RETHINKING WRONGFUL DISCHARGE: A CONTINUUM APPROACH

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I. INTRODUCTION

Since 1985, at least two hundred articles have critiqued some aspect of employment at will, the notion that an employer may discharge an employee for almost any reason—a good reason, a bad reason, or no reason at all.[1] Scholars have suggested changes ranging from a just cause discharge requirement[2] to retention of an employment at will

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1. This number was obtained simply by searching on Westlaw, a popular legal research database, for all articles containing the phrase "at will" and some derivative of the word "employment" in their title. As of June 3, 2003, the search retrieved 230 articles. A cursory search of these articles revealed that most addressed employment at will issues. This number is no doubt conservative and does not include the tens, perhaps hundreds, of articles that discuss this topic but do not happen to use the term in their titles. The following articles are just of a few of the many on the subject. *See, e.g.*, Frank Scialdone, *Sexual Orientation-Based Workplace Discrimination: Carving a Public Policy Exception to Ohio's At-Will Employment Doctrine*, 11 LAW & SEXUALITY 193 (2002); David J. Walsh & Joshua L. Schwarz, *State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales*, 33 AM. BUS. L.J. 645 (1996); J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347 (1995); Melissa S. Baucus & Terry Morehead Dworkin, *Wrongful Firing in Violation of Public Policy: Who Gets Fired and Why*, 7 EMPLOYEE RESPS. & RTS. J. 191 (1994); Christopher L. Pennington, *The Public Policy Exception to the Employment-at-Will Doctrine: Its Inconsistencies in Application*, 68 TUL. L. REV. 1583 (1994); Steven H. Winterbaurer, *Wrongful Discharge in Violation of Public Policy: A Brief Overview of an Evolving Claim*, 13 INDUS. REL. L.J. 386 (1992); Frank Vickory, *The Erosion of the Employment-At-Will Doctrine and the Statute of Frauds: Time to Amend the Statute*, 30 AM. BUS. L.J. 97 (1992); Elletta S. Callahan, *The Public Policy Exception to the Employment at Will Rule Comes of Age*, 29 AM. BUS. L.J. 481 (1991); Frank J. Cavico, *Employment at Will and Public Policy*, 25 AKRON L. REV. 497 (1991); Elletta S. Callahan, *Employment at Will: The Relationship Between Societal Expectations and the Law*, 28 AM. BUS. L.J. 455 (1990); Cheryl S. Massingale, *At-Will Employment: Going, Going . . .*, 24 U. RICH. L. REV. 187 (1990); Marvin J. Levine, *The Erosion of the Employment-at-Will Doctrine: Recent Developments*, 1994 LABOR L.J. 79; Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986); Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653 (2000).

2. *See, e.g.*, Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443 (1996); Note, *Employer Opportunism and the Need for a Just Cause Standard*,

regime.[3] In spite of this rich scholarly debate, few states have made significant changes to their wrongful discharge law since the 1980s. The result is an area of employment law scholarship virtually saturated with research that does not sufficiently impact current doctrine.

Despite the extensive scholarly literature, little effort has been made to reconsider wrongful termination law in its current state. With few exceptions, an acclaimed article published by Stewart Schwab in the *Michigan Law Review* being one example,[4] little research has been done to reconstruct wrongful discharge law as it exists now, instead of how commentators wish it to be. As a result, wrongful discharge law develops haphazardly, leaving employers and employees alike unable to optimally bargain for their preferences or predict the outcome of their disputes in court.

This Article devises a systematic framework of understanding wrongful discharge. By applying a series of inquiries, a decisional grid guides the reader with a discharge question toward a specific result. This framework delivers a virtually all-encompassing lexicon for the evaluation and understanding of employee discharges. Given that at least 10,000 wrongful discharge lawsuits are filed in state courts annually,[5]

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103 HARV. L. REV. 510 (1989); Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1098 (1989); Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56 (1988); Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of 'Just Cause' in Employee Discipline Cases*, 1985 DUKE L. J. 594; Clyde Summers, *Individual Protection Against Unjust Discharge: Time for a Statute*, 62 VA. L. REV. 481, 484 (1976).

3. Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984); *see also* Susan Cattler, *The Case Against Proposals to Eliminate the Employment At Will Rule*, 5 INDUS. REL. L.J. 471 (1983); Larry S. Larson, *Why We Should Not Abandon the Presumption that Employment Is Terminable At-Will*, 23 IDAHO L. REV. 219, 253 (1987); Richard W. Power, *A Defense of the Employment At Will Rule*, 33 DEF. L.J. 199 (1984). Others press the point that the current state of the employment relationship is highly overregulated. *See* Rafael Gely, *Distilling the Essence of Contract Terms: An Anti-Antiformalist Approach to Contract and Employment Law*, 53 FLA. L. REV. 669, 670 (2001) (citing various authorities reaching this conclusion).

4. Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8 (1993). This article articulates a coherent framework for understanding the default rules of employment termination by framing these rules within the context of an employee's career life cycle. The article suggests that employee protection is most necessary for early and late career employees who have invested more in the relationship than their employer. This article is discussed in more depth *infra* Part II.A. For an example of prominent scholars who have praised Schwab's work in this article, see Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205, 216 n.37 (2001) (calling Schwab's essay "important" and his characterization of the conventional view of employment law "superb"), and Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1784 (1996) (describing Schwab's article as "critically important"). *See also* J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 840 (1995) (calling Schwab's work "important," but challenging the empirical validity of Schwab's claim of doctrinal incorporation of the life-cycle model and arguing for the desirability of the continued use of the at-will default rule).

5. H. David Kelly, Jr., *An Argument for Retaining the Well-Established Distinction Between Contractual and Statutory Claims in Labor Arbitration*, 75 U. DET. MERCY L. REV. 1, 35 n.142 (1997). *See generally* COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: FACT FINDING REPORT (May 1994).

any cogent organization of wrongful discharge law should have a positive impact on state court jurisprudence.

Part II of this Article discusses the current state of wrongful discharge law. This Part discusses the rapid changes in employment at will between 1978 and 1988 and concludes that the scholarly critique of wrongful discharge has not caused significant shifts in employment at will for almost fifteen years. This Part establishes the need for an underlying coherence of wrongful discharge law that conceives of wrongful discharge law as an understandable whole. This Part concludes that reorganization of wrongful discharge under a continuum approach clarifies and explains wrongful discharge more effectively than yet another critique of employment at will.

Part III of this Article develops a multi-tier framework for understanding wrongful discharge law by using the continuum approach mentioned in Part II. This Part reveals that most employee discharges fall within five distinct categories: just cause, good faith, arbitrary discharge, bad faith, and against public policy. This Part guides the reader through a sequential five-step format for identifying and classifying employer discharges.

Part IV explains how the continuum approach works in practice. This Part reveals conflicts in wrongful discharge law that could be resolved by applying this approach and uses a case study of a state supreme court decision to show how courts could apply continuum reasoning to produce more clear and accurate decisions. The result is a reasonable and pragmatic framework for understanding and applying wrongful discharge law that could help resolve many of the conflicts that exist today.

II. THE UNCERTAIN NATURE OF WRONGFUL DISCHARGE

This Part traces the history and growth of wrongful discharge exceptions to employment at will. Subpart A highlights the rise and decline of employment at will. Subpart B discusses employee discharge as a behavioral continuum susceptible to systematic inquiry. This Part concludes by establishing a five-tier framework of classifying wrongful discharge law in the United States.

A. History and Development of Regulating Employment

Wrongful discharge is a term that defines various conditions under which an employee may challenge her dismissal even though the employment relationship is governed by employment at will. These

"exceptions" to employment at will reflect an attempt to reconcile the contractual nature of employment with the presence of disparate bargaining power between the employer and the employee.[6]

Wrongful discharge law is a recent development. Since Professor Wood's oft-cited treatise baptized employment at will as the dominant workplace rule in 1877,[7] employment at will has had an impressive one hundred year reign: every state in the United States adhered to the employment at will rule with virtually no wrongful discharge exceptions. Scholars still debate whether Wood invented employment at will or merely summarized late nineteenth century employment law.[8] For those employed during the next one hundred years, the answer did not matter. Employment at will denied non-unionized employees badly needed job security,[9] weakened the bond of societal rights and obligations,[10] and let employers treat their workers as mere property to be disposed of at the convenience of the company.[11]

Then in 1959, a California appeals court in *Petermann v. International Brotherhood of Teamsters*[12] broke new ground by holding that an employee's discharge for refusing to commit perjury before a legislative committee was a violation of a public policy and improper, despite the presence of employment at will.[13] Eight years later, Lawrence Blades wrote a seminal law review article critiquing employment at will as unfair to the employee and ripe for abuse by the employer.[14] In the

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6. David A. Lowe, *Wrongful Discharge Claims & Collateral Torts, in* 30TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 2001, at 1249, 1253 (PLI Litig. & Admin. Practice Course, Handbook Series No. 662, 2001).

7. HORACE GAY WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877).

8. *See, e.g.*, Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551 (1990); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

9. Jane Byeff Korn, *Collective Rights and Individual Remedies: Rebalancing the Balance After* Lingle v. Norge Division of Magic Chef, Inc., 41 HASTINGS L.J. 1149, 1156 (1990).

10. *See, e.g.*, Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213, 215 (S.C. 1985) ("An at-will prerogative without limits could be suffered only in an anarchy, and there not for long—it certainly cannot be suffered in a society such as ours without weakening the bond of counter balancing rights and obligations that holds such societies together. . . . A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.").

11. Michael J. Phillips, *Toward a Middle Way in the Polarized Debate Over Employment At Will*, 30 AM. BUS. L.J. 441, 457 (1992) ("[T]reating employees 'at will' is analogous to considering an employee as a piece of property at the disposal of the employer, because arbitrary firing treats rational persons as things." (quoting PATRICIA H. WERHANE, PERSONS, RIGHTS, AND CORPORATIONS 89 (Eva Jaunzems ed., 1985))).

12. 344 P.2d 25 (Cal. Ct. App. 1959).

13. *Id.* at 28.

14. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405-10 (1967); *see also* Walter Olson, *The Trouble with Employment Law*, 8 KAN. J.L. & PUB. POL'Y 32, 32 (1999) ("Lawrence Blades, who kicked off the modern revolution in state employment law with his article in the Columbia Law Review in 1967 launching the attack on employment at will. The resulting intellectual insurgency, which soon spread to pretty much every law faculty, was to transform American employment law quite dramatically.").

1970s and early 1980s, other scholars followed Blades's lead,[15] attacking employment at will as unprincipled and unduly harsh on employees.[16] Employment at will, they argued, insufficiently accounted for the realities of the modern workplace, characterized by the increased dependence of employees on employers, the reduced availability of employees to use the labor market to their advantage, and the decreased frequency and power of collective bargaining agreements.[17]

In response to this scholarship, a majority of state courts carved out exceptions to the employment at will rule. Between 1979 and 1988, the number of states incorporating the public policy exception[18] to employment at will more than tripled.[19] From 1984 to 1986, more than five states per year recognized the public policy exception to employment at will for the first time.[20] Similarly, between 1980 and 1987, judicial approval of the implied contract exception increased from fewer than

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15. *See generally* Olson, *supra* note 14, at 32 ("Then, suddenly, sometime around 1968 or 1970, our law schools decided that this old rule was terrible. It was oppressive, and it had to go.").

16. *E.g.*, Note, *Protecting Employees at-Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983); Kurt H. Decker, *At-Will Employment in Pennsylvania—A Proposal for its Abolition and Statutory Regulation*, 87 DICK. L. REV. 477 (1983); Donald H.J. Hermann & Yvonne S. Sor, *Property Rights in One's Job: The Case for Limiting Employment at-Will*, 24 ARIZ. L. REV. 763, 815 (1982); Jeffrey L. Harrison, *Wrongful Discharge: Toward a More Efficient Remedy*, 56 IND. L.J. 207 (1981); John D. Blackburn, Restricted Employer Discharge Rights: A Changing Concept of Employment at-Will, 17 AM. BUS. L.J. 467 (1980); Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Summers, *supra* note 2; J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974); Philip J. Levine, Note, *Towards a Property Right in Employment*, 22 BUFF. L. REV. 1081, 1108 (1973); Alred W. Blumrosen, *Workers' Rights Against Employers and Unions: Justice Francis—A Judge for Our Season*, 24 RUTGERS L. REV. 480 (1970). Courts recognized this scholarly dissatisfaction. *E.g.*, Maxwell v. Ross Hyden Motors, 722 P.2d 1192, 1195 (N.M. 1986) (referring to the "mounting criticism by scholars and courts directed at the rule's harshness"); Wagenseller v. Scottsdale Memorial Hospital, 710 P.2d 1025, 1031 (Ariz. 1985) ("In recent years there has been apparent dissatisfaction with the absolutist formulation of the common law at-will rule."). In *Murphy v. Am. Home Prods.*, 448 N.E.2d 86 (N.Y. 1983), Judge Meyer summarized best:

> The harshness of a rule which permits an employer to discharge with impunity a 30-year employee one day before his pension vests or for no other reason than that he filed a compensation claim, the bizarre origin of the termination- at-will rule, the change of economic and constitutional philosophy that has occurred since its adoption, the exclusion of a substantial segment of the working community from its effects through "just cause" limitations upon the right to fire resulting from collective bargaining, and the inconsistency of the rule not only with the common law of England and with earlier New York decisions but also with the law of most industrial countries of the world, have caused an outpouring of judicial and scholarly writings intended to ameliorate, if not abolish, the rule.

Id. at 93-94 (Meyer, J., dissenting in part) (citations omitted).

17. Walsh & Schwarz, *supra* note 1, at 657 n.40.

18. The public policy exception to employment at will states that an employee cannot be terminated from his employment if the motivation for that termination contravenes a clear public mandate, service, or interest such as jury duty, testifying before Congress, or reporting illegal activity. The public policy exception is discussed in more detail *infra* Part III.B.

19. Walsh & Schwarz, *supra* note 1, at 656.

20. *Id.*

ten states to nearly forty.[21] In just seven years, courts and commentators transformed the at-will rule from a dominant workplace rule to one constrained with exceptions prohibiting outrageous employer conduct. Only a few dissenting voices, led by Richard Epstein, supported retention of employment at will.[22] Some scholars predicted that employment at will would disappear.[23]

After 1988, however, new adoptions of employment at will exceptions slowed to a trickle.[24] A number of states steadfastly refused to modify employment at will.[25] The remainder made only minor changes to their wrongful discharge laws. The battle over employment at will reached an unspoken truce.[26] Employment at will remained in place in most states, but it was riddled with exceptions that curtail its most inequitable results.

Over forty years have passed since *Petermann*'s announcement and over twenty years have elapsed since the veritable open declaration of war by courts and commentators on employment at will in the 1970s. Wrongful discharge law since that time has remained largely intact. Although it is potentially futile and thankless to predict future legal trends,[27] it seems reasonable to conclude that 1980s-style shifts in wrongful discharge law are not forthcoming in the near future.

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21. *Id.* at 656-57 ("[V]ery few states recognized implied employment contracts prior to 1980. There was a pronounced acceleration in acceptance of the doctrine between 1983 and 1987.").

22. *E.g.*, Epstein, *supra* note 3; Susan Catler, *The Case Against Proposals to Eliminate the Employment at Will Rule*, 5 INDUS. REL. L.J. 471 (1983).

23. *E.g.*, Hermann & Sor, *supra* note 16, at 815 ("The death knell is sounding for the employment-at-will doctrine; the unfettered right of an employer to discharge an employee is being replaced by recognition of a scheme of qualified rights and duties of employer and employee."). One article even discussed issues that would occur after employment at will was put to rest. S. Richard Pincus & Steven L. Gillman, *The Common Law Contract and Tort Rights of Union Employees: What Effect After the Demise of "At Will" Doctrine?*, 59 CHI-KENT L. REV. 1007 (1983).

24. Walsh & Schwarz, *supra* note 1, at 656-57.

25. States that adhere most strongly to employment at will are discussed *infra* Part III.B.

26. I am not the first person to describe the virulent employment at will debate in warlike terms. *E.g.*, Alex Long, *The Disconnect Between at Will Employment and Tortious Interference with Business Relations: Rethinking Tortious Interference Claims in the Employment Context*, 33 ARIZ. ST. L.J. 491, 517 (2001) ("The employment at-will doctrine has been under attack for over thirty years. Since Lawrence E. Blades' 1967 article criticizing the rule and calling for its replacement with a just cause standard, the rule has been subject to intense debate."); Gary M. Kramer, *Limited License to Fish off the Company Pier: Toward Express Employer Policies on Supervisor-Subordinate Fraternization*, 22 W. NEW ENG. L. REV. 77, 101 (2000) (describing covenant of good faith, implied contract, and other doctrines as "[a]ttacks on [e]mployment-[a]t-[w]ill"); William R. Corbett, *The "Fall" of Summers, the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305, 308 (1996) ("Employment at will now has won so many battles before the Supreme Court that the war may almost be over."); Timothy J. Heinsz, *The Assault on the Employment at Will Doctrine: Management Considerations*, 48 MO. L. REV. 855, 862 (1983).

27. Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?*, 76 IND. L.J. 29, 29-31 (2001); *see also* William R. Groth, *Response to Gillian Lester and Stewart J. Schwab: An Indiana Perspective*, 76 IND. L.J. 77, 79 (2001).

Nevertheless, the flood of scholarship advocating broad normative changes to employment at will continues unabated. For example, an article by Ann McGinley proposes federal legislation forbidding dismissal without just cause for all employees who have completed a probationary period with their employer.[28] This proposed legislation would extinguish all rights under Title VII of the Civil Rights Act of 1964,[29] the Age Discrimination in Employment Act,[30] discrimination actions pursuant to 42 U.S.C. § 1981, and other federal employment statutes.[31] It also would require arbitration of any wrongful discharge claims.[32] The burden of persuasion would be with the employer to show that the employee was terminated for a just cause.[33] According to McGinley, such a system would fulfill the laudatory goal of removing court cases from the grasp of a conservative judiciary uninterested in protecting employee rights.[34]

McGinley and similar scholars offer a reasoned, thorough, and arguably compelling argument for replacing employment at will with a just cause requirement.[35] Such scholarship is no doubt helpful in placing employment at will and other long-standing employment doctrines under scrutiny for its inability to strike an appropriate balance between an employee's interest in job security and an employer's interest in profitability. However, such scholarship would require an immense transformation of well-settled statutory and common law.

Furthermore, chances are remote that just cause will ever become the employment standard. Only one state, Montana, has enacted anything

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28. McGinley, *supra* note 2, at 1504. This legislation would be similar to that already in place in the U.S. Virgin Islands. *Id.* at 1504 n.380 (citing 24 V.I. CODE ANN. §§ 76-79 (1993)).

29. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

30. 29 U.S.C. §§ 621–634 (2000).

31. McGinley, *supra* note 2, at 1512. McGinley states that drafting the specific provisions of the statute is beyond the scope of the paper. *Id.*

32. *Id.* at 1513.

33. *Id.*

34. *Id.* at 1509.

35. *E.g.*, David Dominguez, *Just Cause Protection: Will the Demise of Employment-at-will Breathe New Life into Collective Job Security?*, 28 IDAHO L. REV. 283 (1992) (arguing that the just cause standard is a collective job security right that benefits all employees where employee handbook is distributed and is not simply an individual employment right to be enforced after a discharge has taken place); Gary Minda & Katie R. Raab, *Time for an Unjust Dismissal Statute in New York*, 54 BROOK. L. REV. 1137, 1150 (1989) ("Limitations of the employment at-will doctrine only require judges to interpret the at-will presumption in light of . . . fundamental principles of fairness."); Janice R. Bellace, *A Right of Fair Dismissal: Enforcing A Statutory Guarantee*, 16 U. MICH. J.L. REFORM 207, 231-47 (1983) (proposing state legislation as method of protecting against unjust dismissals). One author has even suggested that wrongful discharge may trigger constitutional protections. *See* Peck, *supra* note 16, at 21-26 (heavy regulation of employers by federal and state law causes a private employer's discharge of an employee to be state action which violates the Equal Protection Clause and procedural due process).

resembling a just cause requirement,[36] and that effort alone has been criticized for being unworkable and unfair to employees.[37] There are no viable plans in other states.

Uniform proposals have also been unsuccessful. The Model Employment Termination Act (META), a model act that prohibits terminations by employers absent good cause, has not been adopted in a single state.[38] META has drawn sharp criticism for imposing too many burdens on employers.[39] Others fault META for not protecting employees enough.[40] Perhaps only sweeping congressional action, an extremely unlikely possibility given the long entrenchment of employment at will, could enact just cause reform.[41]

Given the unlikely prospects of eliminating employment at will, how can scholarship assist in the growth of the doctrine? Efforts to place decisions in wrongful discharge law into a framework and give it coherence would be instrumental in understanding courts' behavior when dealing with employment at will. An excellent example is the work of Stewart J. Schwab in a thoughtful article titled, *Life-Cycle Justice: Accommodating Just Cause and Employment-at-Will.*[42] Schwab states that "snapshot examinations" of unjust dismissal law have led commentators to believe that the current judicial landscape has little coherence or rationale.[43] He also notes that these examinations fail to explain or

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36. MONT. CODE ANN. § 39-2-904(1)(b) (2003).

