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EMPLOYEE TERMINATION AT WILL:
A PRINCIPLED APPROACH

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I. INTRODUCTION

Despite extensive erosion of the common law principle of freedom of contract,¹ a stubborn progeny survives today—the at will contract of employment. Under this common law theory, a contract of employment for other than a definite term is deemed to be terminable at will by either party.² Accordingly, employers may "dismiss their employees at will for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."³ The employment at will rule has been recognized

¹ For a discussion of the demise of the common law principle of freedom of contract, see L. Friedman, Contract Law in America 20-24 (1965); G. Gilmore, The Death of Contract (1974).

² See, e.g., Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439 (7th Cir.), cert. denied, 379 U.S. 914 (1964) (although plaintiff had been employed by his employer for twenty-eight years, there was no implied contract of future employment and employer was free to fire plaintiff at will); Harper v. Southern Coal & Coke Co., 73 F.2d 792 (5th Cir. 1934) (because employment contract contained no provision on the duration of employment, and employer did not violate any statute, employer's termination of employee was justified); Warden v. Hinds, 163 F. 201 (4th Cir. 1908) (a hiring for one year may not be presumed from a letter promising employment and setting forth compensation, but not duration).

³ Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 519-20 (1884) (dictum), overruled on other grounds, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). See also 1 C. Labbé, Commentaries on the Law of Master and

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in treatises on contract,\textsuperscript{4} tort,\textsuperscript{5} and agency\textsuperscript{6} law and is generally accepted in judicial decisions in this country.\textsuperscript{7} In the last decade, however, a growing number of exceptions to the rule have developed based on various tort theories,\textsuperscript{8} implied contract theories\textsuperscript{9} and public policy.\textsuperscript{10} In addition, a number of federal\textsuperscript{11} and state\textsuperscript{12} statutes enacted in the last fifty years have also served to limit the effects of the rule. In particular, the establishment of collective bargaining through union representation and the protection thereby afforded certain classes of employees have curtailed the impact of the employment at will doctrine.\textsuperscript{13} Nonetheless, employees who are not protected by statutory provisions or a collective bargaining agreement may be discharged at any time, for any reason, without legal recourse unless relief is available under one of several limited

\textsuperscript{4} Servant § 159 (2d ed. 1913); Note, Employment Contracts of Unspecified Duration, 42 Colum. L. Rev. 107 (1942).

\textsuperscript{5} 9 S. Williston, Contracts § 1017 (3d ed. 1967).


\textsuperscript{7} The Restatement of Agency adopts the rule that if no term of employment is specified the contract of employment is terminable at will by either party. Restatement (Second) of Agency § 442 (1958). Comment a to this section of the Restatement states that unless a stated term is specified and consideration given, other than a general promise to employ or to serve, then the agreement will be interpreted as one of employment only to the extent either party wishes. \textit{Id.} § 442 Comment a.

\textsuperscript{8} See, e.g., Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (Cal. Dist. Ct. App. 1959) (employer was free to terminate at will the indefinite employment contract of business agent); Land v. Delta Air Lines, Inc., 130 Ga. App. 231, 203 S.E.2d 316 (1973) (flight service agent’s employment contract for indefinite period of time is terminable at will of either party); Jorgensen v. Pennsylvania R. Co., 25 N.J. 541, 138 A.2d 21 (1958) (employment contract for indefinite period of time is terminable at will of either party); Tuttle v. Kernersville Lumber Co., 263 N.C. 216, 199 S.E.2d 249 (1964) (employment contract of general manager of lumber company providing for payments based on percentage of profits so long as matters proved satisfactory amounted to contract for indefinite period that was terminable at the will of either party); Webster v. Schauble, 65 Wash. 2d 849, 400 P.2d 292 (1965) (discharge of employee from brokerage house was valid despite lack of just cause for the termination and severe injury to the employee). See generally 53 Am. Jur. 2d Master and Servant § 43 (1970); Annot., 62 A.L.R.3d 271 (1975).

\textsuperscript{9} For a discussion of these tort theories, see notes 158-229 and accompanying text infra.

\textsuperscript{10} For a discussion of the implied contract theories, see notes 123-57 and accompanying text infra.

\textsuperscript{11} For a discussion of these public policy theories, see notes 166-229 and accompanying text infra.

\textsuperscript{12} For a discussion of the federal statutes limiting the employment at will rule, see notes 37-71 and accompanying text infra.

\textsuperscript{13} For a discussion of the state statutes limiting the employment at will rule, see notes 72-86 and accompanying text infra.

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judicial exceptions. This situation stands in sharp contrast to the legal milieu in other developed industrial countries that have adopted statutes specifically protecting employees from dismissal at will by their employers.\textsuperscript{14}

In recent years, the employment at will doctrine has been extensively criticized and a number of different recommendations for modifying or abrogating the doctrine have been made.\textsuperscript{15} Notwithstanding the variety of approaches suggested by the commentators to modify the harsh effect of the at will doctrine, virtually all\textsuperscript{16} agree that the doctrine is an anachronism and should be abandoned. This article will first describe the origins of the rule. Then it will analyze the extent and effectiveness of the statutory limitations currently placed on the rule and review statutory alternatives under the laws of several foreign countries. It will also closely examine the judicial approaches to restricting the rule and analyze its underlying economic and social justifications. Finally, the article will propose reforms to address the critical problems presented by the employment at will doctrine.

II. ORIGINS OF THE AT WILL DOCTRINE

Prior to the industrial revolution in the late nineteenth century, the law of employment in the United States was status-based.\textsuperscript{17} The principles of status derived from the relationship of the lord to the servant under the feudal system and encompassed a
structure based on paternalistic customs and reciprocal rights and responsibilities created to secure the master-servant relationship.\(^{18}\) Under these principles of status, a hiring at will was deemed to be a hiring for one year\(^{19}\) and dismissal during the term was required to be for just cause.\(^{20}\)

During the latter part of the nineteenth century, however, the United States experienced a surge in industrial growth and with it a shift in political and social attitudes to an insistence "on freedom of bargaining as the fundamental and indispensable requisite of progress."\(^{21}\) In Professor Maine's classic phrase, "the movement of the progressive societies has hitherto been a movement \textit{from Status to Contract}."\(^{22}\) The traditional protections of the status relationship were abruptly discarded during this period of laissez-faire.

The shift from status to contract had a profound impact upon the employment relationship. In a treatise written during this laissez-faire era, Horace Wood observed that a hiring for an indefinite period is presumptively a hiring at will:

With us the rule is inflexible, that a general or indefinite hiring is \textit{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. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. . . . [I]t is an indefinite hiring and is terminable at the will of either party, and in this respect there is no distinction between domestic and other servants.\(^{23}\)


19. \textit{Id.} at 1439.

20. \textit{Id.}


This so-called "Wood's rule" was a direct manifestation of the "pure" law of contract adopted during this period which, as one commentator suggests, evolved hand in hand with the adoption of liberal economic and free market policies during this period of rapid industrial growth: "In both theoretical models—that of the law of contracts and that of liberal economics—parties could be treated as individual economic units which in theory, enjoyed complete mobility and freedom of decision. . . ." This at will rule enunciated by Wood conforms to the free market model of maximum freedom for individual action.

The operation of Wood's rule was presumptive; an employee would be bound to his employer only if he and his employer clearly intended him to be bound. If there were no such intent, then he was free to sell his services to another, and likewise, the employer was entitled to terminate the employment relationship at any time.

The employee's right to terminate the employment relationship at will provided a doctrinal basis for some courts to provide a corresponding right to the employer. In affirming the employer's

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24. See G. Gilmore, supra note 1, at 6. Gilmore defines the pure law of contract as an area of abstract relationships:

"Pure" contract doctrine is blind to details of subject matter and person. It does not ask who buys and who sells, and what is bought and sold. . . . Contract law is abstraction—what is left in the law relating to agreements when all particularities of person and subject matter are removed.

Id. (quoting L. Friedman, supra note 1, at 20). See also O. W. Holmes, The Common Law (1881) (containing a precise analysis of the doctrines of this judicial period in American history); Protecting At Will Employees, supra note 15, at 1825 n.53.

