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# A New Common Law of Employment Termination

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# A NEW COMMON LAW OF EMPLOYMENT TERMINATION

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*The common law "at will" presumption in employment contracts of unspecified duration reflects the nineteenth century ideology prevalent at the time of its judicial adoption. Piecemeal exceptions to that presumption, coupled with pervasive statutory regulation of the workplace, require a reevaluation of employee and employer rights and obligations. In this Article, Professor Leonard suggests that state courts should develop a new presumption, which would require employers to advance a plausible justification for terminating employees who have passed a rea-*

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*sonable probationary period. Professor Leonard discusses recent developments in Montana as an illustration of the interrelationship of common law development and statutory reform.*

"Courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values."[1]

## I. INTRODUCTION

Recent decades have brought significant change and uncertainty to common-law principles governing employment termination. The employment at will rule that came into general acceptance around the turn of the last century[2]— providing that an employment agreement of unspecified duration is presumed to be terminable without penalty or notice by either the employer or employee for any or no reason[3]—has experienced great erosion, leaving uncertainty and wide variations in law between the states.[4]

Federal and state legislation specifying forbidden motivations for discharge, such as race, sex, religion or national origin,[5] age,[6] union activity,[7] application for workers compensation benefits,[8] or jury service,[9] laid the groundwork for undermining the common-law rule. These laws sometimes provide an administrative forum to challenge an unlawfully motivated discharge, and reinstatement is a potentially appropriate remedy.[10] These statutes challenge both the tradi-

1. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 232.

2. The earliest judicial statements of the rule usually are cited as Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895) and Payne v. Western & A.R.R., 81 Tenn. 507 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915).

3. *See* H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877).

4. The New York City metropolitan area provides a prime example of the sharply contrasting state laws on employee termination. The New Jersey and Connecticut Supreme Courts have recognized a variety of common law exceptions to the at will presumption, while the New York Court of Appeals, except for a very limited contractual exception which may be sui generis to the one case in which it was applied, has refused to recognize any common law exception. *See* Magnan v. Anaconda Indus., Inc., 193 Conn. 558, 479 A.2d 781 (1984) (discharge without just cause does not of itself breach any duty of good faith in an at will employment); Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980) (discharge that contravenes public policy actionable in tort); Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257, *modified*, 101 N.J. 10, 499 A.2d 515 (1985) (job security provision in personnel manual enforceable; employee's reliance presumed); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1982) (discharge that contravenes public policy is actionable in tort); Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 506 N.E.2d 919, 514 N.Y.S.2d 209 (1987) (rejecting exception to at will presumption based on personnel manual or contravention of public policy); Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982) (narrow contractual exception to at will presumption recognized when guarantees of job security, backed up by personnel manual, were made at time of hiring and reiterated during dischargee's employment).

5. Civil Rights Act of 1964, §§ 701-716, 42 U.S.C. §§ 2000e to 2000e-17 (1982 & Supp. III 1985); *e.g.*, N.Y. EXEC. LAW § 296(a) (McKinney 1982).

6. Age Discrimination in Employment Act of 1967, §§ 2-16, 29 U.S.C. §§ 621-634 (1982 & Supp. III 1985).

7. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-197 (1982 & Supp. III 1985).

8. *E.g.*, N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1988).

9. *E.g.*, N.Y. JUD. LAW § 519 (McKinney Supp. 1988).

10. For example, the Labor Management Relations Act provides an administrative process for dealing with allegations that discharges violate federal labor relations law, and authorizes reinstate-

tional presumption of terminability at will and the traditional restriction against ordering specific performance of employment agreements. Most of the pertinent legislation was enacted during the New Deal period (in the case of federal labor and employment law)[11] or the years 1960-1975 (in the case of civil rights and related protective labor legislation).[12] In addition, the organization of substantial numbers of employees into labor unions[13] which negotiated collective bargaining agreements setting a just cause standard for employment termination and establishing a nonjudicial mechanism (neutral binding arbitration) for enforcement, marked a major incursion in the at will regime.[14]

Another important legislative development affecting job security was the move to guarantee accumulated employee rights with respect to benefits entitlements. The Employee Retirement Income Security Act (ERISA) of 1974,[15] which set minimum vesting periods[16] and required that vested benefits be nonforfeitable,[17] gave employees a property interest in continued employment by strengthening legally enforceable interests which related to benefit entitlements. ERISA also adopted a nonretaliation principle under which employment terminations would be suspect at various identifiable times during an employee's career.[18]

As legislation and union organization have undermined employment at will, employees have developed new consciousness and expectations about job security. Unionized employees, never a majority of the workforce but still a significant portion, are conscious of their just cause protection, a standard requir-

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ment with or without back pay as a remedy. Labor Management Relations (Taft-Hartley) Act § 10(b), (c), 29 U.S.C. § 160(b), (c) (1982 & Supp. III 1985). The Civil Rights Act of 1964 provides an administrative process for dealing with allegations that discharges violate the nondiscrimination requirements of federal civil rights law, and authorizes reinstatement with or without back pay as a remedy. Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e-5 (1982 & Supp. III 1985).

11. The National Labor Relations Act, predecessor of the Labor Management Relations Act, was enacted in 1935, Pub. L. No. 198, 49 Stat. 449 (1935), and the Fair Labor Standards Act followed shortly thereafter, Pub. L. No. 718, 52 Stat. 1060 (1938).

12. Already mentioned above are the 1964 Civil Rights Act, which became effective in 1965, and the 1967 Age Discrimination in Employment Act. Other pertinent enactments include the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1982 & Supp. III 1985), the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1982 & Supp. III 1985), and the Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001-1461 (1982 & Supp. III 1985).

13. However, this form of protection for job security serves a declining portion of the civilian labor force, as union penetration has decreased from over a quarter of the civilian labor force in 1953 to under a fifth in 1984. Congressional Research Service Report on Implications for Economic Policy and Labor Legislation of Decline in Union Membership, Daily Labor Report (BNA) No. 114, at D-1, D-12 (June 13, 1986) (reproducing table based on L. TROY & N. SHEFLIN, UNION SOURCEBOOK 3-18 (1985)) [hereinafter Union Membership].

14. A direct legislative abrogation of at will employment also can be found in federal laws governing reemployment rights of military veterans. 38 U.S.C. § 2021(b)(1) (1982) provides that reemployed veterans "shall not be discharged from such position without cause within one year after such restoration or reemployment."

15. 29 U.S.C. §§ 1001-1461 (1982 & Supp. III 1985).

16. *Id.* § 1053.

17. *Id.*

18. *Id.* §§ 1140, 1141 (1982); *e.g.*, Zipf v. American Tel. & Tel. Co., 799 F.2d 889 (3d Cir. 1986) (discharge of employee diagnosed with costly illness raises inference of unlawful discrimination under § 1140); Ursic v. Bethlehem Mines, 556 F. Supp. 571 (W.D. Pa.) (discharge prior to vesting date under suspicious circumstances may violate 29 U.S.C. § 1140), *modified*, 719 F.2d 670 (3d Cir. 1983).

ing employer justifications based on business reasons.[19] Members of minority groups know they can mount a legal attack against terminations traceable to racial or ethnic animosity or otherwise unrelated to their work performance. Elderly employees no longer need retire solely due to age,[20] and employers must make "reasonable accommodations" to continue employing individuals with physical or mental impairments[21] or who feel compelled by religious belief to perform unconventional practices of dress, diet, or Sabbath observance.[22]

Legislative entitlements to job security have had an effect on the consciousness not only of those directly protected but also of their families, friends, and fellow employees. Supervisory employees are aware of restrictions on their ability to discharge subordinates covered by collective bargaining or statutory protections.[23] Family and friends of public employees become conscious of the job security afforded by civil service laws and caselaw expanding constitutional job protections in the public sector.[24] Simultaneously, other areas of the law have evolved to provide greater protection to the working class in other spheres of their everyday lives.[25] All of these factors undoubtedly have contributed to increased feelings among employees that they have an entitlement to fair treatment in the workplace, particularly regarding job termination.

Employers have encouraged and abetted these feelings. As statutory regulation has become increasingly complex and pervasive, many employers, particularly larger employers, have published personnel manuals setting forth descriptions of employment benefits and policies, including procedures for employee discipline and termination.[26] As union avoidance has emerged as a significant management strategy, voluntary adoption of restrictions on termination has also become more common. Some employers have constructed internal ap-

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19. A. COX, D. BOK & R. GORMAN, LABOR LAW 701-02 (10th ed. 1986); *see* 2 Collective Bargaining Negot. & Cont. (BNA) § 40:1, at 121 (1986) (grounds for discharge found in 94% of contracts analyzed); *id.* § 51:1, at 51 (grievance and arbitration procedures found in 97-100% of contracts sampled).

20. 29 U.S.C. §§ 623, 631 (1982 & Supp. III 1985), *amended by* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342.

21. School Bd. v. Arline, 107 S. Ct. 1123, 1131 (1987) (Rehabilitation Act, § 504, 29 U.S.C. § 794 (1982 & Supp. III 1985), requires employers to make reasonable accommodations to "otherwise qualified" handicapped persons).

22. 42 U.S.C. § 2000e(j) (1982).

23. For example, in Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982), the plaintiff, a discharged supervisory employee, alleged he had been instructed to follow handbook procedures to avoid legal liability of the company in cases in which he recommended subordinates be discharged. *Id.* at 465-66, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

24. Civil Service Reform Act of 1978, Pub. L. No. 95- 454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.) (comprehensive statutory protections for federal employees); Board of Regents v. Roth, 408 U.S. 564 (1972) (due process protects state employees' reasonable expectation of continued employment); Perry v. Sindermann, 408 U.S. 593 (1972) (same); *see Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611 (1984); Note, *Substantive Due Process: The Extent of Public Employees' Protection From Arbitrary Dismissal*, 122 U. PA. L. REV. 1647 (1974). Because of the special statutory and constitutional protections they enjoy, public sector employees generally fall outside the main concerns of this Article.

25. During the relevant time period, statutory and common law protection for consumers has undergone a revolutionary change, as have protections for residential tenants.

26. *See* Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 742-43. Finkin cites a 1979 survey of 6,000 companies showing about 75% had distributed employee handbooks, most of which contained personnel policies. *Id.* at 743 & n.53.

peals processes, sometimes incorporating decision making by neutral persons.[27]

The resulting new consciousness and assertiveness about job security is vividly reflected in the increasing number of lawsuits brought by employees, including supervisory and managerial employees, protesting their terminations as being unfair or unlawful. One can search state case reports prior to the 1970s in vain for any significant number of cases in which nonunionized employees without written durational employment contracts challenged their discharges. Beginning in the 1970s, however, such challenges became frequent, and the number had increased enough by the middle of the 1980s to generate specialized law reporting services[28] and a national Plaintiff Employment Lawyers Association, reflecting the development of a new and growing field of practice.[29]

The growing number of such cases has been both a stimulus and a response to increased willingness by state courts to identify exceptions to the presumption of at will status. The first judicial cracks in the at will citadel involved allegations that a particular discharge decision offended some principle of public policy. A California decision recognizing such a cause of action during the 1950s has been identified as one of the earliest influential cases.[30] During the 1970s and 1980s the highest courts of many states agreed to recognize a "public policy exception" to the at will rule,[31] although they differed in the latitude they would allow in identifying the sources of public policy for determining whether a discharge was actionable. By 1987 a common law public policy exception had become a clear majority rule, with only a few prominent holdouts such as New York.[32] Over sixty percent of the states now recognize an exception grounded in considerations of public policy, sometimes characterized as a basis for a tort action, with punitive damages available as a remedy in some cases.

Another widely accepted exception is an implied contract based either on written statements contained in employee handbooks or oral statements made at the time of hiring or shortly thereafter, which would lead employees reasonably to believe that they had job security. The developing caselaw shows a growing judicial reluctance to let employers enjoy the presumed benefits of such statements without incurring any obligation to abide by them.[33] By 1987 courts in more than half the states had recognized an effective rebuttal of the at will pre-

27. *See generally* Blumrosen, *Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 U. MICH. J.L. REF. 249 (1983) (proposing a model arbitration agreement for employee terminations).

28. *E.g.*, Employment At Will Reporter; Individual Employee Rights Cases (BNA).

29. A report by a committee of the American Bar Association's Section on Labor and Employment Law counted 314 state and federal court employment at will decisions published during 1985, a 37.1% increase over the number of such decisions announced in 1984. These were mainly appellate decisions, and it is fair to speculate that they represent only a small percentage of the cases actually filed. *See* Section on Labor and Employment Law, American Bar Association, *Report of the Committee on Individual Rights and Responsibilities in the Workplace*, 2 LAB. LAW. 351, 351-52 (1986).

30. Petermann v. Int'l Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (Cal. Dist. Ct. App. 1959), *aff'd*, 214 Cal. App. 2d 155, 29 Cal. Rptr. 399 (Cal. Dist. Ct. App. 1963).

31. *See* Gould, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885, 887 n.6.

32. Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 506 N.E.2d 919, 514 N.Y.S.2d 209 (1987).

33. *See, e.g.*, Small v. Springs Indus., 292 S.C. 481, 357 S.E.2d 452 (1987).

sumption in such cases.[34] The resulting cause of action is a breach of contract, with normal contract damages measured by an expectation interest, reduced by amounts earned in mitigation, as the usual remedy.

A minority of jurisdictions recognize an exception based on an implied covenant of good faith and fair dealing in employment agreements, similar to that implied in commercial contracts covered by the Uniform Commercial Code, and consider a breach of such covenant as the basis for a contract or tort action.[35] Significantly, all the judicially adopted exceptions adhere to the traditional common-law reluctance to order specific performance of employment contracts, favoring damages as the sole remedy, in contrast to legislative exceptions to the at will rule that authorize a reinstatement and back-pay remedy.

Despite the rapid spread of the two principal exception theories—public policy and implied contract—the state courts are reluctant to abandon the underlying concept of a presumption of at will employment. All of the decisions upholding a cause of action do so within the framework of an exception to an underlying at will rule. I contend the combination of statutory and common-law exceptions and the contemporary employment law environment have evolved to the point where courts would be justified in abandoning the underlying common-law rule and devising a new legal theory of the employment relationship more congruent with the legal and social environment.

Despite the pervasive statutory regulation of many terms and conditions of employment—such as compensation, workplace safety, and nondiscrimination requirements—the formation and termination of private sector employment relationships is still largely a matter of private rather than public law, the Congress and almost all state legislatures having made no move to adopt general principles governing such transactions.[36] Characterizing these transactions as essentially contractual, the courts have approached the problem as one of analyzing the employment relationship by reference to familiar principles from contract law such as consideration, mutuality of obligation, and express and implied covenants. But employment does not fit comfortably into the traditional contract scheme, resulting in decisions holding either that executory employment agreements are unenforceable due to lack of mutuality of obligation or consideration,[37] or that the lack of a durational term means the parties presumptively

34. Gould, *supra* note 31, at 887 n.6.

35. Gould, *supra* note 31, at 887 n.6. Leading examples of such an implied covenant are found in the caselaw of Massachusetts, *see* Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977), and Montana, *see* Gates v. Life of Montana Ins. Co., 205 Mont. 304, 668 P.2d 213 (1983).

36. The principal exception at the time of this writing is Montana. *See* Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to -914 (1987); *see also* ARK. STAT. ANN. § 81-310 (1976) (term employee may bring action for wrongful discharge in addition to recovering lost wages); P.R. LAWS ANN. tit. 29, § 185a (1985) (length of service may provide protection against "discharge without cause").

37. Ironically, although lack of mutuality of obligation is relied upon as a basis for finding nondurational employment agreements unenforceable, the law of contracts seems largely to have abandoned the doctrine of mutuality of obligation, if the Second Restatement is any indication. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981); *cf.* J. CALAMARI & J. PERILLO, CONTRACTS § 4-12 (3d ed. 1987) (exceptions and judicial circumvention of rule of mutuality of obligation lend support to the argument that rule should be abandoned). As to the need for traditional "considera-

intended to make the agreement terminable without notice at any time.

If one holds to a strictly contractarian analysis of employment agreements, the lack of a durational term appears to create an important gap. The presumption of at will terminability, if not a requirement due to "lack of mutuality of obligation," can be seen as essentially a gap-filling device.[38] During the period straddling the turn of the last century, courts in effect found that the most logical gap-filler was a presumption of at will terminability. This presumption seems logical given the surrounding employment law of the period, which was hostile to collective employee action, worker tort claims for job-related injuries, and legislative attempts to regulate employment terms.[39] In such a relatively unregulated employment environment, it would have been unlikely that most employment relationships were formed with some unstated expectation by both parties that a termination would require advance notice, severance pay, or some form of legal justification.[40] As such, the presumption was an appropriate gap-filler at the time the courts adopted it.

The appropriateness of this gap-filler is now in considerable doubt. Employers and employees form their relationship in an environment laden with rules and regulations governing most significant aspects of employment. Strict liability exists for work-related injuries under the workers compensation laws.[41] Statutes guarantee employees the right to engage in concerted activity, to form unions, and to compel collective bargaining,[42] and dictate minimum terms of compensation[43] and conditions of workplace safety.[44]

As noted above, a wide array of reasons for termination of employment have been statutorily rendered unlawful. Furthermore, many employers present their newly hired employees with handbooks or policy statements which strongly imply that discharge will not be undertaken on an at will basis. It seems unlikely in such an environment that the employer and the employee, from the outset, share an unspoken presumption that their relationship is terminable at will without advance notice or compensation.

Despite these changes in workplace expectations and numerous proposals, comments, and recommendations by academic commentators, judges, and organized bar groups that legislative change would be appropriate, neither the state legislatures nor Congress has moved to adopt a comprehensive statutory

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tion," see G. GILMORE, THE DEATH OF CONTRACT (1974); RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

38. A prominent defender of the at will presumption sees it as an appropriate gap-filler. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951-53 (1984).

39. *See* Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 127-32 (1976); McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 Y.B. SUP. CT. HIST. SOC'Y 20, 20-33.

40. Indeed, Professor Matthew W. Finkin convincingly shows that at the time the at will rule was adopted, the right to quit was assumed and highly valued by workers, who would frequently change jobs to improve their circumstances. Finkin, *supra* note 26, at 736-43.

41. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION ch. 1, § 1.10 (rev. ed. 1985).

42. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-197 (1982 & Supp. III 1985).

43. Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982).

44. Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1982).

scheme to replace the common-law at will presumption and attendant growing caselaw of exceptions.[45] Some reasons for legislative inaction seem obvious: organized employer groups oppose further legislative restrictions on their freedom of operation, and no countervailing lobby argues in favor of legislative restrictions on employment termination. The organized labor movement understandably does not make such legislative reform a high priority, as statutory job protection would remove one of the main benefits that unions offer to potential members, and could, depending on its administration, decrease the unions' role as an intermediary and protector of employees already organized.

Some might argue the lack of an organized lobby for statutory job protection means that it is an idea which the public would on the whole reject, but there is no evidence that the public has formed a general opinion on the subject. Perhaps the traditional private-law status of the issue, as one peculiarly individualistic in nature, mitigates against the public agitation necessary for legislative change. While a statutory approach to employment termination might be preferable to a purely judicial one, primarily because a statute might create an administrative mechanism for dealing with the resulting litigation,[46] apparently most legislatures are not now ready or willing to act. But the legislatures have not expressly rejected attempts to act in this area; rather, they have acted piecemeal, in some cases responding to particular court decisions by enshrining yet another exception to at will employment.[47] These piecemeal solutions have not stemmed the tide of lawsuits and have helped make employment law extraordinarily complex, especially for employers with multistate operations.

Without legislative guidance, state courts are now groping towards a new conceptualization of the employment relationship closer to the expectations of contemporary workers. Starting from contract concepts, they are trying to devise a new gap-filler that comes closer to what the parties might reasonably expect, had employees and employers consciously articulated their expectations at the time they formed the relationship or as the relationship developed over time. We expect the state courts to play this role in dealing with private law disputes: to identify principles which are congruent with the reasonable expectations of

45. So many articles dealing with unjustified discharge exist that citing them would be superfluous. Perhaps the most significant to urge a legislative change are Gould, *supra* note 31; Stieber & Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REF. 319 (1983); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976). Also of significance is a special report prepared by a committee of the California state bar, urging adoption of a statute mandating a just cause standard for employee discharge and providing an arbitration mechanism to resolve disputes. California State Bar Ad Hoc Comm. on Termination at Will and Wrongful Discharge, *To Strike a New Balance: A Report of the Ad Hoc Committee on Termination at Will and Wrongful Discharge* (special ed., Labor and Employment Law Newsletter, Feb. 8, 1984). Early in 1988, the Commissioners on Uniform State Laws announced a project to draft a model statute.

