN ON CONTRACTS § 700 (1960).

good faith and fair dealing does protect at least a long-service employee from discharge without just cause. In *Cleary v. American Airlines, Inc.*,<sup>51</sup> the employer had established an internal grievance procedure for resolving employee disputes, and the employee in question was an eighteen-year veteran at the time of his discharge. The California Court of Appeals seemed to concentrate at one point only on the latter factor when it stated: "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."<sup>52</sup> *Cleary* also held that a breach of the covenant of good faith and fair dealing sounds in tort as well as contract, thereby allowing punitive in addition to compensatory damages.<sup>53</sup>

Several courts have expressly rejected a broad application of the implied covenant of good faith. In *Murphy v. American Home Products Corp.*,<sup>54</sup> the New York Court of Appeals reasoned that any implied covenant would have to be "in aid and furtherance of other terms of the agreement of the parties." The court then went on to observe that the plaintiff's employment in this instance was at will, leaving the employer "an unfettered right to terminate."<sup>55</sup> The court concluded: "In the context of such an employment it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination."<sup>56</sup> This logic seems sufficiently compelling that the good-faith covenant appears unlikely to become a universally accepted

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51. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). Later California decisions have differed over the significance of an employee's longevity in good-faith covenant cases. Compare *Wheeler v. Hershey Chocolate Co.*, No. 196250 (Cal. App. Aug. 18, 1985) (longevity alone not sufficient) with *Gray v. Superior Court*, 181 Cal. App. 3d 813, 821, 226 Cal. Rptr. 570, 573 (longevity helpful but not essential). Cf. *Foley v. Interactive Data Corp.*, 184 Cal. App. 3d 241, 219 Cal. Rptr. 866 (1985), cert. granted, 222 Cal. Rptr. 740, (1986) (seven years longevity not enough).

52. *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 772, 729 (1980).

53. Although *Fortune* and other decisions have treated breaches of the covenant as sounding in contract, the notion that there may be a tortious breach in certain circumstances (thus opening the door for punitive damages) has been followed in *Wallis v. Superior Court*, 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123 (1984); *Eller v. Houston's Restaurants, Inc.*, 117 L.R.R.M. (BNA) 2651, 2653-54 (D.D.C. 1984).

54. 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983). Accord *Walker v. Modern Realty*, 675 F.2d 1002 (8th Cir. 1982); *Martin v. Federal Life Ins. Co.*, 109 Ill. App. 3d 596, 440 N.E.2d 998 (1982); *Gordon v. Matthew Bender & Co.*, 562 F. Supp. 1286 (N.D. Ill. 1983); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983); *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985); *Hinson v. Cameron*, 742 P.2d 549 (Okla. 1987).

55. *Murphy v. American Home Prod. Corp.*, 58 N.Y.2d 293, 304, 448 N.E.2d 86, 91, 461 N.Y.S.2d 232, 237 (1983).

56. *Id.* at 304-05, 448 N.E.2d at 91, 461 N.Y.S.2d at 237.

panacea for wrongfully discharged employees.<sup>57</sup>

### III. THE PROS AND CONS OF AT-WILL EMPLOYMENT

In my judgment the courts of the more progressive states, like California, Massachusetts, and Michigan, have gone about as far with unjust discharge actions as they are going to go. They will entertain suits alleging serious violations of accepted public policy. They will hold employers to their unretracted word not to fire except for good reason. But ordinarily they will not impose an affirmative obligation on employers to prove just cause to support a discharge. And even where a contractual protection is found, the trial court may, as in a leading California case, instruct the jury that it cannot substitute its opinion for the employer's as to whether plaintiff's work performance was satisfactory, and that "just cause" for termination means a "fair and honest cause or reason, regulated by good faith on the part of the party exercising the power."<sup>58</sup> In short, the courts are unlikely to subject nonunion firms, as a matter of common law, to the same requirements exacted contractually of nearly every employer party to a collective bargaining agreement. The next move therefore seems up to the legislatures. That calls for a thorough appraisal of the theory and operation of employment at will.

Following the pioneering studies of Blades<sup>59</sup> and Summers,<sup>60</sup> a veritable tidal wave of scholarly condemnation has descended upon the at-will employment doctrine.<sup>61</sup> For most commentators, it is a matter

57. No more than a dozen states have accepted the good-faith covenant theory in holdings or dictum. [IERM] 9A Lab. Rel. Rep. (BNA) 505:51 (1988) (twelve states with Oklahoma now excluded); Lab. L. Rep. (CCH), Insight at 4 (May 1987) (five states with Oklahoma now excluded).

58. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917, 928 (1981) (on remand); see also *Simpson v. Western Graphics Corp.*, 293 Or. 96, 100-01, 643 P.2d 1276, 1278-79 (1982). But cf. *Toussaint v. Blue Cross and Blue Shield*, 408 Mich. 579, 623-24, 292 N.W.2d 880, 896 (1980). There are differences of view whether a plaintiff employee should bear the ultimate burden of persuasion concerning the issue of employer breach, or whether, as in the usual labor arbitration proceeding, the burden is on the employer. Compare *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) and *Schmidly v. Perry Motor Freight, Inc.*, 735 F.2d 1086 (8th Cir. 1984) (Arkansas law) with *Rasch v. City of East Jordan*, 141 Mich. App. 336, 367 N.W.2d 856 (1985).