25. L. Friedman, supra note 1, at 21.

26. See H. Wood, supra note 23 and accompanying text. An employer and his employee were required to observe all the formalities of contract law in order to create a contract for employment which would not be subject to the at will doctrine. Without such formal contractual arrangements, courts were loathe to find that a nonterminable contract existed. See generally G. Gilmore, supra note 1, at 21-22. Establishing that the employee's employment was other than at will posed an enormous problem for the employee:

He must be able to prove that this contract, either expressly or implicitly, has a definite duration. In situations where the employment relationship was contemplated by the employee to last for a lifetime, permanently and/or otherwise extended duration, he must show that he has supplied an additional consideration to bind the employer for such a time, or that an express provision clearly shows the parties' intention to make the employment relationship endure for such time. Failing this, the contract is terminable at will by the employer, with or without cause, and no right of action for a wrongful discharge will lie despite the nature of the dismissal. Where there is no definite term of employment, and where the employee is not covered by any relevant statute, he is defenseless against arbitrary or abusive discharge.

right to terminate at will, these courts pointed to the absence of mutuality of obligation.27 Other courts denied employees the right to continued employment upon the basis of absence of consideration. These courts held that the employee's work, in and of itself, only entitled him to compensation for the work done, and could not support a promise for job security.28 These two strict, formal approaches to the contractual relationship were intended to promote and encourage the economic climate of entrepreneurship and industrial growth.29

The laissez-faire attitude which had fostered Wood's rule was also prevalent in the constitutional jurisprudence of the Supreme Court in the early twentieth century. In two cases the Supreme Court upheld an employer's right to discharge an employee solely because the employee had joined a union, thereby according recognition to Wood's rule. In the earlier case, Adair v. United States,30 the Court affirmed the principle that "the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé."31 The Court held that federal legislation which violates these rights by compelling an employer to retain an employee in the absence of a contract "is an invasion of the personal liberty as well as of the right of property guaranteed by [the Fifth] Amendment."32 Similarly, seven years later, the Supreme Court in Coppage v. Kansas33 held a state statute unconstitutional under the due process clause of the fourteenth amendment as a violation of individual property rights and an interference

27. See, e.g., Pitcher v. United Oil & Gas Syndicate, 174 La. 66, 69, 139 So. 760, 761 (1932). The Pitcher court observed that "[a]n employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition. . . . [I]f the contract of employment be not binding on the employee . . . then it cannot be binding on the employer; there would be lack of 'mutuality'." Id. It is interesting to note that application of the mutuality requirement in this context arises out of a purported concern for the freedom of the employee from bondage in his job. See Blades, supra note 15, at 1419 n.71.

28. See, e.g., Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439, 441 (7th Cir.), cert. denied, 379 U.S. 914 (1964); Skagerberg v. Blandin Paper Co., 197 Minn. 291, 295-300, 266 N.W. 872, 874-76 (1936) (because employee could not prove that additional consideration passed to his employer when he accepted employment, the promise of employment created only a hiring at will). For a criticism of the additional consideration theory, see Protecting At Will Employees, supra note 15, at 1819-20.

29. See Protecting At Will Employees, supra note 15, at 1826.


31. Id. at 174-75.

32. Id. at 172.

33. 236 U.S. 1 (1915).
with an employer's freedom to contract. The majority opinion clearly reflects the prevailing laissez-faire attitude of the period:

As to the interest of the employees, it is said by the Kansas Supreme Court . . . to be a matter of common knowledge that "employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making contracts of purchase thereof." No doubt, wherever the right of private property exists, there must be and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. . . . [S]ince it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.34

Justice Day's dissent from the majority opinion in Coppage presaged the view that would become dominant later in the twentieth century:

I think that the act now under consideration, and kindred ones, are intended to promote the same liberty of action for the employee, as the employer confessedly enjoys. The law should be as zealous to protect the constitutional liberty of the employee as it is to guard that of the employer. A principal object of this statute is to protect the liberty of the citizen to make such lawful affiliations as he may desire with organizations of his choice. It should not be necessary to the protection of the liberty of one citizen that the same right in another citizen be abridged or destroyed.35

III. Statutory Developments Limiting the At Will Doctrine

Contract law in the twentieth century has gradually abandoned the nineteenth century attitude of laissez-faire and its theory of unrestricted freedom of contract. This evolution is evident in increasing legislative restrictions which impinge on the parties' right to contract as they see fit for lawful purposes. One of the areas

34. Id. at 17 (citations omitted).
35. Id. at 40 (Day, J., dissenting).
which illustrates this trend most clearly is in the law of em-

The earliest twentieth century legislation restricting the con-
tractual aspect of the employment relationship was the Railway
Labor Act of 1926 (Railway Act) \[37\] which gave both railroad em-
ployers and employees the right to choose bargaining “without
interference, influence or coercion” \[38\] by one against the other.
The constitutionality of this statute and its limitations upon the
employer’s right to discharge employees for their union activities
was upheld by the Supreme Court in Texas & New Orleans Rail-
road Co. v. Brotherhood of Railway and Steamship Clerks.\[39\] In
this decision, the Supreme Court dismissed the Adair \[40\] and Cop-
page \[41\] opinions as “inapplicable”:

The Railway Labor Act of 1926 does not interfere
with the normal exercise of the right of the carrier to
select its employees or to discharge them. The statute is
not aimed at this right of the employers but at the inter-
ference with the right of employees to have representatives
of their own choosing. As the carriers subject to the Act
have no constitutional right to interfere with the freedom
of the employees in making their selections, they cannot
complain of the statute on constitutional grounds.\[42\]

This decision indicates the shift in jurisprudential thinking con-
cerning an employer’s fifth and fourteenth amendment freedoms.
While the Adair and Coppage decisions were premised on the
employer’s fundamental right to do with his property as he saw fit,
including the indiscriminate hiring and firing of employees in con-
nection with his property or business, the Texas & New Orleans
Railroad Co. decision indicates that the Court no longer held these
rights inviolate when certain counterbalancing social interests were
at stake, such as those reflected in the Railway Act.

\[36\] See Protecting At Will Employees, supra note 15, at 1827-28.

\[37\] Ch. 347, 44 Stat. 577 (1926) (current version at 45 U.S.C. §§ 151-162;
(1976)).

\[38\] Ch. 347, § 2, 44 Stat. 577 (current version at 45 U.S.C. § 152 (1976)).

\[39\] 281 U.S. 548 (1930).

\[40\] 208 U.S. 161 (1908). For a discussion of Adair, see text accompanying
notes 30-32 supra.

\[41\] 236 U.S. 1 (1915). For a discussion of Coppage, see text accompanying
notes 33-35 supra.

\[42\] 281 U.S. at 570-71.
In 1934, Congress enacted the National Labor Relations Act (NLRA) \(^{43}\) which provided employees with the right to unionize free of intimidation or coercion from their employers, including freedom from dismissal for engaging in union activities.\(^{44}\) This legislation withstood constitutional attack in the landmark case of \textit{NLRB v. Jones & Laughlin Steel Corp.}\(^{45}\) Of particular significance was the Supreme Court's distinction in that case between the "normal" right of the employer to discharge an employee and the use of that right "as a means of intimidation and coercion."\(^{46}\) As one commentator has noted, the suggestion in \textit{Jones & Laughlin Steel Corp.} that restrictions may be placed upon the employer's right to discharge to prevent it from being used as a means of oppression "is worthy of the most general application."\(^{47}\)

Since the enactment of the NLRA, additional federal legislation has been passed that limits the employer's right of discharge both in the private and public sectors as well as in the unionized and non-unionized sectors. In particular, these statutes fall into three categories: 1) those protecting certain employees from discriminatory discharge; 2) those protecting certain employees in their exercise of statutory rights; and 3) those protecting certain employees from discharge without cause.

An example of the first category is Title VII of the Civil Rights Act of 1964 \(^{48}\) which prohibits discrimination against employees based on race, creed, religion, national origin or sex.\(^{49}\) Although its primary focus is upon hiring, promotion and seniority practices,\(^{50}\) this statute has been used in challenging the employer's right to

\(^{43}.\) Ch. 372, § 1, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1976)). The pertinent language of this statute is found in § 157: "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (1976).

\(^{44}.\) Id. §§ 157-158.

\(^{45}.\) 301 U.S. 1 (1937). In upholding the constitutionality of the NLRA, the Supreme Court was particularly concerned with the employee's lack of equal bargaining power in contracting the terms of his employment with his employer. \textit{Id.} at 33. The Supreme Court, by upholding the NLRA, thereby acknowledged that this imbalance in bargaining power is subject to legislative correction. Freedom of contract, therefore, no longer protects the employment relation from minimum standards of fairness and consistency with social reforms.