37. *See generally* Donald C. Robinson, *The First Decade of Judicial Interpretation of the Montana Wrongful Discharge from Employment Act (WDEA)*, 57 MONT. L. REV. 375 (1996); Michael Bennett, *Montana's Employment Protection: A Comparative Critique of Montana's Wrongful Discharge from Employment Act in Light of the United Kingdom's Unfair Dismissal Law*, 57 MONT. L. REV. 115 (1996); Glenn D. Newman, *The Model Employment Termination Act in the United States: Lessons from the British Experience with Uniform Protections Against Unfair Dismissal*, 27 STAN. J. INT'L L. 393 (1991).

38. Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 426 (2002) ("[N]o state has adopted META's proposed reformulation of employment termination law in the decade following its much heralded promulgation.").

39. *E.g.*, Mary Jean Navaretta, *The Model Employment Termination Act—META—More Aptly the Menace to Employment Tranquility Act: A Critique*, 25 STETSON L. REV. 1027, 1044 (1996); Schwab, *supra* note 4, at 10 (stating that META does not sufficiently prevent employee shirking).

40. Dawn S. Perry, *Deterring Egregious Violations of Public Policy: A Proposed Amendment to the Model Employment Termination Act*, 67 WASH. L. REV. 915, 925 (1992) (META's limitation on damages will not deter violations of public policy); Paul H. Tobias, *Defects in the Model Employment Termination Act*, 43 LAB. L.J. 500, 501-02 (1992) (META weakens employee interests by eliminating punitive and compensatory damages and expanding the scope of judicial review).

41. Some scholars advocate such action by Congress. *E.g.*, Befort, *supra* note 38, at 424 ("Congress should enact a statute that systematically governs the issue of employment security. This statute should adopt a unitary, just cause standard for termination."); *see also* St. Antoine, *supra* note 2; Jack Stieber & Michael Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REFORM 319 (1983).

42. 92 MICH. L. REV. 8 (1993).

43. *Id.* at 9.

understand current law, except in the crudest way.[44] Schwab affirms that current law has an underlying coherence that should be recognized and understood instead of ignored in favor of another common law or statutory system.[45]

Schwab's article argues both positively and normatively for an intermediate solution between the extremes of both just cause and employment at will. The article concludes that courts follow an implicit "life cycle doctrine" which scrutinizes firings at the beginning and the end of an employee's career when she is most vulnerable to opportunism by the employer. Early-career employees are vulnerable to opportunistic firing because they commit far greater resources to their employer before their employer commits to them.[46] Late-career employees are vulnerable to opportunistic firing because it is in the employer's short-term economic interest to terminate those like late-career employees who may be paid disproportionately well compared to their productivity.[47] According to Schwab, employment law is least concerned with mid-career employees when employers are most vulnerable to shirking by the employee.[48] Schwab concludes that, "[f]ar from being chaotic, the current common law provides optimal rules for regulating employment terminations."[49] Courts have been boldest when job protection is appropriate, and "have hesitated precisely when at will plays its most useful role."[50]

Both the application and principles of Schwab's work are relevant for understanding employment law. Schwab's life-cycle framework explains what seems to be a disorganized judicial landscape. Schwab does not attempt to discard current law and replace it with a new regime. His efforts focus on accommodating just cause and employment at will, not discarding one for the other.[51]

The preceding discussion begs the question: if scholarship cannot trigger a change to a new just cause regime, then what can be done to clarify and reform the existing law? The answer lies not with an adop-

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44. *Id.*

45. *Id.*

46. The employee gives up his or her old job and the firm-specific skills and credibility gained at that old position. *Id.* at 39.

47. *Id.* at 19 n.39.

48. *Id.* at 39.

49. *Id.* at 62.

50. *Id.* at 11.

51. I do not want to overstate the point, however. This is not to say that any inquiry that supports any part of the status quo or engages in descriptive inquiry in employment law is worthy of adulation. This is also not to say that Schwab has cornered the market on intellectual consensus building in wrongful discharge. *E.g.*, Phillips, *supra* note 11 (good cause standard modifiable by contract). Nevertheless, the positive response to Schwab's work implies at least to some extent the importance of identifying an underlying coherence in employment termination as opposed to advocating yet another judicial standard.

tion of a new regime, but with expanding upon Schwab's work. The next section of this paper focuses on this task.

B. Employee Discharge as a Behavioral Continuum

Employee protections appeared in state law with little warning and with no concern for the development of the doctrine as a whole. As a result, fifty states over thirty years have reached their own decisions as to what constitutes wrongful discharge. Therefore, it is impossible to draw uniform conclusions summarizing wrongful discharge law in all fifty states. However, states' efforts to devise wrongful discharge protections coalesce into common groups. On one extreme, Georgia, Alabama, and New York adhere rigidly to employment at will and permit few, if any, exceptions to the rule. On the other extreme, California, Alaska, and Montana offer a litany of workplace discharge remedies to employees that rival European-style protections.[52] The majority of states fall somewhere in between.

Wrongful discharge law, however, is not a random association of ad hoc protections. Wrongful discharge law, and by association employer discharge behavior, exists as a structural continuum of conduct.[53] This continuum ranges widely from the most justified and reasonable discharge to one that contravenes fundamental conceptions of fairness and equity. Employers discharge employees in the following five ways: (1) with just cause (an objectively good and honest reason),[54] (2) in good faith (a reason within the parties' justified expectations),[55] (3) arbitrarily (an irrational, whimsical, or nonsensical reason),[56] (4) in bad faith (an opportunistic reason depriving the employee of an expected benefit of the employment bargain),[57] and (5) against public policy (a reason con-

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52. The United States is one of the only Western nations that does not provide discharge protection. *See* Samuel Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 AM. J. COMP. L. 310, 311 (1985) ("We seem to stand virtually alone among the nations of the Western industrialized world in not providing general protection against unjust discharge for private-sector employees who either cannot or do not choose unionism.").

53. For purposes of this article, I define a structural continuum as a coherent body of conduct characterized as a progression of values or elements with relatively clear dividing points. This definition of "continuum" may vary slightly from traditional interpretations of the word, which usually view a "continuum" as a "progression of values or elements varying by minute degrees." MERRIAM-WEBSTER DICTIONARY, *available at* http://www.m-w.com (last visited Apr. 19, 2003).

54. *See infra* Part III.A.

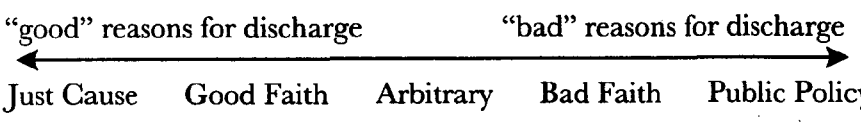
55. *See infra* Part III.E.

56. *See infra* Part III.D.

57. *See infra* Part III.C.

travening an established societal norm).[58] The following diagram represents their relative location along an employer discharge continuum.

Exhibit 1: Employee Discharge as a Continuum



Although a fair amount has been written discussing the interrelationship of good faith and fiduciary duty as a continuum of obligations,[59] explaining an entire range of possible wrongful discharge decisions as an interrelated continuum is something new.[60] The following framework encapsulates the interrelatedness of the five classifications of wrongful discharge and summarizes the necessary inquiry to determine which category applies.

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58. *See infra* Part III.B.

59. *E.g.*, Claire Moore Dickerson, *Cycles and Pendulums: Good Faith, Norms, and the Commons*, 54 WASH. & LEE L. REV. 399, 405-11 (1997) (describing interrelated nature of good faith and fiduciary duty as a continuum); Thomas Lee Hazen, *The Corporate Persona, Contract (and Market) Failure, and Moral Values*, 69 N.C. L. REV. 273, 286 (1991) (describing a view of "fiduciary duty and good faith as part of a continuum. Good faith defines the floor for contractual dealings generally, whereas fiduciary duty sets higher standards applicable in certain relationships."); John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618 (1989) (similar).

60. Only one note has briefly described wrongful discharge in a continuum-like way. Todd M. Smith, Note, *Wrongful Discharge Reexamined: The Crisis Matures, Ohio Responds*, 41 CASE W. RES. L. REV. 1209, 1253 n.325 (1991). Smith writes:

> A continuum of employee rights exists:
> at-will >> public policy >> good faith/fair dealing >> just cause >>implied contract.
> As one moves to the right on the scale, the exceptions increasingly limit the unfettered discretion of employment at will. The step from at will to a public policy exception represents the abolition of the absolutist conception of employment at will, a major qualitative change. Little changes, however, in employment relations as a whole. Recognition of the implied covenant of good faith and fair dealing further decreases the scope of the at-will rule. This step changes the level of employer misbehavior needed to establish a wrongful discharge claim from willful and malicious conduct that violates public policy to all willful and malicious conduct. Just cause changes the standard even further, from willful and malicious conduct to unjust conduct. The step to just cause also changes the burden of proof. For example, in union contexts, where the just cause standard is generally used, the burden rests on the employer to show that the discharge was for a just (business) cause.

Id.

Exhibit 2: A Taxonomy of Wrongful Discharge

Does the reason for discharge:	Just Cause	Good Faith	Arbitrary	Bad Faith	Public Policy
satisfy a good cause and is supported by substantial evidence?	Yes	No	No	No	No
fall within the justified expectations of the parties?	Yes	Yes	No	No	No
deprive the employee of the benefit of the employment bargain?	No	No	No	Yes	Yes
contradict important societal or judicial values?	No	No	No	No	Yes

The rest of this paper explains these exhibits in more depth.

III. A CONTINUUM APPROACH TO WRONGFUL DISCHARGE

Merely placing various employer behaviors into categories does not in itself reduce confusion. The above classification must deliver some benefit by illuminating wrongful discharge in a way that normative arguments for and against employment at will do not. In addition, any classification of such a broad scope of law will not be of much use unless specific guidance is given to apply that schema in a clear and practical manner. This Part will review the state of the law in each classification of wrongful discharge and develop a workable standard. Each section will define a one-sentence inquiry that may be used to determine whether an employer's discharge fits within a particular context.

A. The Behavioral Pinnacle of Just Cause

We begin constructing the continuum approach with what may be seen as the moral peak of employer conduct. Employers acting with just cause treat their employees with punctilious concern for fairness and equity. Only the most qualified employees are promoted. Office politics and arbitrary decision making do not infect the employment relationship. When an employee must be discharged, only justifiable "good reasons," such as incompetence or an economic downturn, are the basis for that termination. Whenever the employer acts, it subjectively believes that it has the company's altruistic motives in mind and objectively possesses substantial evidence or good reason to support its decision. Anything less than substantial evidence cannot justify the employer's conclusion that the employee is "guilty" of misconduct. Finally, the employer's disciplinary action is evenhanded, proportionate to the proven offense, and considers the employee's length of service with the company. If the employer fails to achieve any or all of these high standards, it risks punishment in a court of law. This is the idealized domain of "just cause" employment.[61]

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61. Some scholars note a distinction between good cause and just cause, whereby just cause is governed by an objective standard (a good reason in fact) and good cause by a subjective standard (a reasonable belief that a good reason for discharge exists). However, this distinction is far from clear and the terms are used differently across cases and jurisdictions. Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 927-28 (Cal. Ct. App. 1981) ("The terms 'just cause' and 'good cause,' 'as used in a variety of contexts . . . have been found to be difficult to define with precision and to be largely relative in their connotation, depending upon the particular circumstances of each case.'" (quoting R.J. Cardinal Co. v. Ritchie, 32 Cal. Rptr. 545, 558 (Cal. Ct. App. 1963))); Gary Trachten, *Formal Employment Contracts*, *in* HANDLING WRONGFUL TERMINATION CLAIMS 2001; WHAT PLAINTIFFS AND DEFENDANTS HAVE TO KNOW 7, 13 (PLI Litig. & Admin. Practice Course, Handbook Series No. 650, 2001) ("courts appear to use interchangeably the terms 'cause,' 'good cause,' and 'just cause'"). Some find no distinction between these terms. Hilligoss v. Cargill, Inc., 649 N.W.2d 142, 148 (Minn. 2002) (holding that the terms "just cause," "good cause," or "cause" are equivalent and mean "some cause or ground that a reasonable employer, acting in good faith in similar circumstances would regard as a good and sufficient basis . . . [for] the standards of job performance that [the employer] established and uniformly applied"); Bd. of Governors v. Ill. Educ. Labor Relations Bd., 524 N.E.2d 758, 761-62 (Ill. App. Ct. 1988) (treating just cause and good cause similarly); Deacon v. Int'l Union of Operating Eng'rs, 236 Cal. App. 2d 302, 308 (Cal. Ct. App. 1965) (holding there is no material difference between the terms "just cause" required to be shown by federal statute before union member may inspect union books and term "good cause" used in California decision allowing union member on showing of good cause to inspect union books); Chalker v. First Fed. Sav. & Loan Ass'n, 126 N.E.2d 475, 476 (Ohio Com. Pl. 1955) (treating just cause and good cause synonymously). This Article uses just cause and good cause interchangeably, and apply both concepts of discharge to a broader single category. In addition, this section examines the substantive requirement of just cause discharge rather than the procedural rules and requirements necessary to implement it. For a general discussion of substantive and procedural just cause principles in the arbitration context see Summers, *supra* note 2, at 501-08.

Although just cause terms have existed for hundreds of years,[62] modern just cause employment originated in the 1930s, when unions clamored for termination protection in their collective bargaining agreements.[63] Today, most union members and federal, state, and municipal civil service employees are governed by the just cause regime.[64] Tenured college faculty[65] and arbitration proceedings are protected by a similar standard.[66]

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62. Although the exact standards have varied over the years, the principle of just cause employment has a long and distinguished history. One of the first codified just cause standards dated back to a Statute of Laborers enacted in 1562. Wendi J. Delmendo, Comment, *Determining Just Cause: An Equitable Solution for the Workplace*, 66 WASH. L. REV. 831, 832 (1991) (citing Carl F. Schwarze, Comment, *Understanding the Just Cause Defense*, 65 U. DET. L. REV. 527, 531 (1988)). Prior to the mid-nineteenth century, the arrangement between an employer and his employee was largely a status-based relationship, wherein the master was responsible for the servant's health, welfare, and security. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824 (1980). This would later become known as the "English Rule." Parnar v. Am. Hotels, Inc., 652 P.2d 625, 627 (Haw. 1982). In the mid-to-late nineteenth century, the employment at will doctrine eclipsed just cause in the United States and became established in a number of states, popularized by Wood's famous treatise. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 124 (1976). *See also* Greer v. Arlington Mills Mfg Co., 43 A. 609 (Del. Super. Ct. 1899); McCullough Iron Co. v. Carpenter, 11 A. 176 (Md. 1887); Martin v. New York Life Ins. Co., 42 N.E. 416 (N.Y. 1895); E. Line & R.R.R. Co. v. Scott, 10 S.W. 99 (Tex. 1888); Jeanne Duquette Dorr, *The Model Employment Termination Act: Fruitful Seed or Noxious Weed?*, 31 DUQ. L. REV. 111, 112 (1992). The at-will employment status that eclipsed just cause has been likened to support a "rugged, self-centered individualism" that comports well with the American national psyche. Theodore J. St. Antoine, *Employment at Will – Is the Model Act the Answer?*, 23 STETSON L. REV. 179, 179-80 (1993) (citing ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 477 (J. P. Mayer & M. Lerner eds., G. Lawrence trans., 1966) and related sources); *see also* Ballam, *supra* note 1.

63. Schwarze, *supra* note 62, at 531.

64. Delmendo, *supra* note 62, at 832. One commentator estimates that, at least in 1985, that ninety-four percent of all collective bargaining agreements are governed by a just cause or similar standard. Abrams & Nolan, *supra* note 2, at 594 n.1; *see also* 5 U.S.C. § 7513(a) (2003) (authorizing discharge of many federal civil service employees "only for such cause as will promote the efficiency of the service").

65. *See, e.g.*, Harry F. Tepker, Jr., *Good Cause and Just Expectations: Academic Tenure in Oklahoma's Public Colleges and Universities*, 46 OKLA. L. REV. 205 (1993); Matthew W. Finkin, *"A Higher Order in the Workplace": Academic Freedom and Tenure in the Vortex of Employment Practices and Law*, 53 LAW & CONTEMP. PROBS. 357 (1990).

66. *E.g.*, Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers' Paradox in Responding to Hostile Environment Sexual Harassment—A Proposed Way Out*, 67 FORDHAM L. REV. 1517, 1562 (1999) (citing Enterprise Wire Co., 46 Lab. Arb. Rep. (BNA) 359 (1966) (Daugherty, Arb.)). The arbitrator, as stated by Franklin, articulated the following factors:

> (1) Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct? . . . .
>
> (2) Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee? . . . .
>
> (3) Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management? . . . .
>
> (4) Was the company's investigation conducted fairly and objectively? . . . .
>
> (5) At the investigation, did the [factfinder] obtain substantial evidence or proof that the employee was guilty as charged? . . . .

Although cases applying just cause are not always consistent, two requirements commonly appear in just cause matters:[67] (1) The employer has stated an objectively equitable, sensible, and logical reason that constitutes sufficient cause for discharge; and (2) The employer subjectively believes that sufficient evidence exists that the sufficient cause is in fact true.

Courts have accepted a number of motives as objectively sensible reasons for discharge. The most prominent of these reasons is a reduction in force.[68] Adverse economic conditions, even if the employee is not at fault for these conditions, constitute just cause for discharge of that employee. These adverse conditions include the discontinuance of a new product line,[69] business cutbacks,[70] business closing,[71] elimination of a position,[72] and a reduction in force.[73]

In addition, employers have satisfied the just cause requirement when the employee fails to meet performance standards,[74] or engages in conduct that injures the employer's reputation or interests.[75] This may

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> (6) Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees? . . . .
>
> (7) Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Id. (citing Enterprise Wire, 46 Lab. Arb. Rep. (BNA) at 363-64)). The standard was applied strictly, the failure to satisfy even one of the seven factors would preclude a finding of just cause. *Id.* (citing Enterprise Wire, 46 Lab. Arb. Rep. (BNA) at 362); *see also* Grief Bros. Cooperage Corp., 42 Lab. Arb. Rep. (BNA) 555 (1964) (Daugherty, Arb.).

67. WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES 105 (2d ed. 1993); *see also* Patricia A. Konopka, *Combatting Sexual Harassment in the Workplace Without Risking A Wrongful Discharge Lawsuit: An Employer's Dilemma?*, 42 U. KAN. L. REV. 437, 441-42 (1994); Delmendo, *supra* note 62, at 831.

68. *But see* Sanders v. Parker Drilling Co., 911 F.2d 191, 200 (9th Cir. 1990) (stating that "[t]he just cause doctrine has nothing to do with 'no fault' reductions in force"). This conclusion has been criticized as "just plain wrong." HOLLOWAY & LEECH, *supra* note 67, at 109.

69. Telesphere Int'l, Inc. v. Scollin, 489 So. 2d 1152 (Fla. Dist. Ct. App. 1986) (person hired to market proposed new product discharged for just cause).

70. Bhogaonker v. Metro. Hosp., 417 N.W.2d 501 (Mich. Ct. App. 1987).

71. Friske v. Jasinski Builders, Inc., 402 N.W.2d 42 (Mich. Ct. App. 1986).

72. Valles v. Arizona Bd. of Regents, 743 P.2d 959 (Ariz. 1987).

73. Gianaculas v. Trans World Airlines, Inc., 761 F.2d 1391 (9th Cir. 1985).

74. Tiedman v. Am. Pigment Corp., 253 F.2d 803 (4th Cir. 1958); Franklin v. Texas Int'l Petroleum Corp., 324 F. Supp. 808 (W.D. La. 1971); Grimwood v. Univ. of Puget Sound, Inc., 753 P.2d 517 (Wash. 1988); Belcher v. Dep't of State Lands, 742 P.2d 475 (Mont. 1987). *But see* Berutti v. Dierks Foods, Inc., 496 N.E.2d 350 (Ill. App. Ct. 1986) (poor sales performance not sufficient to establish just cause discharge).