46. More than a decade ago Clyde W. Summers urged that it was "time for a statute" on this subject. Summers, *supra* note 45. More recently, William Gould argued that ensuing developments reinforce the need for statutory protection for private sector employees. Gould, *supra* note 31.

47. The piecemeal approach in New York has resulted in provisions scattered through the state's legal code forbidding particular reasons for discharge. *See* N.Y. JUD. LAW § 519 (McKinney Supp. 1988); N.Y. EXEC. LAW § 296(1)(e) (McKinney 1982); N.Y. LAB. LAW § 215 (McKinney 1982 & Supp. 1988); N.Y. LAB. LAW § 740 (McKinney Supp. 1988); N.Y. CIV. SERV. LAW § 75-b (McKinney Supp. 1988); N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1988).

the parties and the society in which they interact, building on existing bodies of precedent and theory.

It is unlikely that many employees and employers desire the complicated array of forums and statutory and common-law exceptions to an underlying rule of termination at will that constitute employment law in 1988. It also is unlikely that the views of employers and employees as to the nature of their relationship remain static over time; surely employees with significant workplace seniority and accumulated benefits entitlements hold different views about the security of their jobs from employees who have just been hired or who have not advanced to vesting of benefits. In addition, the nature of the job and concomitant responsibilities likely influence the views of both employers and employees about the circumstances under which employment can be terminated. Consequently, it may be that an appropriate gap-filler is a more general standard of conduct rather than a per se or presumptive rule such as termination at will.

In this Article I argue that state courts are justified in taking the important step of adopting a new underlying legal theory for deciding employment termination disputes. This new underlying theory would build on the implied covenant of good faith that has been adopted as a gloss on the at will presumption in a few jurisdictions,[48] and also incorporate some of the features of the "status relation" that characterized precontract employment law.[49] A requirement that termination of employment be undertaken for legitimate reasons related to the economic needs of the employer and the standard of performance by the employee based on a notion of reciprocal duties of loyalty within the employment relation, provides the flexibility courts will need in dealing with a wide variety of factual situations. This requirement would also provide a substantive standard that is congruent with the rest of modern American employment law and other developments in common-law areas directly affecting the daily lives of Americans. A remedial scheme should be based on a make-whole remedy for discharged employees which reasonably approximates the actual injuries resulting from unjustified employment termination. Such a remedy could stimulate more widespread adoption of severance pay systems that, in the long run, would deter litigation and assist former employees in carrying on with their lives after discharge. Furthermore, judicial development of a make-whole remedy may stimulate state legislatures or the Congress to enact an appropriate mechanism for its administration, as occurred in Montana in 1987. After examining the developments in employment law that justify judicial innovation with respect to employee termination, I will propose the contours of a new rule and suggest ways in which it could be applied by the courts.

48. *See* Gould, *supra* note 31, at 902; Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1816-17 & n.6 (1980).

49. For a description of the "status relation" approach of preindustrial employment law, see P. SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 122-37 (1969).

## II. How the Current Situation Arose

### A. *From Adoption of the Common-Law Presumption to the Beginning of the Modern Turmoil*

Prior to adoption of a termination at will presumption around the turn of the century, some American courts had followed the English rule, which presumed a yearly hiring if the parties specified no duration and no evidence showed a contrary intent.[50] However, American common law governing the employment relation during the nineteenth century has been characterized as exhibiting "a confusion of principles and rules,"[51] primarily between the old fields of domestic relations and master and servant.[52] By the 1870s contradictory descriptions in a variety of treatises evidenced a multiplicity of approaches to characterizing the employment relation.[53]

Horace Gray Wood's 1877 treatise announced a formulation later expressly adopted by the New York Court of Appeals:

> With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof . . . . [I]t is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.[54]

Wood cited several cases for his "inflexible rule," but they do not support an assertion of an "inflexible rule."[55] Moreover, the different rules Wood's contemporary treatise writers espoused[56] argue against Wood's assertion that his rule was then established or inflexible.

Neither Wood nor the courts which adopted his rule explain why such a presumption as to termination would be appropriate.[57] Why should at will ter-

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50. Feinman, *supra* note 39, at 119-22. Feinman notes that English courts shifted their attention during the 19th century from the issue of duration to that of notice.

51. Feinman, *supra* note 39, at 122.

52. Feinman, *supra* note 39, at 122-24.

53. Feinman, *supra* note 39, at 123-25. Feinman notes the following treatises: J. SCHOULER, DOMESTIC RELATIONS (rev. ed. 1874) (stating American rule that the period of payment of wages raises a presumption as to duration of hiring), W. STORY, CONTRACTS (5th ed. 1874) (also stating a wage duration presumption, but noting that evidence of intent to create a longer relationship would override), and H. WOOD, *supra* note 3 (stating the at will presumption as the "inflexible" American rule).

54. H. WOOD, *supra* note 3, § 134 (quoted in Feinman, *supra* note 39, at 126). The New York Court of Appeals quoted this passage with approval in Martin v. New York Life Ins. Co., 148 N.Y. 117, 121, 42 N.E. 416, 418 (1895).

55. Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 n.54 (1974); *see* Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 600-04, 292 N.W.2d 880, 886-87 (1980); Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 308 & n.1, 448 N.E.2d 86, 93 & n.1, 461 N.Y.S.2d 232, 239 & n.1 (1983) (Meyer, J., dissenting); Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 463 n.5, 443 N.E.2d 441, 444 n.5, 457 N.Y.S.2d 193, 196 n.5 (1982); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 567 n.3, 335 N.W.2d 834, 837 n.3 (1983).

56. *See supra* note 53.

57. Feinman, *supra* note 39, at 126. The courts were not accustomed to giving theoretical explanations for the adoption of new common law rules. In *Martin* the Court spoke as if it was not adopting a new rule at all, relying on Wood's assertion that the at will presumption was established in American law. *Martin*, 148 N.Y. at 121, 42 N.E. at 418.

mination be the underlying presumption, instead of a duration measured by the manner of payment? Why not a more flexible approach, as in other areas of contract law, seeking to infer the intent of the parties from their course of dealing,. other terms of their agreement, or common understandings and trade usages?[58]

Latter-day commentators have speculated on reasons for the at will doctrine's eventual triumph as the American rule. The most frequently advanced explanation is that the rule was an expression of the freedom of contract ethos characteristic of its time. Arguably, freedom to make contracts includes freedom to terminate them unless the parties have expressly bound themselves for a specified duration.[59]

Another reason for the at will presumption might be that the courts were playing their proper role as developers of the common law by adopting a rule which reflected the expectations and needs of the employer and employee classes of the time. In that age *laissez-faire* was the attitude of government toward industry, massive immigration had reduced or reversed the historic American shortage of labor, large-scale industry was developing at a rapid pace, and employees frequently changed jobs on their own initiative. A policy of according maximum freedom to employers and employees to dissolve their relationship probably seemed to the courts an obvious translation of public policy into the employment sphere.[60] Furthermore, such a rule was consistent with the general approach of the courts toward employment issues.[61]

Finally, exponents of the "critical legal studies" approach have argued that adoption of the rule was, whether consciously or not, part and parcel of the promotion of industrial capitalism by the courts.[62] At will termination protects the capitalist's investment by strengthening his control of the workplace. Because the employer could terminate at will, employees interested in retaining their jobs were motivated to maintain high productivity. The rule also allowed employers maximum freedom to upgrade their workforces or lay off workers in times of reduced need for production.

Although it achieved the dignity of virtually universal adoption and, for

58. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981) ("Supplying an Omitted Essential Term. When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."). As to resort to course of dealing, trade usages, and other methods of supplying missing terms in commercial contracts, see U.C.C. §§ 2-301 to -308.

59. Some contracts scholars have countered this explanation by observing that the law of contracts, as it emerged in the late 19th century, would not have supported the adoption of an at will presumption. Instead, it would have supported a rule under which courts would construct a durational feature based on the other elements of the agreement and whatever could be determined or inferred as to the intentions of the parties. Feinman, *supra* note 39, at 129-30.

60. This explanation is developed from a historian's perspective in McCurdy, *supra* note 39, at 20-33.

61. At the time the at will rule was adopted, collective labor action damaging to an employer was subject to injunction, employees injured at work could not recover against their employer if a fellow employee played any role in the accident, and legislative attempts to ameliorate harsh working conditions were considered unconstitutional by the courts.

62. Feinman, *supra* note 39, at 131-35; McCurdy, *supra* note 39, at 20.

some time, constitutional status,[63] legislators eventually judged the at will rule and its enshrinement of an unregulated labor market to be inadequate to protect legitimate interests of employees in many instances.[64] Recognizing that employees and employers frequently stand on grossly unequal footing when negotiating the terms of their relationship, legislators have carved out significant exceptions to freedom of contract running along two distinct lines: first, encouraging establishment of collective bargaining so that bargaining over employment terms would be less one-sided,[65] and second, directly establishing certain minimum substantive terms and prohibiting certain conduct.[66]

As to the former, the Norris-LaGuardia Act[67] and the Wagner Act[68] sought to create an environment in which collective bargaining would replace individual bargaining for most employees.[69] A union charged with the duty to represent all employees in a bargaining unit would negotiate terms to be contained in a collective bargaining agreement.[70] Although the individual contract of employment still would remain,[71] its terms (or presumptions as to its terms) would be largely supplanted by or taken from the collective agreement.

As to the latter, the Norris-LaGuardia Act abolished enforceability of contract provisions requiring employees to refrain from union membership. The

63. *E.g.*, Adair v. United States, 208 U.S. 161 (1908).

64. Virtually every piece of federal labor legislation, beginning with the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1932), represented an attempt either to protect human or civil rights or to change the character of the market by introducing the element of collective action as a counterweight to employers' economic power. The legislative judgment that the unregulated market failed to respect adequately the rights of unrepresented workers is starkly proclaimed in the public policy provision of Norris-LaGuardia, 29 U.S.C. § 102 (1932), which states that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor . . . ."

65. National Labor Relations Act, 29 U.S.C. §§ 141-197 (1982).

66. *Id.*; Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982 & Supp. III 1985); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1982 & Supp. III 1985); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1982 & Supp. III 1985); Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001-1461 (1982 & Supp. III 1985); Civil Rights Act of 1964, Title VII (Equal Employment Opportunities), 42 U.S.C. §§ 2000e to 2000e-17 (1982).

67. 29 U.S.C. §§ 101-115 (1982).

68. 29 U.S.C. §§ 151-169 (1982).

69. By creating a right for employees to join unions, outlawing employer practices opposed to unions, and imposing a duty on employers to bargain with unions selected by their employees, the Wagner Act may be characterized as a statute embracing a pro-union philosophy. By adopting a right for employees to refuse to support and join unions, outlawing various union practices (especially effective secondary tactics to force unionization on reluctant employers), and redefining the bargaining duty so as not to require concessions or agreement, the 1947 Taft-Hartley Act may be seen as an attempt to recast federal labor relations law in neutral, rather than pro-union, terms.

70. The Supreme Court derived the duty of fair representation in a series of cases brought under § 301 of the Labor Management Relations Act, 29 U.S.C. § 186 (1982). *See* Vaca v. Sipes, 386 U.S. 171 (1967) (union has duty to process discharged employee's grievance in good faith); Humphrey v. Moore, 375 U.S. 335 (1964) (union agreement to integrate seniority lines in a merger situation not a breach of statutory duty); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) (union agreement to contract provision adversely affecting some employees is valid); *cf.* Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) (construing Railway Labor Act, 45 U.S.C. §§ 151-188 (1982), to require that exclusive bargaining agent provide fair representation to all employees in bargaining unit, regardless of union membership status or race).

71. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) (Wagner Act not intended to displace individual contract of employment, which remains in effect to extent not displaced by collective agreement).

Act essentially banned federal injunctions against employee concerted activity.[72] The Wagner Act prohibited discharge of employees for engaging in concerted activity to advance common interests.[73]

In the following decades Congress adopted new statutory prohibitions against termination of employment.[74] Some were phrased in terms of protecting employees who asserted rights conferred by legislation.[75] Thus, employees could not be discharged for pursuing wage entitlements under the Fair Labor Standards Act of 1938,[76] opposing discriminatory practices under Title VII of the Civil Rights Act of 1964,[77] protesting safety problems under the Occupational Safety and Health Act of 1970,[78] or claiming benefits due them under plans subject to ERISA.[79] Other statutes identified particular classifications or statuses that could not be the basis for a discharge, such as race, religion, national origin, or sex under Title VII of the Civil Rights Act of 1964,[80] age under the Age Discrimination in Employment Act of 1967,[81] or, to a limited extent, physical or mental handicaps under the Rehabilitation Act of 1973.[82] In addition to proscribing various motivations for discharge, many of these labor laws undermined considerably the notion of "freedom of contract" with respect to employment by sharply circumscribing various terms of the relationship.[83]

Both tracks of employment legislation at the federal level have their coun-

72. Norris-LaGuardia Act, §§ 1, 3, 4, 29 U.S.C. §§ 101, 103, 104 (1982).

73. Wagner Act, § 8(a)(1), (3), 29 U.S.C. § 158(a)(1), (3) (1982), enforcing *id.* § 7, 29 U.S.C. § 157. The Wagner Act also prohibits discharge as retaliation against employees who file complaints under the Act or participate in Labor Board proceedings. *Id.* § 8(a)(4), 29 U.S.C. § 158(a)(4).

74. *See infra* notes 76-82 and accompanying text. Prior to the passage of the Wagner Act, some legislatures attempted to curtail absolute employer freedom to terminate employment, but these attempts often came to grief under prevailing due process doctrine. *See, e.g.*, Adair v. United States, 208 U.S. 161 (1908) (declaring unconstitutional Act of June 1, 1898, 30 Stat. 424, which purported to forbid discharges of railroad employees because of membership in unions).

75. In addition to the protective labor legislation, other statutes frequently contain provisions forbidding retaliation against employees. *See* Greenbaum, *Toward a Common Law of Employment Discrimination*, 58 TEMP. L.Q. 65, 67 n.10 (1985).

76. § 15(a)(3), 29 U.S.C. § 215(a)(3) (1982).

77. § 704(a), 42 U.S.C. § 2000e-3(a) (1982).

78. § 11(c)(1), 29 U.S.C. § 660(c) (1982).

79. § 510, 29 U.S.C. § 1140 (1982). This section has been interpreted expansively to forbid discharges motivated by a desire to escape anticipated medical expense claims by employees diagnosed with serious but not presently disabling illnesses. *See* Folz v. Marriott Corp., 594 F. Supp. 1007 (W.D. Mo. 1984).

80. § 703(a), 42 U.S.C. § 2000e-2(a) (1982).

81. § 4(a), 29 U.S.C. § 623(a) (1982). In 1986 the Age Discrimination in Employment Act was amended to forbid mandatory retirement based on age, with a few narrow exceptions pertaining to specified jobs. Act of Oct. 31, 1986, Pub. L. No. 99-592, 100 Stat. 3342.

82. §§ 503-504, 29 U.S.C. §§ 793-794 (1982). Perhaps the newest addition to this nondiscrimination litany is discrimination on the basis of sexual orientation, which is prohibited by statute in Wisconsin, WIS. STAT. ANN. §§ 111.31 to .395 (1974 & Supp. 1987), and by local ordinance in many large cities. *See* 3 A. LARSON, EMPLOYMENT DISCRIMINATION § 110.30, at 23-47 (1987).

83. For example, the Fair Labor Standards Act (FLSA) removes considerable discretion from the wage bargain by setting a floor under hourly rates and imposing a requirement for extra compensation for overtime hours as specified in the statute. *See* 29 U.S.C. §§ 206, 207(a), 213 (1982). In addition, through administrative regulations defining executive, administrative, and managerial exclusions from coverage, the FLSA clearly has influenced the content of jobs. *See* 29 C.F.R. §§ 541.0-541.602 (1987). Similarly, the Employee Retirement Income Security Act (ERISA) has dictated the way in which various employee benefits plans have been structured and administered. *See* 29 U.S.C. §§ 1001-1453 (1982). The Occupational Safety and Health Act and implementing

terparts in state and local laws.[84] Taken together, the federal and state laws have created an environment of extensive governmental regulation of the terms and conditions of employment and, at least indirectly, of workplace procedures for establishing such terms. However, because collective bargaining has failed to take root as the predominant method of establishing employment conditions,[85] and significant gaps in coverage remain under protective labor legislation,[86] the collective impact of these laws on job security has been uneven.

While labor unions have succeeded in obtaining a just cause standard for employment termination in most collective bargaining agreements,[87] such agreements cover a small and declining portion of the work force. The labor movement has never succeeded in organizing a majority of the civilian work force. During recent years, union penetration has fallen to its lowest level since the end of World War II, less than twenty percent, and the decline seems to be continuing.[88] Furthermore, exclusions from coverage under federal labor law are exten-

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regulations have dictated minimum standards for the physical workplace with respect to injury-causing conditions and exposures to disease-causing agents. *See* 29 U.S.C. §§ 654, 655 (1982).

84. For example, New York has its own "Little Norris-LaGuardia Act" prohibiting injunctions against concerted activity by employees, N.Y. LAB. LAW § 807(f)(11) (McKinney 1977), and a state Labor Relations Act covering small employers exempt from the federal law, N.Y. LAB. LAW §§ 700-717 (McKinney 1977), as well as a public sector Labor Relations Law, N.Y. LAB. LAW §§ 220-223 (McKinney 1986 & Supp. 1988), thus providing a state counterpart to the National Labor Relations Act. New York also has a Human Rights Law, N.Y. EXEC. LAW §§ 290-301 (McKinney 1982 & Supp. 1988), which provides broader protections against employment discrimination than the federal Civil Rights Act and related statutes by forbidding discrimination based on marital status, age (age 18 through death), and, throughout the private and public sectors, physical, mental, and medical disabilities, broadly defined. New York also has its own version of the Occupational Safety and Health Act, which purports to confer greater informational rights on employees than does federal OSHA or its implementing regulations. *See* N.Y. LAB. LAW §§ 27, 27-9 (McKinney 1986).

85. Only 18% of employees belonged to unions in 1985 according to recent Census Bureau estimates. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1987, at 409, table no. 693 (107th ed.).

86. These gaps in coverage may be illustrated by a recent interpretation of § 504 of the Rehabilitation Act of 1973 adopted by the United States Justice Department in dealing with employment discrimination attributed to Acquired Immune Deficiency Syndrome (AIDS). According to the Justice Department's Office of Legal Counsel, actual physical impairments attributable to AIDS or related conditions would bring an employee within the protection of the law, but an employer would be free to discharge if his good faith motivation was a sincere belief that termination of the employee was required to avoid spread of the disease (even though Public Health officials contended that such a belief was not substantiated by medical facts), because § 504 only forbids discharges based *solely* on nondisqualifying but actual or perceived impairments. Cooper, Memo on Application of Section 504 of Rehabilitation Act to Persons with AIDS, Daily Labor Report (BNA) No. 122, at D-1 (June 25, 1986). The Supreme Court rejected this approach to the issue of discrimination against persons with disabling contagious diseases in School Bd. v. Arline, 107 S. Ct. 1123 (1987); *see also* Chalk v. U.S. Dist. Ct., 832 F.2d 1158, *modified*, 46 FEP Cases (BNA) 279 (9th Cir. 1988) (ordering reinstatement of school teacher with AIDS to classroom duty).

In addition to narrow construction, major gaps in coverage occur due to exemptions of various groups or classes of employees. Thus, supervisory or managerial employees are excluded from protection under federal labor relations law, and even larger groups are excluded from protection under wage and hour laws. *See* NLRB v. Yeshiva Univ., 444 U.S. 672 (1980) (exclusion of managers); Labor Management Relations (Taft-Hartley) Act § 2(3), 29 U.S.C. § 152(3) (1982) (exclusion of supervisors); Fair Labor Standards Act § 13, 29 U.S.C. § 213 (1982) (exemptions from coverage).