\(^{46}.\) \textit{Id.} at 45-46.

\(^{47}.\) Blades, \textit{supra} note 15, at 1418.


\(^{49}.\) \textit{Id.} § 2000e-2.

\(^{50}.\) See \textit{id.} See also Summers, \textit{supra} note 15, at 493.
discharge employees for discriminatory reasons.\(^{51}\) Another example is the Consumer Credit Protection Act of 1970,\(^{52}\) under which an employer may not dismiss an employee whose wages have been made subject to garnishment for indebtedness.\(^{53}\) Additional federal statutes protect other categories of employees such as the handicapped,\(^{54}\) public employees serving jury duty,\(^{55}\) and the aged.\(^{56}\)

The statutes which fall in the second category protect employees from discharge for exercising their rights as provided in the particular statutes. Protective provisions are included in the Fair Labor Standards Act of 1938,\(^{57}\) the Occupational Safety and Health Act of 1970,\(^{58}\) and the Employee Retirement Income Security Act of 1974.\(^{59}\)

The above federal statutes restricting the employer's right of discharge are aimed at employees who represent certain special interest groups or employees warranting protection by virtue of their exercise of certain statutory rights, and in most cases these statutes protect absolutely against discharge.\(^{60}\) There is, however, a third class of federal statutes which do not protect absolutely against dismissal, but protect only against dismissal “except for cause.” The employees who are protected under one of these statutes are veterans who, upon release from military service, are

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\(^{53}\) Id. § 1674.

\(^{54}\) Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976) (providing that handicapped persons may not be excluded from federally funded programs).

\(^{55}\) 18 U.S.C. § 245(b) (1976) (imposing criminal sanctions for threatening dismissal of a federal employee because of jury service or because of race, color, national origin or religion); 28 U.S.C. § 1875 (Supp. IV 1980) (prohibiting discharge for service as grand or petit juror in federal court).


\(^{58}\) 29 U.S.C. §§ 651-678 (1976). This Act prohibits discharge of or discrimination against any employee for instituting an action, \textit{inter alia}, under the Occupational Safety and Health Act. Id. § 660(c) (1976).

\(^{59}\) 29 U.S.C. §§ 1001-1381 (1976 & Supp. IV 1980). This Act provides protection from discharge for employees who exercise their retirement protection rights under the Act. Id. §§ 1132(a), 1140.

\(^{60}\) For a discussion of these statutes see notes 48-59 and accompanying text supra.
entitled to return to their former jobs and may not be dismissed within one year except for cause. 61 Such cause has been defined as that which “a fair-minded person may act upon” 62 and has been compared to the type of protection afforded employees under collective bargaining agreements limiting dismissal to just cause. 63 Employees covered by civil service laws and regulations are protected under another statute which provides that these employees may not be dismissed except “for such cause as will promote the efficiency of the service.” 64

Federal employees have recently received statutory protection against reprisal for the lawful disclosure of information which the employee reasonably believes evidences a violation of any law, rule or regulation, mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 65

In addition to these statutes, a sizeable segment of the United States work force is contractually protected from unjust dismissal pursuant to collective bargaining agreements. Under Section 8(d) of the NLRA, 66 unions and employers are required to bargain collectively over the terms and conditions of employment, which typically include the terms upon which employees may be dismissed. 67 Most collective bargaining agreements contain language prohibiting dismissal “without cause.” This term has been defined through numerous arbitration decisions concerning collective bargaining agreements. 68 Accordingly, accepted standards for what constitutes an unjust dismissal have been developed over the years. 69

66. 29 U.S.C. § 158(d) (1976). For the historical background of this Act, see notes 43-47 and accompanying text supra.
67. Approximately 80% of all members of unions are protected from unjust dismissal in collective bargaining agreements. Peck, supra note 15, at 8.
69. For a discussion of these standards, see Summers, supra note 15, at 499-508.

Although the majority of collective bargaining agreements state simply that discharge may be made only for “just cause,” courts further define this standard by stating that this term includes such causes as refusing to obey orders, working inefficiently, and breaking company rules. See, e.g., NLRB v.
Although the United States has not adopted a statute protecting all employees from unjust dismissal, legislation of this nature was introduced in Congress in 1980 as part of the Corporate Democracy Act.\footnote{H.R. 7010, 96th Cong., 2d Sess. (1980).} Congress, however, failed to enact this bill. Title IV of the Act would have amended the NLRA for the purpose of protecting all employees from dismissal except for "just cause":

It is further declared to be the policy of the United States to protect employees in the security of their employment by ensuring that they are not deprived of such employment on the basis of their having exercised their constitutional, civil, or other legal rights, or because of their refusal to engage in unlawful conduct as a condition of employment.

Employees shall have the further right to be secure in their employment from discharge or adverse action with respect to the terms or conditions of their employment except for just cause.

The term "just cause" shall be defined in accordance with the common law of labor contracts established pursuant to section 301 of the National Labor Relations Act, except that such term shall not include (A) the exercise of constitutional, civil, or legal rights; (B) the refusal to engage in unlawful conduct as a condition of employment; (C) the refusal to submit to polygraph or other similar tests; or (D) the refusal to submit to a search of someone's person or property, other than routine inspections, conducted by an employer without legal process.\footnote{Mueller Brass Co., 509 F.2d 704, 711 (5th Cir. 1975) ("[i]f the specific employee happens not only to break a Company regulation but also to evince a pro-Union sentiment, that coincidence alone is not sufficient to destroy the just cause for his discharge or suspension"). Chemvet Laboratories, Inc. v. NLRB, 497 F.2d 445, 452 (8th Cir. 1974) (citing NLRB v. Finesilver Mfg. Co., 400 F.2d 644, 648-49 (5th Cir. 1968)) (direct defiance of an employer's order is good cause for discharge); NLRB v. Birmingham Publishing Co., 262 F.2d 2, 9 (5th Cir. 1958) ("[i]f an employee is both inefficient and engaged in union activities, that is a coincidence that does not destroy the just cause for his discharge"). As Professor Summers has observed, there are several fundamental concepts embodied in arbitrators' decisions interpreting "just cause." See Summers, supra note 15, at 501-08. First, employees must be made aware of what activities have been proscribed by the employer. Id. at 502-03. Secondly, "just cause" decisions have adopted the concept that all employees must be treated equally. Id. at 503. Finally, employees must be treated with procedural fairness; the offense must be specified and proven. Id. at 503-04.}


71. Id. § 401.
At the state level there are a variety of statutes designed to protect workers from discriminatory discharge for filing workmen's compensation claims. There are also numerous state statutes which parallel federal legislation. For example, at least fifteen states have adopted statutes similar to the NLRA and many states prohibit discrimination in employment on the basis of such factors as race, creed, nationality, sex or age. In addition, a number of states have statutes prohibiting discharge or other punitive actions taken for the purpose of influencing voting or, in some states, political activity. At least one state has protected state government employees from discipline for disclosure of public interest information.

Michigan has recently enacted a Whistleblowers' Protection Act which provides protection to employees who report a violation or a suspected violation of state, local or federal law or who participate in hearings, investigations, legislative inquiries or court actions. It applies to all persons who have one or more employees, including agents of employers and the state or a political subdivision of the state. An employee is defined as a "person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied," and includes "a person employed by the state or a political subdivision of the state except state classified civil service." The Act pro-


73. See Summers, supra note 15, at 492.

74. See, e.g., CAL. GOV'T CODE § 12921 (West 1980) (declaring the opportunity to seek and maintain employment without discrimination is a civil right); MASS. GEN. LAWS ANN. ch. 149, § 24K (West Supp. 1982-83) (prohibiting discrimination against handicapped persons); MINN. STAT. ANN. § 363.03(2) (West 1966) (prohibiting discrimination by employers in hiring or treatment of employees on the basis of "race, color, creed, religion, or national origin."); N.Y. EXEC. LAW § 296 (McKinney 1982) (barring discrimination in employment based on "age, race, creed, color, national origin, sex, or disability, or marital status").

75. See, e.g., CAL. LAB. CODE § 1102 (West 1971); COLO. REV. STAT. § 8-2-108 (1973); N.Y. ELEC. LAW § 17-154(5) (McKinney 1978). See also D.C. CODE ANN. § 1-2514(b) (1981).