59. Blades, *supra* note 1.

60. Summers, *supra* note 2.

61. See, e.g., Aaron, *Constitutional Protections Against Unjust Dismissals from Employment: Some Reflections*, in NEW TECHNIQUES IN LABOR DISPUTE RESOLUTION 13 (H. Anderson ed. 1976); Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment At Will*, 17 AM. BUS. L.J. 467 (1980); Blumrosen, *Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII*, 2 IND. REL. L.J. 519 (1978); Peck, *Unjust Discharges from Employment*, 40 OHIO ST. L.J. 1 (1979); St. Antoine, *Protection Against Unjust Discipline: An Idea Whose Time Has Long Since Come*, in ARBITRATION ISSUES FOR

of simple justice. Conceptually, there appears little or nothing to be said in favor of an employer's right to treat its employees arbitrarily or unfairly. Moreover, it is not just a theoretical problem. One careful observer has estimated:

Some 60 million U.S. employees are subject to the employment-at-will doctrine and about 2 million of them are discharged each year . . . . About 150,000 of these workers would have been found to have been discharged without just cause and reinstated to their former jobs if they had had the right to appeal to an impartial arbitrator as do almost all unionized workers.<sup>62</sup>

Probably the most vigorous and undaunted academic defender of the at-will principle is Professor Richard Epstein<sup>63</sup> of the University of Chicago. He launches a three-pronged counterattack. First, at-will contracts are fair because freedom of contract is an aspect of individual liberty; "the employee is the full owner of his labor," and he and the employer are generally "free to exchange on whatever terms and conditions they see fit."<sup>64</sup> Second, at-will contracts are mutually beneficial. They enable both parties to monitor the other's behavior; "the worker can quit whenever the net value of the employment contract turns negative."<sup>65</sup> Workers also benefit from the "asymmetry of reputational losses;" the single large employer has more to lose if his many good employees perceive the dismissal of a coworker as arbitrary.<sup>66</sup> In addition, workers are helped in dealing with "risk diversification" since the contract at will offsets "the concentration of individual investment in a single job."<sup>67</sup> Furthermore, the system is "very cheap to administer;" there aren't any litigation costs and personnel expenses are kept down.<sup>68</sup> Finally, no inequality of bargaining power can be demonstrated; if it did, "[w]ages should be driven to zero, for no matter what their previous level, the employer could use his (inexhaustible) bargaining power to reduce them further."<sup>69</sup> Profes-

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THE 1980s — PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 43 (J. Stern & B. Dennis eds. 1982); Stieber, *The Case for Protection of Unorganized Employees Against Unjust Discharge*, in PROCEEDINGS OF THE THIRTY-SECOND ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 155 (B. Dennis ed. 1980); Symposium, *Individual Rights in the Workplace: The Employment-at-Will Issue*, 16 U. MICH. J. REF. 199 (1983).

62. Stieber, *Recent Developments in Employment-at-Will*, 36 LAB. L.J. 557, 558 (1985).

63. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984); see also Heinsz, *The Assault on the Employment at Will Doctrine: Management Considerations*, 40 MO. L. REV. 855 (1982); Power, *A Defense of the Employment at Will Rule*, 27 ST. LOUIS U.L.J. 881 (1983); Note, *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?* 35 VAND. L. REV. 201 (1982).

64. Epstein, *supra* note 63, at 955.

65. *Id.* at 966.

66. *Id.* at 967-68.

67. *Id.* at 969.

68. *Id.* at 970.

69. *Id.* at 973. But even the overly pessimistic "iron law of wages" propounded by

sor Epstein's third principal point deals with distributional concerns. He contends that modifications in the at-will doctrine "cannot hope to transfer wealth systematically from rich to poor on the model of comprehensive systems of taxation or welfare benefits."<sup>70</sup>

A wondrous Oz-like air of unreality pervades much of the Epstein thesis. His analysis admits of no living, breathing human beings, who develop irrational antagonisms or exercise poor judgment, on the one hand, or who suffer the psychological as well as the economic devastation of losing a job, on the other. Numerous studies document the increases in cardiovascular deaths, suicides, mental breakdowns, alcoholism, ulcers, diabetes, spouse and child abuse, impaired social relationships, and various other diseases and abnormal conditions that develop even in the wake of impersonal permanent layoffs resulting from plant closures.<sup>71</sup> It seems reasonable to presume that such effects are at least as severe when a worker is singled out to be discharged for some alleged deficiency or misconduct. Even if Epstein is right in everything he has to say about employees collectively, it is this piercing hurt to individuals which justifies the call for reform of the at-will doctrine.

There is a logical nicety to the notion that abolition of at-will employment would jeopardize a worker's present "freedom to quit," capacity for "risk diversification," and so on. But that whole argument turns on an erroneous equation of an employee's right to leave with an employer's right to fire. In fact, there is probably no more discredited concept in modern contract law than the unqualified requirement of "mutuality of obligation."<sup>72</sup> Consideration on the part of the employee is the essential element, and for an increasing number of modern courts that is found in her actual rendition of services.<sup>73</sup> Even more important, in the real world of industrial relations, employees

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Malthus, Marx, and others could only reduce workers' pay to the minimum subsistence level. See, e.g., P. SAMUELSON, *ECONOMICS* 553 (6th ed. 1965). For a more realistic discussion of the disparity in employer and employee bargaining power, see L. REYNOLDS, S. MASTERS & C. MOSER, *LABOR ECONOMICS AND LABOR RELATIONS* 7-8 (9th ed. 1986) [hereinafter *LABOR ECONOMICS*].

70. Epstein, *supra* note 63, at 977.

71. See, e.g., H. BRENNER, *ESTIMATING THE SOCIAL COSTS OF NATIONAL ECONOMIC POLICY: IMPLICATIONS FOR MENTAL AND PHYSICAL HEALTH AND CLINICAL AGGRESSION* (1976); B. BLUESTONE & B. HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* 63-66 (1982), and authorities cited; L. FERMAN & J. GORDUS, *THE ECONOMY AND MENTAL HEALTH* (1979); L. FERMAN, M. AIKEN & H. SHEPPARD, *ECONOMIC FAILURE, ALIENATION, AND EXTREMISM* (1968).