75. Waymire v. Placer Joint Union High Sch. Dist., 29 Cal. Rptr. 459 (Cal. Ct. App. 1963) (bus driver terminated for kissing sixteen year old passenger); Assoc. Milk Producers v. Nelson, 624 S.W.2d 920 (Tex. Civ. App. 1981); Osborn v. Review Bd., 381 N.E.2d 495 (Ind. Ct. App. 1978). Misconduct that offends the employer's personal moral code, however, may not constitute sufficient just cause for discharge. *E.g.*, Campell v. Fierlein, 134 Ill. App. 207 (Ill. App. Ct. 1907) (gambling salesman).

include public advocacy of illegal behavior.[76] Other just cause reasons for terminating an employee include intoxication,[77] severe personality conflicts,[78] criminal acts against the employer,[79] lateness and absences,[80] and insubordination.[81]

Although many just cause reasons exist, the question of the role of the judicial factfinder in a just cause dispute remains unresolved. In other words, to whom should the proffered reasons for discharge be considered objectively reasonable? On the one hand, the employer is the sole judge of its own reasonableness. In *Simpson v. Western Graphics Corp.*,[82] Western Graphics discharged Simpson for violently threatening another employee.[83] Simpson, whose employment was covered by a just cause provision in an employee handbook, denied making the threats.[84] Simpson argued that a court should determine whether he did in fact threaten the other employee. The court reasoned that the handbook was a unilateral self-imposed restriction by the employer and no statement was ever made relinquishing its power to determine whether facts constituting cause for termination existed.[85] The court stated that the employer agreed to govern itself by the just cause standard, but "did not agree to a secondary level of fact-finding authority."[86] The court concluded that it did not have to determine whether just cause actually

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76. Connick v. Myers, 461 U.S. 138 (1983) (district attorney's termination because of a refusal to accept transfer to different criminal area and distribution of questionnaire considered an act of insubordination did not impact district attorney's first amendment rights); Turner v. Byers, 562 S.W.2d 507 (Tex. Civ. App. 1978) (nurse anesthetist advocated nonpayment of taxes on television); Bd. of Ed. v. Gossett, 115 P. 856 (Okla. 1916) (janitor publicly accusing school board members of graft properly terminated for good cause). Advocacy on public issues, however, may trigger free speech interests that thwart good cause firings. *E.g.*, Perry v. Sindermann, 408 U.S. 593 (1972) (refusal to renew public school teacher's contract because of exercise of teacher's free speech unlawful); McGee v. South Pemiscot Sch. Dist., 712 F.2d 339 (8th Cir. 1983) (firing of track coach resulting from coach's letter to newspaper protesting school board's decision to eliminate track violation of coach's constitutional rights); McKinley v. Eloy, 705 F.2d 1110 (9th Cir. 1983) (firing of probationary police union representation for publicly criticizing town's refusal to give police officer's annual raise unconstitutional).

77. Monticello Cotton Mills, Inc. v. Powell, 221 S.W.2d 33 (Ark. 1949).

78. County of Giles v. Wines, 546 S.E.2d 721, 722 (Va. 2001). *But see* Hammond v. T.J. Litle & Co., 82 F.3d 1166, 1177 (1st Cir. 1996).

79. *E.g.*, LaGoe v. Duber Industries Sec., Inc., 239 Cal. Rptr. 445 (Cal. Ct. App. 1987) (theft), *superseded by* Lagoe v. Duber Indus. Sec., Inc., 744 P.2d 654 (Cal 1987).

80. *E.g.*, Volino v. Gen. Dynamics, 539 A.2d 531 (R.I. 1988) (absenteeism).

81. *E.g.*, Parrish v. Worldwide Travel Serv., 512 S.E.2d 818 (Va. 1999); Davies v. Mansbach, 338 S.W.2d 210 (Ky. 1960); Thomas v. Bourdette, 608 P.2d 178 (Ore. Ct. App. 1980).

82. 643 P.2d 1276 (Or. 1982).

83. *Id.* at 1277.

84. *Id.*

85. *Id.* at 1279.

86. *Id.*

existed because that discretion rested with the employer alone.[87] As a result, the court refused to question the employer's decision.[88]

The subjective test of the *Simpson* decision allows employers to retain broad managerial discretion when choosing whether to terminate their employees. The *Simpson* decision, however, creates troubling implications for employees challenging their employers' good cause decisions. Employers only need to articulate a good faith belief that a just cause to terminate exists. The employer has no responsibility to conduct a meaningful investigation or document relevant behavior that would justify its decision.[89] An employer may be tempted to cloud an illicit motive by stating a false reason that complies with just cause requirements. The difficulty of establishing proof of an employer's disingenuous intent makes the incentive to lie all the more powerful. As a result, employers under *Simpson* benefit from increased employee loyalty obtained by a just cause regime without the accompanying burdens.[90] Just cause becomes an illusory subjective standard.[91]

A contrary understanding of just cause proposes submitting the employer's decision to de novo review by a factfinder. A judge or jury would reach an objective independent determination of whether the employer's proffered reason really occurred. The most prominent case advocating this standard is *Toussaint v. Blue Cross & Blue Shield of Michigan*.[92] Toussaint was a middle level manager who was assured

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87. *Id.*; *see also* Gaudio v. Griffin Health Servs., 733 A.2d 197, 208 (Conn. 1999) (agreeing with this conclusion and stating that an employer who wishes to terminate an employee for cause must do nothing more rigorous than "proffer a proper reason for dismissal" (quoting Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980))).

88. *Simpson*, 643 P.2d at 1279. Two justices dissented, calling the majority's decision a "dangerous departure from the rules of contract law." *Id.* at 1280 (Lent, J., dissenting). The dissent stated that it is a well-settled principle of contract law that "if a contract gives one party a right to act with respect to the interests of the other party upon the happening of an event or fulfillment of a condition, the happening or fulfillment is a necessary predicate to exercise of the right." *Id.* at 1279. The mere fact that an erroneous conclusion was relied upon in good faith neither insulates the mistaken party from wrongdoing nor removes from him the responsibility of correcting the redress according the condition's terms. *Id.*

89. *See* Delmendo, *supra* note 62, at 846.

90. *Id.* at 845; *see also* Befort, *supra* note 38, at 388-89 (describing benefits of a stable workforce and employers' historical efforts to foster a career-minded commitment from employees through legitimate expectations of a long term relationship).

91. *See generally* Crosier v. United Parcel Serv., 198 Cal. Rptr. 361, 366 (Cal. Ct. App. 1983) (observing that a "promise to dismiss an employee only for cause would be illusory if the employer were permitted to be the sole judge and final arbiter of the propriety of the . . . discharge"); David M. Young, Note, *The Ninth Circuit Requires Alaskan Employers to Prove Misconduct to Justify Termination of Employees in Hazardous Workplaces:* Sanders v. Parker Drilling, 14 GEO. MASON U. L. REV. 201, 223 n.126 (1991) ("[A] subjective standard [of just cause] would be too susceptible to abuse. It would be far too easy for an employer to prove his own subjective beliefs, so that the rule would not adequately protect against opportunistic behavior by the employer.").

92. 292 N.W.2d 880 (Mich. 1980).

before commencing employment that as long as he performed his job he would not be terminated.[93] Toussaint was terminated because of alleged personality conflicts with other employees and insubordination in a meeting with executives.[94] The court concluded that, at least for discharges based upon misconduct, the jury must determine whether the employee actually committed the infraction alleged by the employer.[95]

An independent factual review of just cause determinations significantly benefits employees. Just cause employees have protections similar to their civil service and unionized counterparts—independent review of an employer's decision by a neutral third party or a group of peers. Such a secondary level of factfinding, however, significantly infringes upon employers' prerogative to shape and design their workforce.[96] De novo review of just cause allows the jury to override the conclusions of the employer. The factfinder becomes the equivalent of a supervising employment panel that could comment upon virtually any just cause decision.[97] Juries, the predominant factfinders in these employment cases, have no specialized knowledge of the employer's goals, interests, or business needs, and they bring to bear their own personal prejudices. Far removed from the rapid-fire decision-making often required in a modern workplace, juries may be tempted to over-analyze the employer's rationale. Large money judgments and jury overreaching would remain a real risk. Employers aware of these biases may be fearful of discharging employees even when the legal right to do so exists. This could create a chilling effect on an employer's managerial discretion.

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93. *Id.* at 884. The opinion also addresses a companion dispute, *Ebling v. Masco Corp.*, which is discussed in parallel with Toussaint's claims.

94. *Id.* at 897 n.39.

95. *Id.* at 896. The court attempted to limit its decision by noting that "[w]hile the promise to terminate employment only for cause includes the right to have the employer's decision reviewed, it does not include a right to be discharged only with the concurrence of the communal judgment of the jury." *Id.* However, the court did not articulate any further guidelines as to how the jury's "communal judgment" powers should be controlled. *See* Delmendo, *supra* note 62, at 835 n.42. The ability of a jury to review a just cause decision also applies to economically based reductions in force. *See, e.g.*, Ewers v. Stroh Brewery Co. 443 N.W.2d 504 (Mich. Ct. App. 1989) (resolution of question of economic necessity proffered by employer and challenged by employee as mere pretext is a question of fact for the jury).

96. *Compare* Heltborg v. Modern Mach., 795 P.2d 954, 961 (Mont. 1990) (noting that "plac[ing] the jury in the middle of general management decisions[ ] in effect eviscerat[es] the concept of employer latitude in decision-making"), *with* Waters v. Churchill, 511 U.S. 661, 677 (1994) ("We think employer decisionmaking will not be unduly burdened by having courts look to the facts as the employer *reasonably* found them to be.").

97. The implications of judicial overreaching in just cause matters is discussed extensively in *Cotran v. Rollins Hudig Hall International, Inc.*, 948 P.2d 412, 419-21 (Cal. 1998).

Fortunately, a middle ground has emerged between the extremes of *Toussaint* and *Simpson*. In *Baldwin v. Sisters of Providence in Washington, Inc.*,[98] the plaintiff worked as a respiratory therapist for the defendant hospital, where he was subject to an employee handbook that limited terminations to instances of "gross violation of conduct."[99] The plaintiff was accused of molesting a patient.[100] After an investigation,[101] the plaintiff was discharged.[102] The trial court entered judgment in favor of the plaintiff.[103]

On appeal, the defendant argued that the trial court's jury instruction on just cause was improper because it only incorporated an objective standard, making the jury the sole determiner of whether just cause existed.[104] The Washington Supreme Court agreed with the defendants and adopted a mixed test that limited the discretion of the employer with the evaluation of the factfinder.[105] The court concluded:

> We hold "just cause" is a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power. We further hold a discharge for "just cause" is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true.[106]

This standard strikes a balance between the employer's interest in making necessary employment decisions and the employee's interest in continued employment.[107] If such a balance did not exist, the court

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98. 769 P.2d 298 (Wash. 1989).

99. *Id.* at 299.

100. *Id.*

101. An investigation by the employer into the veracity of the misconduct may be a required part of the employer's responsibility to establish just cause. *See* Michael D. Moberly, *Negligent Investigation: Arizona's Fourth Exception to the Employment-at-Will Rule?*, 27 ARIZ. ST. L.J. 993, 1003-05 (1995).

102. *Baldwin*, 769 P.2d at 300.

103. *Id.*

104. The trial court's instruction on just cause stated that, "'Just cause' means that under the facts and circumstances existing at the time the decision is made, an employer had a good, substantial and legitimate business reason for terminating the employment of a particular employee." *Id.* at 303. The defendant's instruction incorporated a subjective and objective test to review its just cause determination. The proposed instruction, which was rejected by the trial court in favor of the instruction above, stated:

> "Just cause" is defined as a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power. A discharge for "just cause" is one based on facts that (1) are supported by substantial evidence and (2) are reasonably believed by the employer to be true and also (3) is not for any arbitrary, capricious, or illegal reason.

Id.

105. *Id.* at 304.

106. *Id.*

107. *Id.* The *Baldwin* standard does appear to require more proof than the Model Employment Termination Act (META), which merely requires an employer to act reasonably and does not require presentation of substantial evidence. *See* Michael D. Fabiano, *The Meaning of Just Cause For Termination When*

reasoned, employers such as the defendant might be encouraged to eliminate termination protections from their handbooks altogether.[108] The court reversed the trial court's judgment in favor of the plaintiff.

Some cite *Baldwin* as a mere reiteration of *Simpson*'s subjective test.[109] This view misperceives *Baldwin* and undermines its full meaning. *Baldwin* does not merely stand for the proposition that a court should defer to employer discretion. Rather, *Baldwin* obligates employers to act both in subjective good faith and upon an objective reasonable belief that good cause for termination existed. In effect, the *Baldwin* decision merges the subjective standard of good faith emphasized in *Simpson* with the objective factfinder's determination of *Toussaint*.[110] The test balances the employer's interest in making personnel decisions and the employee's interest in continued employment.[111] The factfinder's role is limited to determining whether the reason for discharge is reasonably believed by the employer to be true, not necessarily whether the reason was true according to the factfinder.

This middle ground is appealing because of its moderate stance, and it is being adopted by a number of other states.[112] New Mexico adopted similar, though less well-articulated, criteria in 1988.[113] Alaska explicitly followed *Baldwin* in 1991.[114] Nevada joined in 1995.[115] In 1998, after a lengthy and thoughtful discussion of prior case law and the policies underlying the factfinder's role in determining just cause, California

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an Employer Alleges Misconduct and the Employee Denies It, 44 HASTINGS L.J. 399, 406 & n.36 (1993) (citing Model Employment Termination Act § 1(4)(i) (1991)).

108. *Id.*

109. *E.g.*, Maietta v. United Parcel Serv., Inc., 749 F. Supp. 1344, 1362-63 (D.N.J. 1990) (citing *Baldwin* and others for the proposition that "[u]nder such a[just cause] employment contract, an employer need only make a good faith determination having credible support that good cause exists").

110. *Id.* at 303. The trial court's jury instruction stated, "'Just cause' means that under the facts and circumstances existing at the time the decision is made, an employer had a good, substantial and legitimate business reason for terminating the employment of a particular employee." *Id.*

111. *Id.* at 304.

112. *E.g.*, Southwest Gas Corp. v. Vargas, 901 P.2d 693, 701 (Nev. 1995) ("In agreement with the standard as set forth in *Baldwin* and *Braun*, we hold that a discharge for 'just' or 'good' cause is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence, and (2) reasonably believed by the employer to be true.").

113. Kestenbaum v. Pennzoil Co., 766 P.2d 280, 287 (N.M. 1988) (jury determination whether employer "had reasonable grounds to believe that sufficient cause existed to justify the defendants' actions in discharging the plaintiff").

114. Braun v. Alaska Com. Fishing & Agr. Bank, 816 P.2d 140, 142 (Alaska 1991) (quoting *Baldwin* and holding that "[a] discharge for 'just cause' is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true").

115. *Southwest Gas Corp.*, 901 P.2d at 701 ("In agreement with the standard as set forth in *Baldwin* and *Braun*, we hold that a discharge for 'just' or 'good' cause is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence, and (2) reasonably believed by the employer to be true.").

adopted the middle ground standard in *Cotran v. Rollins Hudig Hall International, Inc.*[116] North Dakota followed in 2000.[117] Also in 2000, Arizona's federal district court, determining the standard it believed Arizona would follow if faced with the similar issue, adopted what "appears to be the majority rule" of *Baldwin* and *Cotran*.[118] A dissenting opinion in Connecticut also has advocated the *Baldwin* position.[119]

The *Baldwin* definition of just cause provides employers with significant subjective discretion in their termination decisions while using the objective factfinder as a check against unsupported or disingenuous firings. Striking this balance between employer and employee interests arguably promotes the continued use of self-imposed employer limitations on the at-will doctrine and limits backpedaling by employers fearful of giving up their own discretion to terminate.[120] Compressing the standard into one sentence, just cause may be summarized by the following question:

> Has the employer stated an objectively appropriate reason that constitutes sufficient cause for discharge that the employer subjectively believes to be true based upon sufficient and credible evidence?[121]

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116. 948 P.2d 412 (Cal. 1998). The court's discussion of the factfinder's role in just cause was extraordinarily detailed, carefully reviewing the development of California law on good cause, *id.* at 417-18, the breach and reach of the *Toussaint* decision, *id.* at 418-19, the rejection of the reasoning in *Toussaint* by the *Simpson* court and others, *id.* at 419, the *Baldwin* decision, *id.* at 420, other states' decisions, *id.* at 419-20, and the policies underlying factfinder interference with an employer's good cause determination. *Id.* at 420-21. The court phrased the proper inquiry for the jury as not "[d]id the employee *in fact* commit the act leading to dismissal?" *Id.* at 422. Rather, the jury should ask, "[w]as the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?" *Id.* The court ultimately defined good cause as "fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion [is], in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." *Id.*

117. Thompson v. Associated Potato Growers, Inc., 610 N.W.2d 53, 59 (N.D. 2000) ("We adopt the objective good-faith standard under which an employer is justified in terminating an employee for good cause for fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.") (internal quotations omitted).

118. Almada v. Allstate Ins. Co., Inc., 153 F. Supp. 2d 1108, 1114 (D. Ariz. 2000).

119. Gaudio v. Griffin Health Servs. Corp., 733 A.2d 197, 220 (Conn. 1999) (Callahan, C.J., dissenting) (citing *Baldwin* for the proposition that "[i]n my view, the proper standard for determining the existence of just cause is not whether the employer correctly concluded that the employee had engaged in misconduct; rather, it is whether the employer had a good faith and reasonable belief, based upon substantial evidence, that the employee had done so").

120. Cotran v. Rollings Hudig Hall Int'l, Inc., 948 P.2d 412, 421 (Cal. 1998); Baldwin v. Sisters of Providence in Wash., Inc., 769 P.2d 298, 304 (Wash. 1989).

121. This question is very similar to one given by the court in *Cotran* as the appropriate inquiry for the jury in just cause matters. However, the question here differs from *Cotran* in that it states "after an investigation *appropriate to the job and infraction in question*" instead of merely "after an appropriate investigation,"

This question represents the first inquiry in the continuum approach. If the question is answered affirmatively, then the employer may be considered to have terminated that employee with just cause. In virtually all states and under most conditions, the conclusion that an employee was terminated with just cause insulates the employer from wrongful discharge liability. An employer firing with just cause will not breach its collective bargaining agreement establishing that standard. A university terminating a tenured faculty member for just cause may have sufficient reasons to end that faculty member's tenure. Employers operating in an at-will environment may certainly discharge for a just cause.

What if the facts point to a negative answer? It may be best to describe what such a conclusion does *not* mean. Assuming at-will employment, failure to answer this question affirmatively does not mean that the employer breached an implied covenant of good faith and fair dealing with the employee. The covenant of good faith is conceptually distinct and arguably a lower standard than just cause.[122] One also does not know whether the employer violated a clear public policy or acted in bad faith. All that is known so far is whether the employer acted with the subjective motive and objective reasonableness that satisfies the just cause requirement.

Further inquiry therefore is necessary to determine the true nature of the discharge. While this section examined whether the employer acted with fairness and honesty supported by substantial evidence, the next section examines the other extreme—whether the employer's action was so inappropriate that it contravened a well-established public norm.

B. Conduct Contradicting Societal Norms: The Violation of an Established Public Policy

This Article now turns to the other end of the termination continuum —whether the employer terminated the employee in violation of an established public policy. This Part will introduce the concept of a

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as *Cotran* requires. 948 P.2d at 422. The additional emphasis placed upon the appropriateness of an investigation is intended to give the factfinder flexibility in retaining or denying deference to an employer's decision given the nature of the position and the type of infraction. For example, a court may wish to give an employer more discretion to determine just cause toward an employee who works in a highly safety-sensitive position where misconduct by that employee may result in the injury or death of herself and others. For an example of the legal equivalent of a fistfight between appellate judges on this issue, see *Sanders v. Parker Drilling*, 911 F.2d 191 (9th Cir. 1990) (concurring and dissenting opinion hotly debate question of whether employer terminating employees working in highly dangerous oil rigging job because of unsubstantiated allegations of drug use has sufficient just cause to discharge).

122. This distinction is explained in more depth *infra* Part III.E.

public policy, examine prevailing trends in public policy law, and establish a working question that will determine whether an employer's termination decision contravened a public policy norm.

Dismissals against public policy represent the lowest moral ebb of employer conduct. In these situations, the employer terminates employees for reasons that society deems so unfair or unreasonable that statutory law or common law specifically prohibits them. Thus, such discharges warrant formalized statements of societal disapproval through the medium of a "public policy" established by the legislature or the judiciary.

Beyond statutorily prohibited classifications by employers on the basis of race, color, religion, gender, national origin, age, and disability,[123] it has been difficult to define precisely what public policy is to be protected.[124] On one extreme, a few states recognize virtually no public policy protections in employment beyond traditional discrimination. New York is a leading example. In *Murphy v. American Home Products Corp.*,[125] Murphy had been an employee of American Home Products since 1957.[126] He alleged that he was fired because of his internal reporting of alleged accounting improprieties to top management.[127] Murphy claimed that he was wrongfully terminated and urged the court to recognize the tort of abusive discharge.[128] The court denied

123. *See, e.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634(2000); Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2611–2654 (2003); Civil Rights Act of 1964 tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (2000); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000). These prohibitions are not generally considered public policy exceptions to employment at will, but rather well-established statutory prohibitions that fall outside the rubric of common law wrongful discharge.