76. See COLO. REV. STAT. §§ 24-50.5-103 to -105 (Supp. 1981).


78. Id. § 15.362.

79. Id. § 15.361(b).

80. Id. § 15.361(a).

81. Id.
hibits the employer from discharging, threatening or otherwise discriminating against an employee who reports a violation or suspected violation unless the employee knows the report is false.\textsuperscript{62} Civil actions for violations may be brought within 90 days for injunctive relief or actual damages or both.\textsuperscript{83} A court may order, as appropriate, reinstatement, the payment of back wages, full reinstatement of fringe benefits and seniority rights, actual damages, and costs of litigation including reasonable attorney fees and witness fees or any combination of these remedies.\textsuperscript{84} Civil fines of up to $500 may also be imposed.\textsuperscript{85} A similar statute was recently enacted in Connecticut.\textsuperscript{86}

The statutory protection provided by federal and state legislation, nonetheless, remains fragmentary and incomplete. It is estimated that between sixty and sixty-five percent of all American employees are hired on an at will basis, while another twenty-two percent are unionized and fifteen percent are federal or state

\textsuperscript{62} Id. § 15.362. This section provides:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

\textsuperscript{63} Id. § 15.363(1).

\textsuperscript{64} Id. § 15.364.

\textsuperscript{65} Id. § 15.365.

\textsuperscript{66} See Conn. Pub. Act No. 82-289, 4 Conn. Leg. Serv. 1982 (West). This Act, effective October 1, 1982, provides:

No employer shall discharge, discipline or otherwise penalize any employee because the employee . . . reports . . . a violation or a suspected violation of any state or federal law or regulation or any municipal ordinance or regulation to a public body, or because an employee is requested by a public body to participate in an investigation, hearing or inquiry held by that public body, or a court action. The provisions of this subsection shall not be applicable when the employee knows that such report is false.

Any employee who is discharged, disciplined or otherwise penalized by his employer . . . may bring an action . . . for the reinstatement of his previous job, payment of back wages and reestablishment of employee benefits to which he would have otherwise been entitled if such violation had not occurred. An employee's recovery from any such action shall be limited to such items, provided the court may allow to the prevailing party his costs, together with reasonable attorney's fees to be taxed by the court. Any employee found to have knowingly made a false report shall be subject to disciplinary action by his employer up to and including dismissal.
employees. Accordingly, the at will doctrine survives today as the basic law governing employment.

IV. THE EMPLOYEE'S JOB SECURITY IN OTHER COUNTRIES

Professor Summers, and more recently, the New York City Bar Association's Committee on Labor and Employment Law have made surveys of the protection against dismissal afforded employees in several European countries. Their research shows that while each of the countries surveyed had at one point adhered to the doctrine of employment at will, each has replaced that doctrine with a statute prohibiting dismissal without just cause. The statutory standard for what constitutes an "unjust dismissal" in several of these countries is rather vague, thus leaving room for broad interpretation by the courts; and hence greater protection for the employee. The breadth of these statutes, together with their inclusion of certain key provisions covering such areas as adjudication of claims and employee remedies, provides a pointed contrast to the lack of protection against unjust dismissal afforded employees in the United States.

Great Britain abandoned the common law rule of termination at will in 1971 by adopting a comprehensive unfair dismissal law which covered both blue and white collar workers as well as professionals and managers. Portions of this act relating to unfair

87. See Protecting At Will Employees, supra note 15, at 1816 n.2 (citing U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 427 (1979)).
89. See Committee Report, supra note 15, at 175-80.
91. For a discussion of the statutes providing employee protection in Great Britain, Canada, France, Germany, and Italy, see notes 92-122 infra. For a discussion of similar statutes in Sweden, Japan, and Puerto Rico see Summers, supra note 15, at 515-19 and Committee Report, supra note 15, at 177-79.
92. For a discussion of the vagueness of some of these statutes, see text accompanying notes 96 & 112-13 infra.
93. This comparison does not take into account employees in the United States belonging to unions and who are therefore afforded the protection of the National Labor Relations Act. For a discussion of this Act, see notes 43-47 and accompanying text supra.
dismissals were subsequently consolidated in the Employment Protection Act of 1978. This statute leaves the definition of unfair dismissal vague, but states that fair dismissal may be for reasons "related to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, or related to the conduct of the employee." Alternatively, the employer has the burden of showing that the dismissal was for "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held." Under this statute the employer has the burden of proving that dismissal was fair. The determination of the fairness of the dismissal will depend on whether the employer can show that under the circumstances he "acted reasonably in treating [the employee's acts] as a sufficient reason for dismissing the employee." Finally, this Act provides for a variety of remedies for unfair dismissal: fines, reinstatement, and re-engagement.

Canada in 1978 adopted an unjust dismissal statute which provides protection only to nonmanagerial employees who have passed a 12-month probationary period with their employer. An em-

96. See id. §§ 54, 57.
97. Id. § 57(1)(2)(a).
98. Id. § 57(1)(b).
99. Id.
100. Id. § 57(1)(3).
101. Id. § 68(2).
102. Id. § 69(1)(2)-(3). The Act defines reinstatement as follows:
(2) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed, and on making such an order the tribunal shall specify—
(a) any amount payable by the employer in respect of any benefit which dismissal, including arrears of pay, for the period between the date of termination of employment and the date of reinstatement;
(b) any rights and privileges including seniority and pension rights, which must be restored to the employee; and
(c) the date by which the order must be complied with.
Id. § 69(1) (2).
103. The Act defines re-engagement as follows:
(4) An order for re-engagement is an order that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment, and on making such an order the tribunal shall specify the terms on which re-engagement is to take place . . . .
Id. § 69(1)(4).
ployee bringing an action under this statute is heard by a government inspector who attempts a conciliation.\textsuperscript{105} If this fails, the employee may refer his case to the Minister of Labor who appoints an adjudicator whose decision is final.\textsuperscript{106} An employee may be entitled not only to damages, but also to back pay and reinstatement if his dismissal is found unjust.\textsuperscript{107}

France has been operating under an \textit{abus de droit} statute since 1928.\textsuperscript{108} Under this statute an employee may not be dismissed for any of the following reasons: illness or industrial injury, pregnancy, political beliefs, exercising rights of citizenship, engaging in a strike, or purely personal dislike by his employer.\textsuperscript{109} An employee may be awarded damages but not reinstatement.\textsuperscript{110} The employee's complaint is heard before a special tribunal after a conciliation has been attempted, and under the Law of July 13, 1973, the employer must show that there was a real and serious cause for the dismissal upon a written request for such an explanation by the employee.\textsuperscript{111}

In Germany, a statute enacted in 1951 provided that a dismissal must be voided if it were not “socially warranted.”\textsuperscript{112} The German statute defined this term broadly:

“Socially unwarranted dismissal” means any dismissal not based on reasons connected with the person or conduct of the employee or on urgent service needs which preclude his continued employment in the undertaking. The burden of proving the facts on which the dismissal is based shall lie upon the employer.\textsuperscript{113}

Decisions of labor courts in Germany suggest that dismissals will be upheld for incompetence, negligence in work, repeated absenteeism, insubordination, disruption of order, or criminal activity and that “[t]he conduct must be related to the job and must be

\begin{footnotesize}
\begin{enumerate}
\item[106.] Id. § 61.5(6).
\item[107.] Committee Report, supra note 15, at 178.
\item[108.] Id. at 176; Summers, supra note 15, at 510.
\item[109.] See Summers, supra note 15, at 509-10.
\item[110.] Id. at 510.
\item[113.] Id. § 1(2), quoted in Summers, supra note 15, at 511.
\end{enumerate}
\end{footnotesize}
such that dismissal is necessary to effective operations." 114 Since the statute invalidates the dismissal, an employee who successfully invokes the statute never loses his job and hence has a remedy equivalent to reinstatement. In addition, the wronged employee is entitled to back pay. 115

Italy has also adopted several just cause statutes which, like Canada's statute, cover employees subsequent to a probationary period of employment. 116 Just cause is again not defined in these statutes 117 but has, through judicial interpretation, included dismissal for fraud, theft, disloyalty, chronic absenteeism, and serious or dangerous insubordination. 118 An employee must first bring his action to the labor office for conciliation and, if this fails, the parties may agree to arbitrate the issue or the employee may pursue his complaint in the courts. The burden of proving just cause rests on the employer. A successful employee may be entitled to the remedies of both reinstatement and damages. 119