72. See, e.g., 1A A. CORBIN, *CORBIN ON CONTRACTS* §§ 152, 163, 165-67 (1963); *Eales v. Tanana Valley Medical-Surgical Group, Inc.*, 663 P.2d 958, 959-60 (Alaska 1983); *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 325-26, 171 Cal. Rptr. 917, 924-25 (1981).

73. See, e.g., 1A A. CORBIN, *CORBIN ON CONTRACTS* § 163 (1963); see also sources cited *supra* note 45.

seldom quit voluntarily.<sup>74</sup> It is they, not the employer, who most need protection. It is thus neither unfair nor contrary to contemporary contract theory to eliminate the employer's power to discharge arbitrarily without eliminating the employee's right to leave.

It is probably true that some costs would be associated with altering the at-will nature of employment contracts. One scholar has suggested a lower wage level would result because of both a decrease in the demand for labor and an increase in the supply.<sup>75</sup> In effect, the employees themselves would have paid at least partially for their greater job security. That is a time-honored tradeoff among unionized workers,<sup>76</sup> however, and should not be considered inappropriate here. It is hard to determine what, if any, would be the net increases in employers' costs in maintaining a for-cause discharge system. But there is evidence they would not be exorbitant. For example, in all the demands by unionized firms for "givebacks" or bargaining concessions during the early 1980s, practically never did employers seek the removal of "just cause" contract clauses, or the grievance and arbitration procedures supporting them.

American business would not lose out in "competitiveness" in international markets by elimination of at-will employment, even though it might lose some degree of flexibility in job arrangements. Protection against unfair discharge is now provided by statute in about sixty countries around the world, including all the Common Market, Sweden and Norway, Japan, Canada, and others in South America, Africa, and Asia.<sup>77</sup> The International Labor Organization recommended in 1963 and again in 1982 that workers not be terminated except for a valid reason.<sup>78</sup> The United States remains the last major industrial democracy that has not heeded the call for unjust dismissal

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74. See, e.g., LABOR ECONOMICS, *supra* note 69, at 9 ("most workers regard resort to the market — that is, a change of employers — as a disaster rather than as an opportunity"). Cf. Kerr, *The Balkanization of Labor Markets*, in LABOR MOBILITY AND ECONOMIC OPPORTUNITY (E. Bakke ed. 1954), reprinted in L. REYNOLDS ET AL., READINGS IN LABOR ECONOMICS AND LABOR RELATIONS 66, 68 (4th ed. 1986).

75. Harrison, *The "New" Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327 (1984).

76. See, e.g., R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 55-56 (1984); LABOR ECONOMICS, *supra* note 69, at 533.

77. Association of the Bar of the City of New York, Committee on Labor and Employment Law, *At-Will Employment and the Problem of Unjust Dismissal*, 36 THE RECORD 170, 175 (1981).

78. *Id.* at 179-80; *Convention Concerning Termination of Employment at the Initiative of the Employer* (No. 158) INTERNATIONAL LABOUR CONFERENCE AND RECOMMENDATIONS (Supp.) (Sixty-eighth session) (June 22, 1982). It must be noted, however, that foreign legislation is hardly everything that workers might desire. Reinstatement is rare; backpay is usually limited to a brief period; and sometimes a short notice (e.g., 30 days) will suffice. See, e.g., Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 AM. J. COMP. L. 310 (1985).

legislation. Furthermore, experience both here and abroad suggests that the prevention of arbitrary treatment of employees may be not only humane but also good business. Marked correlations have been observed between a secure work force and high productivity and quality output.<sup>79</sup>

Under a more rational, systematic method of dealing with improper terminations, many employers would be saved the crushing financial liability incurred by companies that have felt the wrath of aroused juries under our existing, capricious common-law regime. For example, an early study showed that plaintiffs in California won as many as 90 percent of the discharge cases that went to juries, with the average award being \$450,000.<sup>80</sup> A more recent California survey by a management attorney revealed relatively little change. Juries returned verdicts for plaintiffs in 78 percent of the cases, averaging a total of \$424,527 in general and punitive damages.<sup>81</sup> Single individuals have received jury awards covering actual and punitive damages as high as \$20 million, \$4.7 million, \$3.25 million, \$2.57 million, \$2 million, \$1.5 million, \$1.19 million, and \$1 million.<sup>82</sup> One could well imagine that eventually an informed employer lobby might conclude that comprehensive just cause legislation, which would exclude jury verdicts and punitive damages, was the preferable solution.

A critical factor in securing legislative relief may be the attitude of organized labor.<sup>83</sup> It is about the only nationwide interest group that might be willing to take the lead in promoting such a cause. A common assumption, however, is that many unions will not favor legislation protecting employees against arbitrary treatment by employers because it will eliminate or detract from one of the unions' prime selling points in their efforts to organize the unorganized. I cannot deny this possibility, but I think it would be as shortsighted as was organized labor's initial hostility toward the Fair Labor Standards Act.<sup>84</sup> First, and not insignificantly, organized labor could profit considerably from refurbishing its image as the champion of the disadvantaged. Second, and perhaps more practically, a universal rule against dismis-

79. Foulkes, *Large Nonunionized Employers*, in U.S. INDUSTRIAL RELATIONS 1950-1980: A CRITICAL ASSESSMENT 129, 134-36, 141-44, 155-56 (1981); R. PASCALE & A. ATHOS, *THE ART OF JAPANESE MANAGEMENT* 131-57 (1979). Cf. Special Task Force, U.S. Dep't of Health, Education & Welfare, *WORK IN AMERICA* 93-110, 188-201 (1973).

80. Palefsky, *Wrongful Termination Litigation: "Dagwood and Goliath,"* 62 MICH. B.J. 776 (1983).

81. *Discharge Verdicts Average \$424,527 in California*, 9 Lab. Rel. Rep., 1 Individual Employment Rts. (BNA) No. 14, at 3 (Mar. 3, 1987).