87. A. COX, D. BOK & R. GORMAN, LABOR LAW 701-02 (10th ed. 1986); *see* 2 Collective Bargaining Negot. & Cont. (BNA) § 40:1 (1986) (grounds for discharge found in 94% of contracts analyzed); *id.* § 51:1 (grievance and arbitration procedures found in 97-100% of contracts sampled).

88. Union Membership, supra note 13 at D-1, D-12 (reproducing table based on L. TROY & N.

sive, including agricultural employees, supervisors, managers, and some confidential employees.[89] Many of these exclusions are echoed in state labor laws. Consequently, collective bargaining is largely ineffective for most of the work force in protecting job security by attempting to balance the negotiating power of employees and employers.

The second approach, direct government regulation of terms of employment, has had a dual effect of providing *limited* job security to some people but not to others. Although civil rights legislation is phrased in neutral terms prohibiting categorical discrimination and theoretically provides equal protection for all citizens, in practice the protection is most significant for members of minority groups, whether racial, sexual, religious, ethnic, or otherwise. Thus, while the laws against race and color discrimination theoretically protect white persons as well as black, yellow, or red,[90] they have been used primarily to assist racial and ethnic minorities and women in combatting discrimination, and only sparingly in cases of "reverse discrimination" against white males.[91] Additionally, some of the protective legislation is narrowly focused on tightly defined categories, excluding many workers. The age discrimination protections of federal and state law, for example, provide protection only for employees who come within certain defined age ranges.[92]

For employees who are protected, either because they fit within one of the protected classifications or are engaged in some sort of protected activity, the at will presumption is *partially* set aside in a contest over whether the employment termination was motivated by a prohibited reason. The employee alleging an unlawful discharge must establish a prima facie case by showing facts that directly demonstrate or lend themselves to a reasonable inference that the discharge was unlawfully motivated.[93] If the employee successfully establishes a

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SHEFLIN, UNION SOURCEBOOK 3-18 (1985), showing high point of union penetration in 1953 of 30.4% of nonagricultural employment and 25.9% of total civilian labor force).

89. *See* NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981) (confidential exclusion); NLRB v. Yeshiva Univ., 444 U.S. 672 (1980) (managerial exclusion); 29 U.S.C. § 152(2)-(3) (statutory exclusions).

90. *E.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). Although the *McDonald* court held that Title VII protects white employees from racial discrimination "upon the same standards" applicable to black employees, *id.* at 280, the judicial formulation of the prima facie case that whites must establish imposes on them a higher burden than on blacks or other "protected minorities." *See infra* notes 93-96 and accompanying text.

91. This assertion is exemplified by the recent unsuccessful attempts of the Justice Department to roll back affirmative action plans favoring minorities and women on the theory that such plans offend equal protection or unlawfully discriminate against white males in violation of Title VII. *See, e.g.*, Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (upholding race-conscious affirmative action programs to remedy past discriminatory employment policies); Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (same).

92. These vary from one jurisdiction to the next. The federal law protects those above the age of 40, 29 U.S.C. § 631 (1982), *amended by* Act of Oct. 31, 1986, Pub. L. No. 99-592, 100 Stat. 3342, while New York state law protects all those over the age of 18, N.Y. EXEC. LAW § 296(3-a) (McKinney 1982 & Supp. 1988).

93. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). The elements of a Title VII plaintiff's prima facie case, as set forth in the seminal case of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), are:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was

prima facie case, the employer must articulate a legitimate, nondiscriminatory reason for the discharge. Merely asserting that the alleged unlawful motivation was not present is not an adequate rebuttal.[94] However, the ultimate burden of proving unlawful discharge rests with the employee, who must provide evidence that the employer's articulated reason is pretextual.[95] By contrast, under collectively negotiated just cause provisions in labor contracts, arbitrators normally place the burden of proving a work-related justification for employee termination on the employer.[96]

Given the demands of these justification requirements under laws or collective agreements, prudent employers, regardless whether their employees have union representation, would maintain records of employee conduct and performance. If termination becomes necessary and charges are filed, the employer then would be able to articulate a legitimate, nondiscriminatory reason for the discharge, such as inadequate performance or disciplinary problems, and to counter an allegation that such reason is pretextual. Because inconsistent treatment of employees tends to substantiate allegations of discrimination or lack of just cause, prudent employers would maintain detailed personnel records on *all* employees, not just those possibly covered by protective labor legislation, enabling the employer to rebut charges of discrimination and contradict evidence on the issue of pretext.[97] Thus, employers aware of their potential liability for unlawful discharge under civil rights laws, labor relations laws, and other regulatory statutes would maintain the same kind of personnel records that would be necessary if the underlying legal framework for employment always required legitimate justifications for an employer's termination of such a relationship, such as presently exist in most unionized workplaces.

Viewed together, the just cause standard governing the unionized sector

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rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

*Id.* at 802. This framework must, of course, be modified to accommodate different employment discrimination contexts. *Id.* at 802 n.13. Establishing the prima facie case " 'raises an inference of discrimination only because we presume these acts, *if otherwise unexplained*, are more likely than not based on the consideration of impermissible factors.' " *Burdine*, 450 U.S. at 254 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (emphasis added)). For white employees to establish the prima facie case and thereby benefit from this presumption, they must establish that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." Parker v. Baltimore & O.R.R., 652 F.2d 1012, 1017 (D.C. Cir. 1981); Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985) (quoting *Parker*). Existence of such "background circumstances" is the "functional equivalent of . . . membership in a racial minority," and if established along with the other elements of the prima facie case, permits the inference that unlawful racial motivation was present. *Parker*, 652 F.2d at 1018.

94. *See Burdine*, 450 U.S. at 258.

95. *Id.*

96. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 661-63 (4th ed. 1985); *see generally id.* at 664-73 (arbitrator's review and modification of penalties imposed by management after wrongdoing established).

97. For example, if an employee claims she was discharged for refusing sexual advances by a supervisor, and the employer claims that she was discharged for excessive absenteeism from the job, it would seem vital to the employer's case that the company have accurate records of employee attendance and discipline. Such records would show that other employees with similar attendance records were discharged, which would be necessary to disprove that "absenteeism" was a pretextual reason for discharge.

and the required articulation of nondiscriminatory reasons for discharges of employees who are in "protected classes" or are engaging in "protected activities" create a major disparity in workers' rights. Under the at will presumption, employees who lack union representation, do not belong to protected minority groups, or do not engage in protected activities have no enforceable right to continued employment—regardless of the quality of their work and the continued existence of their jobs—while the employee at the next work station may have such a right by virtue of minority group membership, and the employee of a neighboring company will have the protection due to union representation. Supervisors, even at a relatively low level of authority, may have far less job security than the ranks from which they were promoted.[98] Furthermore, public sector employees, whose salaries and benefits are paid from taxes extracted from the unprotected private sector employees, may have enforceable employment rights due to federal or state civil service regulations and constitutional protections against arbitrary decision making by their governmental employers.[99]

The changing regulatory environment and the disparity in worker rights together may account in part for the significant common-law developments of the past few years that have nibbled away at the traditional at will rule. Employees living in such an environment will have expectations about their rights to continued employment which would not have been held by workers of an earlier age.[100] These modern employees consequently are more likely to react aggressively, rather than acceptingly, to employment terminations which they believe unjustified.

### B. *The Common-Law Exceptions of Recent Years*

Over the past two decades judicial development of common-law exceptions to the presumption of at will employment has been extraordinary, attesting to

98. *E.g.*, Automobile Salesmen's Union Local 1095 v. NLRB, 711 F.2d 383 (D.C. Cir. 1983) (supervisor discharged for protesting firing of union activist not protected by National Labor Relations Act).

99. Civil Service Reform Act of 1978, Pub. L. No. 95- 454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.) (comprehensive statutory protections for federal employees); Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (due process clause protects state employees' reasonable expectations of continued employment); Perry v. Sindermann, 408 U.S. 593, 601 (1972) (same); *see also Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611 (1984) ("The civil service system is an explicit acknowledgment that public servants should receive treatment different from that afforded their counterparts in the private sector."); Note, *Reforming At-Will Employment Law: A Model Statute*, 16 U. MICH. J.L. REF. 389, 393 & nn.19-21 (1983) ("Public sector employees received protection, first under civil service laws, and later under constitutional due process protections and federal and state public employee bargaining laws."); Comment, *Substantive Due Process: The Extent of Public Employees' Protection From Arbitrary Dismissal*, 122 U. PA. L. REV. 1647, 1648 (1974) ("on the basis of recent Supreme Court and court of appeals precedent, a strong argument can be made for the existence under the due process clause of protection from arbitrary government dismissal"). Because of the special protections they have, public sector employees generally fall outside the main concerns of this Article.

100. Indeed, some of these expectations are quite recent. In Studs Terkel's *Working* (1974), a collection of interviews with employees in a wide range of occupations which took place in the period before passage of OSHA and ERISA, many interviewees expressed low expectations about their job rights with respect to issues of safety and pension entitlements. It is likely that now, more than a decade after passage of those laws, employees would state significantly greater expectations as to such rights.

judicial uneasiness with a common-law rule incongruent with contemporary social expectations and economic realities. Even courts which apply the rule express some discomfort as they assert that they are bound to follow the rule in the absence of legislative reform.[101]

The developing exceptions are based on a variety of perceptions about the inadequacy of the at will presumption. Implied contract exceptions show the courts' uneasiness with the notion that express representations of job security must be linked to an agreed duration of employment in order to be enforceable, or that employment agreements are so inherently different from other types of agreements that they should not import the same duty of good faith and fair dealing imposed by custom or statute in other commercial relationships. Although the law of contracts expounded by some late nineteenth and early twentieth century scholars embraced a presumption against enforcement in the absence of mutuality of obligation, consideration, or certainty as to essential terms, the evolution of contract doctrine, particularly equitable or promissory estoppel, has led to a climate in which assertions that induce performance are enforceable at least to the extent of providing some form of compensation to the injured party when the other party has failed to live up to his promises.[102]

Tort exceptions reflect a concern that unbridled operation of an at will presumption may undermine important public policies, found expressly or by implication in statutes or common law, or that it may encourage behavior inconsistent with current community standards of civility and respect for human dignity. Just as contract doctrine has evolved away from a presumption against enforceability of mere representations in a commercial context, the law of torts has expanded from a mechanism for shifting losses directly caused by intentional or negligent conduct to a more generalized mechanism for spreading losses due to conduct which may fairly be said to have led to the losses, in some cases without requiring a more direct link of causation or fault.[103]

Although legislation has at times pushed the laws of contracts and torts toward these results, some of the doctrinal evolution occurred first at the insistence of the courts. The First Restatement of Contracts, for example, noticed and at least tentatively embraced a judicial trend toward protecting reliance interest through an estoppel theory at a time when legislation thus extending contractual obligation did not exist.[104] Similarly, judges led the assault on the "citadel of privity" to expand tort liability for the results of negligent manufac-

101. *See* Meredith v. C. E. Walther, Inc., 422 So. 2d 761, 762 (Ala. 1982) ("The rule has been applied to obtain harsh and inequitable results."); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874, 876 (Miss. 1981) (plaintiff's argument for a cause of action for retaliatory discharge has "considerable appeal," but must be addressed to legislature); Dockery v. Lampart Table Co., 36 N.C. App. 293, 297, 244 S.E.2d 272, 275 (1978) (creation of a cause of action for retaliatory discharge is left to the general assembly).

102. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); *see also* U.C.C. § 1-103 (1977) (supplementary general principles of law, including estoppel, applicable).

103. *See* P. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 85, at 614-15 (5th ed. 1984) (noting the struggle between fault-based and strict liability theories to become the dominant compensation scheme for torts).

104. RESTATEMENT (FIRST) OF CONTRACTS, § 90 (1932); *see* G. GILMORE, *supra* note 37, at 60-65 (account of adoption of promissory estoppel theory by drafters of Restatement of Contracts).

ture in advance of modern consumer legislation.[105] Recently developed common-law exceptions to the at will presumption show the same judicial desire to reflect a reality not yet embraced by legislation: the parties in employment relationships on the whole expect a certain standard of conduct above the traditional at will presumption, and these expectations deserve judicial recognition when employer behavior fails to meet them.[106] The leading cases on exceptions show this vividly.

1. The Implied Contract Exceptions: Enforcing Assurances of Job Security

Whether they are contained in informal statements by management, policy directives, or company handbooks, it is increasingly common and almost necessary to avoid problems under civil rights statutes, whether as a matter of good personnel relations practice or as a strategy to prevent unionization,[107] for employers to adopt standards and procedures for employment termination decisions that are contrary to a presumption of termination at will. The case reports reflect this trend, describing company policy statements and handbooks introduced in evidence which contain procedures for dealing with disciplinary problems. Such handbooks also embrace concepts familiar from the unionized sector such as progressive discipline, rehabilitation through probation, systems for review of employee performance, and appeals procedures for disciplinary decisions by line supervision.[108] While these policy statements may not always speak expressly of a just cause or similar standard for discharge, they suggest that decisions to terminate employment will be made on the basis of uncorrected poor work performance or for other reasons related to the employer's economic interests, such as off-duty conduct which directly impairs public confidence in the employer's product or service.[109]

Applying an at will presumption to sustain a discharge in cases when such company policies exist but have not been followed leads to judicial decisions that individuals not indoctrinated in the underlying legal history could only see as bizarre. These pronouncements may take the form of finding, despite the affirm-

105. Huset v. J.I. Case Threshing Mach. Co., 120 F. 865 (8th Cir. 1903); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Thomas v. Winchester, 6 N.Y. 397 (1852); *see also* P. KEETON, *supra* note 103, § 96, at 681. The "citadel of privity" refers to the doctrine holding manufacturers harmless when ultimate consumers were injured using their products due to lack of a primary contractual relation between the parties.

106. The heavy volume of employment at will litigation in recent years shows that terminated employees believe they have legal job security rights. A 1985 report by an American Bar Association committee counted 314 state and federal court employment-at-will decisions announced in 1985, a 37.1% increase over the number of such decisions announced in 1984. *See* Section on Labor and Employment Law, American Bar Association, *Individual Rights and Responsibilities in the Workplace*, 2 LAB. LAW. 351, 351 (1986). These were primarily appellate decisions, and it is fair to speculate that they represent only a small percentage of the number of such cases actually filed.

107. *See* Barbash, *The New Industrial Relations*, 37 LAB. L.J. 528 (1986).

108. A good example is provided by the company handbook provisions on termination issued by Hoffmann-La Roche, Inc. during the 1960s and introduced in evidence in Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284, 310-13, 491 A.2d 1257, 1271-73, *modified*, 101 N.J. 10, 499 A.2d 515 (1985).

109. In this regard, personnel manuals may constitute a unilateral adoption by management of much of the paraphernalia of employee discipline systems under collective bargaining agreements, the "industrial due process" beloved by labor arbitrators.

ative statements in the employee handbook, no evidence that the company intended to be legally bound by such statements or to induce employees to rely on them[110] or that the statements were merely offered as a unilateral expression of good will or good intentions, revocable at any time and thus not such as to induce reliance by employees.[111] Cases mention revocability as a reason for not enforcing the handbook representations even though the employer has not announced any general revocation of the handbook or policies contained in it, but allegedly has not followed those policies in discharging the plaintiff.[112]

Courts that have found an exception in such circumstances occasionally have limited the exception in ways reflecting the continuing influence of older doctrines. In *Weiner v. McGraw-Hill, Inc.*[113] the New York Court of Appeals held express job security promises in the handbook enforceable only because they existed at the time of hiring and were expressly referred to by McGraw-Hill recruiters when they lured Weiner from a well-paying position with a competitor, in response to an inquiry by Weiner about job security he could expect at McGraw-Hill.[114] The court also placed weight on evidence that McGraw-Hill had applied the handbook policies in other cases, and had instructed Weiner to do so when he made termination decisions about other employees, and that Weiner had turned down subsequent job offers from other employers.[115] The only departure of the *McGraw-Hill* court from the traditional at will presumption was the court's willingness to find a legal obligation by the company to follow its policy in the absence of an agreement of specific duration. The case fits neatly into a promissory estoppel type of analysis. Weiner had given up his accumulated seniority and an offered pay increase from his previous employer in ex-

110. *See* Caster v. Hennessey, 727 F.2d 1075, 1077 (11th Cir. 1984) (per curiam) (applying Florida law); Beidler v. W.R. Grace, Inc., 461 F. Supp. 1013, 1016 (E.D. Pa. 1978), *aff'd*, 609 F.2d 500 (3d Cir. 1979); Schroeder v. Dayton-Hudson Corp., 448 F. Supp. 910, 916 (E.D. Mich. 1977), *amended*, 456 F. Supp. 650 (E.D. Mich. 1978); Uriarte v. Perez-Molina, 434 F. Supp. 76, 79-80 (D.D.C. 1977); Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095, 1096-97 (Del. 1982); Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 7, 328 N.E.2d 775, 779 (1975); Johnson v. National Beef Packing Co., 220 Kan. 52, 54, 551 P.2d 779, 781-82 (1976); Degen v. Investors Diversified Servs., Inc., 260 Minn. 424, 428, 110 N.W.2d 863, 866 (1961); Mau v. Omaha Nat'l Bank, 207 Neb. 308, 313-14, 299 N.W.2d 147, 150-51 (1980); Chin v. American Tel. & Tel. Co., 96 Misc. 2d 1070, 1073, 410 N.Y.S.2d 737, 739 (N.Y. Sup. Ct. 1978).

111. *See, e.g.*, Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359, 1363 (D.S.C. 1985) (manual could be changed unilaterally by employer); Richardson v. Charles Cole Memorial Hosp., 320 Pa. Super. 106, 109, 466 A.2d 1084, 1085 (1983) (handbook unilaterally revised twice during employee's employment); Reynolds Mfg. Co. v. Mendoza, 644 S.W.2d 536, 539 (Tex. Ct. App. 1982) (employer in no way prevented from unilaterally amending or even totally withdrawing its handbook); Larose v. Agway, Inc., 147 Vt. 1, 3, 508 A.2d 1364, 1366 (1986) (parties stipulated that manual adopted, enforced, implemented, and amended by employer unilaterally; thus, summary judgment for employer is appropriate); *see also* Caster v. Hennessey, 727 F.2d 1075, 1077 (11th Cir. 1984) (per curiam) (applying Florida law) (" 'grievance procedures contained in the employment manual could be exercised at the discretion of the defendant,' "; quoting district court). In Joachim v. AT&T Information Sys., 793 F.2d 113 (5th Cir. 1986) (per curiam), the court applied Texas law to hold that a corporate policy against discrimination on the basis of sexual orientation was not legally binding, noting the comment in *Reynolds Mfg. Co.* that employee handbooks " 'constituted no more than general guidelines.' " *Id.* at 114 (quoting *Reynolds Mfg. Co.*, 644 S.W.2d at 539).

112. *See* cases listed *supra* note 111.