In the early 1960's, the International Labor Organization (ILO) adopted Recommendation 119 Concerning Termination of Employment at the Initiative of the Employer. 120 The recommended statute provides that termination should only occur for "a valid reason" and delineates invalid reasons for dismissal which include

(a) Union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;

(b) Seeking office as, or acting or having acted in the capacity of a worker's representative;

115. Id. at 512-13.
117. See Norme sui licenziamenti individuali, Law 15, July 15, 1966, art. 1, Rac. Uff. 2538 (1966). This statute incorporates the civil code's definition of just cause. Id. Section 2119 of this code defines just cause in the negative: it constitutes neither bankruptcy by the employer nor forced administrative liquidation of his business. Codice civile, § 2119.
118. See Committee Report, supra note 15, at 177.
119. Id.
120. Id. at 179. The ILO proposal is presented in International Labor Report, 18 Rutgers L. Rev. 510 (1964).
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(c) The filing in good faith of a complaint or the participation in a proceeding against an employer involving alleged violation of laws or regulations; or

(d) Race, color, sex, marital status, religion, political opinion, national extraction or social origin.\textsuperscript{121}

The ILO Recommendation does not suggest reinstatement as a remedy in every instance but does suggest that a worker found to be unjustly discharged should be entitled to monetary damages unless he is reinstated with back pay.\textsuperscript{122}

V. JUDICIAL MODIFICATIONS OF THE AT WILL DOCTRINE

A. A Cause of Action Under Contract Theories

Some judicial inroads have been made in the at will doctrine predicated upon contract or implied contract principles. Cases cutting back on the doctrine have relied upon various arguments: the dismissal was improper because the employee had detrimentally relied on the employer's promise of work for a reasonable period of time;\textsuperscript{123} the employment was in fact not at will because of implied-in-fact promises of employment for a specific duration which meant that the employer could not terminate the employee without just cause;\textsuperscript{124} the employment contract contained express or implied provisions that the employee would not be dismissed so long as he satisfactorily performed his work;\textsuperscript{125} the employer had

\begin{itemize}
  \item \textsuperscript{121} Id.
  \item \textsuperscript{122} Id. at 180.
  \item \textsuperscript{124} See, e.g., Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880, 891 (1980) (evidence of assurances of job security in company manual stating policy not to discharge without just cause sufficient to create a question of fact for the jury). For further discussion of Toussaint, see notes 129-35 and accompanying text infra. See also Lanier v. Alenco, 459 F.2d 689 (5th Cir. 1972) (evidence sufficient to establish an oral contract of employment for one year).
  \item \textsuperscript{125} See, e.g., Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (Cal. Dist. Ct. App. 1959) (allegation that duration of employment was for such period as work was satisfactory established foundation for a cause of action); Bondi v. Jewels by Edwar Ltd., 267 Cal. App. 2d 672, 73 Cal. Rptr. 494 (Cal. Ct. App. 1968) (allegation that employer made oral agreement to employ the plaintiff for so long as plaintiff satisfactorily performed his duties raised question of fact as to whether the discharge was proper); Cactus Feeders, Inc. v. Wittler, 509 S.W.2d 934, 937 (Tex. Civ. App.
assured the employee that he would not be dismissed except for cause; or that upon entering into the employment contract, the employee gave consideration over and above the performance of services to support a promise of job security.

Cases applying traditional implied contract theory frequently involve reliance by an employee on personnel manuals which contain some assurance of job security, often in the form of a provision stating that employees shall be discharged only for "cause." The Supreme Court of Michigan has recently extended this theory in Toussaint v. Blue Cross & Blue Shield. Toussaint was employed in a middle management position by the defendant and had inquired specifically about job security when he was hired. He testified that the defendant’s representatives assured him orally that he would not be fired so long as he did his job. He was at that time given a manual of personnel policies which reinforced the oral assurance of job security. When Toussaint was fired, he brought a cause of action against the defendant claiming that his discharge violated his employment contract which, pursuant to language in the company's personnel manual, permitted discharge only for

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126. See, e.g., Comfort & Fleming Ins. Brokers, Inc. v. Hoxsey, 26 Wash. App. 172, 613 P.2d 138 (1980) (breach of employee's contract term specifying "termination for good cause shown" provided a defense to plaintiff employer's action for breach of covenant not to compete); Ryan v. Upchurch, 474 F. Supp. 211 (S.D. Ind. 1979) (employee reliance on promise that discharge would only be for cause required employer to honor the commitment).

127. See, e.g., McNulty v. Borden, Inc., 474 F. Supp. 1111, 1119 (E.D. Pa. 1979) (trier of fact could conclude that plaintiff employee's sacrifice of other employment opportunities constituted additional consideration, thereby extending the contract for a reasonable period of time); Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 568 P.2d 764 (1977) (an indefinite employment contract is terminable only for just cause if the employee gives consideration in addition to the contemplated services); Brawthen v. H & R Block, Inc., 52 Cal. App. 3d 139, 124 Cal. Rptr. 845 (Cal. Ct. App. 1975) (detriment, in the form of relocation of family and foregoing of other business, if bargained for, will constitute sufficient consideration to support a contract for permanent employment).


130. Id. at 597-98, 292 N.W.2d at 884.
cause. The employer argued that Toussaint was merely an employee at will hired for an indefinite term and could therefore be dismissed at will. The Supreme Court of Michigan rejected this argument. Essentially abrogating the at will doctrine in cases where an employer has given some assurance of job security, the court held that:

1) a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term—the term is "indefinite," and

2) such a provision may become a part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements.

The court further held that employee reliance on the existence of such policy statements created a situation "instinct with an obligation" which could give rise to contractual rights in the employees. These rights may arise in the absence of evidence of mutual agreement to that effect, even though neither party has signed the statement of policy, and the employer, without notice, is entitled to amend the statement of policy unilaterally. Furthermore, the court stated that these rights may exist even when the statement of policy contains no reference to the specific employee, his job description, or his compensation, the policy was not referred to in preemployment interviews, and the employee did not learn of its existence until after his hiring.

No court has yet applied the Toussaint principle to an at will dismissal case. Recently, the New York Court of Appeals, however, in Weiner v. McGraw Hill, Inc. relied in part on assurances in a personnel handbook to sustain a cause of action for

131. Id. at 595, 292 N.W.2d at 880.

132. Id. at 598-99, 292 N.W.2d at 885.

133. Id. at 598, 292 N.W.2d at 885.

134. Id. at 613, 292 N.W.2d at 892 (citing Wood v. Lucy, Lady Duff-Gordon, 262 N.Y. 88, 118 N.E. 214 (1917); McCall Co. v. Wright, 133 A.D. 62, 162 N.Y.S. 775 (N.Y. App. Div. 1909)).

135. Id. at 613, 292 N.W.2d at 892. Critical to the court's holding was its disposition of the question of mutuality of obligation. The court held that the enforceability of a contract does not depend upon mutuality of obligation but rather upon consideration. Mutuality of obligation, it held, is useful as a rule of construction not of substantive law. Id. at 600, 292 N.W.2d at 885.

breach of contract by an employee who had been hired by a publishing company for an indefinite period. The New York court distinguished *Weiner* from *Toussaint* on the grounds that the plaintiff in *Weiner* presented a valid contract action, yet one of the sources of this contract was a personnel handbook containing assurances that employees would be dismissed only for just cause.  

In explaining the varied elements of the employee's contract, the court observed that

>[f]irst, plaintiff was induced to leave Prentice Hall with the assurances that McGraw-Hill would not discharge him without cause. Second, this assurance was incorporated into the employment application. Third, plaintiff rejected other offers of employment in reliance on the assurance. Fourth, appellant alleged that, on several occasions when he recommended that certain of his subordinates be dismissed, he was instructed by his supervisors to proceed in strict compliance with the handbook and policy manuals because employees could be discharged only for just cause. He also claims that he was told that if he did not proceed in accordance with the strict procedures set forth in the handbook, McGraw-Hill would be liable for legal action. In our view, these factors combine to present a question for trial: Was defendant bound to a promise not to discharge plaintiff without just and sufficient cause and an opportunity for rehabilitation?  