82. K. Lopatka & J. Martin, *Developments in the Law of Wrongful Discharge*, in ABA NATIONAL INSTITUTE ON LITIGATING WRONGFUL DISCHARGE AND INVASION OF PRIVACY CLAIMS vii, 13-18 (1986).

83. See *supra* note 17 and accompanying text.

84. F. DULLES, *LABOR IN AMERICA* 283-85 (2d rev. 1960).

sal without cause should actually prove beneficial to unions in their organizing drives. Now, when a union sympathizer is fired in the middle of a campaign, it must be established by a preponderance of the evidence that a motivating factor in the discharge was the exercise of rights protected by the National Labor Relations Act.<sup>85</sup> This is frequently a burden too heavy to bear. With a just cause requirement generally applicable, it would be up to the employer to show that some positive, acceptable basis existed for the discharge. Finally, I believe there is a strong likelihood that just cause standards will act more as a spur than a hindrance to union organizing. The promise of fair treatment will be held out to employees; the promise may remain a tantalizing and unrealized dream, however, unless there is present the means to realize it. Constant, effective representation and advocacy is the surest way to ensure any right. That is a lesson public sector unions have already learned in representing employees in civil service proceedings.

In addition to the possible reservations of organized labor, some neutrals in industrial relations might oppose a statutory just cause requirement for fear that it would erode such worthy values as voluntarism, private initiative, and workplace creativity, and more particularly the collective bargaining process itself. I, too, treasure the unique American institution of union-employer bargaining, but when even so hardheaded an observer as John Dunlop can be found rhapsodizing on its "beauty,"<sup>86</sup> I think we should all be wary about being carried away by the mystique of the process. Collective bargaining, after all, is a means and not an end. The objective is the betterment of the individual working person. When only about a quarter to a third of the labor force is currently afforded protection against unjust discipline, I feel the needs of the great majority outweigh some theoretical risk to traditional bargaining processes. Even then, assuming history is any guide, we underrate the flexibility and resilience of collective bargaining if we believe it cannot adapt to, and indeed exploit, a new legal environment.<sup>87</sup>

#### IV. LEGISLATIVE PROPOSALS

If employees are to be fully and effectively protected against unjust discipline, new specialized legislation will ultimately be necessary.

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85. *Miller Elec. Mfg. v. NLRB*, 265 F.2d 225 (7th Cir. 1959); *NLRB v. West Point Mfg. Co.*, 245 F.2d 783 (5th Cir. 1957); cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

86. Dunlop, *The Social Utility of Collective Bargaining*, in *CHALLENGES TO COLLECTIVE BARGAINING* 168, 173 (L. Ulman ed. 1967).

87. Traditionally, labor unions have used statutory minimum standards as a base on which to build greater employee protections. See generally Fillion & Trebilcock, *The Duty to Bargain Under ERISA*, 17 WM. & MARY L. REV. 251 (1975).



The judiciary, as we have seen, may be able to respond to extreme cases and to the atypical situations of middle-management personnel. But the courts have no capacity to construct an administrative apparatus for enforcement purposes, and their more formalized processes are not readily accessible to rank-and-file workers. Nor do I see much hope in either the Constitution or existing civil rights legislation. To me the former route seems barred by the courts' increasing reluctance to expand the "state action" concept,<sup>88</sup> and the latter by the need to accord some modicum of respect to the legislative intent to forbid job discrimination only on the specified bases of "race, sex, religion, national origin, age," and the like.<sup>89</sup> It comes down, then, to a matter of further legislation. A federal statute applying uniformly to employers in all sections of the country would probably be the best solution, but it seems unlikely in the near future. State legislation appears more promising, and it offers the compensating advantage of an opportunity for some healthy experimentation with alternative procedures. During the past few years bills have been drafted in such states as California,<sup>90</sup> Michigan,<sup>91</sup> and New Jersey<sup>92</sup> to provide "just cause" protection to unorganized workers. The first comprehensive statute has now been enacted in Montana.<sup>93</sup> In the remainder of this paper I shall consider some of the principal issues almost any statutory proposal will have to confront. Obviously, there will often be substantial values in competing approaches, and more than one choice could be supported. My own suggestions will try to take account of both the ideal and the politically feasible.

#### A. "Just Cause" Standard

The first question can be disposed of the easiest. The statute should articulate a standard for lawful discharge or discipline in terms of "just cause" or equivalent language, without further definition. Even in Western European countries having nothing like the body of American arbitral precedent interpreting "just cause" requirements, there has apparently been little difficulty in applying broadly phrased statutory criteria. Any effort at specification is bound to risk underinclusiveness. The decisionmakers can be counted on to flesh out "just cause" in the same way as have the arbitrators. Nonetheless, political

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88. See, e.g., *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

89. Civil Rights Act of 1964, 78 Stat. 255 (1964) (codified as amended 42 U.S.C. § 2000e-2 (1982)); Age Discrimination in Employment Act of 1967, 81 Stat. 602 (1967) (codified as amended, 29 U.S.C. § 671 (1982)).

90. Cal. A. B. 3017 (1984); Cal. S. B. 1348 (1985); Cal. A. B. 1400 (1985).

91. Mich. H.B. 5155 (1983).

92. N.J.A.B. 1832 (1980).

93. Mont. H.B. 241 (now codified at MONT. CODE ANN. § 39-2-901 (1987)).

expediency might call for restricting statutory protection, at least as a first step, to an enumerated list of the most common abuses.

The statute should probably remain discreetly silent on such items as the burden and the quantum of proof. The differing standards that have been applied by public tribunals in job discrimination cases and by private arbitrators under collective bargaining agreements will tug in opposite directions. Concrete cases would appear to provide the best vehicle for dealing with such issues.