124. *E.g.*, Thibodeau v. Design Group One Architects, LLC, 802 A.2d 731,736 (Conn. 2002) (recognizing "the inherent vagueness of the concept of public policy and the difficulty encountered when attempting to define precisely the contours of the public policy exception"); Zientara v. Long Creek Township, 569 N.E.2d 1299, 1303-04 (Ill. App. Ct. 1991) (the recognition of retaliatory discharge tort acknowledges "the common law principle that parties to a contract may not incorporate in it rights and obligations which are clearly injurious to the public . . . . But the Achilles heel of the principle lies in the definition of public policy."); Petermann v. Int'l Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Ct. App. 1959) ("The term 'public policy' is inherently not subject to precise definition."); Parker, *supra* note 1, at 393 ("Courts and commentators alike have struggled to define the parameters of the public policy tort."); William C. Martucci & Georgann H. Eglinksi, *Emerging Employment Litigation: Wrongful Discharge Update*, 45 J. MO. B. 179, 182 (1989) ("The difficulty is determining when public policy requires courts to intervene on behalf of a discharged employee."); John W. Loseman, Note, *Unraveling the Illinois Retaliatory Discharge Tort*, 1989 U. ILL. L. REV. 517, 517 (stating that "[b]y failing to clearly define 'public policy,' the court forces employers and employees to speculate regarding the scope of the new retaliatory discharge tort").

125. 448 N.E.2d 86 (N.Y. 1983).

126. *Id.* at 87.

127. *Id.*

128. *Id.* at 89.

Murphy's claim, reasoning that it was the role of the legislature to establish a statutory scheme limiting employment at will.[129]

Georgia courts also have steadfastly refused to create judicial public policy exceptions to the at-will rule,[130] upholding only statutory prohibitions.[131] For example, in *Land v. Delta Air Lines, Inc.*,[132] a freight service agent injured himself on the job and was incapacitated. As a result, Delta fired him.[133] Land claimed that his termination constituted wrongful discharge.[134] The court ruled that the plaintiff did not have a cause of action because Georgia statutorily codified the employment at will doctrine.[135] This trend continued in *Evans v. Bibb Co.*[136] In *Evans*, the plaintiff claimed that he was wrongfully discharged for pursuing a remedy under Georgia's Worker's Compensation Act.[137] The court found that an at-will employee could not bring an action for wrongful discharge.[138] Although the court recognized that other states incorporate a public policy exception, the court refused to create such a remedy.[139] The court reasoned that it was not its role to change laws, but only to interpret them.[140]

Alabama also does not judicially recognize a public policy exception. In *Grant v. Butler*,[141] the plaintiffs reported hazardous working conditions to OSHA and were subsequently terminated.[142] The court refused to create a public policy exception for reporting hazardous workplace conditions, stating that the plaintiffs already had an adequate remedy at law under the anti-retaliation provisions of the Occupational Safety and

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129. *Id.* at 90.

130. *See* Nancy Baumgarten, Note, *"Sometimes the Road Less Traveled is Less Traveled for a Reason": The Need for Change in Georgia's Employment-At-Will Doctrine and Refusal to Adopt the Public Policy Exception*, 35 GA. L. REV. 1021 (2001) (providing a useful discussion of Georgia law).

131. *E.g.*, GA. CODE ANN. § 18-4-7 (1998) (prohibiting discharge because wages subject to garnishment); GA. CODE ANN. § 34-1-3 (1998 & Supp. 2000) (prohibiting discharge because employee attends hearing in response to court order regarding a cause of action).

132. 203 S.E.2d 316 (Ga. Ct. App. 1973).

133. *Id.* at 317.

134. *Id.*

135. *Id.*; *see also* GA. CODE ANN. § 34-7-1 (1998 & Supp. 2000) (stating that "indefinite hiring may be terminated at will by either party").

136. 342 S.E.2d 484 (Ga. Ct. App. 1986).

137. *Id.* at 485.

138. *Id.* at 486.

139. *Id.*

140. *Id.* Other Georgia cases have followed *Evans* and *Land*, and have also refused to provide a remedy. *E.g.*, Borden v. Johnson, 395 S.E.2d 628 (Ga. Ct. App. 1990) (refusing to recognize a public policy exception); Mr. B's Oil Co., Inc. v. Register, 351 S.E.2d 533 (Ga. Ct. App. 1986) (similar).

141. 590 So. 2d 254 (Ala. 1991).

142. *Id.* at 255.

Health Act.[143] The court reaffirmed its continuing disapproval of the public policy exception, stating:

> Through the years, this Court has steadfastly declined to modify the employee-at-will doctrine by recognizing a cause of action sounding in tort for the wrongful termination of an employment contract when the employer's actions were in contravention of this state's public policy, but has chosen, instead, to rely upon legislative action to ameliorate some of the harshness of the employee-at-will doctrine.[144]

The court did not rule out the possible success of future challenges, stating that it does "recognize that it may become necessary for this Court to adopt a limited public-policy-based tort remedy for a wrongfully terminated employee,"[145] but so far that door remains closed. In short, although Alabama recognizes limited statutory exceptions,[146] the language in *Grant* reveals a consistent refusal by the Alabama courts to allow public policy protections.

Unlike New York, Alabama, Georgia, and a few other states, the prevailing weight of judicial authority on the subject recognizes a public policy exception to employment at will.[147] As discussed above, an employee's termination for refusal to engage in indecent exposure is a violation of a public policy.[148] Terminating an employee for insisting that an employer comply with FDA regulations[149] or threatening to report an employer for violating federal regulations[150] also contravenes public policy. Employee discharges for legally filing workman's

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143. *Id.* at 257 (citing 29 U.S.C. § 660(c) (1993)).

144. *Id.* at 256.

145. *Id.* The court stated that this case "does not present facts that would justify the judicial creation of such a remedy." *Id.*

146. *See* Robert C. Lockwood, Commentary, *Alabama's Statutory Exception to the Employee-At-Will Doctrine: Retaliatory Discharge Under Alabama Code Section 25-5-11.1*, 47 ALA. L. REV. 541 (1996) (describing Alabama law).

147. According to one author, all states except Alabama, Florida, Georgia, Louisiana, New York, and Rhode Island recognize some public policy exception to employment at will. Seymour Moskowitz, *Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect*, 36 LOY. L.A. L. REV. 589, 650 (2003). The article cites *Williams v. Killough*, 474 So. 2d 680, 681 (Ala. 1985), *Scott v. Otis Elevator Co.*, 524 So. 2d 642, 642-43 (Fla. 1988), *Borden v. Johnson*, 395 S.E.2d 628, 630 (Ga. Ct. App. 1990), *Sampson v. Wendy's Management, Inc.*, 593 So. 2d 336, 338 (La. 1992), *Murphy v. American Home Products Corp.*, 448 N.E.2d 86, 89-90 (N.Y. 1983), and *Pacheo v. Raytheon Co.*, 623 A.2d 464, 465 (R.I. 1993) in support of its conclusion. Moskowitz, *supra* at 650 nn.389-94; *see also* Michael McGuinness, *North Carolina's Developing Public Policy Wrongful Discharge Doctrine in the New Millennium: Basic Principles, Causation, and Proof of Improper Motive*, 23 CAMPBELL L. REV. 203, 206 n.7 (2001) (agreeing with this conclusion).

148. *See* Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1027 (Ariz. 1985).

149. Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 389 (Conn. 1980). *But cf.* Spierling v. First Am. Home Health Servs., Inc., 737 A.2d 1250 (Pa. Super. Ct. 1999) (termination of employee for reporting evidence of Medicare fraud not violation of an established public policy). *See also* Sabrina C.C. Fedel, *Superior Court Upholds At-Will Employment Doctrine*, LAW. J., Nov. 5, 1999, at 2 (describing the decision).

150. Boyle v. Vista Eyewear, Inc. 700 S.W.2d 859, 877 (Mo. Ct. App. 1985).

compensation claims are also included.[151] Further, an employee cannot be terminated for refusing to commit perjury[152] or for serving on a jury.[153]

Courts, to varying degrees, recognize five categories of public policy limitations to the at-will rule.[154] An employer may not terminate an employee for: (1) refusing to participate in an illegal activity;[155] (2) performing an important public obligation, such as jury duty;[156] (3) exercising a legal right or interest;[157] (4) exposing legal wrongdoing in the employee's company;[158] and (5) performing an act that public policy would encourage, or refusing to perform something that public policy would condemn, when the discharge is coupled with a showing of bad faith, malice, or retaliation (a "catch-all" provision).[159]

Based upon the discussion above, a definitional question may be extracted from these cases:

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151. Morgan Drive Away, Inc. v. Brant, 489 N.E.2d 933 (Ind. 1986).

152. Sides v. Duke Hosp., 328 S.E.2d 818 (N.C. Ct. App. 1985).

153. Nees v. Hocks, 536 P.2d 512 (Or. 1975).

154. *See* Bishop v. Federal Intermediate Credit Bank of Wichita, 908 F.2d 658, 663 (10th Cir. 1990) (listing these factors). Not all states formally recognize every public policy stated, but these kinds of activities by employers are generally seen by a number of courts as improper. For an example of one state's development of a coherent public policy protection scheme see generally McGuinness, *supra* note 147. *See also* Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275 (Iowa 2000) (providing in-depth discussion of public policy doctrine in Iowa).

155. *E.g.*, Bushko v. Miller Brewing Co., 396 N.W.2d 167, 171 (Wis. 1986); Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980) (employee terminated for refusing to participate in price fixing scheme); Trombetta v. Detroit, Toledo & Ironton R. Co., 265 N.W.2d 385 (Mich. Ct. App. 1978) (public policy found where employee fired for refusing to falsify pollution control test results, but employee nevertheless failed to recover because employer showed employee insubordination); Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978) (employee terminated for refusing to violate a consumer credit protection law); Petermann v. Int'l Bhd. of Teamsters, 344 P.2d 25 (Cal. 1959) (employee discharged for refusing to commit perjury).

156. *E.g.*, Nees v. Hocks, 536 P.2d 512 (Or. 1975) (employee discharged while performing jury service); Reuther v. Fowler & Williams, Inc., 386 A.2d 119 (Pa. Super. Ct. 1978) (similar).

157. *E.g.*, Lally v. Copygraphics, 428 A.2d 1317 (N.J. 1981) (employee dismissed for filing a workers' compensation claim); Palmateer v. Int'l Harvester Co., 421 N.E.2d 876 (Ill. 1981) (employee fired for supplying information about fellow employee to law enforcement); Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973).

158. *E.g.*, Watassek v. Mich. Dept. of Mental Health, 372 N.W.2d 617 (Mich. Ct. App. 1985) (employee terminated for reporting to supervisor incidents of patient abuse at a mental hospital before exhausting administrative procedures); Petrik v. Monarch Printing Corp., 444 N.E.2d 588 (Ill. App. Ct. 1982) (employee fired for complaining about corporate embezzlement and other violations to fellow employees); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980) (employee dismissed for complaining to regulatory agency about poor quality and mislabeled food).

159. Cloutier v. Great Atl. & Pac. Tea Co., 436 A.2d 1140, 1143-44 (N.H. 1981) (fashioning this two-part test); *see also* Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 513 (N.J. 1980). Although public policy protection is extensive in some states, it is not limitless. *E.g.*, Sorensen v. Comm Tek, Inc., 799 P.2d 70, 74 (Idaho 1990) (employer's failure to negotiate with employee terms of employment not violation of public policy).

> To the extent that the state recognizes this standard, did the employer terminate the employee in contravention of a well-established legislative, judicial, or general public policy?

If the question is answered affirmatively, then the employer violated a clear public policy when it terminated the employee. In almost all states, discharging an employee in violation of an important public policy is illegal. Therefore, the determination that an employer's termination decision contravened a public policy would generally mean that the employer committed wrongful discharge.

If the answer is no, then the continuum approach completed thus far tells us two things. First, based upon the inquiry in section A, we know that the discharge did not occur with just cause. Second, we now also know that the discharge did not violate an established public policy. We must then proceed to the following section for further information.

C. Opportunistic Discharge by the Employer: The Problem of Bad Faith

We have now examined two categories of wrongful termination—just cause and public policy. Assume that the relevant facts of the discharge did not satisfy either category. The employer neither contravened a public policy nor acted with objective reasonableness and subjective good intent to establish just cause. Therefore, the employer's actions neither reached the highest standards of conduct nor violated established public norms. With the most extreme "good" and "bad" possibilities resolved, the discussion now moves towards the center of the discharge continuum.[160] We now ask: Given that the employer neither violated an established public policy nor acted with just cause, did the employer nevertheless discharge its employee in bad faith? This section defines and clarifies this question.

Although definitions are numerous, bad faith commonly is defined as a "[d]ishonesty of belief or purpose."[161] In the insurance context, bad

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160. *See supra* Exhibit 1.

161. BLACK'S LAW DICTIONARY 134 (7th ed. 1999). An earlier definition of bad faith imbued an evil or duplicitous into the term, defining bad faith as "[t]he opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another . . . not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." BLACK'S LAW DICTIONARY 176 (4th ed. 1968). Bad faith has been considered to be notoriously vague, compelling some courts to refrain from defining and enforcing the term. *E.g.*, City of Midland v. O'Bryant, 18 S.W.3d 209, 216 (Tex. 2000) (declining to recognize the covenant cause of action because to do so "would completely alter the nature of the at-will employment relationship"); Parnar v. Americana Hotels, Inc., 652 P.2d 625, 629 (Haw. 1982) (rejecting the covenant of good faith because it would necessitate "judicial incursions into the amorphous concept of bad faith").

faith occurs when the insurer has no reasonable basis to deny a claim or reject settlement, or fails to investigate or defend a claim by the insured.[162] Bad faith has also been defined as dishonest conduct carried out with the intent of ill will, hatred, or revenge.[163] In the *Restatement (Second) of Contracts*, bad faith means an evasion of the spirit of the bargain that may involve deliberately making imperfect performance, abuse of terms, interference with the performance of the contract or a failure to cooperate with the other party.[164]

Bad faith in the employment context has also been subject to a variety of interpretations;[165] however a common definition explains bad faith as depriving the employee of the benefit of her agreed upon employment bargain.[166] This "benefit of the bargain" requirement means that neither party will act in any way to deprive or impair the other party from receiving the agreed upon benefits of the employment relationship.

Bad faith under the benefit of the bargain test may arise from terminating employees before their pensions vest.[167] An employer may

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162. *E.g.*, Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 625 (2001).

163. Odette Woods, Note, *Tort Law—Tortious Interference with Contract: The Arkansas Supreme Court Clarifies Who Has the Burden and What They Have to Prove*, 21 U. ARK. LITTLE ROCK L. REV. 563, 575 n.101 (1999).

164. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1981).

165. *E.g.*, Franco v. Yale Univ., 238 F. Supp. 2d 449, 455 (D. Conn. 2002) ("Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake . . . but by some interested or sinister motive. . . . Bad faith means more than mere negligence; it involves a dishonest purpose." (quoting Habetz v. Condon, 618 A.2d 501 (Conn. 1992))).

166. *See, e.g*, Deborah A. Schmedemann, *Working Backwards: The Covenant of Good Faith and Fair Dealing in Employment Law*, 16 WM. MITCHELL L. REV. 1119, 1135-38 (1990) (recommending adherence to benefit of bargain standard as appropriate measure of good faith). By implication, impairment of the benefit of the agreed upon employment bargain would constitute bad faith.

167. *E.g.*, Foley v. Presbyterian Ministers' Fund, 749 F. Supp. 109 (E.D. Pa. 1990); Mudd v. Hoffman Homes for Youth, 543 A.2d 1092 (Pa. Super. Ct. 1988); K-Mart Corp. v. Ponsock, 732 P.2d 1364 (Nev. 1987) (firing forklift operator fired six months before pension vesting for painting battery cover on his forklift bad faith discharge), *abrogated on other grounds*, 498 U.S. 133 (1990); Schlenz v. United Airlines, Inc., 678 F. Supp. 230 (N.D. Cal. 1988) (employee discharged forty-seven days from ten year employment anniversary motivated to stop employee's pension plan from vest is a bad faith discharge). *See generally* United Steelworkers of Am., Local No. 1617 v. Gen. Fireproofing Co., 464 F.2d 726 (6th Cir. 1972) (supervisor discharged one day short of 30 years of service which would have qualified him for enhanced pension level). In *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822 (E.D.N.Y. 1980), *abrogated on other grounds, Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), the court chided an unrepentant employer for just such conduct:

> Mr. Savodnik toiled over thirteen years for defendant. He received frequent promotions and salary increases—indeed, he was virtually a model employee. By agreement, part of the compensation he was to receive for his labors was a pension, the rights of which were to vest after fifteen years of covered service. Mr. Savodnik faithfully discharged his responsibilities; defendant, virtually at the eleventh hour, then sought to avoid its responsibility to contribute to the Plan by discharging Mr. Savodnik. In its papers defendant does not deny this scenario

also act in bad faith when it attempts to avoid profit sharing obligations or retirement payments by dismissing an employee.[168] The benefit of the bargain can also incorporate nonmonetary aspects of the employment relationship. In *Metcalf v. Intermountain Gas Co.*,[169] Armida Metcalf was subject to a leave policy limiting accrual of sick leave to one day per month.[170] A lengthy illness forced her to remain absent for eight weeks, causing problems for the office.[171] As a result, her employer changed her work status from full-time to part-time.[172] Metcalf claimed that her employment status could not be changed merely because she used a substantial portion of her sick leave available to her under her employment contract.[173] The court agreed that Metcalf had a cause of action, noting that "any action by either party which violates, nullifies or significantly impairs any benefit of the employment contract is a violation of the implied-in-law covenant of good faith and fair dealing."[174]

The benefit of the bargain test described above has received broad acceptance and provides a useful measure for determining bad faith. Furthermore, a host of rules already exists in contract law to determine the meaning of a contractual bargain. These tools may be carried over to determine the terms of the agreed upon employment bargain.[175] The bargain standard also preserves broad managerial prerogatives to hire and fire their employees. Managerial discretion is preserved where it is most necessary, at the time when the employment terms and the resulting bargain are formed.[176] Bad faith thus is rooted in the agreement between the employer and the employee and is not a judicially constructed value judgment of what constitutes a fair employment relationship. Bad faith would be limited to the class of terminations that

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> —indeed, they seem to agree they discharged Mr. Savodnik for this very purpose, and urge that however contemptible such behavior may be, it is simply not illegal. Defendants thus place themselves in a position where they acknowledge they do not, in good faith, abide by their own agreements. Defendants' conduct smacks of the unconscionable.

Id. at 825-26. The court recognized the plaintiff's abusive discharge claim. *Id.* at 826. The court wrongfully predicted, however, that New York courts would soon recognize the abusive discharge doctrine. *Id.* at 827.

168. K Mart Corp. v. Ponsock, 732 P.2d 1364 (Nev. 1987) (retirement payments); Mitford v. De Lasala, 666 P.2d 1000 (Alaska 1983) (profit sharing obligations).

169. 778 P.2d 744 (Idaho 1989), *modified on other grounds by* Sorensen v. Comm Tek, Inc., 799 P.2d 70, 75-76 (Idaho 1990).

170. *Id.* at 745.

171. *Id.*

172. *Id.*

173. *Id.* at 746.

174. *Id.* at 750.

175. *See* Schmedemann, *supra* note 166, at 1136 (agreeing with this conclusion).

176. *Id.* at 1137. *See generally* Epstein, *supra* note 3.

are "antithetical to the bargain."[177] The standard promotes an approximation of the terms the parties would have negotiated had they anticipated the particular dispute at hand.[178]

Although the bad faith bargain standard has many advantages, it is also vulnerable to abuse. An already narrow exception to employment at will, it may be interpreted so narrowly as to offer virtually no protection to employees. For example, in *Cothern v. Vickers, Inc.*,[179] Harrold Cothern began work in 1965 as a unionized maintenance employee.[180] Three years later, a supervisor told Cothern that if he gave up his hourly wage position in exchange for a salaried managerial one, Cothern would have employment at Vickers, as remembered by Cothern, "forever as long as there was work to do and I did my work satisfactorily, and my job would only be interrupted or terminated for good cause."[181] Even with this seemingly secure offer, Cothern did not initially accept the new position because it would force him to relinquish a "super-seniority" position and the protections of the collective bargaining agreement.[182] Six months later, after persistent representations by his supervisor, Cothern left his union job and began working in management.[183]

For the next 29 years Cothern worked in management, receiving several pay raises and promotions.[184] In 1997, Cothern discovered two employees clocked in on his shift who were not doing alternative work assigned to them.[185] After discussing the situation with a line supervisor and consulting union representatives, Cothern sent the employees home on a temporary layoff.[186] Vickers's senior management reviewed the action and determined, although not unanimously, that Cothern violated the company's labor agreement because he failed to give the employees 48 hours notice before placing them on temporary layoff.[187] As a result, Vickers demoted Cothern to a lower supervisory position and capped his salary until the pay structure for the demoted position equaled the pay level Cothern received prior to his demotion.[188]

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177. Schmedemann, *supra* note 166, at 1137. *See generally* Clayton P. Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L. J. 619.