Several recent state court cases have led the way in imposing an additional limitation upon the applicability of Wood's rule in the situation where the discharge is abusive. These cases have recognized an implied contract cause of action under at will contracts of employment for discharge motivated by bad faith, malice or retaliation. This approach is predicated upon imposing an additional limitation upon the applicability of Wood's rule in the situation where the discharge is abusive. These cases have recognized an implied contract cause of action under at will contracts of employment for discharge motivated by bad faith, malice or retaliation. This approach is predicated upon imposing an additional limitation upon the applicability of Wood's rule

137. *Id.* The *Weiner* court suggested that the contract should not be invalidated on the sole ground of lack of mutuality of obligation, merely because the employee was free to quit at will, if the employer received valid consideration. *Id.* Earlier, the Appellate Division of the New York Supreme Court, basing its argument on the absence of mutuality of obligation, had held that an employer was not obligated to comply with the conditions of employment set forth in an employment manual. See Edwards v. Citibank, 74 A.D.2d 553, 425 N.Y.S.2d 327 (N.Y. App. Div. 1980).


139. For a discussion of Wood's rule, see notes 23-29 and accompanying text *supra*.

140. A similar cause of action has been based on tort theory and public policy as well. For a discussion of this cause of action, see notes 158-73 and accompanying text *infra*. 

http://digitalcommons.law.villanova.edu/vlr/vol28/iss1/1
implied duty on the part of the employer to terminate only in good faith. The leading case in this area is Fortune v. National Cash Register.\textsuperscript{141} The plaintiff alleged that his dismissal after forty years of service was motivated by his employer's desire to avoid paying him a commission on a five million dollar sale. Fortune had been hired under a written contract which was "terminable at will, without cause, by either party on written notice." Despite the express language in the contract, the Supreme Judicial Court of Massachusetts held that in this instance\textsuperscript{142} the "written contract contains an implied covenant of good faith and fair dealing, and a termination not made in good faith constitute[d] a breach of contract."\textsuperscript{143} The court based this implied covenant on the basic principles of good faith and fair dealing required of parties to contracts in commercial transactions.\textsuperscript{144}

In arriving at its decision, the court further relied on Monge v. Beebe Rubber Co.,\textsuperscript{145} a New Hampshire case, to support the proposition that good faith is implied in contracts terminable at will.\textsuperscript{146} The Monge decision is a more expansive adoption of the theory of abusive discharge. Monge had alleged that her oral contract of employment had been terminated because she had refused to date her foreman. The jury found in her favor and the Supreme Court of New Hampshire upheld the decision on the issue of liability but remanded the case on the issue of damages.\textsuperscript{147} In examining the issue of discharge, the court considered the evolution of social and economic conditions.\textsuperscript{148} The court stated that "[i]n 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 main-

\textsuperscript{141} 373 Mass. 96, 364 N.E.2d 1251 (1977).
\textsuperscript{142} Id. at 104, 364 N.W.2d at 1257. The court worded its decision such that the holding in Fortune could not be taken as a broad affirmation of an implied good faith requirement in every contract: "nor need we speculate as to whether the good faith requirement is implicit in every contract for employment at will. It is clear, however, that, on the facts before us, a finding is warranted that a breach of the contract occurred." Id.
\textsuperscript{143} Id. at 101, 364 N.E.2d at 1256.
\textsuperscript{144} Id.
\textsuperscript{145} 114 N.H. 130, 316 A.2d 549 (1974).
\textsuperscript{146} 373 Mass. at 104, 364 N.E.2d at 1257.
\textsuperscript{147} 114 N.H. at 133-34, 316 A.2d at 552. The jury awarded Monge damages for mental suffering. Because the supreme court characterized the cause of action as one sounding in contract not tort, it held that the award for mental suffering was not recoverable. Id.
\textsuperscript{148} Id. at 132, 316 A.2d at 551.
taining a proper balance between the two."  

The court then went on to 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."  

A recent decision applying the Monge rationale is Cleary v. American Airlines, Inc., involving an at will employee with eighteen years of satisfactory service who was allegedly discharged without cause. In Cleary, the California Court of Appeal held that "[t]ermination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts."  

A number of courts have thus circumvented the common law at will doctrine under implied contract theories by finding that contracts of employment contain an implied promise to deal in good faith. Although a number of jurisdictions subscribe to an implied good faith standard to protect an employee who has been wrongfully discharged in an at will contract of employment, a comparable number of decisions can be found in other jurisdictions which deny recovery on such a basis. Several commentators have expressed criticism of basing abusive discharge actions on contract theories, and have suggested that the issue is better addressed by a tort theory or by legislation.

149. Id.  
150. Id.  
152. Id. at 455, 168 Cal. Rptr. at 729.  
155. See, e.g., A Common Law Action, supra note 15, at 1454-56. One author, however, has suggested that contract law is the better avenue to provide protection to the at will employee. See Blackburn, Restricted Employer Discharge Rights: A Changing Concept of Employment at Will, 17 Am. Bus. L.J. 467 (1980). For an analysis of implied contractual rights in employment at will contracts, see Implied Rights, supra note 15.  
156. See, e.g., Blades, supra note 15; A Common Law Action, supra note 15; Protecting At Will Employees, supra note 15.  
EMPLOYEE TERMINATION AT WILL

B. A Cause of Action Under Tort Theories

Professor Blades is credited with creating the cause of action for "abusive discharge" under tort theory in his seminal piece on employment at will: 158

The existing sources of protection for the employee are patently inadequate. The question arises whether any other kind of sanction might be used. An appropriate legal response would be to confer on the afflicted employee a personal remedy for any damage he suffers when discharged as a result of resisting his employer's attempt to intimidate or coerce him in a way which bears no reasonable relationship to the employment. For convenience, a discharge so motivated might be termed an "abusive" discharge. 159

In developing this cause of action, Blades draws upon the analogous action of abuse of process in which a remedy is provided against the use of a legal right (access to the court system for settlement of disputes) for an ulterior purpose regardless of whether it can be otherwise justified. 160 Blades suggests that such emphasis on state of mind makes this tort-based type of action particularly appropriate as an approach to the problem of abusive dismissals. 161

As is the case for contractually based actions for wrongful discharge, 162 there are several distinct theories of liability within the rubric of tortious abusive discharge. Specifically, causes of action for abusive discharge have been based on intentional infliction of emotional harm, 163 tortious interference with employment relations, 164 and on a variety of theories of public policy. 165

158. See Blades, supra note 15.
159. Id. at 1413.
160. Id. at 1423.
161. Id.
162. For a discussion of causes of action sounding in contract, see notes 123-57 and accompanying text supra.
163. See, e.g., Agis v. Howard Johnson, 371 Mass. 140, 355 N.E.2d 315 (1976) (manager liable for intentional infliction of emotional harm for dismissing waitresses in alphabetical order in an attempt to pressure them into disclosing who was responsible for stealing food); Alcorn v. Anbro Eng'r Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (Cal. 1970) (en banc) (complaint which alleged plaintiff employee suffered emotional distress when employer maligned his race while firing him stated a cause of action).
164. See, e.g., RESTATEMENT (SECOND) OF TORTS § 766 (1979); Yaindl v. Ingersoll-Rand Co., 281 Pa. Super. 560, 422 A.2d 611 (1980). The Yaindl court refused to grant summary judgment to an employer charged with the tort of intentional interference with the performance of a contract for its...
Courts have become more willing to increase employee job security by imposing tort obligations on employers in connection with the employment contract or relationship.

In recent years, the most prevalent theory applied in abusive discharge cases is that the discharge violates statutory or other established public policy. A number of states have recognized this exception to the at will doctrine. An early case applying this theory defined public policy as "the principles under which freedom of contract or private dealing is restricted by law for the good of the community [or, alternatively] whatever contravenes good morals or any established interests of society." As the cases illustrate, however, one court's interpretation of public policy differs from that of another and these varying interpretations hinder the formulation of a clear and consistent statement of the rule. The Supreme Court of New Jersey recently observed that

[the sources of public policy [which may limit the employer's right of discharge] include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy . . . . Absent legislation, the judiciary must define the cause of action in case-by-case determinations.]

In general, the cases in which violations of public policy are found fall into several categories of dismissal for 1) refusing to

agent's dismissal of an employee allegedly because the employee criticized standards of product safety in the company. The Pennsylvania court suggested that several factors should be balanced in determining a wrongful discharge on this basis: the interest of the discharged employee "in making a living, his employer's interest in running its business, its motive in discharging [the employee] and its manner of effecting the discharge." Id. at 577, 422 A.2d at 620. See also Campbell v. Ford Indus., Inc., 274 Or. 243, 546 P.2d 141 (1976) (employee claimed that the officers and directors of his employer wrongfully interfered with his employment contract).