## B. Protected Classes of Employees

It is hard to argue in principle that any employee should be subject to an unjust termination. Still, when one reaches the presidency of a Fortune 500 company, it does not seem wholly unfitting that one accepts the risk of being confronted one day by an announcement from the chairman of the board, "I'm getting rid of you because I don't like you." Beyond that, there are practical reasons for excluding certain classes of employees from the protection of a statute.

### 1. *Managers and Supervisors*

In the higher ranges of management, one official's evaluation of another's business judgment may become so intertwined with questions of fair personal treatment that the two cannot be separated. That does not reach down to the level of shop foremen and other supervisors, who are excluded from the organizational protections of the National Labor Relations Act because they are management's immediate representatives to rank-and-file employees and any union that may be bargaining for them. This concern about potential conflicts of interest plainly does not apply to "just cause" legislation, and supervisors as such should be covered. More troubling is the position of middle-management personnel, who are among the most exposed and vulnerable. Unfortunately, our lexicon of industrial relations usage does not contain a convenient term distinguishing middle management, who we should protect, from higher management, who we may wish to exclude. A sensible solution is to except persons entitled to a pension above a certain amount, or persons with a fixed-term contract of two years or more.

### 2. *Probationary Employees*

There is almost a presumption that an employer will not dismiss an employee unfairly in the early days of employment—otherwise, why hire? Moreover, the first few weeks or months of employment enable the employer to size up the new recruit and assess his or her performance on the job. At the same time, it is not until an employee has been part of an establishment for some measurable time that he can reason-

ably feel he possesses anything like an equity in his position. For all these reasons it is generally recognized in collective bargaining agreements and elsewhere that so-called "probationary" employees are not entitled to just cause protections. One expert would make the probation period one year;<sup>94</sup> Summers and the Michigan and New Jersey bills opt for six months.<sup>95</sup> The latter seems adequate to me. But this is an appropriate area of compromise, and the California bill specifies two years.<sup>96</sup>

### 3. *Small Employers*

Theoretically, job protections should not depend on the size of the employer. Indeed, arbitrariness and individual spite may well be more common on the part of an idiosyncratic sole entrepreneur than on the part of a large, structured corporation. Nonetheless, we feel uneasy about intruding too hastily into the sometimes intensely personal relationships of small, intimate establishments. There is also concern about dissipating our resources in an endless pursuit of minor culprits instead of concentrating on the major malefactors. A suitable dividing line, at least at the outset, would seem to be employers having between ten<sup>97</sup> and fifteen<sup>98</sup> or more employees.

### 4. *Public Employees*

Public employees generally have constitutional guarantees against the deprivation of their "vested" job interest without due process. Approximately half also have more specific civil service or tenure protections against unjust dismissal. At least the latter group, as the California and Michigan bills propose, could properly be excluded from any new statutory procedures. In addition, since American employment legislation has traditionally differentiated between the public and private sectors, it may be politically advantageous to maintain that distinction by limiting any new protections to private industry.

### 5. *Organized Employees*

Most of the arguments in favor of just cause requirements have been phrased in terms of protecting "unorganized" workers. The Michigan bill expressly excludes employees "protected" by a union

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94. Howlett, *Due Process for Nonunionized Employees: A Practical Proposal*, in PROCEEDINGS OF THE THIRTY-SECOND ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 164, 167 (B. Dennis, ed. 1980).

95. Summers, *supra* note 2, at 525; Mich. H.B. 5155, § 2(c) (1983); N.J.A.B. 1832, § 1 (1980).

96. Cal. A.B. 3017, § 2880(b) (1984).

97. Summers, *supra* note 2, at 526; Mich. H.B. 5155, § 2(d) (1983).

98. Cal. A.B. 3017, § 2880(a) (1984).

contract.<sup>99</sup> The New Jersey bill more specifically limits protection to an employee "without the benefit of . . . a collective bargaining agreement that contains a grievance procedure covering these matters which terminates in binding arbitration."<sup>100</sup> The California bill takes the tack of requiring prior exhaustion of an employer's internal procedures that "have been devised with substantial employee involvement."<sup>101</sup> Montana's new law does not apply to employees covered by written collective bargaining agreements or written contracts for a set term.<sup>102</sup>

There is plainly the possibility of a federal preemption problem in covering unionized workers, as any state statute would necessarily affect collective bargaining and the enforcement of union contracts under the National Labor Relations Act and other federal labor laws. Arguably, there are several applicable strands of Supreme Court doctrine, pointing in somewhat different directions. First, state law claims are preempted if they are "substantially dependent" upon an analysis of the terms of a collective agreement.<sup>103</sup> On the other hand, "minimum state labor standards" may be imposed on union and non-union employees alike.<sup>104</sup> Perhaps most pertinent, the Supreme Court has generally taken a liberal attitude toward state regulation in the areas of employment discrimination,<sup>105</sup> unemployment compensation,<sup>106</sup> and similar welfare matters of a compelling local concern.<sup>107</sup> The federal courts of appeals are divided. When an employee covered by a union contract is fired for exercising such a traditional state right as filing a workers' compensation claim, there is some tendency to find no preemption.<sup>108</sup> But claims of retaliatory discharges for filing safety and health complaints have led to divergent preemption rulings within the same federal circuit.<sup>109</sup>

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99. Mich. H.B. 5155, § 2(c) (1983).

100. N.J.A.B. 1832, § 1 (1980).

101. Cal. A.B. 3017, § 2888(a) (1984).

102. Mont. H.B. 241, as enacted, § 7(2) (1987); MONT. CODE ANN. § 39-2-912(2) (1987).

103. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985); *IBEW v. Heckler*, 107 S. Ct. 2167, 2168 (1987).

104. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); cf. *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211 (1987).

105. *E.g.*, *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, 372 U.S. 714 (1963).

106. *New York Tel. Co. v. New York State Dept. of Labor*, 440 U.S. 519 (1979).