113. 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

114. *Id.* at 465, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

115. *Id.* at 465-66, 443 N.E.2d at 445, 457 N.Y.S.2d at 197.

change for express promises of job security, had assertedly relied on the promises in refusing subsequent job offers, and had been instructed by higher company officials that the company believed the policy to be binding. Subsequent New York decisions involving company handbooks show that the exception in *Weiner* was narrow in scope and starkly fact-specific.[116]

While other courts recognizing a handbook exception have not necessarily been as restrictive as the New York court in *Weiner*, these courts still evince the lingering role of older contract doctrines. Courts state, for example, that the handbook had to have been in effect at the time of hiring and thus could be considered part of the "bargain" when the employment agreement was made.[117] They also require some colorable allegation of a job security promise of which the employee was aware and on which she had actually relied.[118]

Only a few courts have gone so far as to hold express or strongly implied job security promises contained in a handbook, regardless when made, binding on the company if in effect at the time of the discharge, without requiring any proof of actual prior reliance on the policy by the employee-plaintiff. Perhaps most prominent among them is the New Jersey Supreme Court in *Woolley v. Hoffmann-La Roche, Inc.*[119] The court held that in the absence of express language of disclaimer in the handbook, its provisions on discipline and termination

116. Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 333-34, 506 N.E.2d 919, 921-22, 514 N.Y.S.2d 209, 211-12 (1987); Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 305, 448 N.E.2d 86, 89-90, 461 N.Y.S.2d 232, 237-38 (1983); *see also* Oakley v. St. Joseph's Hosp., 116 A.D.2d 911, 912-13, 498 N.Y.S.2d 218, 219 (1986) (policy statement in handbook—"[t]o provide, insofar as possible, continuous employment to all whose work proves satisfactory"—not an express limitation on power of termination; plaintiff failed to show reliance); O'Connor v. Eastman Kodak Co., 108 A.D.2d 843, 843, 485 N.Y.S.2d 345, 346 (manual did not limit dismissals for just and sufficient cause only), *aff'd mem.*, 65 N.Y.2d 724, 481 N.E.2d 549, 492 N.Y.S.2d 9 (1985); Rizzo v. International Bhd. of Teamsters, Local 237, 109 A.D.2d 639, 641, 486 N.Y.S.2d 220, 221 (1985) (listing the operative facts of *Weiner* that "deserve emphasis"); Wexler v. Newsweek, Inc., 109 A.D.2d 714, 715, 487 N.Y.S.2d 330, 331-32 (1985) (mem.) (*Weiner* is a "rather unique case"; manual unenforceable); Hager v. Union Carbide Corp., 106 A.D.2d 348, 349, 483 N.Y.S.2d 261, 261-62 (1984) (mem.) (no handbook or express promise of job security as found in *Weiner* exists here); Gould v. Community Health Plan of Suffolk, Inc., 99 A.D.2d 479, 480, 470 N.Y.S.2d 415, 417 (1984) (mem.) (employee's allegations that he gave up optometry practice to accept position, and that employer assured him he could have the job as long as he wanted it, and that he would receive security from personnel policies held insufficient to withstand summary judgment motion); Patrowich v. Chemical Bank, 98 A.D.2d 318, 323, 470 N.Y.S.2d 599, 603 (manual did not contain express limitation relating to job tenure and no reliance shown, therefore, case not within *Weiner* exception), *aff'd per curiam on other grounds*, 63 N.Y.2d 541, 473 N.E.2d 11, 483 N.Y.S.2d 659 (1984).

117. *E.g.*, Caster v. Hennessey, 727 F.2d 1075, 1077 (11th Cir. 1984) (per curiam; applying Florida law); Heidek v. Kent Gen. Hosp., Inc., 446 A.2d 1095, 1096-97 (Del. 1982); Johnson v. Natural Beef Packing Co., 220 Kan. 52, 54, 551 P.2d 779, 781-82 (1976); Gates v. Life of Mont. Ins. Co., 196 Mont. 178, 183, 638 P.2d 1063, 1066 (1982); Mau v. Omaha Nat'l Bank, 207 Neb. 308, 314, 299 N.W.2d 147, 150-51 (1980).

118. Salimi v. Farmers Ins. Group, 684 P.2d 264, 265 (Colo. Ct. App. 1984) (handbook providing for termination procedures, "when relied upon by an employee and supported by the consideration of continued service," may be enforced); Rizzo v. International Bhd. of Teamsters, Local 237, 109 A.D.2d 639, 641-42, 486 N.Y.S.2d 220, 221 (1985) (no reliance shown, therefore no need to determine through discovery procedures whether manual existed); Patrowich v. Chemical Bank, 98 A.D. 2d 318, 323, 470 N.Y.S.2d 599, 603 (1984) (employee's conclusory statements about reliance cannot defeat a motion for summary judgment); Speciale v. Tektronix, Inc., 38 Or. App. 441, 444, 590 P.2d 734, 736 (1979) (employee entitled to compliance with only those policies which an employer has made known to or promised to him).

119. 99 N.J. 284, 491 A.2d 1257, *modified*, 101 N.J. 10, 499 A.2d 515 (1985).

of employment would be treated as contractually binding.[120] Woolley first saw the handbook several weeks *after* being hired in 1969, and was discharged in 1978, allegedly because his supervisor had "lost confidence" in him.[121] The handbook set out a specific procedure leading to termination which had not been followed in Woolley's case.[122] The New Jersey court held that the handbook constituted an offer for a unilateral contract between the company and its employees as a group, thereby distinguishing older cases holding that enforcement of an individual lifetime employment contract would be contrary to public policy.[123] The court also held that the handbook should be construed in line with the reasonable expectations of the employees.[124]

Some courts have found that a handbook, while not itself a contract, could serve as the foundation for implying a duty of good faith and fair dealing in the employment relationship to the extent of requiring reasonable adherence to its provisions governing discipline and discharge.[125] The handbook exception provides a limited remedy. Because courts see the contract at issue as one for personal services, they have awarded only money damages, normally calculated by resort to traditional contract formulations for measuring an expectation or reliance interest.[126] Equitable relief, such as reinstatement, is not provided, and,

120. *Id.* at 307, 491 A.2d at 1269-70.

121. *Id.* at 286, 491 A.2d at 1258.

122. *Id.* at 307-08, 491 A.2d at 1270.

123. *Id.* at 292-301, 491 A.2d at 1262-66. The principal case on which the lower courts in *Woolley* had relied was Savarese v. Pyrene Mfg. Co., 9 N.J. 595, 89 A.2d 237 (1952). In *Savarese* the employee furnished consideration in addition to services contemplated by the employment relationship by agreeing to play for and manage the company baseball team. In return he received an oral promise of lifetime employment. *Id.* at 587-98, 89 A.2d at 238. Noting that courts are reluctant to enforce such contracts because of their "unusual nature" and lack of mutuality of obligation, the court required "precision and clarity" as to all the terms and held the contract unenforceable because of uncertainty and indefiniteness. *Id.* at 603, 89 A.2d at 240-41. Other cases distinguished in *Woolley* included: Schlenk v. Lehigh Valley R.R., 1 N.J. 131, 62 A.2d 380 (1948); Hindle v. Morrison Steel Co., 92 N.J. Super. 75, 223 A.2d 193 (N.J. Super. Ct. App. Div. 1966); Piechowski v. Matarese, 54 N.J. Super. 333, 148 A.2d 872 (N.J. Super. Ct. App. Div. 1959); Bird v. J.L. Prescott, 89 N.J.L. 591, 99 A. 380 (N.J. 1916); Shaw v. Woodbury Glass Works, 52 N.J.L. 7, 18 A. 696 (N.J. Sup. Ct. 1889), *aff'd per curiam*, 53 N.J.L. 666, 24 A. 1004 (N.J. 1891). Except for *Schlenk*, these cases also involved contracts held unenforceable because of indefiniteness. *See Woolley*, 99 N.J. at 293-94, 491 A.2d at 1262.

The *Woolley* court pointed out the difference in protections afforded to the employee covered by a general good cause provision and one who has secured a lifetime contract. An employee under a lifetime contract is protected against any termination. An employee under a good cause provision is still subject to termination due to, among other causes, vagaries of the business cycle; he is protected only against arbitrary termination. *Id.* at 301 n.8, 491 A.2d at 1266 n.8.

124. *Id.* at 297-98, 491 A.2d at 1264.

125. *See infra* notes 185-228 and accompanying text (caselaw developed by Montana Supreme Court). The notion of an implied covenant of good faith and fair dealing will be explored at greater length in the next section.

126. The usual measure of damages is the difference in the wages the employee would have received had he not been wrongfully terminated and wages earned by way of mitigation. *See Woolley*, 99 N.J. at 308, 491 A.2d at 1270; Rogozinski v. Airstream by Angell, 152 N.J. Super. 133, 157-58, 377 A.2d 807, 820 (N.J. Super. Ct. Law Div. 1977), *modified*, 164 N.J. Super. 465, 397 A.2d 334 (N.J. Super. Ct. App. Div. 1979); *see also* Gulf Consol. Int'l, Inc. v. Murphy, 658 S.W.2d 565, 566 (Tex. 1983) (present cash value of contract if it had not been breached, less any amounts employee should, using reasonable diligence, be able to earn through other employment). If the discharged employee promptly finds employment at the same or higher wages, computing damages would not present any problem. Computing damages is problematic if the employee cannot find employment for an unusually extended period of time or is forced to accept a position for lower wages, assuming

with some exceptions which may illustrate blurring of doctrinal categories, punitive damages are eschewed as well.[127] Thus, the contractual exception based on express representations of job security does not lead to the specter of a "forced marriage"[128] between mutually antagonistic parties, but rather requires an employer to follow its own rules as announced in its handbook or to compensate the employee for not doing so through a relatively conservative damage measure.

The handbook exception is only available in the fortuitous circumstance that an employer has issued such a document. As such, the protection it provides for employees is fragile, because an employer alerted to the possible unilateral assumption of liability for wrongful terminations may well revoke the handbook or at least rewrite it to deny expressly any intention to confer contractual rights on employees.[129] Oral promises of job security provide an even shakier foundation, because proof may be difficult and the statute of frauds for contract actions may render the promise unenforceable.[130]

### 2. The Implied Contract Exceptions: Good Faith and Fair Dealing

Some courts have become reluctant to exempt employment relationships from the same obligation of good faith and fair dealing routinely implied in other economic or commercial relationships founded on some sort of agreement or understanding. In *Monge v. Beebe Rubber Co.*[131] the New Hampshire Supreme Court noted how common-law courts had used the concept of implied-

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in both cases the employee has used reasonably diligent efforts. Because the duration of the employment contract is indefinite and may be terminated without liability for a number of reasons, the courts are unlikely to hold the employer liable for lost wages over the remainder of the discharged employee's productive life. Instead, they are likely to impose a reasonable time limit on damages. *See Rogozinski*, 152 N.J. Super. at 144, 377 A.2d at 813 (limiting damages for breach of a "perpetual" employment contract to wages lost over a two-year period). For a general discussion on the issue of damages in wrongful discharge cases, see Annotation, *Damages Recoverable for Wrongful Discharge of At-Will Employee*, 44 A.L.R.4th 1131 (1986).

127. Gates v. Life of Mont. Ins. Co., 205 Mont. 304, 668 P.2d 213 (1983), is a prime example of blurring of categories, discussed in more detail *infra* notes 189-228 and accompanying text. For a rare example of a case awarding other than traditional contract damages for breach of a provision in an implied handbook contract, see Chamberlain v. Bissell, Inc., 547 F. Supp. 1067, 1080-84 (W.D. Mich. 1982) (negligent performance of contractual duty to perform job evaluations is actionable; discharged employee receives damages for mental distress).

128. *See* Power, *A Defense of the Employment at Will Rule*, 27 ST. LOUIS U.L.J. 881, 889-90 (1983) (analogizing employment to a marriage relationship).

129. *See, e.g.*, Bailey v. Perkins Restaurants, Inc., 398 N.W.2d 120, 122-23 (N.D. 1986) (disclaimer in handbook relieves employer of duty to abide by progressive discipline policy announced therein).

130. The recent New York decision Harrison v. Susskind, N.Y.L.J., Oct. 17, 1986, at 13, col. 2 (N.Y. Sup. Ct. Oct. 16, 1986) (N.Y. County, Justice Baer), provides a striking illustration of these problems. Ms. Harrison alleged she was orally promised a position by television personality David Susskind during an encounter in a restaurant, in reliance on which she quit her job and reported for work at the Susskind organization. At that time, she alleged that she was told she would have to lose some weight and would not be happy working there. She sued for a breach of employment contract. The court dimissed the contract claim but gave leave to amend the complaint to allege employment discrimination because New York recognizes obesity as a disability under its fair employment practices law. *See* State Div. of Human Rights v. Xerox Corp., 65 N.Y.2d 213, 220, 480 N.E.2d 695, 698, 491 N.Y.S.2d 106, 109 (1985).

131. 114 N.H. 130, 316 A.2d 549 (1974).

in-law covenants to soften the pro-landlord bias of old property law.[132] The court further recognized the evolution of employment law "over the years to reflect changing legal, social and economic conditions," characterized by the court as "the new climate prevailing generally in the relationship of employer and employee."[133] The court adopted a balancing test to determine whether a particular termination was consistent with evolving common-law doctrine:

> In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two. We hold 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 [in] the best interest of the economic system or the public good and constitutes a breach of the employment contract. Such a rule affords the employee a certain stability of employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably.[134]

Mrs. Monge claimed she had been terminated for refusing sexual advances from her supervisor.[135] When the case arose courts generally did not recognize sexual harassment as a violation of Title VII,[136] and the New Hampshire court was venturing into new territory by recognizing a public interest in providing redress for such conduct.[137] Unlike other courts that based exceptions to the at will presumption on notions of public policy,[138] the New Hampshire court treated the matter as entirely one of contract, disallowing "pain and suffering" damages awarded by the jury as "not generally recoverable in a contract action."[139]

Sometimes the covenant of good faith and fair dealing has been narrowly construed or closely tied to performance of obligations already executed within the relationship. In the Massachusetts case *Fortune v. The National Cash Register Co.*,[140] Fortune, a salesman paid partly by salary and partly by bonuses, was

132. *Id.* at 132, 316 A.2d at 551.

133. *Id.* at 132-33, 316 A.2d at 551.

134. *Id.* at 133, 316 A.2d at 551-52 (citations omitted).

135. *Id.* at 130, 316 A.2d at 550.

136. Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 (1982 & Supp. III 1985). The Supreme Court has only recently ruled that sexual harassment is actionable as unlawful sex discrimination, more than fifteen years after *Monge* was decided. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-68 (1986).

137. It is also interesting to note that Mrs. Monge was represented by a union and presumably could have pursued a grievance under the collective bargaining agreement. Curiously, the court does not discuss that possibility and treats the case as one involving an at will employment relationship. Perhaps the union contract did not provide a just cause standard for discharge.

138. *See infra* text accompanying notes 160-84.

139. The New Hampshire Supreme Court drew back from the broad language of *Monge* in Howard v. Dorr Woolen Co., 120 N.H. 295, 414 A.2d 1273 (1980), in which the general covenant language was limited to a more narrow public policy exception. The *Howard* court construed *Monge* to "apply only to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn." *Id.* at 297, 414 A.2d at 1274. Under this construction, a complaint alleging that the plaintiff-employee was discharged because of his age or sickness was insufficient to withstand a motion to dismiss. *Id.*

140. 373 Mass. 96, 364 N.E.2d 1251 (1977).

discharged after participating in a sale which would entitle him to significant bonuses under his written contract.[141] Fortune alleged "bad faith" in the termination of his employment, and a jury agreed.[142] The Supreme Judicial Court upheld the jury verdict on a theory that a discharge which would deprive an employee of compensation to which he was entitled by virtue of past performance must be tested by the good faith of the employer.[143] Noting *Monge*,[144] which had fully incorporated such a good faith duty into an employment relation, the Massachusetts court shied away from such a broad incorporation, adopting instead the more limited formulation summarized above. As such, the "Massachusetts Rule" creates a very limited exception.[145]

A covenant of good faith and fair dealing, without more, may present a basis for protecting job security, but due to its amorphous character may require additional evidence of employer and employee expectations, perhaps in the form of published disciplinary procedures, to acquire sufficient structure for enforceability. For example, in *Cleary v. American Airlines, Inc.*,[146] an employee with eighteen years' seniority who was dismissed for alleged theft asserted he had been denied due process guaranteed in the company's published handbook.[147] The employee brought suit on a contract theory arguing both enforceability of the handbook terms and a more general duty of good faith and fair dealing.[148] A California appellate court held longevity of service, by itself, provided a basis for finding a violation of "the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts,"[149] and that the promulgation of a handbook policy is evidence that the employer himself recognized such an obligation.[150]

The good faith and fair dealing exception imports a large measure of subjectivity, introducing employer motivation as an issue and censuring those motivations which either a jury or a court consider improper. Consequently, the remedies issue becomes more complicated than in the handbook cases. The New Hampshire court in *Monge*, for example, rejected damages for pain and suffering

141. *Id.* at 97-100, 364 N.E.2d at 1253-54.

142. *Id.* at 100, 364 N.E.2d at 1255.

143. *Id.* at 102-03, 364 N.E.2d at 1256-57.

144. *See supra* notes 131-39 and accompanying text (holding discharge for refusing to date foreman violative of duty of good faith and fair dealing in employment contract).

145. Melley v. Gillette Corp., 397 Mass. 1004, 1006, 491 N.E.2d 252, 253 (1986), *aff'g* 19 Mass. App. Ct. 511, 475 N.E.2d 1227 (1985) (rejecting creation of a wrongful discharge action based on implied covenant of good faith and fair dealing) confirms the narrow scope of *Fortune*. However, the Massachusetts court recently left open the possibility of a tort remedy for the method of termination. Madsen v. Erwin, 395 Mass. 715, 481 N.E.2d 1160 (1985) (dismissing wrongful discharge action but giving leave to amend complaint to assert tort actions).

146. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

147. *Id.* at 447-48, 168 Cal. Rptr. at 724.

148. *Id.* at 447, 168 Cal. Rptr. at 724.

149. *Id.* at 455, 168 Cal. Rptr. at 729.

150. *Id.* Montana Supreme Court decisions illustrate this same phenomenon of building a good faith requirement, and, indeed, stretching it into a quasi-tort, out of promulgation of a handbook not itself directly enforceable. *E.g.*, Gates v. Life of Mont. Ins. Co., 196 Mont. 178, 638 P.2d 1063 (1982), *appeal from decision on remand*, 205 Mont. 304, 668 P.2d 213 (1983). Subsequent cases in that court are discussed at greater length *infra* notes 185-252 and accompanying text.

after holding the evidence could support a jury finding that the termination was "maliciously motivated," and that Monge's cause of action rested on some understanding of "the public good."[151] The court in *Gates v. Life of Montana Insurance Co.*,[152] after initially holding a termination violated an implied covenant of good faith and fair dealing,[153] subsequently authorized the award of punitive damages on the theory that "if defendant's conduct is sufficiently culpable" a breach of the covenant would be a tort.[154] Despite differences over how damages are to be measured in such a case, none of the courts have ordered reinstatement. Courts have not applied the exception to impose an unwanted employee on the employer, but have merely required that termination decisions be made in a way that could be characterized as fair, and have assessed a financial penalty against an employer who does not live up to such a standard.

Judicial reluctance in some states to engraft a broad covenant of good faith and fair dealing onto the employment relationship may derive from the poor fit of employment agreements with commercial contract doctrines. Employment agreements are intrinsically different from commercial contracts in many fundamental ways. Employment agreements create an ongoing personal relationship between employee and employer—or, in larger companies, with the employer's managerial and supervisory agents—which transcends purely economic interests. Courts have recognized this relationship by identifying various rights and obligations of employers and employees not typically mentioned in connection with commercial contracts, including duties of loyalty[155] and intrinsic rights of management, direction, and control.[156] While applying some objective standard of good faith and fair dealing based on the usual practices of merchants seems appropriate for commercial contracts involving sales of goods or even sales of services by independent contractors,[157] identifying the components of such a standard in the more personalized employment relationship poses difficulties. Not least among these is the difficulty of putting into words standards general enough to apply broadly to the wide range of employment relationships, but detailed enough to have a meaning more specific than "be nice." Workplaces

151. *Monge*, 114 N.H. at 133, 316 A.2d at 551.

152. 196 Mont. 178, 638 P.2d 1063 (1982), *appeal from decision on remand*, 205 Mont. 304, 668 P.2d 213 (1983).

153. *Id.* at 184-85, 638 P.2d at 1067.

154. *Gates*, 205 Mont. at 307, 668 P.2d at 215.

155. NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers, 346 U.S. 464 (1953) (common-law duty of loyalty owed by employees to employers not abrogated by NLRA; employees who distributed handbills disparaging employer's broadcasts without referring to ongoing labor dispute were not engaged in protected activity under § 7 of NLRA and were rightfully discharged "for cause").

156. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 686 (1981) (decision to close part of business within sole discretion of employer). The commitment of investment capital and the scope of an employer's business are matters which "lie at the core of entrepreneurial control," Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964) (Stewart, J., concurring), and as such may be decided unilaterally by the employer without prior notification to or bargaining with the union, no matter how inevitably they affect job security. Courts frequently rely on Justice Stewart's "core of entrepreneurial control" concept to limit the employer's duty to bargain over subjects which fall within the literal terms of the statutorily mandated subjects of collective bargaining, "terms and conditions of employment." *See, e.g., First Nat'l Maintenance Corp.*, 452 U.S. at 672-73 & nn.8-9.

157. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979); U.C.C. § 1-203 (1978).

vary widely in their own internally generated common law of procedures, hierarchies, folkways, and understandings. Employer or employee behavior which would be deemed offensive on an assembly line might not merit any comment on a loading dock, or vice versa. Different managers and supervisors bring different personal and professional styles to the running of a workplace. An individualistic determination in a particular case as to whether a termination decision was made in good faith or represented fair dealing could be a difficult task for a court that does not possess specific knowledge of the workplace and its reflection in the expectations and understandings of those who work there.[158]

Perhaps the solution is to characterize and treat the employment agreement as a species of agreement different from other commercial transactional contracts, and to derive some new standards peculiar to employment that could be applied by a neutral decisionmaker—whether judge, magistrate, or independent arbitrator—to resolve disputes about employment termination. At this point, the notion of treating labor law as a contract problem begins to dissolve into the broader area of civil liability normally associated with the law of torts, which may explain some of the confusion of categories found in judicial decisions grappling with the problem.[159]

### 3. Public Policy Exceptions

In order to prevent an employer from acting contrary to an important public policy, some state courts have recognized a tort of "wrongful discharge" as an exception to the at will presumption.[160] The underlying rationale is that the

158. A similar contention underlies much of the jurisprudence on enforcement of collective bargaining agreements under § 301 of the Labor Management Relations Act, 29 U.S.C. § 160 (1982). Accordingly, courts are required to (1) enforce a party's right to arbitrate a grievance covered by a collective bargaining agreement's arbitration clause, no matter how frivolous the claim might appear to the court, United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 568 (1960); (2) resolve all doubts regarding the applicability of an arbitration clause in favor of coverage, United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960); and (3) refuse to review the merits of an arbitration award, as long as it "draws its essence from the collective bargaining agreement." United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). The special competence of the arbitrator to settle industrial disputes justifies this reliance on the arbitration process:

> The parties expect that [the arbitrator's] judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

*Warrior & Gulf Navigation*, 363 U.S. at 582.

159. This is reminiscent of the "confusion of principles and rules" Feinman observed in examining the status of the common law of employment termination during the 19th century. *See supra* text accompanying notes 51-53. A more detailed consideration of such a generalized civil action will be deferred until after discussion of judicial development of the tort of wrongful discharge.

160. *See* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (discharge for refusal to commit criminal act is tortious); Petermann v. International Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (discharge for refusing to commit perjury before legislative committee is actionable in tort); Palmateer v. International Harvester Co.,

traditional formulation of the at will rule—that a discharge could be predicated even on a bad or morally wrong reason—would undermine legislative attempts to enhance social welfare if too rigidly observed, or would sanction behavior inimical to general societal interests embraced in the common law.[161] As with the statutory exceptions, the public policy exception does not replace the at will presumption, but instead provides a mechanism for identifying illegitimate reasons for discharge.

A major difficulty in applying a public policy exception arises when courts seek to identify public policy. Who makes public policy for this purpose, and where is it to be found? The governmental system created by the federal constitution and echoed in the structures of state governments formally designates legislative bodies as the makers of public policy, but neat separation of functions between executive, legislative, and judicial branches has become blurred over two centuries of practice. From the very beginning, when the common law of England was taken over as the common law of the newly independent states, state courts played an important role in identifying public policy wholly apart from legislative or executive actions. Courts created major new areas of civil liability in contract, tort, and property law without substantive legislative guidance, implying new warranties, guarantees, and standards of behavior through the development of private law to meet changing economic and social conditions.[162] Judicially developed principles of public policy may have been founded at times on particular constitutional or statutory provisions, but the connection has not always been precise or particularly convincing.

Courts derive the policies underlying such decisions from notions of evolving standards of conduct appropriate in society. As judges dealt in the area of private law, their task was to identify the expectations of individuals entering into relationships, or the common expectations of society as to standards of conduct, and to compensate individuals who were injured when those expectations were not realized or the standards were not met. Such standards or expectations are not easy to articulate, and it should not be too surprising when a judicial

85 Ill. 2d 124, 421 N.E.2d 876 (1981) (employee's complaint that he was discharged for cooperating with police investigation of fellow employee stated a cause of action in tort); Frampton v. Cent. Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (discharge for filing workmen's compensation claim held tortious); Keneally v. Orgain, 186 Mont. 1, 5-6, 606 P.2d 127, 129-30 (1980) (expressing willingness to recognize tort action for discharges contravening public policy); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (discharge for serving on jury is tortious); Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978) (discharge for seeking to ensure that bank management complied with consumer credit law actionable).

161. *See, e.g.*, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 173, 610 P.2d 1330, 1333, 164 Cal. Rptr. 839, 842 (1980) ("To hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and serve to contaminate the honest administration of public affairs."); Kelsay v. Motorola, Inc., 74 Ill.2d 172, 182, 384 N.E.2d 353, 357 (1979) (The comprehensive remedial scheme of the Worker's Compensation Act "would be seriously undermined if employers were permitted to abuse their power to terminate by threatening to discharge employees for seeking compensation under the Act.").

162. *See generally* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977) (tracing evolution of American law through judicial development from the received common law of England to a distinctively American law in the common-law fields of contract, tort, and property).

decision in an evolving area of private law does not articulate ideally the reasoning underlying its result. However, policies identified by common law judges are never wholly new in the sense of being entirely unprecedented. Rather, they mark evolutionary changes from older policies which have become either less relevant, or inappropriate, to new social conditions.[163] Thus, the tradition of common-law adjudication supports the development of public policy exceptions that may not have a direct basis in existing constitutional or legislative provisions, and arguably could embrace judicial derivation of a new hybrid cause of action for unjustifiable termination of employment or some equivalent new civil action.[164]

Executive orders, rules, and regulations can also embody statements of public policy. Their limits are that the former must be within the broad constitutional powers of the executive and the latter must not violate the letter or intent of enabling statutes, which frequently are quite vague as to the details of the broad policies they establish.[165] Consequently, common-law courts may be justified in deriving public policy exceptions to the at will presumption based on executive orders or executive or administrative policies and procedures.

The most traditional sources for finding public policy are the official documents of policy—federal and state constitutions and legislative enactments. Some statutes not only enact policies limiting the discretion of employers to terminate their employees, but provide administrative or judicial mechanisms for their enforcement. An important issue in the developing caselaw on public policy exceptions is the degree to which such statutes should be held to preempt a common-law cause of action based on the same policy arguments.[166] The issue

163. *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 178 (1921). Justice Cardozo wrote,

> The work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years. Little by little the old doctrine is undermined. Often the encroachments are so gradual that their significance is at first obscured. Finally we discover that the contour of the landscape has been changed, that the old maps must be cast aside, and the ground charted anew.

*Id.* Justice Cardozo also noted how accumulated exceptions to common-law "rules" could eventually be extended to create a new underlying rule: "There has been a new generalization which, applied to new particulars, yields results more in harmony with past particulars, and, what is still more important, more consistent with the social welfare. This work of modification is gradual. It goes on inch by inch." *Id.* at 25; *see also* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 3-5 (1982) (describing historic role of common-law courts in prestatutory period); K. LLEWELLYN, THE BRAMBLE BUSH 66-69 (1930) (how judges use precedent to accomplish both stability and change).

164. *See infra* text accompanying notes 296-300.

165. Examples of Executive Orders affecting job security rights include the executive orders of President Nixon which permitted collective bargaining in the federal sector prior to its statutory recognition in the 1978 Civil Service Reform Act. Executive Order No. 11,491, 3 C.F.R. 861-75 (1966-70), *amended by* Executive Order No. 11,616, 3 C.F.R. 605-09 (1971-75). An additional example is the executive order regulating the employment practices of federal contractors. Executive Order No. 11,246, 3 C.F.R. 339-48 (1964-65). Other significant examples are the regulations adopted by the Office of Civil Rights, U.S. Department of Health and Human Services, imposing a "reasonable accommodation" requirement on employers of otherwise qualified handicapped persons under § 504 of the Rehabilitation Act of 1973. 45 C.F.R. § 84.12 (1987).

166. Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984) (union employee un-

may arise in several situations. For example, a terminated employee may fail to comply with procedural requirements for asserting a statutory claim, usually by failing to file an administrative complaint within a relatively short statute of limitations,[167] and later seek to assert a common-law claim based on the statutory policy under a more extended statute of limitations available for torts. Another example is a plaintiff who seeks to append a public policy claim as an alternative ground in a breach of contract action.[168] The preemption issue also arises when an employee covered by collective bargaining seeks to pursue a common-law discharge action instead of labor contract remedies.[169] Because remedies available through protective labor statutes or labor arbitration tend to be limited to reinstatement with or without backpay,[170] discharged employees who do not wish to return to a hostile workplace may prefer a common-law tort remedy providing compensatory and punitive damages rather than the less desirable and remunerative statutory relief.

Additional legislative sources for public policy exceptions are statutes that do not expressly provide a mechanism for individual employees to vindicate the rights they suggest, but that may nonetheless provide a basis for inferring such

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successfully challenged discharge in arbitration proceeding pursuant to collective bargaining agreement and then brought wrongful discharge suit based on state public policy; held, suit not preempted by § 301 of LMRA); Bonham v. Dresser Indus., Inc., 569 F.2d 187 (3d Cir. 1977) (Pennsylvania's age discrimination statute precludes common-law wrongful discharge action asserting age discrimination); McKinney v. National Dairy Council, 491 F. Supp. 1108 (D. Mass. 1980) (Massachusetts comprehensive age discrimination statute does not preclude common-law contract action alleging discharge motivated by age discrimination); Wehr v. Burroughs Corp., 438 F. Supp. 1052 (E.D. Pa. 1977); Brinkman v. State, 729 P.2d 1301 (Mont. 1986) (existence of collective bargaining protection preempts state law action founded on implied covenant of good faith and fair dealing); Brown v. Transcon Lines, 284 Or. 597, 588 P.2d 1087 (1978) (remedies provided in workers' compensation statute inadequate; employee entitled to maintain common-law retaliatory discharge action to redress firing after filing for benefits); *see also* Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) (Title VII remedies do not preclude an action under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982)); Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974) ("Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination."). For a general discussion of this preemption issue, *see* Greenbaum, *supra* note 75 at 80-114.

167. Statutes of limitations under employment statutes tend to be shorter than statutes of limitations for common-law claims. For example, the National Labor Relations Act, § 10, 29 U.S.C. § 160(b) (1982), requires unfair labor practice charges to be filed within six months. Federal and state civil rights laws generally impose a statute of limitations of a year or less, while contracts and torts claims generally can be asserted after a year or more. *E.g.*, CONN. GEN. STAT. § 52-576 (Supp. 1986) (six years for contract actions); CONN. GEN. STAT. § 52-577 (1960) (three years for tort actions); N.Y. CIV. PRAC. L. & R. LAW § 213(2) (McKinney 1972 & Supp. 1986) (six years for contract actions); N.Y. CIV. PRAC. L. & R. LAW § 214(4), (5) (McKinney 1972 & Supp. 1986) (three years for actions to recover damages for an injury to property or personal injury); N.Y. CIV. PRAC. L. & R. LAW § 215(3) (McKinney 1972 & Supp. 1986) (one year for intentional torts). For a listing of state statutes of limitations for suits under state fair employment laws ranging from thirty days to one year, see Greenbaum, *supra* note 75, at 86 n.138.

168. A variation on this scenario may be found in McKinney v. National Dairy Council, 491 F. Supp. 1108 (D. Mass. 1980), in which the United States District Court for the District of Massachusetts recognized a wrongful discharge action premised on age discrimination under an implied covenant of good faith and fair dealing. The employee's breach of contract action otherwise would have been barred by the statute of frauds and an alternative remedy under state age discrimination law was unavailable.

169. *E.g.*, Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031 (7th Cir.), *cert. granted*, 108 S. Ct. 226 (1987); Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984); Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 474 U.S. 909 (1985).

170. *See, e.g.*, 29 U.S.C. § 10(c) (1982).

enforcement rights in a common-law action. Perhaps the most common examples of this phenomenon are workers' compensation laws, which have nonretaliation provisions in some jurisdictions but not in others.[171] To ensure that employees are free to apply for benefits to which they are entitled, courts prohibit employers from interfering by threats, coercion, or dismissal of the employee.[172]

Another area of public policy exceptions concerns public functions which would be obstructed if employers penalize employees for participating in them. An exception to at will termination may be found when an employer interferes with the function of the courts by retaliating against employees who testify truthfully, refuse to testify untruthfully, or serve on juries.[173] Another example is the so-called "whistle-blower" exception, which protects employees from economic losses due to termination following a report of employer noncompliance with regulatory laws.[174]

While public policy exceptions are relatively noncontroversial, and even endorsed by some defenders of the at will presumption,[175] some plaintiffs have attempted to extend this exception to virtually any situation in which an employee is dismissed for acting in a way which might be seen as public-spirited or in personal compliance with laws binding on the employer. Thus, in a leading California case an employee who refused to participate in a price-fixing scheme was found to have been discharged in violation of antitrust policy.[176] This sort of theory also underlies a Pennsylvania case in which the court disapproved of a termination to retaliate against an employee who refused to endorse and act on the employer's political views.[177]

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171. *Compare, e.g.*, CAL. LAB. CODE § 132a (West. Supp. 1986) (anti-retaliation provision); ME. REV. STAT. ANN. tit. 39, § 111 (1985) (same); MINN. STAT. ANN. § 176.82 (West. Supp. 1986) (same); MO. ANN. STAT. § 287.780 (Vernon 1986) (same); N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1986) (same) *with* ARIZ. REV. STAT. ANN. §§ 23-901 to -1091 (1983 & Supp. 1985) (no anti-retaliation provision included); N.M. STAT. ANN. §§ 52-1-1 to -1-69 (Supp. 1986) (same); S.C. CODE ANN. §§ 42-1-10 to -19-50 (Law. Co-op. 1985 & Supp. 1985) (same).

172. Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976); *see also* Annotation, *Recovery for Discharge From Employment in Retaliation for Filing Workers' Compensation Claim*, 32 A.L.R.4th 1221, 1227-35 (1984) (listing and discussing cases in which cause of action expressly or impliedly contained in statute or recognized by courts as common-law cause of action).

173. Sides v. Duke Univ., 74 N.C. App. 331, 328 S.E.2d 818, *disc. rev. denied*, 314 N.C. 331, 335 S.E.2d 13 (1985) (refusal to testify untruthfully or incompletely in civil action against employer); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (jury service); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978) (jury service); *cf.* Petermann v. International Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (discharge for refusing to commit perjury before legislative committee).

174. *See, e.g.*, Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980) (Food, Drug and Cosmetic Act); Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978) (consumer credit and protection laws); Malin, *Protecting the Whistleblower From Retaliatory Discharge*, 16 U. MICH. J.L. REF. 277 (1983). Indeed, some states have actually codified this exception by enacting specific protection for "whistle-blowers" in some situations. *E.g.*, N.Y. LAB. LAW § 740(a) (McKinney 1986) (prohibiting retaliatory discharges for disclosures of violations of laws, rules, or regulations that create "a substantial and specific danger to the public health or safety").

175. Power, *supra* note 128, at 881.

176. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

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

Some courts find this sort of exception insufficiently related to a determinable public policy to overcome the at will presumption.[178] Courts may recognize and give weight to employers' expectations that employees should be loyal. Thus, courts may condone discharges for disloyalty even though the result may be to discourage employees from vigorously pursuing their employer's compliance with regulatory laws.[179] Some courts have similarly given a narrow construction to the "whistle-blower" concept, restricting its protection to those employees who have a direct job responsibility for compliance with the particular law which is cited in support of the exception.[180] Other courts have rejected attempts to assimilate employment statutes into a common-law cause of action, holding in effect that the more limited statutory remedies are the exclusive mechanism for asserting statutory rights.[181] Several state courts have rejected attempts to predicate a termination action on public policies contained in anti-discrimination laws.[182]

Courts faced with a public policy argument have searched for an existing label to place on the resulting legal action. They have most frequently described it as a tort of wrongful discharge. Application of the tort label has its own consequences, however, including possible requirements that the plaintiff show an intention to inflict injury or at least negligent or reckless infliction of injury, and has opened the door to possibilities of punitive damages. The serious consequences of making particular employer conduct actionable as a tort may explain the reluctance of some courts to recognize a common law wrongful discharge action, sometimes under the guise of deferral to the legislature on the creation of "new torts."[183]

Excepting situations in which a discharge is carried out in an egregiously

178. Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1977) (public policy too vague a concept to justify creation of tort of wrongful discharge); Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981) (employee's failure to show specific statutory violations fatal to claim); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983) (employee must identify a specific declaration of public policy evidenced by a statute or constitutional provision; discharging an employee because his testimony in a pending sex discrimination claim brought by a fellow employee might be contrary to the employer's interest does not contravene a clearly defined mandate of public policy); *see also* DeMarco v. Publix Super Mkts., Inc., 360 So. 2d 134 (Fla. Dist. Ct. App.) (no civil cause of action provided for alleged interference with constitutionally guaranteed access to courts; discharge for bringing personal injury suit on behalf of daughter not actionable), *aff'd*, 384 So. 2d 1253 (Fla. 1978) (per curiam); Peterson v. Scott Constr. Co., 5 Ohio App. 3d 203, 451 N.E.2d 1236 (1982) (no independent cause of action for sex discrimination in statute; at will rule applied).

179. *See, e.g.*, Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974).

180. *Id.* at 181, 319 A.2d at 178-79 (salesman not expert in safety matters; discharge for opposing marketing of a product he thought defective not actionable).

181. *See* Wolk v. Saks Fifth Avenue, Inc., 728 F.2d 221 (3d Cir. 1984) (statutory remedy in Pennsylvania Human Relations Act precludes common-law claim); Tarr v. Riberglass, Inc., 115 L.R.R.M. (BNA) 3688 (D. Kan. 1984) (common-law claim for wrongful discharge requires showing of public policy violation and absence of other statutory remedy); Crews v. Memorex Corp., 588 F. Supp. 27 (D. Mass. 1984) (remedy in Massachusetts employment discrimination statute precludes common-law claim).

182. Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983); *see also* Greenbaum, *supra* note 75 (advocating creation of common law cause of action for employment discrimination).

183. *See, e.g.*, *Murphy*, 58 N.Y.2d at 302, 448 N.E.2d at 89, 461 N.Y.S.2d at 235-36 ("Both of these aspects of the issue, involving perception and declaration of public policy . . . are best and more appropriately explored and resolved by the legislative branch of our government.").

offensive or insensitive manner,[184] or with a proven intention to inflict emotional injury on the employee, the field of tort seems inappropriate to deal with many employment terminations. Traditional tort elements appear irrelevant to some of the issues central to a termination dispute, and the common-law tort compensation scheme may provide an inappropriate measure for damages. Thus, the equivocal embrace of tort as a basis for the public policy exception is quite understandable, and it is not surprising that some courts have expressed reluctance to recognize a tort-based public policy exception without legislative backing.

### 4. A Case Study of Merged Doctrine: The Termination Decisions of the Montana Supreme Court

Employee discharge disputes do not always fit easily into the domain of contract. Although the employment relationship is founded conceptually on an agreement, many of its terms are not the result of conscious bargaining. The resulting "contract" does not neatly fit into the exchange transaction model typical of commercial contract law.[185] Additionally, to the extent the express agreement exists, it rarely includes explicit provisions governing termination, making difficult a determination of whether a termination constitutes a breach of the agreement. Likewise, discharge disputes do not always fit well into tort doctrine. Termination may result in injury, but lack of tortious motivation or behavior in some cases renders absurd the view that a tort has been committed, even though the discharge was without any objective justification, or otherwise seems to have been unfairly carried out.