165. See notes 167-229 and accompanying text infra.


168. For a discussion of these conflicting judicial views of public policy, see notes 169-229 and accompanying text infra.

violate a statute; 170 2) exercising a statutory right; 171 3) performing a statutory obligation; 172 and 4) reporting an alleged violation of a statute of public interest. 173

1. Discharge for Refusal to Violate a Statute

Petermann v. International Brotherhood of Teamsters, 174 decided in 1959, is one of the earliest tort cases based on the public policy rationale. The employee alleged that the defendant employer had wrongfully discharged him in retaliation for the plaintiff’s refusal to perjure himself in legislative hearings concerning the employer’s business. 175 Because state statutes proscribed the commission of perjury or the suborning of perjury, 176 the California Supreme Court held that it was a violation of public policy to allow an employer to dismiss an employee who refused to perjure himself on his employer’s behalf. 177 The court granted the employee relief against his employer even though the perjury laws themselves provided no express civil remedy to an employee. 178 In support of the public policy argument, the court stated that “[t]he law must encourage and not discourage truthful testimony. The public policy of this state requires that every impediment, however remote to the above objective, must be struck down when encountered.” 179 Petermann represents a clear example of a situation in which limitations on the at will doctrine are appropriate: an employee should not be forced to choose between the commission of a crime for his employer and the loss of his employment. 180

170. For a discussion of refusal to violate a statute as a basis for the public policy exception, see notes 174-83 and accompanying text infra.

171. For a discussion of the exercise of a statutory right as a basis of the public policy exception, see notes 184-91 and accompanying text infra.

172. For a discussion of the performance of a statutory obligation as a basis of the public policy exception, see notes 196-207 and accompanying text infra.

173. For a discussion of the reporting of an alleged violation of a statute as a basis for the public policy exception, see notes 208-28 and accompanying text infra.


175. Id. at 188, 344 P.2d at 26.


177. 174 Cal. App. 2d at 189, 344 P.2d at 27.

178. Id.

179. Id.

180. Id.
The Petermann rationale was recently reaffirmed by the California Supreme Court in *Tameny v. Atlantic Richfield Co.*, a case in which an employee was allegedly dismissed for refusing to participate in a scheme to fix gasoline prices in violation of federal and state antitrust laws. In extending protection to the employee, the *Tameny* court summarized *Petermann* as stating:

> [E]ven in the absence of an explicit statutory provision prohibiting the discharge of a worker on such grounds, fundamental principles of public policy and adherence to the objectives underlying the state penal statutes require the recognition of a rule barring an employer from discharging an employee who has simply complied with his legal duty and has refused to commit an illegal act.\(^{182}\)

The California Supreme Court concluded that “an employer cannot condition employment upon required participation in unlawful conduct by the employee.”\(^ {183}\)

2. Discharge for Exercising a Statutory Right

The *Petermann* rationale has been extended beyond situations where an employer has compelled the violation of a statute and has been marshalled to protect an employee’s exercise of a statutory right such as filing for workers’ compensation. In *Frampton v. Central Indiana Gas Co.*, the Supreme Court of Indiana recognized an exception to the at will doctrine where it was alleged that the employee had been discharged in retaliation for filing a workers’ compensation claim. Relying on language in the state workers’ compensation statute which stated that no contract, agreement “or other device” would operate to relieve an employer of his obligations under the statute, the court held that a discharge,


182. 27 Cal. 3d at 176, 610 P.2d at 1333-34, 164 Cal. Rptr. at 842 (1980).

183. Id. at 178, 610 P.2d at 1136, 164 Cal. Rptr. at 845.


or threat of discharge, is such an unlawful device.\textsuperscript{186} The Indiana court observed that

[i]f employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation—opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation.\textsuperscript{187}

In an analogous case, \textit{Sventko v. Kroger Co.},\textsuperscript{188} the plaintiff alleged that her employment with the defendant had been terminated in retaliation for her filing of a workers' compensation claim. The Michigan trial court, however, granted the employer summary judgment on two grounds: 1) the legislature did not intend to prohibit such retaliatory discharges since there was a provision in the workers' compensation statute prohibiting "consistent discharges" of employees before they qualify under the Act, but no similar provision prohibiting discharges in retaliation for the filing of compensation claims; and 2) the public policy of the state did not prohibit such discharges.\textsuperscript{189} On appeal, the Michigan Court of Appeals recognized the public policy exception to the at will doctrine for retaliatory discharge in workers' compensation cases and reversed the trial court, stating that "[a]n employer cannot accept that benefit for himself [freedom from general liability for negligence provided by the worker's compensation act] and yet attempt to prevent the application of the act to the work-related injuries of his employees without acting in direct contravention of public policy. This Court cannot tolerate such conduct."\textsuperscript{190}

Although a number of jurisdictions have granted relief to employees who have been discharged in retaliation for filing a workers' compensation claim,\textsuperscript{191} many states have denied such relief by strictly construing the workers' compensation statute.\textsuperscript{192} For

\begin{thebibliography}{99}
\bibitem{186} 260 Ind. at 252, 297 N.E.2d at 428.
\bibitem{187}  Id. at 251-52, 297 N.E.2d at 427.
\bibitem{188} 69 Mich. App. 644, 245 N.W.2d 151 (1976).
\bibitem{189}  Id. at 646-47, 245 N.W.2d at 152-53.
\bibitem{190}  Id. at 648, 245 N.W.2d at 153-54.
\bibitem{191} See cases cited in Olsen, \textit{supra} note 16, at 269 n.21; \textit{Committee Report}, \textit{supra} note 15, at 212 n.137.
\bibitem{192} See \textit{Committee Report}, \textit{supra} note 15, at 212 n.137.
\end{thebibliography}
example, in a recent North Carolina case, *Dockery v. Lampart Table Co.*, the employee had relied on the *Frampton* interpretation of the statutory language "other device," which was also found in the North Carolina statute. The court, however, rejected the *Frampton* interpretation of the language, stating that if the legislature had intended to create a cause of action for wrongful discharge based on retaliation for an employee’s exercise of statutory rights, it would have created a body of law as it had with respect to union organizational rights.

3. *Discharge for Performing a Statutory Obligation*

The *Petermann* rationale has also been relied upon to create a public policy exception to the at will doctrine in jury duty cases. The leading case in this area is *Nees v. Hochs*, a case in which the Oregon Supreme Court upheld the plaintiff’s claim for compensatory damages based on an alleged retaliatory discharge for her service on a jury. Contrary to her employer’s desires, the plaintiff informed the clerk of the court that she would like to serve. When this fact came to light, the employer dismissed her. After reviewing the state’s constitution, statutes, and judicial decisions, the court held that the state had a public policy in favor of encouraging jury duty and that the will of the community would be thwarted if an employer were allowed to discharge his employees for jury service.

In reaching this result, the court concluded that “there can be circumstances in which an employer discharges an employee for such a socially undesirable motive that the employer must respond in damages for any injury done.”

In a similar cause of action for wrongful discharge based on the acceptance of jury duty, *Reuther v. Fowler & Williams, Inc.*, the Pennsylvania Superior Court had to look only as far as the statutes and constitution to determine that the state had a public policy in favor of such service. In light of both the state constitu-

195. 36 N.C. App. 299-300, 244 S.E.2d at 277.
196. 536 P.2d 512 (Or. 1975).
197. *Id.* at 513.
198. *Id.* at 516.
199. *Id.* at 515 (emphasis added).
tion's provision for a right to jury trial, as well as the duty imposed on individuals by statute to obey a jury summons, the court held that public policy would be jeopardized if dismissals of employees were allowed for accepting jury duty.

Some states, however, have refused to apply the public policy exception to jury duty cases, preferring to uphold the at will doctrine over any public policy arguments. The Supreme Court of Alabama, which had earlier rejected a public policy exception in a wrongful dismissal case involving the filing of a workers' compensation claim, likewise denied the exception in regard to a dismissal for jury service in *Bender Ship Repair, Inc. v. Stevens.* In this case, the plaintiff alleged that he had been dismissed for his service on a grand jury and based his claim for wrongful discharge on a state statute which protected employees from loss of their wages while serving on a grand jury. Turning a deaf ear to the public policy issues implicit in the statute and relying on a strict interpretation of the at will doctrine, the court granted summary judgment for the employer.