107. *See, e.g.*, *Teamsters Local 24 v. Oliver*, 358 U.S. 283, 297 (1959).

108. *Compare* *Peabody Galion v. A. V. Dollar*, 666 F.2d 1309 (9th Cir. 1981), *Herring v. Prince Macaroni, Inc.*, 799 F.2d 120 (3d Cir. 1986) and *Baldracchi v. Pratt & Whitney Div.*, 814 F.2d 102 (2d Cir. 1987) (no preemption) with *Johnson v. Hussman Corp.*, 805 F.2d 795 (8th Cir. 1986) and *Lingle v. Norge Div. of Magic Chef*, 2 I.E.R. (BNA) 354 (7th Cir. 1987) (preemption).

109. *Compare* *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468, 1475 (9th Cir. 1984) (preemption when employee filed complaint with Federal Mine Safety and Health Administration) with *Garibaldi v. Lucky Food Stores*, 726 F.2d 1367 (9th

At the very least I think a state would have sufficiently deep-rooted local interests to justify protecting employees within its borders from being importuned to commit a crime or violate some other basic public policy. Furthermore, by a modest expansion of either the "minimum labor standards" or "employment discrimination" exceptions to the preemption doctrine, it seems that a state might be able to prohibit all arbitrary, abusive, or unjust dismissals, except those based on union activity.<sup>110</sup> These lines are not all that easy to draw, however, and it is understandable that several bills and the new Montana law have opted not to cover employees subject to a collective agreement.<sup>111</sup>

Nevertheless, except for the possible conservation of limited administrative resources, I see no principled grounds for treating organized employees differently from the unorganized with respect to basic statutory protections. If we conclude that workers in general are entitled to invoke a just cause standard, the same public policy should apply to all, regardless of the existence of parallel protections in a collective bargaining agreement. There is federal precedent for such an approach in both the NLRA and civil rights legislation, which clearly extend to workers who are also covered by antidiscrimination guarantees in their union contracts.<sup>112</sup> Furthermore, one might ask why the state should shield nonunion workers gratis, and force unionized employees to expend bargaining chips to obtain the same safeguards.

For me the difficult question is the proper relationship of statutory and contractual rights and remedies, when both are available. Summers would give the contract priority to the extent of requiring a disciplined employee to exhaust the contractual grievance procedure, and

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Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) (no preemption when employee notified local health officials about spoiled milk). *Cf. De Soto v. Yellow Freight Systems*, 811 F.2d 1333 (9th Cir. 1987) (preemption when employee refused to drive truck he mistakenly believed was not legally licensed or registered). *But cf. Keehr v. Consolidated Freightways*, 125 L.R.R.M. (BNA) 3235 (7th Cir. 1987) (no preemption of state tort claims of intentional infliction of emotional distress and invasion of privacy when supervisor adverted to supposed immoral sexual behavior of employee's wife). *See generally* Note, *NLRA Preemption of State Law Actions for Wrongful Discharge in Violation of Public Policy*, 19 U. MICH. J.L. REF. 441 (1986).

110. *Viestenz v. Fleming Cos.*, 681 F.2d 699 (10th Cir. 1982), *cert. denied*, 459 U.S. 972 (1982). Of course, if a collective bargaining agreement is present containing a blanket prohibition of unjust discharge, there is not only the possibility of unfair labor practice preemption under the NLRA; there is also the possibility of federal contract law preemption under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982). *Teamsters Local No. 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962).

111. *See supra* notes 99-102 and accompanying text.

112. *General Am. Transp. Corp.*, 228 N.L.R.B. 808 (1977); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

would make any arbitral award that is obtained final and binding.<sup>113</sup> But he would not let the union enter a binding settlement with the employer, as it now may do under *Vaca v. Sipes*,<sup>114</sup> subject only to its duty of fair representation toward the employee. Instead, if the union declines to arbitrate under the contract, Summers would permit the employee to proceed on his or her own to the neutral tribunal provided by the state. He believes only "the most stubborn individual" would persist in the face of the union's settlement. From my experience with the United Automobile Workers' Public Review Board, I suspect there are more such "stubborn individuals" around than Summers imagines. My own inclination would be to put more trust in the flexibility of collective bargaining, and to leave some of these questions for future resolution amidst the counterpoint of particular facts, negotiated tradeoffs, dollar costs, and the union's overriding duty of fair representation. I see no reason here to engage in the same close scrutiny of union, employer, or arbitrator conduct that may be appropriate in dealing with such sensitive and divisive issues as race and sex discrimination.<sup>115</sup> Having said all that, I realize there may be much practical wisdom in the decision to finesse all these complications by excluding unionized workers from the new statutory protections.

### C. Discipline Covered

Advocates of employee protection have usually talked about protection against discharge, the so-called economic "capital punishment" of industrial relations. That is dramatic. But an extended suspension, a demotion, a denied promotion, or an onerous job assignment, while not as blatant, can be almost as distressful. Such job actions should be regarded as the functional equivalent of discharge. The Michigan bill may be politically astute in the way it puts the matter, in effect creating a "constructive discharge," though it requires the employee to engage in a variation on Russian roulette: "Discharge includes a resignation or quit that results from an improper or unreasonable action or inaction of the employer."<sup>116</sup> The new Montana law explicitly reaches "constructive discharge," defined as a "voluntary termination of employment by an employee because of a situation created by an act or omission of the employer . . . so intolerable that voluntary termination is the only reasonable alternative."<sup>117</sup>

European experience indicates that protections against unjust discipline will inevitably force inquiries into an employer's handling of "redundancies," that is, layoffs or other employee reassignments to

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113. Summers, *supra* note 2, at 528.

114. 386 U.S. 171 (1967).