178. Market St. Assoc. Ltd. P'ship v. Frey, 941 F.2d 588, 595 (7th Cir. 1991); Katz v. Oak Indus., Inc., 508 A.2d 873, 880 (Del. Ch. 1986).

179. 759 So. 2d 1241 (Miss. 2000).

180. *Id.* at 1244.

181. *Id.* at 1246-47.

182. *Id.* at 1247.

183. *Id.* at 1246-47.

184. *Id.* at 1244.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

Cothern suffered "unbearable stress and humiliation" from the decision.[189] Cothern learned from a psychologist that it would be harmful to his health for him to return to work in the position to which he was demoted.[190] Cothern did not return to work.[191]

Cothern sued Vickers claiming, among other infractions, a breach of the covenant of good faith and fair dealing. Even with evidence produced that other managers had temporarily laid off workers just like Cothern did without repercussions,[192] Cothern likely knew that his claim was a judicial longshot in Mississippi. Mississippi is a strict at-will state. Mississippi courts have repeatedly rejected the idea of any good faith requirement in employment agreements.[193] Predictably, the *Cothern* court explicitly refused to follow *Fortune v. National Cash Register*[194] and other states granting bad faith protection, and ruled in favor of Vickers.[195]

If the court had simply rejected Cothern's claim of a breach of the good faith covenant because none existed in Mississippi, the decision would be less problematic. However, the court did not stop with its recitation of its well-settled rule. The court proceeded to speculate in dicta that even if the court were to adopt the good faith rule for the first time, Cothern still would not prevail.[196] The court stated that Cothern failed to create a factual issue as to whether any implied covenant was breached. According to the court, "Cothern does not contend that he was promised anything but permanent employment. There is no evidence in the record that he was ever promised that he could not be demoted. Even with the demotion, Cothern was still receiving the benefit of his bargain . . . ."[197]

At first glance, this language does not seem particularly unsettling. Cothern still retained a management position with Vickers even after the infraction. Cothern received a promise of lifetime employment. Cothern remained employed after the demotion, thus he still received the benefit of the bargain—permanent employment. However, reading

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189. *Id.* at 1245.

190. *Id.*

191. *Id.*

192. *Id.* at 1248.

193. *E.g.*, Young v. N. Miss. Med. Ctr., 783 So. 2d 661, 663 (Miss. 2001) ("This Court has specifically held that at-will employment relationships are not governed by a covenant of good faith and fair dealing which gives rise to a cause of action for wrongful termination."); Slatery v. Northeast Miss. Contract Procurement, Inc., 747 So. 2d 257, 259 (Miss. 1999); Hartle v. Packard Elec. Co., 626 So. 2d 106, 110 (Miss. 1993); Perry v. Sears, Roebuck & Co., 508 So. 2d 1086, 1089 (Miss. 1987).

194. 364 N.E.2d 1251 (Mass. 1977).

195. Cothern v. Vickers, Inc., 759 So. 2d 1241, 1248 (Miss. 2000).

196. *Id.*

197. *Id.* at 1249.

the opinion more closely reveals disturbing implications. First, the court applied the benefit of the bargain test without a single citation, not a positive sign for a well-reasoned discussion. The court appeared to intermingle *Fortune*'s bad faith standard with the covenant of good faith. Second, and more important, the discussion of the meaning of the benefit of the bargain was entirely devoid of sensitivity to the facts of the case. The court viewed the employment bargain as a simple grant of employment, if it even existed at all. As the court said, "Cothern never made any contention . . . that he was promised anything more than 'employment' with Vickers."[198]

The court's cursory review of the facts obscured that the relationship between Cothern and Vickers likely was far more complex than a disinterested exchange of position for employment. Cothern had a very high level of seniority and the benefit of collective bargaining agreement. Cothern's hesitance to accept the managerial positions demonstrates that he was reluctant to leave his well-protected union job. Only after six months of representations from his supervisor did Cothern accept. Although the opinion does not explicitly state what those representations were, one can imagine Cothern's supervisor reassuring Cothern that he would not lose any job security in taking the managerial job, even though he would be forced to give up the protection of a collective bargaining agreement to do so. One also can imagine the personal relationship of trust between Cothern and his supervisor playing an important role in Cothern finally relenting to the supervisor's requests and taking the managerial position. Indeed, Cothern stated that the unwritten polices, practices, and procedures of the company established the dominant rules of working for Vickers.[199] The court accepts none of this in its opinion instead relying heavily on the fact that no explicit written policy existed and thus Cothern had "no facts to support a claim of entitlement to the specific, advanced position he had attained prior to his demotion."[200]

Admittedly, Cothern's demotion was not particularly drastic; he still held a managerial position without an immediate cut in pay. However, the consequences of *Cothern*'s reasoning are quite severe. For example, instead of Cothern's slight demotion as a result of his efforts to enforce company rules, assume that Cothern is demoted to the lowest management position available. Worse yet, Cothern is given a 75 percent

198. *Id.* at 1247.

199. *Id.* at 1247-48.

200. *Id.* at 1247. The court went on to say that "[w]ere Cothern able to produce [sufficient] evidence . . . as to whether some written policy existed which gave him a right to be counseled and an opportunity to correct his deficiencies before disciplinary action could be taken, summary judgment would have been inappropriate. . . . However, Cothern admitted that he can identify no such written policy." *Id.* at 1248.

reduction in pay with no hope of salary increases for the remainder of his lifetime, and is required to work an overnight shift. Would Vickers still have upheld its benefit of the bargain? According to the reasoning of the *Cothern* court, the answer arguably would be "yes." Following the court's reasoning, Cothern would still have what he was promised, employment with Vickers.

The *Cothern* decision reveals a fundamental limitation of the benefit of the bargain standard. Although it is the most widely accepted definition of bad faith in wrongful termination law, it is vulnerable to an overly narrow application. By simply ignoring the contextual facts, the bargain may be rendered so narrow as to be nearly irrelevant. Many employment relationships exist without a detailed written agreement or even a formal statement of principles. Instead of defining the employment bargain as a holistic relationship between the parties, courts following *Cothern* may define as the acceptable "bargain" only as the written terms of an employment contact.

Therefore, any discussion of bad faith must include an evaluation of the relational and contextual aspects of the employment bargain. Relational contract theory, a widely discussed principle in contract law, holds that an agreement is governed in part by the numerous external relationships and factors surrounding the agreement.[201] Relational contract theory has four fundamental principles. First, most transactions are embedded in complex relationships.[202] Second, understanding a given transaction requires an understanding of the essential associated relationships between the parties.[203] Third, analysis of a transaction requires recognition and consideration of essential relational elements that might significantly affect the agreement.[204] Fourth, a contextual analysis of relations and transactions produces a more efficient and complete analytical product.[205] These relationships are critical in long-term agreements where expectations will inevitably change over the employment relationship and trust builds over time that both parties will treat their relationship with fairness and integrity. The leading scholar in this area is Ian Macneil, who has studied relational contracting since the

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201. Lois R. Lupica, *Transition Losses in the Electric Power Market: A Challenges to the Premises Underlying the Arguments for Compensation*, 52 RUTGERS L. REV. 649, 694 (2000) ("The relational contract theory conceives of contract as an arrangement whereby an exchange takes place, but the nature and terms of the exchange are defined with reference to the 'power and normative positions' of the parties.") (citing Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 889 (1978)).

202. Ian R. Macneil, *Relational Contract Theory: Queries & Challenges*, 94 NW. U. L. REV. 877, 881 (2000).

203. *Id.*

204. *Id.*

205. *Id.*

mid-1960s.[206] Since Macneil's groundbreaking work, there has been much research into the breath and depth of relational contracting and its affect on modern agreements.[207]

Applying relational contract theory to the benefit of the bargain standard, the concept of a bargain must be interpreted to include matters beyond the explicit employment agreement to incorporate values such as solidarity, trust, reciprocity, cooperativeness, and role integrity.[208] To prevent a relational bargain standard from transforming into a back-door good faith requirement, the incorporation of these relational values should only occur where evidence exists that these values had significant relevance in the formation and enforcement of the employment agreement. For example, Cothern's relational interests in his oral agreement for job security with Vickers would be significantly less relevant if Cothern was hired off the street into the manager's position as opposed to being coaxed into relinquishing a very secure union job to become a salaried employee. Other relational considerations, such as the flow of benefits between parties and interests of the dominant party, may also be relevant in situations where the employer's bargaining power dominates the shaping of the bargain.[209] Where proof

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206. *See, e.g.*, IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980); *see also* Ian R. Macneil, *supra* note 202, at 877; Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483; Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340, 360-65 (1983) [hereinafter Macneil, *Values in Contract*].

207. *See, e.g.*, Richard E. Speidel, *Article 2 and Relational Sales Contracts*, 26 LOY L.A. L. REV. 789, 795-98 (1993); Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1092 (1981). A few of the appellate opinions arguably supporting distinctively relational interpretations of good faith in contract are *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772, 805-06 (9th Cir. 1981), *J.J. Brooksbank Co. v. Budget Rent-A-Car Corp.*, 337 N.W.2d 372 (Minn. 1983), and *Bak-A-Lum Corp. v. Alcoa Building Products, Inc.*, 351 A.2d 349 (N.J. 1976).

208. Ian Macneil has described ten common contractual norms that are essential elements of contractual behavior and constitute values of such behavior. They are:

> (1) role integrity (requiring consistency, involving internal conflict, and being inherently complex), (2) reciprocity (simply stated as the principle of getting something back for something given), (3) implementation of planning, (4) effectuation of consent, (5) flexibility, (6) contractual solidarity, (7) the restitution, reliance, and expectation interests (the 'linking norms'), (8) creation and restraint of power (the 'power norm'), (9) propriety of means, and (10) harmonization with the social matrix.

Macneil, *Values in Contract*, *supra* note 206, at 347.

209. For example, in insurance contracts, where typically the insurer has far greater size and sophistication than the insured, factors indicating a good faith relationship between the parties include:

> (1) the agreement calls for performance over a period of time, (2) benefits of the agreement flow steadily from the subservient to the dominant party and only intermittently vice versa, (3) benefits to the subservient party flow after the dominant party has performed its obligation to the agreement, (4) benefits flowing to the subservient party are assessed and approved by the dominant party, and (5) the dominant party's interests are at least partially adverse to those of the subservient party.

Larry Garrett, *Comparative Fault in Legal Malpractice and Insurance Bad Faith: An Argument for Symmetry*, 21 REV. LITIG. 663, 669 (2002).

is sufficient of the significant existence of relational values,[210] those values should be incorporated into the understanding of the employment bargain.

In sum, bad faith may be defined as the following question:

> Did the employer opportunistically deny the employee the benefit of the relational employment bargain explicitly or implicitly forged between the employer and the employee?

If the question is answered in the affirmative, then the employer has acted in bad faith. In many, but not all, states, a bad faith termination of an employee constitutes wrongful discharge. Idaho, the home state of the *Metcalf* decision,[211] and a number of other states prohibit bad faith firings.[212] If the question is answered in the negative, then we may conclude that the employer's discharge did not constitute just cause, contravene a public policy, or deprive an employee of the benefit of the bargain. We then proceed to the fourth possible reason for an employer discharge, a frivolous or irrational reason that can best be described as an arbitrary discharge.

D. The Frivolous Exercise of Employer Discretion: Arbitrary Discharge

An employer may choose to terminate an otherwise competent employee because of office politics, nepotism, preference for left-handedness, astrological sign, or their choice of favorite sports team.[213] It does not matter whether the reason is morally just or morally wrong.[214] An employer may also discharge an employee because of personal

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210. Not all agreements are similarly imbued with relational characteristics. Indeed, a spectrum of contractual behavior exists. On one end of the spectrum are highly relational contracts that arise out of long-term agreements defined by personal relationships and understood within social customs and conventions. For example, the relationship between a medical doctor and her patient may exhibit characteristics of a highly relational contractual arrangement. On the other end, discrete, short-term relationships may be minimally imbued with relational elements. For example, Ian Macneil offers the example of motorist purchasing gas at a station rarely visited. This would be a discrete transaction limited in its relational elements. *See* Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 720-21 (1974).

211. 778 P.2d 744 (Idaho 1989), *modified on other grounds*, Sorensen v. Comm Tek, Inc., 799 P.2d 70, 75-76 (Idaho 1990). This case is discussed in more depth *supra* this section.

212. *See generally* Walsh & Schwarz, *supra* note 1.

213. *E.g.*, Ijames v. Murdock, No. 1:01CV00093, 2003 WL 1533448, at *6 (M.D.N.C. Mar. 21, 2003) (employment at will doctrine permits employer to terminate "for no reason, or for an arbitrary or irrational reason."); Febres Morales v. Challenger Carribean Corp., 8 F. Supp.2d 126, 132 (D.P.R. 1998) (similar); *cf.* Smith v. Stratus Computer, Inc., 40 F.3d 11, 16 (1st Cir. 1994) ("Title VII does not grant relief to a plaintiff who has been discharged unfairly, even by the most irrational of managers, unless the facts and circumstances indicate that discriminatory animus was the reason for the decision.").

214. *E.g.*, Smith v. Am. Greetings Corp., 804 S.W.2d 683, 684 (Ark. 1991) ("Under this doctrine [of employment at-will] an at-will employee may be discharged for good cause, no cause, or even a morally wrong cause.").

animosity, even if that employee performed her job perfectly.[215] In the absence of other legal protections, employees cannot challenge the correctness of the employer's decision.[216] As one author noted, "[e]mployment at will means that the entire universe of foolish, petty, unfounded, or arbitrary reasons for discharge—as long as they are not unlawfully discriminatory or retaliatory—are available to the employer."[217] Even though the Supreme Court generally has assumed that an employer "acts only with some reason,"[218] this is not always the case. Information asymmetries, personal whim, and other irrational motives may inspire discharges. Such frivolous and irrational firings are arbitrary discharges.

Enforcing unusual, strange, or irrational business practices falls well within the arbitrary discretion of an employer. For example, in *Smith v. Monsanto Chemical*,[219] the company had a policy to automatically terminate any employee with less then five years seniority who was caught stealing.[220] Employees with more than five years seniority were punished less severely for the same infraction. Following the rule, Smith, an African-American employee with three years of employment, was discharged for taking three dirty rag towels from the factory floor to wipe off his car.[221] He complained that the company policy was discriminatorily applied against him.[222] The court rejected Smith's claim, and notably commented that it would not interfere with the company's written policies: "The wisdom of this particular policy is not an issue in this case. It is an employer's business prerogative to develop as many arbitrary, ridiculous and irrational rules as it sees fit."[223] The business

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215. Franklin, *supra* note 66, at 1560 n.198.

216. *Id.* at 1560.

217. Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1672 (1996). There are numerous structural reasons that such terminations are permitted. These emerge from long held beliefs that a government should be an institution of limited powers, and that citizens place a strong emphasis on individual freedoms. *See* W. Gary Vause & Dulcina De Holanda Palhano, *Labor Law in Brazil and the United States – Statism and Classical Liberalism Compared*, 33 COLUM. J. TRANSNAT'L L. 583, 633 (1995). *But cf.* Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will*, 34 LOY. L.A. L. REV. 351, 429 (2001) ("The courts' continued adherence to the at-will rule reflects assumptions that employees and employers are equal in bargaining power and that employers in general do not make irrational or inefficient employment decisions . . . .").

218. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978); *see also id.* ("[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.").

219. 770 F.2d 719 (8th Cir. 1985).

220. *Id.* at 722.

221. *Id.* at 721. Smith violated a company rule requiring employees to have a material pass before taking property out of the plant. *Id.*

222. *Id.* at 723.

223. *Id.* at 723 n.3.

policy in *Smith*, even if it is applied only for the temporary removal of work rags, arguably is arbitrary, but not illegal.[224]

Arbitrary firings also occur as a result of an employer's imposition of its moral values. For example, in *Ball v. United Parcel Service, Inc.*,[225] UPS required all of its employees to authorize deductions of their pay to the United Way, a community charity.[226] The employer terminated Ball when she refused to sign the payroll authorization.[227] The court did not accept Ball's arguments that she was wrongfully discharged from her employment.[228] In *Patton v. J.C. Penney, Co.*,[229] an employer discharged an otherwise exemplary employee because he had a continuing relationship with a co-worker during off duty hours.[230] The employer simply objected to the employee's immoral lifestyle. The court dismissed the employee's discrimination claim because the employment at will doctrine allowed the employer to make such discretionary termination decisions.[231] Finally, in *Zimmer v. Wells Management Corp.*,[232] the court declined to find that the employee's termination for refusing to be a swinger and "mix well in the swinging environment" constituted a breach of an implied covenant of good faith.[233]

An employer's overcautious or irrational fears also constitute an arbitrary act. In *Brunner v. Al Attar*,[234] an employee was discharged when her employer learned that she performed volunteer work at an AIDS

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224. If such a neutral rule had a disparate impact on a protected class, then the practice would arguably be illegal. *See* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 257 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).

225. 602 A.2d 1176 (Md. 1992).

226. *Id.* at 1176-77.

227. *Id.*

228. Interestingly, the court permitted UPS to require these contributions in spite of a statute banning coercive or intimidating others to contribute to any social, political, or economic organization. *Id.* at 1176 (citing MD. CODE ANN., [Criminal Law] § 562A(a) (1987) (repealed)).

229. 719 P.2d 854, 856 (Or. 1986), *abrogated on other grounds*, McGanty v. Staudenraus, 901 P.2d 841, 852-53 (Or. 1995).

230. *Id.* at 856.

231. *Id.* at 857 ("It may seem harsh that an employer can fire an employe [sic] because of dislike of the employe's [sic] personal lifestyle, but because the plaintiff cannot show that the actions fit under an exception to the general rule, plaintiff is subject to the traditional doctrine of 'fire at will.'"); *see also* Ward v. Frito Lay, Inc., 290 N.W.2d 536 (Wis. 1980) (no public policy violation when employer terminated one employee cohabitating with another employee while having an affair with a second married co-employee).

232. 348 F.Supp. 540 (S.D.N.Y. 1972).

233. *Id.* at 543. The underlying dispute in this case involved closely held shares of stock. When the plaintiff suggested that the shares of stock should be issued in joint tenancy with his wife, Myron Chefetz, a principal of the employer, was "offended" by this suggestion. *Id.* The judge apparently sympathized with Chefetz, reassuring Hunter and anyone else that cared to read his opinion that, "[n]umerous cases attest to the irritation and mischief which wives, widows, and ex-wives of principals can cause in closely held corporations." *Id.* at 543 n.1 (citing Botwin v. Central Structural Steel Co., 279 N.Y.S.2d 741 (1967)).

234. 786 S.W.2d 784 (Tex. Civ. App. 1990).

center.[235] The employer admitted an irrational fear that the employee's work at the center would place himself, his family, and his employees at risk.[236] The court concluded that the employer's reason for termination fell with in the bounds of at-will employment.[237] In *Agis v. Howard Johnson Co.*,[238] a supervisor gathered his wait staff and told them that "there was some stealing going on" and that until the person responsible was discovered, he would begin firing the waitresses in alphabetical order starting with the letter "A."[239] Plaintiff Deborah Agis, the first to be fired, successfully established an intentional infliction of emotional distress claim.[240] Although not a wrongful discharge case, *Agis* highlights the possibility that truly outrageous arbitrary firings may expose the employer to other causes of action.

One class of arbitrary practices has received more in depth scholarly attention—the problem of "reindeer games."[241] Theresa Beiner defines reindeer games as "outside activities that give employees exposure to persons with power at their place of employment."[242] Firing an employee for his non-participation at an annual picnic, after-hours pub attendance, or a company sports activity is perfectly permissible. Beiner argues that such events are more than company frivolities. Outside functions give participating employees a key advantage over other co-workers through increased exposure to superiors.[243] If an employee does not participate, she may be seen as not a team player and risks discharge as a result.[244]

Litigated examples of this topic are few. For example, in *EEOC v. Shelby County Government*,[245] the plaintiffs sought to prove that women were paid less than men for equal work.[246] Among other evidence of gender disparity, male employees participated in a local picnic and golf

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235. *Id.* at 784-85.

236. *Id.* at 785.

237. *Id.* at 785-86.

238. 355 N.E.2d 315, 316 (Mass. 1976).

239. *Id.* at 317.

240. *Id.* at 320. *But see* Watte v. Maeyens, 828 P.2d 479 (Or. Ct. App. 1992) (defendant who directed plaintiffs to hold hands with co-workers, demanded that they surrender their keys, accused them of lying, terminated their employment, refused to explain his conduct, and ordered them off the premises, was rude and boorish but did not commit intentional infliction of emotional distress).

241. Theresa M. Beiner, *Do Reindeer Games Count as Terms, Conditions or Privileges of Employment Under Title VII?*, 37 B.C. L. REV. 643 (1996). The term arises from the holiday song *Rudolph the Red Nosed Reindeer*. The song states, "[a]ll of the other reindeer used to laugh and call him names. They never let poor Rudolph join in any reindeer games." *Id.* at 645 n.10.