In a few states the courts have borrowed evolving principles of modern contract and tort law to fashion a new approach to employee termination questions. California courts have been leaders in this process,[186] embracing several different theories, including public policy tort exceptions, contract exceptions, and implied warranties, which have thrived side by side with prior legislative codification of an at will presumption.[187] That the California courts have taken the lead is not surprising, given their past record of innovation in common-law developments of torts, contract, and property.[188]

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184. *See* Gates v. Life of Mont. Ins. Co., 196 Mont. 178, 638 P.2d 1063 (1982), *appeal after remand*, 205 Mont. 304, 668 P.2d 213 (1983) (employee discharged without prior warning and forced to sign a letter of resignation which barred her claim to unemployment benefits; promise of favorable recommendation was later breached).

185. Minda, *The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine*, 36 SYRACUSE L. REV. 939, 959-60 (1985).

186. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (public policy exception; refusal to violate antitrust laws); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917, 925-26 (1981) (implied contract exception; oral promise and longevity of employment); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980) (covenant of good faith and fair dealing); Petermann v. International Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (public policy exception; refusal to commit perjury); Kouff v. Bethlehem-Alameda Shipyard, 90 Cal. App. 2d 322, 202 P.2d 1059 (1949) (public policy tort exception; retaliation for participation as election poll official).

187. CAL. LAB. CODE § 2922 (West 1971 & Supp. 1988).

188. The California Supreme Court's pioneering rulings in many common-law areas over the past several decades are noted in law review commentaries on the jurisprudence of Roger J. Traynor, a long-time member and chief justice of that court. *See* Leflar, *Roger J. Traynor—Exemplar of the*

The termination decisions of the Montana Supreme Court during the first half of the 1980s are especially deserving of attention. The Montana justices derived an approach that, despite an initial lack of conceptual clarity, has produced an increasingly coherent and logical pattern of doctrine.[189] Although Montana has a statutory provision which arguably embodies an at will presumption,[190] its highest court found a way to bring the statute in line with contemporary expectations by the manipulation of contract and torts concepts, and eventually goaded the state legislature into adopting the nation's first, and to date only, general wrongful discharge statute.[191]

The Montana Supreme Court first decided a private sector wrongful discharge claim in *Keneally v. Orgain*,[192] in which it observed a "growing tendency of the judicial system to grant relief to persons who have been abusively or wrongfully discharged,"[193] but that violation of an articulated public policy, presumably contained in a statute, must be shown to sustain such an action. Although it dismissed the wrongful discharge claim in the case, the unanimous court stated that "in a proper case a cause for wrongful discharge could be made out by an employee," without specifying whether the claim would sound in contract or tort.[194]

Having recognized the possibility of a wrongful discharge action, the court developed the contours of such an action in *Gates v. Life of Mont. Ins. Co.*[195] and *Nye v. Department of Livestock*.[196] In *Gates* the employee was terminated from a clerical position without advance warning and was pressured into signing a letter of resignation, which later barred her claim for unemployment benefits.[197] The company had issued a personnel manual containing procedures

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*Judicial Process*, 1971 UTAH L. REV. 1; Tobriner, *Retrospect: Ten Years on the California Supreme Court*, 20 U.C.L.A. L. REV. 5 (1972); Ursin, *The California Supreme Court: Tort Law Pathfinder*, BRIEF, Aug. 1982, at 4, 6; *Memorial Tributes to Roger J. Traynor*, 71 CALIF. L. REV. 1037 (1983); *Symposium on Chief Justice Roger J. Traynor*, 53 CALIF. L. REV. 1 (1965).

189. *See* Hopkins & Robinson, *Employment At-Will, Wrongful Discharge, and the Covenant of Good Faith and Fair Dealing in Montana, Past, Present, and Future*, 46 MONT. L. REV. 1 (1985) (summary of Montana at-will case law through the end of 1984).

190. MONT. CODE ANN. § 39-2-503 (1987) provides, as described by a state supreme court justice, "that employment, having no specified term, may be terminated at the will of either party on notice to each other." Gates v. Life of Mont. Ins. Co., 205 Mont. 304, 316, 668 P.2d 213, 219 (1983) (Gulbrandson, J., dissenting). This provision is contained in the portion of the state's Wage and Hour law dealing with payment obligations when employment terminates.

191. Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 39-2-901 to -914 (1987).

192. 186 Mont. 1, 606 P.2d 127 (1980). An earlier case, Sovey v. Chouteau County Dist. Hosp., 173 Mont. 392, 567 P.2d 941 (1977), presented the court with an opportunity to consider adopting an exception to the state's at will rule, but the court refrained from considering the issue. *See* Hopkins & Robinson, *supra* note 189, at 6.

193. *Keneally*, 186 Mont. at 5, 606 P.2d at 129.

194. *Id.* at 6, 606 P.2d at 130. *Keneally* left Montana law essentially in the same place as the law in Pennsylvania after Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974), a case cited by the *Keneally* court. A subsequent case, Reiter v. Yellowstone County, 627 P.2d 845 (Mont. 1981), denied a wrongful discharge claim by a public employee for reasons based on statutes not relevant to this Article.

195. 196 Mont. 178, 638 P.2d 1063 (1982), *appeal after remand*, 205 Mont. 304, 668 P.2d 213 (1983).

196. 196 Mont. 222, 639 P.2d 498 (1982).

197. *Gates*, 196 Mont. at 180, 638 P.2d at 1064.

which were not followed in her case.[198] Her complaint alleged in the alternative tort, contract, and other state and federal law theories.[199] Finding no public policy violation, the trial court granted a motion to dismiss.[200]

The Supreme Court held that the personnel manual was not itself an enforceable contract, because it had not been issued until two years after Gates was hired,[201] but used the handbook in finding a violation of an implied "good faith" obligation. Noting that such an obligation inhered in commercial contracts under the Montana Commercial Code[202] and had been recognized elsewhere,[203] the court held that the employer's unilateral publication of "certain procedures with regard to terminations" created a standard of conduct by which the employer's good faith should be measured.[204] The court did not specify whether the breach of covenant sounded in contract or tort, or what an appropriate damage measure would be, but implicitly held the action sounded in contract when it commented that "appellant's claim in tort for wrongful discharge is unsupported by any showing of a violation of public policy as required under Keneally v. Orgain."[205]

Decided a few days after *Gates*, *Nye v. Department of Livestock*[206] gave substantive content to a tort of wrongful discharge. The plaintiff was discharged for poor performance in a position to which she had been promoted. She was afforded departmental review, but a hearing board's recommendation that she be reassigned to a position for which she was qualified was overruled by the department head. She sought judicial review, but the trial court dismissed all her claims.[207]

Agreeing that Montana law provided no right to judicial review of a departmental personnel decision and extended a privilege to the employer's allegations of incompetence, the Supreme Court sustained dismissal of those portions of the

198. The personnel manual provided that discipline, with some exceptions not relevant to her case, would only be applied after a prior warning. The manual was not in effect at the time she was hired. *Id.* at 183, 638 P.2d at 1064-65.

199. In addition to breach of contract, breach of implied covenant of good faith and fair dealing, and tort of wrongful discharge, Gates alleged intentional infliction of emotional distress, fraud and deceit in procuring a letter of resignation and failing to return the letter on demand, violation of ERISA, and violation of several Montana employment statutes, including one assertedly requiring advance notice prior to discharge. *Id.* at 181-82, 638 P.2d at 1065.

200. *Id.* at 183, 638 P.2d at 1066.

201. *Id.* at 184-85, 638 P.2d at 1067.

202. MONT. CODE ANN. § 30-1-203 (1987). A prior decision had implied such an obligation in an insurance contract. *See* First Security Bank v. Goddard, 181 Mont. 407, 593 P.2d 1040 (1979).

203. The court cited the same cases cited by plaintiff in Reiter v. Yellowstone County, 627 P.2d 845 (Mont. 1981).

204. *Gates*, 196 Mont. at 184, 638 P.2d at 1067. The court observed that the employer did not have to issue the manual, but having done so had created certain expectations in the minds of employees. "If the employer has failed to follow its own policies, the peace of mind of its employees is shattered and an injustice is done." *Id.* Because the appeal reversed a dismissal of the complaint, the matter was remanded for trial on the question whether the standard set in the manual had been violated.

205. *Id.* at 185, 638 P.2d at 1067 (citing Keneally v. Orgain, 186 Mont. 1, 606 P.2d 127 (1980)).

206. 196 Mont. 222, 639 P.2d 498 (1982). *Gates* was decided January 5, 1982, and the *Nye* decision was announced January 14.

207. *Id.* at 223-25, 639 P.2d at 499-500.

complaint.[208] But the court held that Nye's discharge implicated a public policy,[209] founded on administrative rules and policies that created a "just cause" standard for removal of "permanent employees" and required that "due process" be followed in such cases.[210] Finding that Nye had achieved a "permanent status" in her prior permit clerk position, the court asserted that her termination would violate these policies when only her performance in the job to which she had been promoted had been evaluated.[211] The court remanded with instructions to give the employer an opportunity to reconsider the case before proceeding with trial.[212] Although the case involved public employment, the court did not expressly rely on constitutional protections.

*Nye* gives a broad sweep to the public policy tort of wrongful discharge, especially considering that the plaintiff had been found by a hearing board to be unqualified for the job from which she was terminated, and that the public policy identified by the court was based on administrative regulations rather than a statute. As precedent for private sector cases *Nye* may stand for the proposition that sources of public policy other than statutes may be the basis for a wrongful discharge action in tort.

In *Gates* on remand, a jury awarded $1,891 in compensatory damages and $50,000 in punitive damages.[213] The case came back to the Supreme Court when Gates appealed the trial judge's decision to set aside the award of punitive damages. The court held that violations of a covenant of good faith and fair dealing sounded in tort because the duty "is imposed by operation of law,"[214] and that punitive damages should be available.[215] A dissenter, noting that the earlier opinion had dismissed the tort claim and sustained a contract action based on breach of an implied covenant, argued that tort actions should be restricted to those based on public policy.[216]

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208. *Id.* at 225-26, 639 P.2d at 500-01.

209. *Id.* at 229, 639 P.2d at 501.

210. *Id.* at 229, 639 P.2d at 502. The court placed specific reliance on Montana Department of Administration Policies 3-0130 (discipline handling) and 3-0125 (grievances).

211. *Nye*, 196 Mont. at 229, 639 P.2d at 502-03.

212. *Id.* at 230, 639 P.2d at 503.

213. *Gates*, 205 Mont. at 305, 668 P.2d at 214.

214. *Id.* at 307, 668 P.2d at 214-15. The court's full statement of its reasoning is interesting:

> An action for breach of an implied covenant of fair dealing, at first blush, may sound both in contract and tort. The duty arises out of the employment relationship, yet the duty exists apart from, and in addition to, any terms agreed to by the parties. In this respect, the duty is much like the duty to act in good faith in discharging insurance contractual obligations . . . . The duty is imposed by operation of law and therefore its breach should find a remedy in tort.

*Id.* (citation omitted).

215. The court thus found that a Montana statute which appears to forbid punitive damages in contract actions was not applicable. *Id.* (construing MONT. CODE ANN. § 27-1-221 (1983)). The same statute sets the standard for awarding punitive damages "where the defendant has been guilty of oppression, fraud, or malice, actual or presumed." *Id.*

216. *Gates*, 205 Mont. at 320-21, 668 P.2d at 221-22 (Weber, J., dissenting). In a lengthier, angrier dissent, Justice Gulbrandson, who had not participated in the first *Gates* decision, made many of the same arguments, and observed: "In my view, the majority, by extending the original *Gates* decision, has set the stage for a 'just cause standard for at-will employees,' which I believe is a legislative rather than a judicial function." *Id.* at 316, 668 P.2d at 219 (Gulbrandson, J., dissenting).

*Gates II* left Montana with a double-barrelled tort exception to the at will rule: (1) a tort of wrongful discharge based on violation of public policy, and (2) a tortious breach of an implied covenant of good faith and fair dealing. In later cases, the Montana Supreme Court consolidated and refined this two-pronged tort approach. The court ruled in *Dare v. Montana Petroleum Marketing*[217] that neither a statute nor a regulation was a necessary prerequisite for a wrongful discharge action founded on public policy,[218] and that a violation of the covenant of good faith could be based on "objective manifestations by the employer giving rise to the employee's reasonable belief that he or she has job security and will be treated fairly."[219] In *Crenshaw v. Bozeman Deaconess Hospital*[220] the court held that the necessary "objective manifestation" could be implied from an employee's inclusion in a benefit program reserved for "permanent" employees, and reiterated that punitive damages could be awarded, even though an alternate claim for wrongful discharge in violation of public policy had been dismissed.[221] In *Flanigan v. Prudential Federal Savings & Loan Association*[222] the court upheld an award of $1.4 million in punitive damages to a thirty-year employee discharged in 1980, and quoted with approval a California decision adopting the covenant of good faith and fair dealing in all employment contracts.[223] *Flanigan* presented no public policy issues. Although the court was divided over the size of the award, all the justices seemed to agree that punitive damages were proper in the case.[224] In *Kerr v. Gibson's Products Co. of Bozeman, Inc.*[225] the court approved an award of five years "front pay" to an employee determined by a jury to have been wrongfully discharged.[226]

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217. 687 P.2d 1015 (Mont. 1984).

218. *Id.* at 1019.

219. *Id.* at 1020. Concurring specially, Justice Morrison argued there was no longer any need under Montana law for a public policy exception, since the good faith requirement could be read into all employment agreements. Furthermore, he would not require any "objective manifestation" from the employer to make the good faith requirement operative. *Id.* at 1021-22 (Morrison, J., concurring).

220. 693 P.2d 487 (Mont. 1984).

221. *Id.* at 491-96.

222. 720 P.2d 257 (Mont.), *appeal dismissed*, 107 S. Ct. 564 (1986).

223. " 'Termination of employment without legal cause after such a period of time [28 years] offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts.' " *Flanigan*, 720 P.2d at 262 (quoting Cleary v. American Airlines, 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (Cal. Ct. App. 1980)). In addition, the court identified two "objective manifestations" on which to imply the covenant: (1) longevity of service without complaint by the employer; (2) employer's unilateral issuance of a company policy providing for warnings and rehabilitation of unsatisfactory employees. *Id.*

224. The employer attempted to appeal this ruling to the United States Supreme Court, arguing it was unconstitutional under the due process clause, the contracts clause, and the eighth amendment to levy a huge punitive damage award against an employer for an action undertaken at a time when the state's courts had not yet recognized a tort action for discharge of an employee. The Court rejected the appeal because the federal constitutional questions had not properly been presented to the Montana courts. See Prudential Fed. Sav. & Loan Ass'n v. Flanigan, 107 S. Ct. 564 (1986) (mem.).

225. 733 P.2d 1292 (Mont. 1987).

226. *Kerr* clarifies ambiguities from earlier cases on the circumstances under which the covenant of good faith and fair dealing would be implied in law. *Flanigan* left unclear whether the court had agreed to abandon the "objective manifestation" requirement of earlier cases, but *Crenshaw* suggested the requirement would not pose a particularly severe burden on plaintiffs. In *Kerr* the court found that promotions and pay increases made it "reasonable for [the employee] to believe that she

The Montana cases, culminating in passage of a wrongful discharge statute in 1987, provide at the same time a cautionary note and an example. The Montana Supreme Court refused to continue enforcing old doctrines it found incongruent with modern circumstances. But in the absence of legislative guidance it engaged in a trial and error approach which, while fascinating to legal scholars, must have bewildered Montana employers and their counsel. The employer's argument in appealing *Flanigan* to the United States Supreme Court—that the rapidly developing caselaw could not have been anticipated when the discharge in that case took place[227]—has some merit. Statutory changes are normally prospective for such reasons.

Another objection to the Montana cases, as they developed, is the court's continued reluctance to acknowledge it was really changing the underlying common-law rule for employment in Montana. By upholding the extraordinary damage award in *Flanigan*, and more importantly, by virtually extending the good faith obligation to all employment contracts, the court had in effect abandoned the at will presumption. Perhaps the court felt precluded from going further by the existence of a statute which arguably embodied the at will rule.[228]

If that was the problem, it was solved by the subsequent enactment of legislation ratifying most of what the court had done. In this sense, the Montana court has provided an example for other state courts desiring to provoke legislative action. By extending developing common-law exceptions to their logical extremes, a court may stimulate legislative attention to the problem in response to the outrage expressed by employers.

As the nation's first wrongful discharge statute, the Montana law is likely to become a model for others, so the manner in which it deals with employee termination is worth some discussion. The brief statute is in nine sections.[229] The legislature states its purpose in the second section as setting forth the rights and remedies with respect to wrongful discharge, and providing that apart from the rights and remedies set forth in the statute, employment in Montana is still to be considered "at will" if it has "no specified term."[230]

The third section provides definitions of "discharge,"[231] "constructive discharge"[232] and rather broad definitions of "employee"[233] and "fringe bene-

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had job security and would be treated fairly." *Id.* at 1295. Consequently, the court apparently would find an implied covenant of good faith and fair dealing for an employee whose work had been satisfactory, resulting in pay increases and promotions, over a period as short as five and a half years, the length of Kerr's employment. *Id.* at 1293.

227. *See* Prudential Fed. Sav. & Loan Ass'n v. Flanigan, 55 U.S.L.W. 3399 (Oct. 9, 1986) (No. 86-612) (summarizing issues presented).

228. "An employment having no specified term may be terminated at the will of either party on notice to the other, except where otherwise provided . . . ." MONT. CODE ANN. § 39-2-503 (1987).

229. The first section merely states the short title of the law: "Wrongful Discharge From Employment Act." *Id.* § 39-2-901.

230. *Id.* § 39-2-902.

231. *Id.* § 39-2-903(2). " 'Discharge' includes a constructive discharge as defined in subsection (1) and any other termination of employment including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason." *Id.*

232. *Id.* § 39-2-903(1).

fits."[234] "Good cause," which is part of the standard for judging a discharge,[235] is "reasonable, job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason."[236] Public policy is also defined: "a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule."[237]

Section four establishes three causes of action for wrongful discharge. Subsection one creates an action for retaliatory discharges for "the employee's refusal to violate public policy or for reporting a violation of public policy."[238] This action encapsulates the main features of the public policy exception now embraced in a majority of states.[239] Subsection two creates an action on behalf of employees who have passed "the employer's probationary period" if their discharge "was not for good cause."[240] This action essentially replaces the at will rule for nonprobationary employees with the equivalent of a just cause standard. Subsection three creates an action for discharges that violate the express provisions of written personnel policies,[241] essentially adopting the employee handbook breach of contract theory now recognized in a majority of jurisdictions.[242]

The fifth section deals with remedies, and undoubtedly reflects a reaction to the excessive punitive damages awarded in *Flanigan* and perhaps the front pay award in *Kerr*. The basic remedy for wrongful discharge is "lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest thereon." An express mitigation duty can serve to reduce the award.[243] If the court finds that a discharge violates section 39-2-904(1), the "public policy" cause of action, *and* the employer "engaged in actual fraud or

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"Constructive discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.

*Id.*

233. *Id.* § 39-2-903(3). " 'Employee' means a person who works for another for hire. The term does not include a person who is an independent contractor." *Id.*

234. *Id.* § 39-2-903(4). " 'Fringe benefits' means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in force on the date of the termination." *Id.*

235. *Id.* § 39-2-904(2).

236. *Id.* § 39-2-903(5).

237. *Id.* § 39-2-903(7).

238. *Id.* § 39-2-904(1).

239. *See supra* text accompanying notes 160-84.

240. MONT. CODE ANN. § 39-2-904(2) (1987).

241. *Id.* § 39-2-904(3).

242. *See supra* text accompanying notes 107-30.