115. General Am. Transp. Corp., 228 N.L.R.B. 808 (1977).

116. Mich. H.B. 5155, § 2(b) (1983).

117. Mont. H.B. 241, as enacted, § 3(1) (1987); MONT. CODE ANN. § 39-2-903(1) (1987).

meet economic downturns or reduced production demands. Otherwise, there is simply too much opportunity to disguise unfair treatment of an individual employee as part of an employer's overall reaction to business oscillations. This hardly imposes an oppressive burden on employers. All they need do is establish almost any sort of rational, verifiable criterion — seniority, skills, past productivity, etc. — as the basis for their job determinations, and they are practically impervious to challenge.

#### D. Adjudicators and Procedure

A new statute could pick and choose across a broad spectrum of possible enforcement devices. Most persons would probably rule out the courts as too formal, too costly, and already overloaded. Existing administrative agencies, either the labor relations boards or the civil rights commissions, are more likely candidates. Robert Howlett, the former chairman of the Michigan Employment Relations Commission, favors placing administration in the hands of state labor departments.<sup>118</sup> He feels the hearing officers of the conventional labor relations agencies are more attuned to organizational than to individual concerns. He also believes the whole proposal would face less political opposition if it were divorced from the usual union-employer regulatory context. My view is that a question like this is best answered by reference to the governmental structure and industrial relations climate of each state.

More significant, I think, than the locus of administration is whether we follow the hearing officer-agency model or the arbitration model. I hope I am not merely exhibiting crass professional bias when I join the overwhelming majority of my fellow arbitrators who have addressed the issue in concluding that arbitration is the superior procedure for "just cause" determinations. The California and Michigan bills provide for arbitration, and the Montana statute makes it a preferred option.<sup>119</sup> Adopting the arbitration format would immediately make available the vast body of arbitral precedent concerning substance and procedure that has been developed in countless decisions over the years. It would permit the use of an established nucleus of experienced arbitrators, and of the growing number of young, able aspirants who are caught in the vicious circle of being denied experience because they have no experience. It would facilitate maximum flexibility, at least until more is learned about future caseloads, because there would be no need to engage a large permanent staff at the outset. It would leave open the option, however, of utilizing a mix, as

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118. Howlett, *supra* note 94, at 167.

119. Cal. A.B. 3017, § 2282 (1984); Mich. H.B. 5155, § 6 (1983); Mont. H.B. 241, as enacted, § 9 (1987); MONT. CODE ANN. § 39-2-914 (1987).

New York has done, of "staff" arbitrators and of free-lancers drawn from a panel for ad hoc assignments. The relative informality and speed of arbitration — though both those qualities are now often much eroded — should also appeal to rank-and-file employees. Finally, just cause rulings do not call for the minute technical expertise that may be essential in a permanent hearing officer specializing in unemployment compensation or Social Security claims.

Although arbitration is the customary capstone of collectively bargained grievance procedures, only a small percentage of the grievances that are filed reach arbitration. Arguably the whole system would collapse if all claims went to the final step. Most are settled or dropped along the way. It would seem highly desirable to have some comparable sieve in the statutory procedure. The most obvious would be a preliminary mediation stage of minimum duration, and in California and Michigan bills so provide.<sup>120</sup> Howlett would have an official in the administering agency make a "reasonable cause" determination before a case could go to arbitration.<sup>121</sup> I agree such a requirement makes sense, especially if the state is to bear the major share of the cost of the proceedings.

Another advantage of the arbitral model is that the award is final and binding, without the need for agency adoption or review as in the case of the hearing officer's report or decision. Ordinarily, of course, a private arbitration award will not be set aside by the courts unless the arbitrator exceeded his jurisdiction or the award was obtained by fraud, collusion, or similar means. That ought to be the standard here. Since a statutory arbitrator is imposed on the parties, however, there may be considerable pressure to adopt the stiffer "substantial evidence" standard. Moreover, some state constitutions require that rulings by public agencies and officials be supported by "competent, material, and substantial evidence on the record considered as a whole."<sup>122</sup> If "substantial evidence" is the standard, one way or another, it raises the grim prospect of verbatim transcripts, with all the attendant delays and added costs. Although some persons seem to eye a tape recorder in a hearing room the way certain people are said to view cameras — as if cameras were out to capture their souls — the sponsor of the Michigan bill was persuaded to accept this cheap, handy device as a sufficient means of documentation,<sup>123</sup> and I should hope others would follow suit.

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120. Cal. A.B. 3017, § 2881(d) (1984); Mich. H.B. 5155, § 5 (1983).

121. Howlett, *supra* note 94, at 169.

122. *E.g.*, MICH. CONST. art. VI, § 28.

123. Mich. A.B. 5155, § 9(5) (1983).



## E. Remedies

Arbitrators under labor contracts have demonstrated both ingenuity and common sense in devising a range of remedies to counter unjust discharge and other discipline. They have, for instance, evolved the cardinal principle that the punishment must fit not only the offense but also the offender. What is suitable for the short-term employee of spotty record is not right for the long-time veteran of irreproachable deportment. Presumably statutory arbitrators will temper their judgments accordingly.

More specifically, remedies for unjust discharge in the United States have traditionally included reinstatement with or without back pay. In Europe reinstatement is the exception. Apparently it is felt that the lone, unwanted employee can seldom regain a comfortable position in his old workplace, and it is better to award him severance pay and let him go. A number of American experts also seem to believe that reinstatement is unfeasible without the presence of a labor union to support the restored employee. I think awarding severance pay in lieu of reinstatement is an option the arbitrator should have. But I see no reason for precluding reinstatement out of an exaggerated regard for the employee's psychic well-being. American workers are probably more transient than their European counterparts, and they are used to handling unfamiliar job situations. A reinstatement order also gives them extra bargaining leverage in working out any future adjustment with the employer. I would grant reinstatement when it seemed appropriate, and let the employee decide what use to make of the award.