242. *Id.* at 645.

243. *Id.*

244. *Id.*

245. 707 F. Supp. 969 (W.D. Tenn. 1988).

246. *Id.* at 979.

tournament, while female employees did not.[247] Male employees were permitted to leave work early to referee sports events.[248] Finally, a boss took male employees to lunch but did not invite female counterparts.[249] Commenting on the reindeer games evidence, the court ascribed this to, "thoughtless preservation of outdated custom, rather than to a conscious consideration of sex in determining conditions of employment."[250]

The court found that the pay disparities would not have occurred without consideration of sex.[251] However, primary support for this conclusion came from statistics of salaries and wage histories, not discrimination in reindeer games, which the court discounted as non-discriminatory. Nevertheless, this decision gives an example of treatment of reindeer games as non-actionable conduct.[252]

Another kind of permissible arbitrary termination criterion arises from a doctrine called "paramour preference." Paramour preference, in short, is the use of sexual favoritism as a term or condition of employment.[253] Paramour preference occurs "where a consensual romantic relationship between a supervisor and subordinate results in otherwise undeserved benefits for the subordinate."[254]

Paramour preference does not occur when a supervisor demands sex from a subordinate as a precondition for giving that subordinate some job benefit.[255] Rather, paramour preference occurs when a supervisor and a subordinate engage in a consensual romantic relationship, and the supervisor promotes that subordinate over more qualified candidates. Paramour preference may even occur when a subordinate paramour

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247. *Id.* at 985.

248. *Id.*

249. *Id.* at 980.

250. *Id.* at 985.

251. *Id.* at 986.

252. Although the *Shelby* decision discounts reindeer games, other courts appear to be slightly more receptive to the link between them and discrimination. *E.g.*, Marcing v. Fluor Daniel, Inc., 826 F. Supp. 1128, 1135 (N.D. Ill. 1993) (noting female plaintiff viewed as inferior because "[s]he was not 'one of the boys' (either literally or figuratively)"), *rev'd in part*, Marcing v. Fluor Daniel, Inc., 36 F.3d 1099 (7th Cir. 1994).

253. *See, e.g.*, Mitchell Poole, Comment, *Paramours, Promotions, and Sexual Favoritism: Unfair, But is There Liability?*, 25 PEPP. L. REV. 819, 819-21 (1998); *see also* Michael J. Phillips, *The Dubious Title VII Cause of Action for Sexual Favoritism*, 51 WASH. & LEE L. REV. 547, 549 n.7 (1994).

254. Poole, *supra* note 253, at 819 n.2.

255. Such an act is no doubt quid pro quo sexual harassment and illegal under Title VII of the 1964 Civil Rights Act and subsequent caselaw. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65-66 (1986); Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(1) (2004). *See generally* Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85 (2003) (describing history and development of sexual harassment law); Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & LAW 137 (1997) (describing history and development of sex discrimination law).

receives promotions based upon a consensual affair with a superior, the affair ends, and the scorned supervisor then demotes the subordinate.[256] Although morally reprehensible to many, such sexual favoritism is not considered sex discrimination by many courts.

Paramour preferences and reindeer games represent irrational, arbitrary conduct that typifies arbitrary employer actions. The decision to terminate an employee based on a consensual romantic relationship or for refusal to participate in company socials does not further the business. However, the act is neither contractually expected nor so inherently objectionable that the legislature or the common law bans it. Such arbitrary choices are not true bad faith actions or decisions against public policy.[257]

Obviously, terminations based upon such arbitrary reasons may not be wise or efficient personnel decisions. When good employees are dismissed for non-business reasons, it costs the company key intellectual capital.[258] Although such firings may be limited by market forces,[259] under current law firing a subordinate for not playing reindeer games, promoting a paramour over a more qualified employee, and numerous other irrational motives constitute permissible reasons for discharge under employment at will. Therefore, the determination of whether a discharge occurred arbitrarily may be simply answered by the following:

> Did the employer discharge the employee for an irrational, frivolous, or otherwise arbitrary reason?

If the question is answered in the affirmative, then we may conclude that the employer acted arbitrarily when it terminated its employee. States prohibiting only discharges that deprived an employee the benefit of the bargain would not interfere with an employer's arbitrary decision. Bad faith is a limited exception to employment at will that only focuses on whether the employee received the benefits of the explicitly and implicitly agreed upon employment relationship, such as pay, benefits, and sick leave. Bad faith limits itself to opportunistic discharges, not arbitrary ones. Similarly, states that only prohibit terminations that con-

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256. *E.g.*, Dockter v. Rudolf Wolff Futures, Inc., 913 F.2d 456, 458-62 (7th Cir. 1990).

257. *See* Magnan v. Anaconda Industries, Inc., 479 A.2d 781, 786 n.19 (Conn. 1984) (mere arbitrariness is not synonymous with bad faith firings, which have a specific animus that offends the benefit of the bargain).

258. *See generally* Marlene Pitturo, *Alternatives to Downsizing*, 88 MGMT. REV. 37 (1999) (describing loss of intellectual capital as a result of employee discharge).

259. Richard Epstein and Judge Richard Posner argue that market forces will limit arbitrary discharges because an employer who terminates employees in this fashion will be viewed as untrustworthy and thus will have greater difficulty maintaining its workforce under existing wages. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 358-59 (5th ed. 1998); Epstein, *supra* note 3, at 972-76.

tradict a clear public policy would also not interfere with arbitrary firings. The public policy exception is only concerned with clear expressions of significant societal public policies, not the internal politicking and whimsical decision making of a manager that may create individual unfairness. Most states permit such arbitrary firings to occur as it is a hallmark of the employment at will system.

If the answer to the above question is no, then we must continue to the next and last section. Because we have already eliminated just cause, public policy, bad faith, and arbitrariness as reasons for discharge, we can conclude that the reason for discharge occurred in good faith. The challenging topic of good faith and its conceptualization is the subject of the next section.

E. Discretion, Honesty, and Justified Expectations: The Challenge of Good Faith

Just what does good faith mean? Scholars have discussed the question for thousands of years. Ancient Greek society viewed good faith as a universal social norm that could be objectively determined by external standards.[260] Classical Roman law viewed good faith as binding contracting parties to all express and implied terms of an agreement.[261] Canon law understood good faith as an overarching norm requiring a contractual exchange to be both legally and morally conscionable.[262]

Courts and commentators today understandably have difficulty defining good faith.[263] Entire books have been written on the

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260. Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 818 (1982).

261. James A. Webster, Comment, *A Pound of Flesh: The Oregon Supreme Court Virtually Eliminates the Duty to Perform and Enforce Contracts in Good Faith*, 75 OR. L. REV. 493, 498 (1996).

262. Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences Into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839, 863-64 (1999) ("In the area of contract, the Christian conscience dictated that the exchange had to be conscionable. In remolding Roman law into canon law, the founders of medieval equity gave the Roman principles of good faith . . . new meaning by making their subject the conscionable Christian."); *see also* R. Wilson Freyermuth, *Enforcement of Acceleration Provisions and the Rhetoric of Good Faith*, 1998 B.Y.U. L. REV. 1035, 1051-52. From at least the twelfth century, ecclesiastical courts equated the failure to keep a promise with a breach of duty to God. Eric M. Holmes, *A Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation*, 39 U. PITT. L. REV. 381, 402 n.88 (1978). Later, these courts recognized that universal enforcement of all promises was not practical. *Id.* The ultimate requirement of good faith comes from the Old Testament. *Leviticus* 19:18 ("Thou shalt love thy fellow man as thyself.").

263. The concept of good faith provides a good example of the uncertainty of such vague phrases in employment law generally. *See* DiMatteo, *supra* note 262, at 896-97 ("If unconscionability and good faith continue their expansion then it may be argued that the demarcation between remedial unfairness and 'simple unfairness' will become meaningless. The result will be that the fairness inquiry will be the order of the day."); Alvin C. Harrell, *The Consumer Issues Agenda of the National Bankruptcy Review Commission*, 51

subject.[264] Articles abound on the subject of good faith on various topics ranging from criminal procedure[265] to bankruptcy.[266] The definition of good faith remains as imprecise now as it was thousands of years ago.

Good faith in employment is no less difficult to understand. Monique Lillard's useful article on good faith in employment law found at least *eight* definitions of good faith.[267] Lillard found definitions ranging from "I know it when I see it,"[268] to "too vague to discuss,"[269] to anything that is not bad faith.[270] One court uncovered five different kinds of good faith interpretations.[271] Although some definitions appear to have more

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CONSUMER FIN. L. Q. 9, 16 (1997) (describing "good faith" as "potentially meaningless" in bankruptcy law); J. Dennis Hynes, *The Revised Uniform Partnership Act: Some Comments on the Latest Draft of RUPA*, 19 FLA. ST. U. L. REV. 727, 755 (1992) ("The concept of 'good faith and fair dealing,' undefined, is broad and open-ended. Much can be read into it, depending on the inclinations of the reader. Some courts will hold parties to extremely high, even impossible standards, to the extent of disregarding contractual language."); *cf.* Mark A. Rothstein, Serge A. Martinez & W. Paul McKinney, *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans with Disabilities Act*, 80 WASH. U. L. Q. 243, 253 (2002) (arguing that adopting of term "disabled" to include persons with correctable vision problems would transform "disabled" into a meaningless phrase). The authors also note that the phrase "individual with a disability" is so vague that it frustrates employers and other parties responsible for ADA compliance. *Id.* at 244.

264. *E.g.*, STEVEN J. BURTON & ERIC G. ANDERSEN, CONTRACTUAL GOOD FAITH: FORMATION, PERFORMANCE, BREACH, ENFORCEMENT (1995); GOOD FAITH AND FAULT IN CONTRACT LAW (Jack Beatson & Daniel Friedmann eds., 1995); J.F. O'CONNOR, GOOD FAITH IN ENGLISH LAW (1990).

265. *E.g.*, Gerald G. Ashdown, *Good Faith, the Exclusionary Remedy, and Rule Oriented Adjudication in the Criminal Process*, 24 WM. & MARY L. REV. 335 (1983).

266. *E.g.*, Kenneth P. Coleman, *Conduits, Good Faith, and the Recovery of Preferences and Fraudulent Transfers Under Bankruptcy Code Section 550*, 114 BANKING L.J. 375 (1997); Virginia M. Hunt, *The Bankruptcy Good Faith Issue*, 47 CONSUMER FIN. L.Q. REP. 402 (1992-93); *see also* Alvin C. Harrell, *The Consumer Issues Agenda of the National Bankruptcy Review Commission*, 51 CONSUMER FIN. L.Q. 9, 16 (1997). Indeed, Harrell argues that bankruptcy law is plagued with ambiguous terminology, and cites good faith as one of the examples of phrases with vague meaning. Harrell writes:

> [A] number of the problems within the current Bankruptcy Code have a common theme: The lack of consistency in the case law as a result of the use of vague and ambiguous terminology at dispositive points in the current statute. The use of undefined and potentially meaningless terms such as "substantial abuse," "value," "good faith," and "fraudulent misrepresentation" to govern key issues is an invitation to judicial nonuniformity.

Id. at 16.

267. 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, 1249-58 (1992).

268. *Id.* at 1249.

269. *Id.*

270. *Id.* at 1255. Lillard's reports the following definitions of good faith: 1. Too vague to discuss; 2. I know it when I see it; 3. Benefit of the bargain; 4. Good cause; 5. Not bad faith; 6. Honesty in fact; 7. Conformance to community standards or business practices; and 8. Fair dealing. *Id.* at 1249-58.

271. *See, e.g.*, City of Midland v. O'Bryant, 18 S.W.3d 209 (Tex. 2000). The Texas Supreme Court created, with extensive citations, the following classifications of good faith cases amongst the states:

> Courts in other jurisdictions that have considered the issue have reached varying conclusions. In decisions that have considered employment at-will, the holdings seem to fall within one or more of several broad categories: 1) an employee cannot be terminated if to do so would violate public policy; 2) there is an implied covenant of good faith and fair dealing not to impair a right to receive a benefit an employee has already earned; 3) there is a general implied covenant of good faith and fair dealing; 4) there is an implied covenant of good faith

judicial adherents than others,[272] the definition of good faith in employment is far from settled. As a result, the covenant of good faith and fair dealing is one of the most difficult to define concepts in employment law.[273]

As a result of the doctrinal confusion related to good faith in employment, no predominant definition emerges.[274] Analogous understandings of good faith in contract law, a close cousin to the employment relationship, are thus relevant. The most significant good faith debate over the past thirty years has been a scholarly exchange between Steven Burton and Robert Summers, commonly named the "Summers-Burton" debate.[275] In 1968, Summers published an article conceiving good faith as an "excluder" definition, a phrase with no general meaning of its own but rather serving to rule out various forms of bad faith.[276] Suspicious of "reductionist definitions,"[277] good faith existed only in the absence of bad faith. In the tradition of the legal realist generation of which Summers was a part, Summers declined to develop unifying principles underlying the good faith concept.[278] Instead, he established six categories of bad faith performance: (a) evasion of the spirit of the deal, (b) lack of diligence and slacking off, (c) willfully rendering only substantial performance, (d) abuse of a power to specify contract terms, (e) abuse of power to determine compliance, and (f) interfering with or failing to

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and fair dealing, but any damages are limited to a contract measure, not a bad faith, tort measure; or 5) there is no implied covenant of good faith and fair dealing. A few courts also suggest that the terms of an employee handbook can create a similar obligation that limits the at-will nature of the employment.

Id. at 213-14 (citations omitted).

272. *See generally* Lillard, *supra* note 267.

273. *E.g.*, Parker, *supra* note 1, at 359-60 ("The use of the implied covenant of good faith is perhaps the most problematic response to improper employee discharges. . . . [the covenant] presents the courts with the most nebulous exception to the employment-at-will doctrine."); Lillard, *supra* note 267, at 1260 ("[D]espite the combined efforts of the scholars cited at the beginning of this Article and the case law that follows, a generalized understanding of good faith has not been forthcoming."); Schmedemann, *supra* note 166, at 1128 ("Despite the concentrated efforts of the courts in determining when and how the covenant of good faith and fair dealing is created, the definition of 'good faith' (much less 'fair dealing') remains obscure."); *cf.* James J. White, *Good Faith and the Cooperative Antagonist*, 54 SMU L. REV. 679, 679-80 (2001) ("Notwithstanding [a] silent indorsement of the duty of good faith . . . courts and commentators have had difficulty in determining what is and what is not good faith [contract] performance and very little success in agreeing on standards that might give a court guidance.").

274. *See, e.g.*, Walsh & Schwarz, *supra* note 1, at 661, 669-72 (describing various judicial approaches to good faith in employment); Lillard, *supra* note 267, at 1249-58 (reporting eight different definitions of good faith in employment); Schmedemann, *supra* note 166, at 1128-31 (discussing problem in context of Minnesota law).

275. Randy E. Barnett, *The Richness of Contract Theory*, 97 MICH. L. REV. 1413, 1413 (1999).

276. Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 207 (1968).

277. *Id.*

278. Barnett, *supra* note 275, at 1414.

cooperate in the other party's performance.[279] Summers adroitly commented that, "general definitions of good faith either spiral into the Charybdis of vacuous generality or collide with the Scylla of restrictive specificity."[280]

This view of good faith had a deep impact on prevailing law.[281] For example, Summers's imprint on the *Restatement (Second) of Contracts* is prominent and unmistakable. Section 205 of the *Restatement*, where good faith is discussed, makes no attempt to formally define the term. Furthermore, comments to section 205 merely state that good faith "excludes a variety of types of conduct characterized as involving 'bad faith.'"[282] The *Restatement* comments even go as far as to list Summers's bad faith categories practically verbatim.[283] A variety of state and federal courts have since adopted a Summers-style approach.[284]

In the 1970s and 1980s, attitudes changed. Scholars questioned Summers's realist method[285] and sought more systematic and unifying

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279. *Id.* (citing Summers, *supra* note 276, at 232-43). Summers's article also gives examples of bad faith in contract negotiation, raising and resolving contract disputes, and taking remedial action. Summers, *supra* note 276, at 220-32, 243-52.

280. Summers, *supra* note 276, at 206. *See generally* M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 759 (1968-69) (advocating a similar approach to good faith and calling it a "standard" as opposed to a rule or principle).

281. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."). Summers stated that a reporter for the *Restatement (Second) of Contracts* (*Restatement*) told Summers that his 1968 article significantly influenced the develop of good faith in what was to become section 205 of the *Restatement*. Summers, *supra* note 260, at 810.

282. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981); *see also id.* cmt. d (asserting that "[a] complete catalogue of types of bad faith is impossible").

283. *See id.* cmt. d.

284. *E.g.*, P.R. Burke Corp. v. United States, 277 F.3d 1346, 1360 (Fed. Cir. 2002); Occusafe, Inc. v. EG&G Rocky Flats, Inc., 54 F.3d 618, 624 (10th Cir. 1995); Bank of China v. Chan, 937 F.2d 780, 789 (2d Cir. 1991); Fremont v. E.I. DuPont DeNemours & Co., 988 F. Supp. 870, 877 (E.D. Pa. 1997); Coca-Cola Bottling Co. v. Coca-Cola Co., 769 F. Supp. 599, 652 (D. Del. 1991); Kleiner v. First Nat'l Bank, 581 F. Supp. 955, 960 n.5 (N.D. Ga. 1984); Larson v. Larson, 636 N.E.2d 1365, 1367-68 (Mass. App. Ct. 1994); Bourgeous v. Horizon Healthcare Corp., 872 P.2d 852, 856 (N.M. 1994); Garrett v. Bankwest, Inc., 459 N.W.2d 833, 845 (S.D. 1990); Carmichael v. Adirondack Bottled Gas Corp., 635 A.2d 1211, 1216-17 (Vt. 1993); Somers v. Somers, 613 A.2d 1211, 1213 (Pa. Super. Ct. 1992).

285. *E.g.*, Russell A. Eisenberg, *Good Faith Under the Uniform Commercial Code—A New Look at an Old Problem*, 54 MARQ. L. REV. 1 (1971). Eisenberg raised a number of insightful questions to Summers's characterization of good faith:

> Professor Summers's idea raises several questions. . . .
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> . . . [I]s "good faith" simply what a judge says it is? Wouldn't each judge, in such a system, determine what his own personal standards are and apply them to the case at hand, even if the litigants themselves have different standards which they both agree upon and which they agree were taken into consideration when they entered into the transaction? Wouldn't such a system create a great deal of litigation because one party to the contract decides to break and realizes that he has nothing to lose by raising the "good faith" issue, hoping that notwithstanding what he thought, the judge might see the facts otherwise and rule for him? Each judge would then be tempted to formulate his own unique rules and code of conduct.

approaches to legal doctrine.[286] In 1980, Steven Burton led the contra-realist charge against the Summersian domain of good faith with his article titled, *Breach of Contract and the Common Law Duty to Perform in Good Faith*.[287] Burton equated bad faith with an attempt by a contracting party to recover a cost of performance allocated to him upon entering the contract with the other party. Burton called this cost of performance a "forgone opportunity" by the contracting party. "[T]o determine whether a party has acted in bad faith, one must identify both an opportunity objectively foregone and a subjective intention to recapture it."[288] Burton framed good faith in two questions: "(1) at formation, what were the reasonably expected costs of performance (foregone opportunities) to the discretion-exercising promissor? (2) [a]t performance, did the discretion-exercising promissor use its discretion to recapture an opportunity forgone on contracting?"[289] For example, a buyer who contracts to purchase all of his apple requirements from a grower may purchase few or no apples because the buyer has no business need for the purchase during times when apple sales are down. However, a buyer may not purchase nothing from the grower merely because the market price for apples has fallen and the buyer may obtain a better deal somewhere else. The buyer would be attempting to reacquire forgone opportunities to purchase elsewhere that were given up when the buyer agreed to purchase all of his requirements from the grower. Such an act, according to Burton, would constitute a breach of the good faith covenant established between the parties.

Burton took direct aim at Summers's list of factors method. Burton argued that the failure to develop an operational standard of good faith leaves interpretation of the term for the unfettered exercise of judge and jury intuition, resulting in inconsistent and unpredictable applications.[290] Burton's attack on Summers and the *Restatement* was enough, in Summers's words, to "arouse me from my dogmatic slumbers."[291]

> The Uniform Commercial Code would not be uniform at all, and chaos in the good faith field would result.

Id. at 7-8.

286. *See* Barnett, *supra* note 275, at 1414; *see also* Randy E. Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy*, 97 HARV. L. REV. 1223 (1984) (attributing shift to rise in law and economics scholarship and the emergence of normative legal philosophy).

287. Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980).

288. *See* Barnett, *supra* note 275, at 1415; *see also* Summers, *supra* note 260, at 830-31 (describing Burton's foregone opportunities model as containing both a subjective and objective component).

289. Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497, 506 (1984).