243. MONT. CODE ANN. § 39-2-905(1) (1987). This damages measure is sufficiently ambiguous to make it unclear whether the damage award is to be limited to the time between the discharge and the judgment of the court, or whether, using the theory of the *Kerr* decision, it is actually an authorization of up to four years "front pay." In *Kerr* the court relied on the Montana Commercial Code, *id.* § 27-1-203, authorizing the award of damages for injury "certain to result in the future." *Kerr*, 733 P.2d at 1295.

actual malice in the discharge of the employee," the court may award punitive damages.[244] Any damages other than those specifically authorized by the statute are expressly ruled out.[245]

The remaining provisions deal with administration of the wrongful discharge action. Section 6 establishes a one-year statute of limitations[246] and requires that plaintiffs exhaust internal appeals procedures, when available, before resorting to litigation. Employees, however, are excused from complying with internal procedures if these are not brought to their attention within seven days of the discharge.[247] Avoiding encroachment on existing statutory remedies and preemption problems, section 7 provides that any discharge subject to state or federal procedures for "contesting the dispute" or any discharge involving an employee covered by a written collective bargaining agreement will not be covered by the Wrongful Discharge from Employment Act, and section 8 quashes any claims for wrongful discharge founded on common-law tort or contract theories.[248] Finally, section 9 authorizes employees and employers to agree to submit their discharge disputes to final and binding arbitration.[249] To encourage parties to arbitrate, section 9(4) provides that attorney's fees may be awarded to a prevailing party whose offer to arbitrate was refused.[250] Section 9 also provides that if the discharged employee makes an offer to arbitrate and wins the arbitration, the costs of the arbitration will be paid by the employer.[251] Submission of the dispute to arbitration terminates the right to litigate the discharge under the Act, but the arbitrator's decision is subject to review under provisions of the Uniform Arbitration Act.[252]

The Montana statute deals creatively with many of the issues raised by the problem of wrongful termination from employment. By providing incentives for the parties to submit their disputes voluntarily to arbitration, the statute may discourage the flood of lawsuits already burdening the courts and feared by those who support the traditional rule. By providing a limited remedy, it should discourage frivolous suits and provide a strong incentive for settlement. Indeed, the statute might be seen as a form of compelled severance pay for wrongfully discharged employees, because it does not make any provision for court-ordered reinstatement, thus avoiding the problem of compelling an unwanted association. Finally, by explicitly refraining from supplanting collective bargaining and statutory remedies, the Montana statute preserves the role of unions in protecting employee rights in organized workplaces, and leaves largely intact the ability of the union to promote itself as a provider of services not otherwise available,

244. MONT. CODE ANN. § 39-2-905(2) (1987).
245. *Id.* § 39-2-905(3).
246. *Id.* § 39-2-911(1).
247. *Id.* § 39-2-911(2), (3).
248. *Id.* §§ 39-2-912, -913. On the preemption point the statute is consistent with the Montana Supreme Court's views on federal labor law preemption, as expressed in *Anderson v. TW Corp.*, 741 P.2d 397 (Mont. 1987).
249. MONT. CODE ANN. § 39-2-914 (1987).
250. *Id.* § 39-2-914(4).
251. *Id.* § 39-2-914(5).
252. *Id.* § 39-2-914(6).

such as representation in grievance procedures and provision of counsel in contested discharge cases.

## III. WHY THE COURTS CAN AND SHOULD ABANDON THE AT WILL PRESUMPTION

The foregoing history brings us to a time of confusion and uncertainty in the law of employment termination from which the legislative branches of our federal and state governments seem uninterested in extricating us. Assuming that state legislatures will continue in their hesitancy on this subject and that national legislation is unlikely any time soon, can and should the state courts take the initiative to abandon the at will presumption, substituting new substantive principles of employment law? The question whether the courts can take such action must be answered before one addresses the question whether they should.

When courts sit in cases not governed by statutes, they are expected to apply rules of decision derived from a body of precedent. It is easy to forget in an age dominated by legislation that the common-law courts of America have always decided many cases not covered by statutes. Perhaps this judicial role has atrophied as the traditional common-law areas have been increasingly codified, first by "restaters" and then by uniform law writers and legislators. Any contention, however, that the common law should be frozen because we have become increasingly accustomed to legislating solutions to society's problems does not withstand careful examination.

At what point should common-law doctrine be frozen? Why should common-law developments governing termination of employment from a particular period be treated with such heavy reverence, if many of the other common-law doctrines of that period—including many governing employment—have fallen by the wayside through legislative reform? Should legislative inertia automatically be interpreted as continuing societal approval of a long-established doctrine, or might it be seen as a recognition that a particular problem is resistant to legislative solution and perhaps best treated by the evolutionary processes of the common law?

Dean Guido Calabresi has suggested that a significant role remains for the common-law process.[253] He argues that when an old doctrine, whether contained in a statute or a common-law rule, has become incongruous or archaic in light of the "legal landscape" that has emerged since its adoption, the courts can modify the doctrine in circumstances when legislatures have not recently spoken affirmatively to preserve it.[254] This role is justified by the unavoidable inertia in a system which relies heavily on legislative consensus for lawmaking, resulting in serious inconsistencies between more recently enacted policies and older stat-

253. G. CALABRESI, *supra* note 163, at 163-64.

254. G. CALABRESI, *supra* note 163, at 163-64. Dean Calabresi's argument centers on the role of courts in dealing with antiquated statutes, but he extends his argument to the role of the courts in updating antiquated common law doctrines. He recognizes that such a power should only be used sparingly in extreme situations. *See* ch. 13, "The Dangers of the Doctrine," *id.* at 167-71.

utes or common-law rules.[255]

The courts should not legislate in the sense of carving out new areas for active promulgation of doctrine. Rather, they should play their traditional role of modernizing existing doctrines to make them more congruent with other areas which have been the subject of recent legislative action.[256] Some of the most obvious leads in recent legislation which would justify the courts undertaking this task have occurred in the area of employment discrimination law. This area reflects an underlying legislative philosophy that employees should be judged based on their job qualifications and performance rather than categorical classifications. A less obvious but philosophically more convincing lead is provided by the unemployment compensation insurance schemes adopted by state legislatures.[257]

Unemployment legislation is essentially a cost-shifting mechanism. Some part of the cost of discharge is shifted from the employee to the employer through the experience rating system when a discharge is found to be due to conditions beyond the control of the employee, such as adverse economic circumstances leading to job elimination, or unjustified discharges.[258] A cause of action for unjustified discharge similarly can be seen as a cost-shifting device, because by definition a plaintiff in such an action is alleging he was not at fault in the discharge. Unemployment insurance does not fully shift the cost. It provides a subsistence bridge for discharged employees seeking new work,[259] but reflects a legislative recognition that long-time employees have some minimal right to economic support when they lose their jobs. A similar sort of legislative recognition underlies workers compensation laws, which require some employer-funded support for employees incapacitated by work-related injuries.

The minimal compensation provided by unemployment insurance schemes, however, does not sufficiently compensate the wrongfully discharged employee for her physical, temporal, and emotional investment in the job. Judicial initia-

255. G. CALABRESI, *supra* note 163, at 164-65.

256. Calabresi points to Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) as an example of this phenomenon in action. Justice Harlan, writing for a unanimous court, adopted a new federal common-law right of action for wrongful death in the absence of direct federal statutory authority, noting that the traditional common-law doctrine against such causes of action had been undermined by numerous state and federal enactments, making it "sharply out of keeping with the policies of modern American maritime law." *Id.* at 388. Justice Harlan went on to comment: "It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles—many of them deriving from earlier legislative exertions." *Id.* at 392. Thus, when a legislative environment has rendered a common-law rule anomalous, a common-law court may be justified under appropriate circumstances in revising the common-law rule to be consonant with that environment. For a more recent expression of this view of the common-law court's function, *see* Grisham v. Hinton, 490 So. 2d 1201, 1208-09 (Miss. 1986) (Robertson, J., concurring).

257. I am indebted to my student research assistant, Ronald Gottlieb, for developing the following analysis of the relevance of unemployment insurance as a "lead in legislation" for common-law abrogation of the at will presumption, and what follows is to some extent paraphrased from a memorandum he wrote to me on this subject while assisting in research for this Article.

258. For a general description of the unemployment insurance system in the United States, see J. HOGAN AND F. IANNI, AMERICAN SOCIAL LEGISLATION 536-48 (1956).

259. *Id.* at 546. Unemployment insurance benefits are not set at wage-replacing rates, for fear of deterring recipients from seeking new employment. *Id.*

tive in protecting these interests would not be a radical step for the courts, but instead would be consonant with the underlying philosophy of unemployment compensation as well as a developing societal recognition that noneconomic losses, such as pain and suffering or emotional distress, should be compensable. My proposal for the appropriate remedial scheme—in essence, economic compensation patterned on some of the voluntary severance pay systems now in operation[260]—is also consistent with this approach, noting that under unemployment compensation, reinstatement is ordinarily not a remedy for wrongful discharge.[261] If unemployment compensation systems were redesigned to compensate employees for a greater portion of their discharge-related losses, courts would have less need to deal with this issue, except for instances when a discharge involved independent torts calling for punitive damages.

Calabresi recognizes that the evolution of legislatures as the primary sources of new law means such judicial action would be subject to legislative correction.[262] But he sees the process as a continuing dialogue between courts and legislatures. When a court determines that the existing common law or old statutory doctrine is severely out of line with other, more recently established doctrine, it is appropriate for the court to send signals to the legislature through its opinions, suggesting that they modernize statutes in the area in question. Calabresi suggests that courts can take the next step if the message does not provoke legislative consideration of the issue. The court can modify the doctrine to conform more closely with related recent policy pronouncements of the legislature, thus placing the ball in the legislature's court. If the legislature does not agree with the need for such modification or prefers that it take a different form, the legislature can overrule the court. This was done by the Montana legislature when it adopted judicially-developed caselaw but imposed a more restricted administrative and remedial scheme than was provided by the state's supreme court.[263]

It is in this spirit that I contend the courts *can* and *should* abandon the at will presumption. If the courts determine that the at will presumption is inconsistent with the contemporary body of employment laws, and the legislatures have not responded to the messages contained in the wholesale adoption of exceptions sapping the vitality of the rule, the courts would be justified in taking the next step of doctrinal modification, substituting a doctrine they believe to be more consistent with what the legislatures would do if they were to bring the law of employment termination into line with the rest of employment law by statute.

### A. *Reasons for Abandoning the At Will Presumption*

The reasons for abandoning the at will presumption divide into three main areas: consistency with the overall substance of contemporary employment law,

260. *See infra* text accompanying notes 301-07.

261. M. ROTHSTEIN, A. KNAPP & L. LIEBMAN, EMPLOYMENT LAW 898-907 (1987). Indeed, if termination was voluntary or justified, the former employee may not be entitled to benefits.

262. *Id.* at 164.

263. *See supra* text accompanying notes 229-52.

economics, and fairness consistent with contemporary concepts of equality and human rights.

### 1. The Consistency Argument

The at will presumption no longer accurately reflects the expectations of most employees and employers with respect to the nature of their relationship. The role of an evidentiary presumption is to provide a fallback position in the absence of affirmative evidence of the intentions of parties, and to assist in allocating the burden of proof with respect to such issues. In light of the legal landscape of employment law, most employees and employers likely do not presume that termination decisions at all levels, whether rank-and-file, supervisory, or managerial, should routinely be made without reference to job qualifications and performance or, in the case of job elimination, valid economic factors.

Federal, state, and local employment statutes already require that the employer at least be able to "articulate" a "legitimate, nondiscriminatory reason" for terminating an employee whenever circumstances are such that an inference of an impermissible motivation could be drawn.[264] Furthermore, as Professor Finkin has demonstrated, unlike the assumptions about longevity of employment held by employers and employees at the time the at will presumption was adopted, today employers and employees normally presume that employment which is not expressly undertaken for a limited time will be long-term, provided some initial probationary stage is successfully completed, the employee's work performance is satisfactory, the employee has done nothing to damage the employer's business or reputation, and the employer still requires performance of the job at issue.[265] Fringe benefits attaching to many employment relationships confirm the assertion that neither employees nor employers regard "permanent" employment as a relation casually entered or terminated.[266]

The procedural due process revolution, while technically confined to governmental decision making, has made an impression in the private sector as well, first through collective bargaining and then through the administration of employment statutes which implicitly impose procedural regularity in a wide variety of circumstances. Consequently, most employees and employers likely expect termination decisions to be carried out through regular procedures embodying some rudimentary notion of fair process, and that the substantive basis for such decisions relate to the employee's job performance and the employer's economic needs. To the extent legal presumptions should reflect the reasonable expectations of the persons to whom they apply, a presumption that terminations can be made without justification or any regularity of process is no longer supportable and is inconsistent with legislatively adopted policies relating to other types of employment decisions. In workplaces where the employer has promulgated written policies concerning discipline and termination procedures,

264. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

265. Finkin, *supra* note 26, at 736-743.

266. M. ROTHSTEIN, A. KNAPP & L. LIEBMAN, *supra* note 261, at 380-81 (tables demonstrating proportion of workforce receiving various kinds of fringe benefits).

a continued presumption of at will employment seems inconsistent with more than merely the unspoken assumptions of the parties. The continued reluctance of some state courts to recognize at least that the presumption has been rebutted in such cases seems an indulgence in unnecessary legal fiction.

Some defenders of the at will presumption argue its abandonment would be inconsistent with another fundamental concept of American law: freedom of contract.[267] They assert that it is contrary to the notions of liberty and free association to require persons, including corporations, to remain in associations involuntarily. Once a mutually consensual allegiance to the relationship breaks down, either party should be able unilaterally to abandon it, with no need for explanation or justification—provided, of course, that labor already performed be properly compensated under the rubric of an executed contract. Considered in isolation from the law surrounding employment which has developed during this century, the freedom of contract argument seems highly persuasive. However, the law has moved too far from its nineteenth century antecedents for the argument to carry much credibility.

Today, freedom of contract is circumscribed in almost every significant aspect of the employment relationship, on the ground that allowing personal preferences and the market to reign freely with respect to employment endangers the public welfare. From minimum wage, overtime, and child labor laws[268] to health and safety laws,[269] from collective bargaining laws[270] to laws regulating fringe benefit plans,[271] government has established floors and ceilings within which the employment bargain must be struck. In addition, civil rights laws sharply constrict the personal factors which may figure in a hiring, promotion, or discharge decision.[272] In essence, society has determined that many aspects of the employment relation have too many external ramifications to be left entirely to a private bargain between an employer and an individual employee. To be consistent, a defender of the at will presumption based on freedom of contract must also advocate the repeal of much of the panoply of statutory employment regulations. Not surprisingly, the most prominent such defender does advocate such repeal.[273] Thus the argument from freedom of contract is essentially sentimental. It is an attempt to clutch at the last vestiges of an older concept of employment connoted by the traditional nomenclature of master and servant, rooted in feudalism as transformed during the age of industrialization.

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267. Probably the leading exponent of this view is Professor Richard Epstein. *See* Epstein, *supra* note 38, at 953-55.

268. *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1982).

269. *See, e.g.*, Occupational Safety & Health Act of 1970, 29 U.S.C. §§ 651-678 (1982 & Supp. 1985).

270. *See, e.g.*, Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-197 (1982 & Supp. 1985).

271. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1982 & Supp. 1985).

272. *See, e.g.*, Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1982 & Supp. 1985); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982 & Supp. 1985); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1982 & Supp. 1985).

273. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1357 (1983); *see* Power, *supra* note 128.

Another aspect of the freedom of contract argument points to the availability of job security through the selection of union representation. If employees really desired job security, the argument goes, they would designate unions to negotiate collective agreements on their behalf. By rejecting representation employees are said to have freely elected to be governed by the unregulated market.[274] A corollary argument is that extending just cause protection to nonunion workers would further undermine the viability of the union movement, because employment security is a valuable incentive which the movement needs to organize more employees.

Both of these arguments fail to withstand serious analysis. Our labor law creates a system in which union representation is normally available only if a majority of the employees in a statutorily cognizable "bargaining unit" desires representation by a particular union.[275] An individual employee cannot enjoy the benefits of collective bargaining unless a majority of her fellow employees share the desire for collective representation. Consequently, individual employees cannot fairly be charged with freely selecting at will status merely due to failure to secure union representation. And, unions have had the selling point of protection from arbitrary discharge for decades without making any significant headway in increasing their share of the workforce, so it appears that to many workers the promise of job security is not by itself a significant enough motivation to select representation, given any objections they might have to other aspects of unionism.[276]

### 2. The Economic Argument

Some of the most outspoken supporters of courts' retaining the at will presumption resort to arguments about economic efficiency,[277] but it is not clear that retention of the presumption is necessarily good for the economy or, in the

274. *See* Catler, *The Case Against Proposals to Eliminate the Employment at Will Rule*, 5 INDUS. REL. L.J. 471 (1983) (arguing that employees who seek job security should resort to union organization of their place of employment).

275. While a minority of employees may form a union and request bargaining, *see* Black Grievance Committee v. NLRB, 749 F.2d 1072 (3d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985), an employer is not obligated to bargain with a minority union and, in any event, may not bargain with such a union with respect to terms and conditions of employment of those who are not its members. National Labor Relations (Taft-Hartley) Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (1982); *see, e.g.*, Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975). Furthermore, a minority union would not be protected in striking to compel new contract terms because the employer is under no statutory obligation to negotiate with it in the first place.

276. Without describing in detail the various considerations of selecting a union representative, one might note the waiver of certain statutory rights entailed in selection of a representative, the submergence of individual economic interests to a common denominator, and the imposition of union discipline and financial obligations. *See* Comment, *The Contractual Waiver of Individual Rights Under the National Labor Relations Act*, 31 N.Y.L. SCH. L. REV. 793 (1986). Professor Epstein concludes that the evidence is equivocal as to whether abandonment of the at will presumption would benefit or disadvantage unions in their organizational efforts. Epstein, *supra* note 38, at 978-79.

277. Epstein, *supra* note 38, at 955-77. Professor Epstein's economic arguments have inspired spirited rebuttal. Professor Finkin questions many of the factual assumptions on which the arguments are based. Finkin, *"In Defense of the Contract at Will"—Some Discussion, Comments and Questions*, 50 J. AIR L. & COM. 727 (1985). Professor Minda challenges Epstein's economic model as unsuitable to the nature of the employment relation, Minda, *supra* note 185, at 959-60.

long run, the individual employer. A contrary presumption would give employers a strong incentive to improve the quality of their hiring process and management and supervision of their workforces, and thus should not be presumed detrimental to the profitability of their businesses or the competitiveness of the American economy in world markets. Most of the industrialized economies with which the United States competes already provide some measure of job security through legislation or standard practice.[278] There are ways to motivate employees to produce without hanging a sword of Damocles—unjustified or uncompensated termination—over their heads. Employee loyalty resulting from expectations of long-term employment may be more beneficial in managing a business enterprise than the implicit threat of unemployment.

Abandonment of an at will presumption does not necessarily mean all employees would be guaranteed continued employment regardless of their job performance or the economic needs of the employer.[279] Whether the burden on the employer is to prove just cause for discharge or merely to articulate a legitimate and plausible reason for discharge, employees would still have to meet reasonable standards of performance to keep their jobs. Under the British system, for example, industrial tribunals determine whether an employee has been improperly discharged. Employers' termination decisions may be sustained when legitimately based on the economic needs of the company.[280] While the just cause standard as applied in American labor arbitration arguably may create too high a barrier to the discharge of unsatisfactory employees, it is not the only alternative to the at will presumption and should not be set up as a straw man in the debate about whether at will should be retained.

Another economic argument in support of maintaining an at will presumption is that a system in which the employer need not explain termination decisions, and employees may not appeal such decisions to a neutral forum, minimizes transaction costs to both parties.[281] Because an unemployment insurance system and, at least at some companies, a severance pay system, provide discharged employees with a safety net to carry them through to a new job, at will supporters argue that the company and the society need not be burdened with the costs of litigating and compensating terminations.

It is true that transaction costs will accompany any requirement that terminations be justifiable and subject to challenge in a neutral forum. However, such transaction costs must be weighed against the benefits that might derive from requiring rational decision making with respect to terminations, including the potential benefits to business performance under a system which encourages pro-

278. *At-Will Employment and the Problem of Unjust Dismissal*, 36 REC. A.B. CITY N.Y. 170, 175-80 (1981) [hereinafter *At-Will Employment*] (summarizing legislative enactments in Europe, Japan, and Canada); W. GOULD, JAPAN'S RESHAPING OF AMERICAN LABOR LAW 106-16 (1984).

279. For example, the Montana Supreme Court recently held that a discharge motivated by the employer's economic situation did not violate the implied covenant of good faith and fair dealing. McClain v. NERCO, Inc., 738 P.2d 1285 (Mont. 1987).

280. *At-Will Employment*, *supra* note 278, at 175-76. Japanese courts also sustain a discharge for a variety of reasons related to an employee's job performance and suitability for continued employment. W. GOULD, *supra* note 278, at 108.