The California bill offers a rather elaborate set of alternative remedies for the arbitrator, including reinstatement, backpay with interest, income and related losses for two years if reinstatement is not appropriate, and attorneys' fees and costs to the prevailing party.<sup>124</sup> The Michigan bill is somewhat similar. It includes a "severance payment" but not attorneys' fees.<sup>125</sup> The new Montana legislation expressly preempts common law actions but, somewhat surprisingly, retains punitive damages for "actual" fraud or malice, in addition to the more common lost wages and benefits, with interest, here limited to a period of four years from the date of discharge.<sup>126</sup> Interim earnings are to be deducted. Reinstatement is not mentioned.

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124. Cal. A.B. 3017, § 2884 (1984).

125. Mich. H.B. 5155, § 10(2) (1983). Future versions of the bill are expected to authorize attorneys' fees.

126. Mont. H.B. 241, as enacted, §§ 5, 8 (1987); MONT. CODE ANN. §§ 39-2-905, 39-2-913 (1987).

## F. Costs

The arbitrator's fee and expenses under collectively bargained arrangements are normally shared, 50-50, by the parties, although occasionally the loser pays all. Each side bears its own representation costs, if any. Some years ago my former colleague, Judge Harry Edwards, calculated that the typical one-day hearing costs a union \$2200;<sup>127</sup> that might be a prohibitive figure for many individual employees, especially those out of work. Clyde Summers declares that "in principle" under the statutory scheme the state should cover administrative costs and the arbitrator's fee, just as it bears the expense of courts and judges.<sup>128</sup> He would allow a nominal filing fee, perhaps \$100, to discourage frivolous claims. Howlett would require such a fee at the point a case is referred to arbitration by a screening officer.<sup>129</sup>

In theory one cannot fault that approach. But there may be practical problems in implementing it. There is now a strong tradition in the collective bargaining sector that the parties shall pay the arbitrator. Although a few states, like Connecticut and Wisconsin,<sup>130</sup> provide arbitrators at public expense, the trend has been, in a kind of reversal of Gresham's Law, for privately paid arbitrators to replace publicly paid arbitrators. Thus, prior to the Taft-Hartley Act, the old United States Conciliation Service furnished free arbitration through staff personnel. Now, of course, the FMCS simply offers parties the names of private arbitrators. New York continued to provide a choice of staff arbitrators paid by the state and "panel" arbitrators whom the parties had to pay.<sup>131</sup> But Robben Fleming reported that "the amount of free service is declining by deliberate choice of the state agency."<sup>132</sup> The list of private arbitrators was publicized and the availability of staff personnel was not. Moreover, in a period of severe financial stringency for many state governments, the prospect of one more new and perhaps substantial expense is sure to generate even further opposition to a proposal that is not going to elicit universal acclaim in any event. The California and Michigan bills heeded the counsel of prudence and provided that the employer and the employee shall bear "equally" the cost of the arbitrator.<sup>133</sup> Under the Montana law, a discharged employee who prevails in the arbitration is entitled to have the employer

127. Edwards, *Problems Facing Arbitration Process*, in Lab. Rel. Y.B. — 1977 (BNA) 206 (1978).

128. Summers, *supra* note 2, at 524.

129. Howlett, *supra* note 94, at 169. The California bill requires the employee and the employer each to file \$500 with the state mediation service "for the costs of resolving the dispute." Cal. A.B. 3017, § 2881(c) (1984).

130. Summers, *supra* note 2, at 524; Mueller, *The Role of the Wisconsin Employment Board Arbitrator*, 1963 Wis. L. Rev. 47, 49.

131. Summers, *supra* note 2, at 522.

132. R. FLEMING, *THE LABOR ARBITRATION PROCESS* 51 (1965).

133. Cal. A.B. 3017, § 2888(b)(3) (1984); Mich. H.B. 5155, § 7 (1983).

pay "the arbitrator's fees and all costs of arbitration."<sup>134</sup> Either party whose valid offer of arbitration is rejected will be awarded reasonable attorneys' fees if he prevails in the ensuing court action.<sup>135</sup>

If the state pays the bill, the state will almost certainly, like Connecticut, set the rate.<sup>136</sup> That may be fine for fledgling arbitrators, but it may not be adequate for obtaining the services of highly qualified, experienced professionals. In my opinion, it would probably be best for the statute to leave open the issue of amount, letting the parties themselves determine the level of quality for which they are willing to pay.

## V. CONCLUSION

Unjust dismissal makes no sense ethically, little sense legally, and at best marginal sense in industrial relations and economic terms. Its elimination is fast becoming a moral and historical imperative. This is not "uncharted territory,"<sup>137</sup> as some timid courts have exclaimed. This is terrain that has been carefully mapped in thousands of arbitration decisions since the Second World War. That body of arbitral precedent and a large and potentially much larger body of arbitrators stand ready to be drawn upon in the forging of a new set of statutory guarantees.

The debates that remain over this detail or that detail of proposed legislation should not obscure one central fact. In this the twentieth anniversary year of Blades's truly seminal piece,<sup>138</sup> an academic consensus has blossomed, a judicial consensus has taken root, and the makings of a legislative consensus have been planted. Whether it will be in the coming decade or the following, we shall shortly see on the legal landscape only the decaying husk of the doctrine of employment at will. The far more wholesome theory of just cause will have taken its place.

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134. Mont. H.B. 241, as enacted, § 9(5) (1987); MONT. CODE ANN. § 39-2-914(5) (1978).

135. MONT. H.B. 241, as enacted § 9(4) (1987); MONT. CODE ANN. § 39-2-914(4) (1987).

136. Summers, *supra* note 2, at 522.

137. Geary v. United States Steel Corp., 456 Pa. 171, 174, 319 A.2d 174, 175 (1974).

138. See *supra* note 1.