290. Burton, *supra* note 287, at 369-70.

291. Summers, *supra* note 260, at 826.

Summers shot back two years later with his own article, reaffirming that good faith is not susceptible to any genuine definitional guidance.[292] Summers questioned whether or not Burton's schema focused on the "right things," went "far enough," or provided any additional focus to the good faith question.[293] In 1984, Burton responded again further developing his "foregone opportunities" arguments.[294] Burton authored a later article and a book further reinforcing the foregone opportunity doctrine.[295]

The question remains, however, should good faith in employment derive from principles articulated by Summers or Burton described above, or draw from another source? The most obvious definitional guidance would be current cases interpreting good faith in employment. However, as this paper discussed *supra*, articles examining wrongful discharge law report a highly fractured understanding of good faith amongst courts and commentators.[296] There is no uniform definition of good faith that encompasses every jurisdiction. Thus, virtually any suggestion for an appropriate definition of good faith in the employment relationship will demand significant changes in current law.

A brief examination of Summers's excluder method reveals problems readily apparent in applying his framework to the employment context. Recall that Summers does not define good faith, but rather rules out various instances of bad faith.[297] This inquiry would not be very helpful to a judge asked to determine whether an employer's termination constituted good faith. The judge would be forced to examine examples of bad faith and then determine whether the discharge did *not* belong in those categories.[298] Not only is this difficult to understand and organize, but it does not allow for the easy maturation of the good faith doctrine. If a judge is faced with a creative yet invidious discharge that falls outside the confines of the excluded examples, would the judge be forced to rule that the termination was in good faith because it did not fulfill one of the classifications? As Steven Burton rightly states, "[b]y emphasizing the heterogeneity of cases of bad faith, excluder analysis

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292. *Id.* at 829-30.

293. *Id.* at 831-32.

294. *See* Burton, *supra* note 289.

295. BURTON & ANDERSEN, *supra* note 264; Steven J. Burton, *Good Faith in Articles 1 & 2 of the U.C.C.: The Practice View*, 35 WM. & MARY L. REV. 1533 (1994).

296. *See generally* Lillard, *supra* note 267. *See also* Walsh & Schwarz, *supra* note 1, at 661, 669-72 (describing various judicial approaches to good faith in employment); Schmedemann, *supra* note 166, at 1128-31 (discussing problem in context of Minnesota law).

297. Summers, *supra* note 260, at 821.

298. Burton, *supra* note 295, at 1536 n.14.

denies the availability of needed rules, principles, policies, or conventions."[299]

Burton's understanding of good faith appears to be much more promising for the employment context. In recommending a change to the Uniform Commercial Code, Burton offers a straightforward definition of good faith performance in contracts:

> § 1-201. General Definitions . . .
> (19) . . . "Good faith" in contract performance means exercising any discretion for reasons within the parties' justifiable expectations arising from their agreement. . . .[300]

The "justifiable expectations" standard protects party autonomy by allowing the negotiation of an employment relationship that satisfies both parties' wishes within the rich backdrop of commercial employment practice. The standard appears to allow employers to retain broad discretion to fire while protecting employees from unfair terminations that the employee would not justifiably expect from the employment agreement.

But what exactly are the parties' good faith justifiable expectations in an employment relationship? The employer certainly possesses justifiable expectations. In addition to completing assigned tasks, the employer expects the employee to exercise a duty of loyalty and care toward the company and not act in any way that jeopardizes the interests of the company.[301] A departing corporate executive cannot "poach" employees away from his former employer.[302] Workers cannot disparage their employer.[303] A corporate executive may not misuse customer lists, customer pricing, new opportunities, and secret formulas.[304] An employee cannot cause a mass exodus from a company resulting in 40 percent reduction of the company's workers to a competing company owned by the employee.[305]

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299. *Id.*

300. *Id.* at 1545.

301. *E.g.*, DeKalb Collision Ctr. v. Foster, 562 S.E.2d 740, 745 (Ga. Ct. App. 2002) ("Under Georgia law, 'an employee owes a duty of loyalty, faithful service and regard for an employer's interest.'" (quoting Crews v. Roger Wahl, C.P.A., P.C., 238 Ga. Ct. App. 892, 901 (1999))).

302. *See* GAB Bus. Servs. v. Lindsey & Newsom Claim Servs., Inc., 99 Cal. Rptr.2d 665, 675 (Cal. Ct. App. Aug. 29, 2000).

303. *See* Benjamin Aaron & Matthew Finkin, *The Law of Employee Loyalty in the United States*, 20 COMP. LAB. L. & POL'Y J. 321, 330-31 (1999).

304. *See* Leonard M. Baynes, *Just Pucker and Blow?: An Analysis of Corporate Whistleblowers, the Duty of Care, the Duty of Loyalty, and the Sarbanes-Oxley Act*, 76 ST. JOHN'S L. REV. 875, 885 (2002).

305. *See* ABC Trans. Nat'l Transp., Inc. v. Aeronautics Forwarders, Inc., 379 N.E.2d 1228, 1237-39 (Ill. App. Ct. 1978); *see also* Duane Jones Co. v. Burke, 117 N.E.2d 237, 245 (N.Y. 1954) (employees hired away over half of company personnel while still employed with company violated fiduciary duty of good faith and fair dealing).

An employee's expectations are more complex. We may no doubt surmise that an employee wants gainful employment in a workplace free from illegal discrimination or harassment. Employees want to be treated with fairness compared to their fellow employees and the market as a whole. But what are employees' actual perceptions of the rules governing an employment relationship? Before 1997, courts and commentators could only speculate.

In that year, Pauline Kim published an unprecedented study on worker perceptions of employment protection in an at-will employment context.[306] Contradicting the widely held perception that employees knew exactly what they were getting into when they worked in an at-will relationship,[307] Kim found that employees believe they have significant rights and protections in their employment relationship. Eighty-two percent of respondents incorrectly believed that an employer cannot fire an employee for the purpose of hiring another person to do the same job at a lower wage.[308] Seventy-nine percent of respondents incorrectly believed that an employer cannot fire an employee in retaliation for reporting theft by another employee to a supervisor.[309] Eighty-seven percent of respondents incorrectly believed that an employer cannot fire an employee based upon the mistaken belief that the employee stole money, even if that employee can prove that the employer's conclusion was mistaken.[310] Finally, eighty-nine percent of respondents incorrectly believed that an employer cannot fire an employee because of an employer's personal dislike of that employee.[311] A strong majority of respondents rightly concluded that employees may be discharged for lack of work and unsatisfactory job performance.[312]

How do these conclusions affect the construction of the employee's perspective of the justified expectations equation? If good faith follows what a strong majority of employees expect then the following rules

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

307. *E.g.*, Epstein, *supra* note 3, at 955 ("[E]mployers and employees know the footing on which they have contracted: the phrase 'at will' is two words long and has the convenient virtue of meaning just what is says, no more and no less."); *see also* Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901, 1929 (1996) ("One obvious characteristic of the at-will rule is that the legal responsibilities of the employer are clear—it has none. How then are employees systematically fooled?"); Verkerke, *supra* note 4, at 874-75.

308. Kim, *supra* note 306, at 134.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

arguably govern the good faith relationship whenever the covenant applies: [313]

- Employers may never fire an employee to replace them with a cheaper one doing the same work as long as the employee does his job (but there is no problem with firing an employee outright for lack of work).
- Employers may never punish an employee who constantly annoys his supervisors by reporting even the slightest violations of company rules.
- Employers may never fire people they just don't like. If an employer hires an employee who performs his job satisfactorily but turns out to have a grating, obnoxious personality, that employee must stay.
- Employers can never make or leave uncorrected mistakes regarding their own company disciplinary standards. Employers must rescind their disciplinary decision when the employee has proven that employer's decision to be inaccurate.

In light of these findings, what kind of protection do employees believe they have? The answer is certainly not employment at will, but rather protection from discharge except for just cause.[314] If the expectations standard merely follows the majority of worker opinion, then the covenant of good faith and fair dealing transforms into the covenant of just cause and objective dealing.

This cannot define the justified expectations prong of good faith. These beliefs may be worker expectations, but they are not *justified* expectations given the overwhelming presence of employment at will in American law.[315] Accordingly, a justifiable expectations standard of "good faith" cannot merely parrot surveys of worker perceptions.

Then what should govern the justified expectations prong? In other words, what factors should be considered to determine whether an employer has acted within his broad managerial discretion in a way that conforms to the justified expectations of both parties? The answer lies with the doctrine of relational contract.

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313. The following points express reasonable inferences from the study's finding as well as restatements of the literal questions asked by the survey.

314. *See generally* Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-at-Will in Light of Findings That Employees Believe They Possess Just Cause Protection*, 23 BERK. J. EMP. & LAB. L. 307 (2002).

315. Justified expectations should be distinguished from reasonable expectations, which may be too susceptible to expansive interpretations of good faith. For example, the Connecticut Supreme Court has stated that the concept of good faith and fair dealing is "[e]ssentially . . . a rule of construction designed to fulfill the reasonable expectations of the contracting parties as they presumably intended." Verrastro v. Middlesex Insurance Co., 540 A.2d 693, 699 (Conn. 1988) (quoting Magnan v. Anaconda Industries, Inc., 479 A.2d 781 (Conn. 1984)).

In Part III.C, *supra*, the doctrine of relational contract was applied to incorporate flexibility into an otherwise potentially inflexible benefit of the bargain standard that defines bad faith in an employment relationship.[316] In this section, relational contracting is applied again to enrich an understanding of good faith. For example, assume that an employee believes that he cannot be fired for the purpose of replacing him with an individual who will do the work for less pay.[317] The employer hires that employee and informs her that, while she is performing satisfactorily, the employer is facing difficult and unexpected financial difficulties. Financial conditions worsen, and the employee is asked to accept a salary decrease. The employee declines to do so. The employee is fired and replaced with another person who is able to perform the job at a lower wage.

A justified expectations rule governed by employee perceptions would hold that the termination violated the covenant of good faith. The employee, whose belief is held by a sound majority of workers, expected to not be fired and replaced by someone who would work for less. The employer's act contravened her expectations.

Under relational theory, a different result emerges. The employee was fully aware of the employer's financial difficulties. The employer exhibited a spirit of solidarity with the employee's situation and took steps to improve it. The employee was not able to fill the employer's need to work for a lower wage. The context of the parties' discussions established the uncertain economic conditions surrounding the employment relationship. The employer's termination cannot be seen to be contrary to the covenant of good faith and fair dealing, as a layoff falls well within the justified expectations of the parties.

Can the complete terms of the relational contract, and by extension the justified expectations of the parties, be determined in the commencement of an employment relationship? The answer probably is no. According to relational contract theory, participants do not expect to see the whole future of their relationship at any one time. Instead, that relationship develops as an ongoing integration of behavior that grows and varies with events in a mostly unforeseeable future.[318] Accordingly, the breadth and depth of relational contracting increases over time as a working relationship develops between an employer and an employee.

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316. *See supra* Part III.C.

317. Recall that Kim's study reports that eighty-two percent of respondents indicated their mistaken belief that this act was unlawful. *See* Kim, *supra* note 306, at 134.

318. *See* Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763, 764 (1998) (quoting IAN R. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS 13 (2d ed. 1978)).

However, this does not always mean that the mere passage of time creates an increasingly strong good faith covenant. Consider the extreme example of an employee who works in a high-pressure sales organization. Twelve- to fourteen-hour days are the norm. Co-workers steal client lists from one another in an effort to capture more commissions. The company tacitly approves of this behavior to promote competitive spirit. Salespeople are held to extremely high sales requirements by the organization and are constantly fired for failing to meet quotas. Employees leave constantly because of burnout and frustration. However, those that stay and survive are rewarded with lavish commissions. Turnover, office politics, and cutthroat competitiveness are a way a life. A top salesperson who has worked at this pressure-cooker company for over ten years is suddenly fired and replaced with another employee who is willing to accept a lower commission.

The relational agreement in this example is no less obvious. Revenue matters above all. Sell or be fired. There is little evidence of shared solidarity or developing relationships. Whether right or wrong, this is the implicit culture of this workplace. Certainly the employee received no indication that he would have his job for life or as long as it was performed satisfactorily. Accordingly, any covenant of good faith applied to this relationship would likely contain few supportive relational aspects and, thus, few justified expectations beyond at will employment.

In sum, the covenant of good faith and fair dealing in employment should be governed by a well-settled standard in contract and employment law—good faith requires conformance to the justified expectations of the parties. However, good faith for purposes of this Article includes an additional element, the requirement that interpretations of good faith be understood within the parties' justified expectations of the employment relationship. Based on these principles, the following inquiry helps determine whether an employer has acted in good faith:

> Has the employer's exercise of discretion in discharging the employee fallen within the justified expectations of the parties arising from the implicit and explicit employment relationship?

As this is the final question in the five-step process and all other possibilities have been eliminated by the prior four steps, the answer to this question should be "yes." In this analysis, good faith is a default status for employer discharges. In other words, if a discharge is not supported by just cause, does not violate a public policy, does not deprive the employee of the benefit of the bargain, and is not arbitrary or frivolous, then the employer's actions are likely in good faith. This "catch all" element of good faith implicates Summers's view that good

faith is anything that does not fit within selected instances of bad faith. However, the framework described here allows an employer's discharge to be called "good faith" only if it does not fit within the other four broad classifications. Furthermore, this section has described the contours of a practical good faith definition within the employment context. The combination of four other categories and this explanation of good faith makes clear the boundaries of each category, especially good faith, in relation to one another.

The justified expectations standard represents a useful approach to understanding good faith in the employment context. The justified expectations standard compliments the other classifications of employer actions. It is also widely accepted. One of the leading architects of modern contractual good faith theory, Steven Burton, advocates a similar standard for the UCC. Even his doctrinal arch-nemesis Summers might agree with the justified expectations concept of good faith, at least in principle.[319] The standard also is compatible with the already established benefit of the bargain standard accepted in much of employment law. Moreover, the justified expectations standard is flexible enough to serve as the fifth and final classification of employer discharge. If an employer's termination does not fall within the other four categories, we may consider it an action in good faith.

This Article thus far has discussed current scholarship in wrongful discharge and offered a solution that examines wrongful discharge law and determines it to have some underlying coherence. The next Part applies the framework discussed above to specific examples, demonstrating how wrongful discharge law benefits from the continuum approach.

IV. APPLICATION OF THE CONTINUUM APPROACH: IMPLICATIONS FOR EMPLOYERS, EMPLOYEES, AND THE JUDICIARY

This Part puts the continuum approach into practice, demonstrating how widely misunderstood areas of wrongful discharge law could benefit from its application. The covenant of good faith and prohibition of discharges against public policy, two doctrines badly intermixed by at least eight states, provide useful examples. This section also will discuss the confusion between good faith and good cause, and will review *Magnan v. Anaconda Industries, Inc.*,[320] to explain how judges faced with varying

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319. Summers, *supra* note 276, at 263 ("In most cases the party acting in bad faith frustrates the justified expectations of another."); *see also* Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1251-52 (1999) (agreeing with this conclusion).

320. 479 A.2d 781 (Conn. 1984).

levels of wrongful discharge protection would benefit from the application of the continuum approach in their judicial opinions.

As previously stated, a breach of the covenant of good faith and fair dealing in the employment relationship is not necessarily the same as a violation of an established public policy. Good faith is a broad imperative to behave honestly, whereas public policy protections prohibit discharges based upon selected societal norms. Confusion of these concepts is one of the greatest impediments to an ordered definition of good faith in employment.

For example, in *Magnan v. Anaconda Industries, Inc.*,[321] the Connecticut Supreme Court concluded that an employee hired under a contract for an indefinite duration could not sustain an action for breach of the good faith covenant based solely on a discharge that occurred without just cause.[322] The court rightly concluded that just cause is a different standard than good faith,[323] and termination without just cause does not necessarily mean an infringement of the good faith covenant. However, the court failed to differentiate between a breach of good faith and fair dealing and a violation of an established public policy.[324] The court in effect equated the two doctrines as two sides of the same cause of action.[325]

Justice Parskey, concurring in part and dissenting in part, criticized the majority's confusing result. Noting that a prior court decision, *Sheets v. Teddy's Frosted Foods, Inc.*,[326] already established a public policy exception to employment at will in the state, Justice Parskey stated:

> The majority also sees no reason to exempt employment contracts from the implication of a covenant of good faith and fair dealing. But having said that it goes on to say that a breach of such covenant will be enforced in the employment at will situation only if the basis for the termination of the employment violates public policy. If the termination violates public policy, then under *Sheets* it is wrongful and actionable and one is not required to rely on an implied covenant of good faith. When it is needed, in cases of bad faith discharges that do

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321. *Id.*

322. *Id.* at 782.

323. *See supra* Part III.A. (discussing just cause in more depth).

324. *Magnan*, 479 A.2d at 788-91.

325. *Id.* at 791 n.25 ("We see no good reason for submitting both counts [of breach of implied covenant and violation of public policy] to the jury, as the minority opinion would prefer, since the factual issues to be determined by the jury for each count are identical."); *see also* HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 6.61 (1998) (quoting language in Brockmeyer v. Dim & Bradstreet, Inc., 335 N.W.2d 834 (Wis. 1983)).

326. 427 A.2d 385 (Conn. 1980).

> not violate public policy, the majority gives the employee a covenant that is nothing more than an empty vessel.[327]

According to the majority in *Sheets,* a breach of the covenant of good faith and fair dealing will occur if the breach violates a public policy. However, what if the employer acts in bad faith but does not breach a public policy? Is an employer's bad faith not actionable under the covenant of good faith because it does not violate a public policy? If yes, then what is the purpose of the covenant of good faith and why should it even exist?

The following example illustrates the distinction between good faith and public policy and gives both doctrines substance.[328] Assume an employer falsely accuses an employee of theft and insists that to keep her job the employee must falsify documents submitted to a government agency. The employee refuses and the employer terminates her. The employee should be able to commence a wrongful discharge action under two theories: a breach of the covenant of good faith (arising from the malicious accusation of theft) and a violation of an established public policy (refusal to submit false documents to a governmental authority). Each claim should be evaluated independently. A failure to prove that the employer attempted to force the employee to sign the document should not preclude the employee's efforts to prove that the employer falsely accused the employee of theft. The result would be two clearly defined independent causes of action with different purposes and distinct elements of proof.[329]

Unfortunately, the *Magnan* court is not the only one to equate (and thus confuse) a breach of the covenant of good faith with a violation of an established public policy.[330] Courts in Alaska,[331] Arkansas,[332]

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327. *Magnan*, 427 A.2d at 792 (Parskey, J., concurring in part and dissenting in part).

328. This example is adapted from Justice Parskey's dissent in *Magnan*. *See id.* at 792-93 (Parskey, J., concurring in part and dissenting in part).

329. *See, e.g*, Spanish Oaks, Inc. v. Hy-Vee, Inc., 655 N.W.2d 390, 400 (Neb. 2003) ("The implied covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.").

330. *See* Johnson v. Cheseborough-Pond's USA Co., 918 F. Supp. 543, 550 n.4 (D. Conn. 1996) ("Connecticut law . . . recognizes a breach of the implied covenant of good faith and fair dealing . . . An at-will employee can only recover on such a claim if the employee can show that the employer violated public policy in the firing of an employee."); Carnemolla v. Walsh, 815 A.2d 1251, 1259 (Conn. App. Ct. 2003) ("In the absence of a public policy violation, there is no breach of the implied covenant of good faith and fair dealing." (quoting Doherty v. Sullivan, 168 A.2d 56 (Conn. App. Ct. 1992))).

331. *E.g.*, Eldridge v. Felec Servs., Inc., 920 F.2d 1434, 1437 (9th Cir. 1990) ("Alaska courts have held that a discharge in violation of public policy is adjudicated appropriately as a breach of the implied covenant of good faith and fair dealing." (citing Reed v. Municipality of Anchorage, 782 P.2d 1155, 1158 (Alaska 1989))).

332. Smith v. Am. Greetings Corp., 804 S.W.2d 683, 684 (Ark. 1991) ("[E]very employment relationship, even one terminable at will, contains an implied covenant of good faith and fair dealing, which

Colorado,[333] Arizona,[334] Virginia,[335] New Hampshire,[336] and Delaware[337] have interchanged the two doctrines.[338] As a result, the doctrines begin to merge with one another, leaving good faith, as Justice Parksey stated, little more than an empty vessel for relief.[339]

Even when courts distinguish between the covenant of good faith and the public policy exception, the holdings can be obscured by subsequent courts and commentators misinterpreting the decision. For example, in *Brockmeyer v. Dun & Bradstreet, Inc.*,[340] the employer learned that Brockmeyer, a married district manager for Dun & Bradstreet, was vacationing in Montana with his secretary, failing to appear at meetings, and smoking marijuana in the presence of other employees.[341] Dun & Bradstreet declined to fire Brockmeyer because he was an above average performer, but told Brockmeyer that either he or his secretary should consider a job at another division of the firm. When a new position could not be found for Brockmeyer's secretary,[342] Dun & Bradstreet told Brockmeyer to fire her, and he did so.