281. Epstein, *supra* note 38, at 970-73.

gressive discipline, improved supervision, and positive incentives for good performance. In addition, costs certainly exist—perhaps not so easily calculable but no less real than litigation costs—that fall upon the discharged employee and his dependents and that are not adequately compensated by unemployment insurance or severance pay. Even in workplaces not covered by collective bargaining agreements, employees' seniority on the job may have a distinct value for a variety of prerequisites.[282] A discharged employee must start over somewhere else without seniority. Employees who have accumulated substantial seniority may encounter illegal but nonetheless real age-based discrimination in seeking new employment, particularly new employment which is compensated at a level comparable to the job from which they were dismissed. Furthermore, the psychological impact of an unexplained termination, which may translate into stress-induced health problems, must also be factored into the equation.[283] The economic impact on companies of abandoning or retaining the at will presumption is not the only impact to be considered, for retaining the presumption has both an economic and noneconomic impact on employees and their dependents.

Consequently, economic considerations do not necessarily provide overwhelming support for retaining the at will presumption, particularly if one briefly shifts attention from theory to practice and observes that the courts are now full of litigation about employee terminations, even though the at will presumption is still officially the common-law rule in almost every state. That the small proportion of individuals who cannot already fit their case into one of the existing legislative or common-law exceptions will create a massive flood of new litigation seems unlikely, especially if remedies are appropriately tailored to be truly compensatory rather than punitive. Furthermore, abandonment of the at will presumption logically should deter employers from discharging employees when they lacked the evidence to support a reasonable justification for the discharge. Thus, the volume of discharge litigation might actually decrease over the long term. If more employers adopted the progressive discipline and rehabilitation approaches common under just cause collective bargaining agreements, combined with a policy of providing an explanation backed up by documentation to the discharged employee, the discharges that do take place would more likely be perceived by employees as justifiable, further deterring litigation.

### 3. The Human Rights and Equality Argument

Another reason for abandoning the at will rule is that substituting a rule more protective of employee interests in job security would be consistent with the trend toward humanizing the workplace and advancing from the harsh conditions of the industrialization period in American history. Society's concept of

282. M. ROTHSTEIN, A. KNAPP & L. LIEBMAN, *supra* note 261, at 482-84.

283. Ravin, *Unjustifiable Termination: A New Entity in the Private Practice of Forensic Psychiatry*, 8 AM. J. OF FORENSIC PSYCHIATRY 2, 3 (1987). Dr. Ravin demonstrates the psychological and physical consequences of unjust discharge in a series of case studies taken from his practice. Such consequences are beginning to gain judicial recognition in employment discrimination cases. *See, e.g.*, Chalk v. U.S. Dist. Ct., 46 F.E.P. Cases (BNA) 279 (9th Cir. 1988) (non-teaching assignment for instructor with AIDS inflicts psychological injury which is irreparable).

human rights, whether with respect to the government or to fellow citizens, has advanced since the late nineteenth century. Many working conditions then commonplace would not be tolerated today. We have mandated a shorter workweek and workday, a floor under economic compensation,[284] nondiscriminatory practices with respect to race, religion, and other characteristics,[285] appropriate ventilation, sanitation and minimal health and safety requirements,[286] protections for fringe benefits entitlements,[287] and the right of employees to combine for collective action if they so desire.[288] While a wide variety of particular justifications support each of these specific changes, a concern for basic human rights is reflected in all of them. Together, they suggest a move toward a societal consensus that each individual is entitled to be judged on the basis of individual effort and ability, and to work in a reasonably safe and healthful environment for compensation sufficient to provide for basic survival needs, even if she or he does not command the bargaining power or skills to secure such conditions as an individual negotiator in the labor market. This overall trend of placing increased weight on the rights of employees in balancing employer and employee interests with respect to workplace regulation is continuing, even during a period when deregulation seems to be the catchphrase of the hour. Recent legislation has expanded protection against discrimination for the physically and mentally disabled,[289] required employers to allow dismissed employees to continue participating in employment-based group health insurance programs,[290] abolished mandatory retirement on account of age,[291] required unpaid childcare leave policies covering both parents,[292] and mandated advance notification of plant closures.[293]

One aspect of the trend toward employee protection particularly relevant to the issue of at will employment is the concept of equality of treatment. In terminating an employee whose race, sex, age, religion, union activities, or other personal characteristics might lead to an inference of unlawful discrimination, an employer may be required to " 'articulate a legitimate, nondiscriminatory rea-

284. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 206 (1982); 40 U.S.C. § 328 (1982).

285. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1982).

286. *See, e.g.*, Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1982 & Supp. III 1985).

287. Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001-1461 (1982 & Supp. III 1985).

288. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. § 157 (1982).

289. ARIZ. REV. STAT. ANN. § 41-1463 (1956) (state civil rights law amended to add protection against handicap discrimination in employment); S.D. CODIFIED LAWS ANN. §§ 20-13-1, -10 (1987) (disability discrimination law extended to private sector employers); TENN. CODE ANN. § 850-103 (1986) (nondiscrimination requirement broadened to extend to discharges); WYO. STAT. § 27-9-105 (Supp. 1987) (the handicapped added to state Fair Employment Practices Law).

290. Omnibus Budget Reconciliation Act of 1986, §§ 601-608, 29 U.S.C.A. §§ 1161-1168 (West Supp. 1987).

291. Age Discrimination in Employment Act Amendments of 1986, Pub. L. 99-592, § 2, 100 Stat. 3342 (codified at 29 U.S.C.A. § 631 (West Supp. 1987)).

292. Legislatures have enacted such requirements recently in Minnesota, Oregon, and Rhode Island. *See* MINN. STAT. ANN. §§ 181.940-.941 (West Supp. 1988); OR. REV. STAT. § 659.360 (1987); R.I. GEN. LAWS § 28-48-2 (Supp. 1987).

293. ME. REV. STAT. ANN., tit. 26, § 625-B.3.6 (Supp. 1987); *see* Fort Halifax Packing Co., Inc. v. Coyne, 107 S. Ct. 2211 (1987).

son' " for the discharge.[294] No such legal requirement exists under an at will regime for those employees whose personal characteristics or activities do not place them in a statutorily protected group. While this justification requirement was adopted to combat discrimination motivated by categorical prejudices, it produces an anomaly in the law. Protecting the rights of certain employees to be free of discrimination discriminates against employees who are not members of protected groups because their interests in fair treatment and continued employment are accorded less recognition than employees who are members of such groups. If some employees are entitled not to be fired without at least the articulation of a legitimate reason, why should not all employees be so entitled? Particularly when one adds to the consideration public employees, who are entitled to procedural and substantive protections by virtue of federal and state constitutions and statutes,[295] it is inconsistent with equality of treatment to deny at least minimal protections against arbitrary discharge to the employees not so protected. To entitle all discharged employees to an explanation related to their work performance or economic needs of the employer would level the playing field as between different groups of employees. It would accord with contemporary notions of respect for human dignity which underlie much of the evolving statutory employment law.

### B. *Structuring a New Common-Law Presumption*

Common-law courts operating on the principle that new rules must represent evolutionary rather than revolutionary changes from existing doctrine have thus far dealt with this issue by recognizing exceptions to the old rule. These exceptions may be characterized as special case doctrines because they deal with particular circumstances in which it seems inappropriate to the court to apply the traditional at will rule. The exceptions suggest the outlines for a new presumption which could simplify the process of decision, clarify the rights of employees and employers, and be consistent with existing statutory and constitutional requirements.

The principal common-law exceptions recognized by state courts require employers to follow their announced policies for discipline and discharge, to refrain from discharging employees under circumstances that would undermine articulated public policies, and in a small number of jurisdictions to deal with their employees in good faith.[296] The modern employment relationship suggests, in its essential features, that such requirements are not at all foreign to the reasonable expectations of most employers and employees when they enter such relationships.

Let us take a typical employment relationship in which there is no written

294. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

295. *See generally Developments in the Law, Public Employment, supra* note 24 (provides a unified treatment of public employment law highlighting differences between public and private employment law).

296. As such, the judicially developed exceptions are virtually codified in MONT. CODE ANN. § 39-2-904 (1987), that provides:

agreement and the only terms specified by the employee and employer are compensation, work requirements, and everyday shop rules. Nothing has been said or written between the parties regarding the exact duration or method of terminating the relationship. Let us assume further that compensation for the job includes, in addition to hourly wages, a stated intention by the employer to give a certain number of days off with pay for holidays and vacations, health insurance coverage, and contributions toward a pension, with entitlements to these benefits phased in over time.[297] Let us also assume that the employee is told that some initial period of time is considered a probationary period, and that the employee is not a member of a statutorily protected "minority group." Given these circumstances, what would be reasonable for a court to presume with respect to the parties' intentions on the issue of termination?

This typical constellation of facts suggests the parties expect their relationship to continue so long as the job needs to be performed and the employee performs it satisfactorily. The indicia of this unspoken understanding include the employer's provision of health care and retirement benefits. Why would such forms of deferred compensation be included in a relationship presumed to be of brief duration, and terminable without notice for any or no reason? The other forms of deferred compensation—holiday and vacation benefits—would tend to confirm this understanding, for one would not expect an employer to pay for time not worked, essentially an investment by the employer in human resources, unless there was some understanding that the relationship was to be long-term.

Indeed, any policies adopted by the employer which tend to induce employee allegiance and discourage employee turnover support a presumption that the employer wants the relationship to be a continuing one.[298] The more care the employer puts into the hiring process, such as interviewing, checking references, administering preemployment physical examinations, and specifying a probationary period, the more logical would be the presumption that the employer and the employee expected the relationship to be extended. If the employer stated expressly—particularly in a printed policy manual—that it would not terminate the relationship without a specified reason, a presumption of a continuing relationship is even more soundly based in fact.

The distinctions between employees and independent contractors, which lie at the heart of employment law, tend towards the same presumption of longevity

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A discharge is wrongful only if:

(1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;

(2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or

(3) the employer violated the express provisions of its own written personnel policy.

297. As previously noted, most private sector employees enjoy some combinations of these types of nonwage benefits in connection with their jobs. M. ROTHSTEIN, A. KNAPP & L. LIEBMAN, *supra* note 261, at 380-81.

298. *See* Finkin, *supra* note 26, at 736-43. Professor Finkin persuasively shows how employers have tried to reduce the cost of employee turnover by changing management policies to induce increased employee loyalty and stability. *Id.*

in the relationship. As distinct from an independent contractor, an employer has an investment in the employee, reaping the benefits of the employee's increased familiarity with the business over time and the loyalty induced by the expectation that the relationship will continue. The profit-maximizing employer seeks to encourage the employee in feeling that he has a common stake in the enterprise, a common interest in improved productivity through innovation and effort. This relationship is foreign to that of the independent contractor, which, although it may be repeated between particular individuals or companies, is normally of a more ad hoc nature, with the parties primarily concerned with achieving a specified result for a specified price.

Consequently, it seems appropriate for courts to *presume*, if the parties have not expressed themselves on the subject during the hiring process, that the parties intend a typical employment relationship to be open-ended, curtailed only when the job does not exist or the employee proves to be unsuitable for the job. In this context, the lack of a definite duration is not a significant matter, because it is simply irrelevant to the issue of *method* or *reason* of termination. Only two issues are truly relevant: whether the employer requires the work to be performed, and whether the employee is suitable to perform the work. With such a presumption in place, any employee challenging a termination would be required to demonstrate to the satisfaction of an impartial third party that the job continued after her dismissal and that she remained suitable for that job.

As with the current at will regime, a new presumption of extended employment would be rebuttable and could be avoided through express contract. If an employer and employee freely entered into a relationship with the *express* understanding that it was terminable at the will of either party at any time without explanation, or after a particular period of time had passed, and such an understanding could be proven by competent evidence, the presumption would be rebutted and the employer would have no common-law duty to justify a termination.[299] If shown that the employment in question carried none of the indicia supporting a presumption of extended employment, such as deferred compensation (fringe benefits), and individualistic hiring criteria, the presumption of extended employment would be weaker and easier to overcome with evidence tending to show employee unsuitability, particularly if the dischargee had been employed only briefly or was discharged during an initial probationary period.

In a case governed by the unrebutted presumption of extended employment, an employer sued for wrongful discharge would have to state a plausible reason for termination, relating to the quality of the employee's performance or other employee behavior directly affecting the workplace. Employee behavior outside the workplace which significantly lessened the employee's value to the enterprise or made the employee unavailable for work when needed, such as conviction of a crime entailing imprisonment, would justify a discharge, as

299. It would be a simple matter for employers to advertise openly such jobs as being at will, and presumably they would have to offer some increased compensation to induce employees to accept such jobs.

would convincingly documented production below the accepted norm in the workplace, or serious customer dissatisfaction. Elimination of the work to be performed would be an adequate defense, because the common law could not require an employer to make an entrepreneurial decision under current limits of private workplace regulation.[300]

As in any civil litigation when the plaintiff alleges an injury by the defendant, the ultimate burden of persuading the trier of fact that a discharge was a violation of the employment relationship should rest with the employee. However, the burden of establishing a credible justification for a discharge when the employee presents convincing evidence that the job continued to exist and that the employee was suitable to continue performing it should rest with the employer, who would be the party most likely to possess the information necessary for proof on the issue, and whose action discharging the employee sparked the litigation in the first place. Once an employer had established a justification for a discharge, the employee would lose the case unless he could show that the justification was in some way inadequate or unlawful.

### C. *The Remedial Problem*

The way the caselaw has been developing complicates the problem of providing a suitable remedy for an unjustified discharge. Under the various exceptions to the at will rule developed in state courts, remedies can range from a relatively small award of back pay reduced by other earnings of the former employee when liability is premised solely on a contractual theory, to punitive and compensatory damage awards exceeding a million dollars when liability is premised on a tort of wrongful discharge in violation of public policy or an implied obligation of good faith.[301] No common-law court has yet imposed a reinstatement remedy. Although it is likely many cases will be settled by the employer agreeing to reinstate the employee or to make a cash settlement acceptable to the employee, in that small percentage of cases that go to a verdict and determination that the employee was wrongfully discharged, a remedy is needed that makes the employee whole without constituting a windfall that will stimulate unduly speculative litigation.[302]

The current rule in some jurisdictions under implied contract exceptions to the at will rule, limiting the employee to lost pay subject to offset by earnings from new employment or unemployment insurance benefits, does not seem adequate to make the employee whole. The loss to the employee, especially an employee with significant seniority, is really more than lost wages and benefits. In addition to emotional and psychological injuries attendant on an unjustified discharge from employment, the employee loses seniority and status and possibly

300. *See* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981).

301. An example of an extraordinarily large damages award is Flanigan v. Prudential Fed. Sav. & Loan Ass'n, 720 P.2d 257 (Mont.) ($1.4 million), *appeal dismissed*, 107 S. Ct. 564 (1986).

302. An example of the windfall problem can be found in Small v. Springs Indus., Inc., 292 S.C. 481, 357 S.E.2d 452 (1987), in which the jury awarded the plaintiff such a large amount for a discharge in violation of an employee handbook policy that she would have no incentive ever to work for the reminder of her life, in the view of the appellate court. *See id.* at 486, 357 S.E.2d at 455.

the ability to secure a particular level of entitlements with respect to fringe benefits earned over time, particularly pension benefits. Although federal law requires that pension benefits vest after a relatively short period of employment,[303] the actual value of vested benefits may be rather small if the employee is not able to put in a large number of years under a company's pension plan. It seems likely that an employee who works until retirement with one company may secure a better benefit than an employee who works five- or ten-year periods at several different companies. Consequently, compensatory damages need to be above the loss in pay in order to make an employee whole for an unjustified discharge.

On the other hand, in the absence of conduct by the employer that would independently constitute a tort, the award of punitive damages does not seem appropriate as a normal remedy for a discharge. Despite the characteristics that separate it from other commercial transactions, an employment relationship is at bottom contractual in nature, and the law has long recognized that contracting parties should be able to buy their way out of disadvantageous contracts without an excessive penalty.[304] If an employer wishes to terminate an employment relationship without a reason legally sufficient to justify a discharge under the body of law which would develop, the employer should nonetheless be able to terminate the relationship provided the employee is reasonably compensated for his losses. Not to allow for such an eventuality would violate the principle of liberty that the defenders of at will employment stress. Finally, damage awards out of all scale to the actual loss incurred by the employee undoubtedly will stimulate speculative litigation, because employees who believe that their discharge was inadequately compensated by severance pay or unemployment insurance benefits will have a strong incentive to sue, and lawyers surely will be available to represent them on a contingency basis when the promised rewards are great.

Provision of reasonable severance pay for discharged employees could prevent litigation and provide an appropriate measure of damage awards in discharge cases. Severance pay represents an attempt by employers to compensate employees for the losses resulting from termination of employment, and is frequently calculated by a formula relating the employee's normal rate of pay to his workplace seniority.[305] It is most commonly awarded in situations in which employees lose their jobs due to economically dictated reductions in force, but could well be adapted to all situations of involuntary termination. If the formula voluntarily adopted for severance pay for managerial or clerical employees by

303. *See* 29 U.S.C.A. § 1053 (West Supp. 1987).

304. The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses.

O. HOLMES, THE COMMON LAW 301 (1923); *see also* E. FARNSWORTH, CONTRACTS § 12.3 (1982) (economic aspects of contract enforcement).

305. Professor Finkin briefly summarizes the severance pay situation in a consideration of Professor Epstein's article on at will employment. Finkin, *supra* note 277, at 756-58. He finds most severance plans are limited to one or two weeks of pay, but that those adjusting for long-term service may provide a week or more of pay for each year of service. *Id.*

larger companies, plus lost pay up to the time of trial, became the standard for awarding damages in wrongful discharge litigation, more employers might adopt severance pay policies. The application of such policies might deter much litigation, because litigants could not gain more by suing unless they could prove tortious conduct, and their attorney's fees could not be awarded by the court in the absence of statutory authorization.[306] Reinstatement should generally not be available as a remedy in a common law action challenging a discharge, for many of the same reasons underlying the common law tradition of not ordering specific performance of personal service contracts.[307] The human relationships involved would make forcible return of the employee to the workplace an undesirable solution to the discharge problem when the discharge has been litigated and supervisors or other employees are drawn in as witnesses against the discharged employee. If the potential monetary damages are sufficient to encourage settlements, consensual reinstatements may materialize, but forcible reinstatements are not conducive to a productive workplace atmosphere.

## IV. CONCLUSION

The evolving law governing the employment relationship has rendered the at will presumption obsolete, but almost all legislatures have failed to modernize the law governing employment terminations to bring it into consonance with the surrounding employment law environment. The courts have been left to struggle with an increasing volume of wrongful discharge litigation brought by former employees whose expectations differ sharply from the nineteenth century ideology embodied in the old common-law presumption. Lacking direct legislative guidance and perceiving that application of the traditional presumption is increasingly inappropriate, the courts have developed a variety of exceptions on a piecemeal basis, producing significant differences in the law governing employee termination in the different states and complicating the management of personnel in an interdependent national and international economy.

These circumstances justify the courts in rethinking the common-law presumption and restructuring it to reflect the contemporary employment law setting. A presumption consistent with employee and employer expectations would require employers to advance a plausible reason for termination when an employee could show that the job continued to exist and the employee was qualified to continue performing it, and would award suitable make-whole damages if threatened litigation could not be settled. If the new presumption did not meet with legislative approval, the legislatures or Congress would be free to legislate a

306. In his defense of employment at will Professor Epstein argues that the existence of severance pay as a widely available benefit justifies maintaining the current rule. Epstein, *supra* note 38, at 967. Professor Epstein's assumption about how widespread such benefits are has been challenged. *See* Finkin, *supra* note 277, at 755-57. If severance pay at a level sufficient to compensate employees for their actual losses through discharge were as widely available as Epstein assumes, it seems unlikely that there would be so much wrongful discharge litigation.

307. J. CALAMARI & J. PERILLO, CONTRACTS § 16-5 (3d ed. 1987); E. FARNSWORTH, *supra* note 304, §§ 12.4-.7.

different solution to the problem of job termination, as at least one state legislature already has done.