Shortly thereafter, Brockmeyer's secretary filed a sex discrimination claim against Dun & Bradstreet. Brockmeyer refused to submit written reports aiding his employer's defense because of the fear he would be made a scapegoat. Brockmeyer also indicated that if he testified at trial,

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under limited circumstances may make discharge actionable. This covenant prohibits discharge for a reason which contravenes public policy." (quotation omitted)).

333. Colorado equated the covenant of good faith and fair dealing and a breach of a public policy by negative implication. *See* Decker v. Browning-Ferris Indus. of Colo., Inc., 931 P.2d 436, 446 (Colo. 1997) ("In the absence of [legislative or other governmental] declarations of public policy, there is no appropriate basis upon which to ground a tort of breach of an express covenant of good faith and fair dealing in employment contracts.").

334. Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1036 (Ariz. 1985).

335. Schryer v. VBR, No. 101692, 1991 WL 835295, *3 (Va. Cir. Ct. Nov. 13, 1991).

336. Monge v. Bebbe Rubber Co., 316 A.2d 549, 551 (N.H. 1974); *see also* Foley v. Cmty. Oil Co., Inc., 64 F.R.D. 561, 563 (D.N.H. 1974) (following *Monge* for the proposition that "a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not the best interest of the economic system or the public good and constitutes a breach of the employment contract." (citing *Monge*, 316 A.2d at 551)). In subsequent years, however, much of the holding in *Monge* has been limited to its facts. *See* Howard v. Dorr Woolen Co., 414 A.2d 1273, 1274 (N.H. 1980).

337. Bailey v. City of Wilmington, 766 A.2d 477, 480 (Del. Super. Ct. 2001) (violation of public policy one of four situations that constitute breach of covenant of good faith and fair dealing in employment relationship).

338. The public policy exception may swallow up the at-will rule as a result. Barbara Rhine, *Business Closing and Their Effects on Employees – Adaption of the Tort of Wrongful Discharge*, 8 INDUS. REL. L.J. 362, 393 (1986).

339. *See supra* text accompanying note 327.

340. 335 N.W.2d 834 (Wis. 1983).

341. *Id.* at 836.

342. Interestingly, the opinion does not clearly explain why Brockmeyer could not have moved to another division and his secretary remain in place.

he would tell the truth. Dun & Bradstreet and the former secretary settled the lawsuit, and Brockmeyer was terminated three days later.[343]

Brockmeyer claimed he was wrongfully discharged because he refused to commit perjury[344] and contended that his employer wrongfully interfered with his pursuit of work[345] and injured his business reputation.[346] Dun & Bradstreet asserted that he was terminated because of his affair, marijuana use, and lack of attention to job duties.[347] On appeal from a jury finding in favor of Brockmeyer,[348] Dun & Bradstreet argued that the court should not recognize a good faith exception and a public policy exception to the doctrine of employment at will.[349]

The court first considered whether to impose upon an employer an implied duty to terminate an employee only in good faith.[350] The court refused to impose this duty upon employers. Unlike many other courts that simply reject the covenant out of hand or cursorily follow the majority of states,[351] *Brockmeyer* offers three distinct reasons for rejecting the covenant. First, allowing the covenant would subject each discharge to scrutiny under the amorphous rubric of bad faith.[352] Second, courts would risk becoming arbiters of any termination that possesses even a hint of bad faith.[353] Third, the covenant would unduly restrict an employer's broad discretion to manage its workforce.[354]

The court considered in a wholly separate discussion whether to adopt a public policy exception to the state's employment at will doctrine.[355] The court canvassed other states' reactions to the public policy exception and examined the various interests that would be affected if the exception were adopted.[356] The court concluded that Wisconsin

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343. Brockmeyer also refused an offer for $8,500 in exchange for signing a release agreeing not to sue Dun & Bradstreet. *Brockmeyer*, 335 N.W.2d at 836.

344. The commission of perjury is a violation of WISC. STAT. § 946.31 (2001-2002).

345. *See id.* § 134.03 (any person who hinders pursuit of work of another shall be fined or imprisoned).

346. *See id.* § 134.01 (prohibiting concerted effort to injure business reputation or prevention of any act against a person's will).

347. *Brockmeyer*, 335 N.W.2d at 837.

348. The jury found that Dun & Bradstreet wrongfully terminated Brockmeyer and awarded $250,000 in compensatory damages and $250,000 in punitive damages. *Id.* at 837.

349. *Id.* at 841-42.

350. *Id.* at 838 (citing Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251 (Mass. 1977) and Monge v. Bebbe Rubber Co., 316 A.2d 549 (N.H. 1974)).

351. Walsh & Schwarz, *supra* note 1, at 661.

352. *Brockmeyer*, 335 N.W.2d at 838. Transforming bad faith from an amorphous concept into a clear and applicable doctrine in employment cases is one of the goals of this paper. *See infra* Part III.E (discussing good faith in more depth).

353. *Brockmeyer*, 335 N.W.2d at 838.

354. *Id.*

355. *Id.* at 840-41.

356. *Id.*

should adopt a narrow public policy exception limited to the contravention of clearly mandated public policies.[357]

The *Brockmeyer* decision is a significant early case adopting one exception to the employment at will doctrine (public policy) and rejecting another (covenant of good faith). However, what gives the decision true distinction for purposes of this Article is that, like Justice Parskey's dissent above, *Brockmeyer* properly conceives of good faith and public policy violations as two distinct sanctions.[358]

Unfortunately, even though *Brockmeyer* clearly explains these nuances in its opinion, courts and commentators still categorize it as a case that intermingles the good faith and public policy concepts as a single doctrine. *Brockmeyer* is quoted as supporting the proposition that a violation of public policy constitutes a breach of an implied covenant of good faith and fair dealing between the employer and employee. For example, one treatise summarized *Brockmeyer* as "[holding] that a covenant of good faith and fair dealing is violated when the discharge 'is contrary to a fundamental and well-defined public policy as evidenced by existing law.'"[359] Other commentators have made similar statements.[360]

Unfortunately, construing *Brockmeyer* in this manner mischaracterizes the court's decision and reasoning. The court did not rule that the covenant of good faith is breached when an employer's practice contradicts an existing public policy. Rather, the court treated the covenant of good faith and the public policy exception as two separate legal theories. The court declined to accept the covenant because of its amorphous nature and allowed the public policy exception because of its ability to satisfy various societal interests. Nowhere in its lengthy

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357. *Id.* at 840.

358. *See also* Breen v. Dakota Gear & Joint Co., 433 N.W.2d 221, 224 (S.D. 1988) (conceptually separating the public policy exception from its rejection of the implied covenant).

359. PERRITT, *supra* note 325, at § 6.61 (quoting *Brockmeyer*, 335 N.W.2d at 840).

360. *E.g.*, Parker, *supra* note 1, at 367-68 ("[I]n *Brockmeyer v. Dun & Bradstreet, Inc.*, the Wisconsin Supreme Court held that the covenant of good faith is limited to discharges 'contrary to a fundamental and well-defined public policy as evidenced by existing law.'" (quoting *Brockmeyer*, 335 N.W.2d at 840) (footnote omitted)); Henry H. Perritt, Jr., *Implied Covenant: Anachronism or Augur?*, 20 SETON HALL L. REV. 683, 706 (1990) (similar); Peter B. Jurgeleit, Note, *Physician Employment Under Managed Care: Toward a Retaliatory Discharge Cause of Action for HMO-Affiliated Physicians*, 73 IND. L.J. 255, 280 n.138 (1997) (parenthetically describing *Brockmeyer* as "holding implied covenant of good faith and fair dealing cannot be broken absent a violation of public policy"). Not all commentators citing the *Brockmeyer* decision have mischaracterized it, however. *E.g.*, Harry F. Tepker, Jr., *Oklahoma's At-Will Rule: Heeding the Warnings of America's Evolving Employment Law?*, 39 OKLA. L. REV. 373, 420 n.326 (1986) (properly describing *Brockmeyer* in a parenthetical as "rejecting implied good faith duty, but adopting narrow public policy exception"); Schwab, *supra* note 4, at 37 n.113 (citing *Brockmeyer* for the proposition that "[o]ther courts have equated the good-faith obligation with the tort of wrongful discharge in violation of public policy"). Schwab criticized what he perceived has *Brockmeyer*'s holding as an "unwise limitation on the good-faith doctrine." *Id.*

discussion of the public policy exception does the court refer to a breach of the covenant of good faith.[361] Thus, the *Brockmeyer* court's proper partition of good faith and public policy theories shows a better understanding of these exceptions than in other cases.[362]

The covenant of good faith and fair dealing has also been confused with just cause.[363] For example, in *Stark v. Circle K. Corp.*,[364] the court affirmed a verdict for an employee who refused to sign a probation notice that the employee thought was inaccurate and unfair. The court reasoned that the employer must provide a "fair and honest" reason for dismissal to avoid liability under the covenant of good faith.[365] In *Huber v. Standard Ins. Co.*,[366] the court stated that the finder of fact may infer bad faith, and by implication the absence of good faith, from the lack of just cause in an employer dismissal. Judicial dissents have also equated good faith with just cause.[367]

Further, in *Cleary v. American Airlines, Inc.*,[368] the court found that dismissing an employee without "legal cause" after 18 years of employment violated a covenant of good faith and fair dealing implied in employment contracts.[369] The court defined good faith by phrasing the jury determination as whether the discharge was due to reasons other than dissatisfaction with the employee's services.[370] Thankfully, a later California decision recognized this contradiction, stating that the concepts of ordinary breach of employment contract for good cause, bad faith, and tortuous discharge "were rather badly admixed in *Cleary*."[371]

More than an isolated mistake, confusion between good faith and public policy represents a significant judicial trend that threatens to undermine wrongful discharge law as a whole. If a violation of public policy is equated with a breach of good faith, three branches of wrongful discharge law—implied contract, implied covenant of good faith and

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361. *Brockmeyer*, 335 N.W.2d at 838-42.

362. *See* Jurgeleit, *supra* note 360, at 280-81 ("[I]f a state does require a public policy violation in order to state a claim for breach of the implied covenant, then the practical applicability of the implied covenant exception is at worst a smaller class within the public policy tort exception, and is at best coterminous with it.").

363. *See* Kenneth A. Clark, Note, *Ensuring Good Faith in Dismissals*, 63 TEX. L. REV. 285, 292 (1984) ("[T]here may be an inherent tendency for a good faith standard to approach a requirement of just cause.").

364. 751 P.2d 162, 167 (Mont. 1988).

365. *Id.* at 167.

366. 841 F.2d 980, 985 (9th Cir. 1988). A later California state court's interpretation of the covenant rendered this decision invalid. *See* Mundy v. Household Fin. Corp., 885 F.2d 542, 544 n.1 (9th Cir. 1989).

367. *E.g.*, Foley v. Interactive Data Corp., 765 P.2d 373, 402-12 (Cal. 1988) (Broussard, J., dissenting).

368. 168 Cal. Rptr. 722 (Cal. Ct. App. 1980).

369. *Id.* at 729.

370. *Id.*; *see also* Lillard, *supra* note 267, at 1266.

371. Koehrer v. Superior Court, 226 Cal. Rptr. 820, 827 (Cal. Ct. App. 1986).

fair dealing, and public policy—could converge into one doctrine.[372] Similarly, equating good faith with just cause would turn one of the two doctrines into an empty vessel for relief.

Under the continuum approach, however, good faith, just cause, and public policy are wholly distinct doctrines with separate inquiries. The covenant of good faith concerns itself with a breach of implicit or explicit terms of the relationship, whereas public policy looks externally to enforce the norms of society. Similarly, the covenant of good faith is not the same as just cause protection. Just cause protection implicates objective reasonableness in the discharge decision and a possible secondary review by a factfinder.[373] Good faith has no such requirements.

Employees benefit from the continuum approach by being able to more clearly reach optimal bargaining decisions based upon more accurate information.[374] Given that workers may choose among potential employers based in part on their discharge policies,[375] a clearer ordering of wrongful discharge improves worker decision-making processes.

Employers benefit by reducing their defensive decision-making costs. As a general rule, employers significantly overestimate their exposure to wrongful discharge liability. One study by Dertouzos and Karoly reveals that the costs of wrongful discharge doctrines, including judgments and settlements, amounted to approximately $100 per termination or $10 per employee.[376] However, employers plan their workforce as if their exposure to wrongful discharge was one hundred times as great.[377] Although the exact results of this study are under debate,[378] the overestimation of wrongful discharge costs by employers is well documented.[379] The continuum approach permits employers to reach more

372. Rhine, *supra* note 338, at 393.

373. *See also* HOLLOWAY & LEECH, *supra* note 67, at 126 (describing distinction between good faith and good cause).

374. Merely simplifying the statement of at-will employment may not suffice, as Pauline Kim's work reveals that employees fail to understand the significance of at-will employment even when presented in the simplest terms. Kim, *supra* note 306, at 146 ("[Employee's] ability to process written information, particularly when it contradicts their preconceived beliefs about the law, appears to be quite limited."); *see also* Rudy, *supra* note 314, at 336 (agreeing with this conclusion).

375. Verkerke, *supra* note 4, at 873.

376. JAMES N. DERTOUZOS & LYNN A. KAROLY, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY xi (1992).

377. *Id.* at xiii.

378. One paper questions these high labor costs. DAVID H. AUTOR, JOHN DONOHUE III & STEWART J. SCHWAB, THE COSTS OF WRONGFUL DISCHARGE LAWS, (Nat'l Bureau of Econ. Research, Working Paper No. w9425, 2002), *available at* http://www.nber.org/papers/W9425.

379. *E.g.*, Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47 (1992); Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. OF SOC. 1401 (1990).

realistic conclusions about the true state of wrongful discharge protection in their jurisdiction and to shape their labor forces accordingly.

When the continuum approach is applied to an actual court decision, such as *Magnan v. Anaconda Industries, Inc.*,[380] its benefits to the judiciary of accuracy and clarity become more apparent. In *Magnan*, the employer investigated whether managerial employees were embezzling assets.[381] Investigators believed that the chief financial officer (CFO), with assistance from a yard foreman, delivered a company refrigerator to the CFO's residence.[382] Investigators approached Magnan, who was working under the foreman's supervision at the time, to obtain his cooperation in establishing the foreman's complicity in delivering the refrigerator.[383] Although investigators promised Magnan he would not be prosecuted, Magnan refused to sign a statement implicating the foreman and admitting his own complicity in the theft.[384] Magnan was fired for refusing to sign the statement.[385] Magnan claimed that his employer illegally retaliated against him and breached a covenant of good faith.[386] The court discussed at length the history of employment at will from colonial times to today and conducted a searching review of the current state of wrongful discharge law including just cause, good faith, bad faith, and public policy doctrines.[387] The court ultimately set aside the plaintiff's verdict on the breach of good faith claim and remanded for new trial the defendant's verdict on the retaliation claim.[388]

Application of the continuum approach would have resulted in simpler reasoning and a more accurate result. The key legal question in *Magnan* was this: did Anaconda Industries's (Anaconda) discharge of Magnan for refusing to sign a false document implicating him in a theft constitute wrongful discharge? First, the court would inquire as to whether Magnan's discharge constituted just cause: did Anaconda state an objectively appropriate reason that constitutes sufficient cause for just discharge that it subjectively believes to be true based upon sufficient and credible evidence?[389] Magnan's discharge for refusing to implicate himself is obviously not a reason such as incompetence, an economic

380. 479 A.2d 781 (Conn. 1984).
381. *Id.* at 782.
382. *Id.*
383. *Id.* at 782-83.
384. *Id.* at 783.
385. *Id.*
386. *Id.* at 782.
387. *Id.* at 783-91.
388. *Id.* at 791.
389. *See supra* Part III.A.

downturn, or absenteeism that directly implicates the proper ordering of the business. Therefore, the answer to this question is no, and the court would conclude that the Anaconda did not terminate Magnan with just cause.

Next, the court would examine whether Magnan's discharge violated an important societal public policy. After an examination of the breadth and depth of protected public policies, the court probably would conclude that Magnan's termination did violate a clear public policy against forcing an employee to expose himself to criminal liability.[390] Once the court determined that Magnan's firing violated a public policy, all the court would need to do is apply that factual conclusion to that state's wrongful discharge law. Connecticut is a "public policy" state, which means that Connecticut only forbids discharges that violate a clear public policy. Magnan's discharge breached a public policy, and Anaconda is therefore liable for wrongful discharge under Connecticut law.

The same process could apply in other states. In Alaska, a "good faith" state,[391] Anaconda would be liable for wrongful discharge because it breached a covenant of good faith and fair dealing. Public policy violations are in essence a subset of much stronger good faith protections—violation of a clear public policy undoubtedly also violates the employee's covenant of good faith and fair dealing with the employer. The determination that Anaconda violated a clear public policy would permit an Alaska court to conclude that Anaconda breached its covenant of good faith with Magnan.

In Montana, arguably a "just cause" state,[392] the court would inquire if Anaconda's stated reason was objectively reasonable and subjectively supported by credible evidence. As discharging an employee for refusing to expose himself to criminal action is not an objectively reasonable reason for discharge, the Montana court would conclude that Anaconda did not fire Magnan for cause, and thus committed wrongful discharge.

If Magnan's discharge occurred in New York, a pure at-will state, reaching the proper result would be the simplest of all. New York places almost none of the restrictions listed in the continuum on its employers' ability to discharge its workers, including no protections for contraven-

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390. In fact, the court need not look past its own precedent in *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385, 389 (Conn. 1980) ("[A]n employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment.").

391. *E.g.*, Mitford v. DeLasala, 666 P.2d 1000 (Alaska 1983).

392. *See* MONT. CODE ANN. § 39-2-904(1)(b) (2003). Heightened discharge protection attaches after a probationary period of six months or set by the employer. *Id.* at § 39-2-904(2)(b).

ing public policies.[393] A New York court would simply conclude that Magnan has no remedy.

The continuum approach untangles the complex threads of wrongful discharge. As *Magnan, Cleary,* and other cases show, courts misconstrue wrongful discharge and intertwine its various protective prongs. Even courts such as *Brockmeyer* that evaluate wrongful discharge properly may be misconstrued by later courts and commentators. The result is a doctrine that is riddled with unnecessarily complex and confusing precedents. The continuum framework's sequential and organized approach to understanding wrongful discharge ensures that the various wrongful discharge protections remain distinct and allows courts to reach decisions with less complexity, more consistency, and greater accuracy.

V. CONCLUSIONS

Employment at will remains one of the most widely discussed topics in American jurisprudence. Scholars critique the employment at will doctrine, argue that it should be discarded, and conclude that a default rule of just cause in the workplace would create an equitable and more tolerant workplace for employees lacking the bargaining power to negotiate favorable terms with their employers. Although scholarship helped make significant inroads in curbing the worst excesses of employment at will, few fundamental changes have been made to the doctrine since the heyday of innovation in the 1980s. The result is more scholarly literature that is having a reduced effect on the development of current doctrine.

Basic economic theory dictates that market forces move people toward full information.[394] With a lack of full information, participants cannot bargain to their preferred terms. Yet in spite of all of the aforementioned research, wrongful discharge law remains as confusing as ever.[395] The uncertainty harms both employers and employees because outcomes are less predictable and both sides cannot optimally negotiate their employment contracts.[396] The almost uniform chaos in wrongful discharge law should not be accepted as inevitable.

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393. *E.g.*, Horn v. New York Times, 790 N.E.2d 753, 759 (N.Y. 2003) ("We have consistently declined to create a common-law tort of wrongful or abusive discharge, or to recognize a covenant of good faith and fair dealing to imply terms grounded in a conception of public policy into employment contracts . . . and we again decline to do so."); Murphy v. Am. Home Prods., Inc., 448 N.E.2d 86 (N.Y. 1983).

394. Epstein, *supra* note 3, at 955.

395. *Cf.* Befort, *supra* note 38, at 352 ("Assessing the current status of American labor and employment law is the easiest part of this task. Simply put, it's a mess.").

396. Rudy, *supra* note 314, at 339.

The continuum approach developed in this paper brings some clarity to a vague doctrine by framing wrongful discharge law into five discrete and related categories. Each category describes a tier of protection that has been adopted by at least one state or has a significant effect on current law. The continuum demonstrates that an employer's discharge may be evaluated through a series of sequentially ordered questions. Courts reviewing wrongful discharge cases, therefore, can approach employment decisions more accurately and systematically, resulting in more accurate and cogent decisions. These decisions in turn will better inform employers and employees. Given that employers systematically overestimate their wrongful discharge liability exposure and staff their workforce accordingly, an increased understanding of wrongful discharge law will bring an employer's perceived exposure of wrongful discharge liability closer to its actual costs. An employee's simplified and more accurate understanding of her exposure to discharge will allow that employee to negotiate for job conditions that best match her preferences. A systematic approach to wrongful discharge brings clarity and accuracy to a highly litigated and badly confused legal doctrine that scholarly calls for the imposition of just cause and other regimes cannot provide.