4. Discharge for Protecting the Public Interest

The most controversial public policy exception to the at will rule involves cases in which an employee acts in good faith to protect the public interest by disclosing information regarding his employer's violation of a law, regulation or moral principle. These cases are frequently referred to by the pejorative term "whistleblowing" and the employee is called the "whistleblower." Instead, we will use the term "public disclosure" and "disclosing employee." In recent years, some courts have allowed a cause of


204. See *Olsen,* *supra* note 16, at 274 n.43.


206. 379 So. 2d 594 (Ala. 1980).

207. *Id.* at 595.

208. For a discussion of "whistleblowing" generally and in the context of the discharge of employees, see *Committee Report,* *supra* note 15, at 185-87, 213 n.151. For a discussion of statutory protection of disclosing employees, see notes 77-86 and accompanying text *supra.*
action against an employer who has discharged an employee for reporting or disclosing business activities of the employer which the employee considered unlawful or unethical. For example, employees have successfully maintained causes of action based on discharge due to disclosure of their employer's violations of state and federal consumer protection and antitrust laws.209

Generally, courts have been reluctant to extend the public policy exception to include the employee who discloses information regarding his employer's statutory violation unless the violation is certain. In one of the earliest of the public disclosure cases, Geary v. United States Steel Corp.,211 the Pennsylvania Supreme Court denied the employee's cause of action. The plaintiff in Geary was an employee who had been with United States Steel Corporation for fourteen years and who had responsibility for sales of tubular products to the oil and gas industry. Geary became concerned that a particular product had not been adequately tested and constituted a danger to those who used it. He voiced his thoughts to his immediate superiors who ordered him "to follow directions." Nonetheless, Geary continued to express his concerns and, as a result of his efforts, the product was reevaluated and withdrawn from the market. Geary, however, was dismissed. He asserted that the dismissal was wrongful, malicious, and abusive and sought both punitive and compensatory damages for injury to his reputation, mental anguish, and direct financial harm.212 In denying Geary's cause of action, the Pennsylvania Supreme Court held that the interest which deserved the greatest protection was that of the employer in preserving the company's "normal operational procedures" from disruption:

The praiseworthiness of Geary's motives does not detract from the company's legitimate interest in preserving its normal operational procedures from disruption. In sum, while we agree that employees should be encouraged to express their educated views on the quality of their employer's products, we are not persuaded that creating a new non-statutory cause of action of the sort proposed by appellant is the best way to achieve this result.213

212. Id. at 173-74, 319 A.2d at 175.
213. Id. at 183, 319 A.2d at 180.
The court preemptorily dismissed Geary's argument that he was acting in the best interests of the public and his employer, stating that Geary was qualified only to sell the product and not to make an expert judgment in matters of product safety.\textsuperscript{214} In its closing remarks, the court left open the possibility for a different holding where a "clear mandate of public policy" had been violated.\textsuperscript{215} The court stated that it may be granted that there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened.\textsuperscript{216}

The court, however, did not feel that Geary's suit represented such a case.

In a strongly worded dissent, Justice Roberts stated that the public policy of the state had been deeply offended by Geary's discharge.\textsuperscript{217} In elaborating, he emphasized the importance to the public of product safety and that "the prevention of injury is a fundamental and highly desirable objective of our society."\textsuperscript{218} To further this objective, Justice Roberts suggested resort to the tort of wrongful discharge:

If the existence of the tort of wrongful discharge in these circumstances (assuming, as we must, the truth of all facts alleged) will keep employees like George Geary on corporate payrolls, both the employer's and the public's interest will have been served. Affording relief for arbitrary and retaliatory discharge in no way impinges upon the employer's right to discharge for cause. That difficult linedrawing may be involved is of no great moment, since courts are daily confronted with the task of separating wheat from chaff.\textsuperscript{219}

In \textit{Percival v. General Motors Corp.},\textsuperscript{220} the United States District Court for the Eastern District of Missouri followed the

\textsuperscript{214} \textit{Id.} at 181, 519 A.2d at 178-79.
\textsuperscript{215} \textit{Id.} at 185, 519 A.2d at 180.
\textsuperscript{216} \textit{Id.} at 184, 519 A.2d at 180.
\textsuperscript{217} \textit{Id.} at 187, 519 A.2d at 181 (Roberts, J., dissenting).
\textsuperscript{218} \textit{Id.}
\textsuperscript{219} \textit{Id.} at 189, 519 A.2d at 182 (Roberts, J., dissenting) (footnote omitted).
\textsuperscript{220} \textit{400 F. Supp. 1522 (E.D. Mo. 1975), aff'd, 539 F.2d 1126 (8th Cir. 1976).}
same line of reasoning applied in Geary. In Percival, the plaintiff, an executive engineer for General Motors for twenty-six years, alleged that he had been dismissed because he had attempted to correct false impressions given by the corporation to outside business associates and he had urged corporate management itself to correct misleading information conveyed to the public. The district court granted the employer's motion for summary judgment, holding that even if the employee's allegations were correct and could be proven, his dismissal did not constitute a serious enough breach of public policy to state a cause of action for wrongful or retaliatory discharge. The district court expressed the same concerns about the employment relation that had been presented in Geary: "[t]he courts which have recognized this non-statutory cause of action have done so cautiously, recognizing that a proper balance must be maintained between the employee's interest in earning his livelihood and the employer's interest in operating his business efficiently and profitably." The decision was upheld on appeal with the Eighth Circuit emphasizing the importance of respecting the employer's right to exercise unfettered judgment as to who should remain in his employ:

It may be conceded to plaintiff that there are strong policy arguments that can be made in support of the theory which he invokes; there are also strong policy arguments that can be made against it. It should be kept in mind that as far as an employment relationship is concerned, an employer as well as an employee has rights; and it should also be kept in mind that a large corporate employer such as General Motors, except to the extent limited by statute or contractual obligations, must be accorded wide latitude in determining whom it will employ and retain in employment in high and sensitive managerial positions.

Even when the employee's disclosure is in the interest of the public, courts have been reluctant to apply the public policy exception to factual situations in which the dismissal does not involve a violation of a specific statute or of a legislatively sanctioned public policy. The decision of the Supreme Court of Appeals of
West Virginia in *Harless v. First National Bank* suggests the type of disclosure which will sustain a cause of action for wrongful discharge by an employer. In *Harless*, the plaintiff alleged that he had been wrongfully discharged for attempting to convince his employer to comply with the state consumer credit laws and for disclosing certain incriminating files to the bank's auditors. In sustaining the plaintiff's action, the court reasoned that the "manifest public policy" embodied in the state law protecting consumers would be frustrated if an employee who attempted to ensure compliance with this law could be discharged without legal recourse. The court also stated that the at will doctrine should be tempered further by the principle that "where the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge."

Another example of retaliation for public disclosure which supports an action for wrongful discharge is *Palmateer v. International Harvester Co.* An employee of sixteen years alleged that he was dismissed for supplying information to local law enforcement officials concerning alleged illegal activities of a co-employee. The plaintiff alleged that his dismissal was based also on his willingness to assist in the investigation and to give testimony at trial. The court held that the plaintiff had been discharged in violation of an established public policy, and explained that

"[t]here is no public policy more basic, nothing more implicit in the concept of ordered liberty ..., than the enforcement of a State's criminal code. ... No specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but public policy nevertheless favors citizen crimefighters."

Language in such cases as *Geary*, *Percival*, *Harless*, and *Palmateer* seems to suggest that a plaintiff's success in a case of wrongful discharge will depend upon the value a particular court places on the public policy alleged to be violated. Unless legis-
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VI. TOWARD A PRINCIPLED APPROACH

The United States has witnessed significant changes in socioeconomic values which necessitate a reassessment of the at will rule. Formerly, employers were predominantly individuals who operated their own shops and were familiar with all their employees. Today, a great number of employers are large, multi-employer corporations which wield a tremendous amount of power over employees.

This section will examine the classical economic justifications for the at will rule, and the extent to which the assumptions upon which the rule is based have been eroded by changed circumstances. After establishing that these justifications for allowing the employer unbridled power “to run his business as he sees fit” are no longer valid, we will examine the interest of the employee in maintaining his employment by identifying the costs of the employment at will rule. Finally, we will propose a statutory solution that restores and maintains a proper balance among the legitimate interests of the employer, employee and society at large.

A. Classical Justifications

Historically, both the at will termination rule and the overall free market system have been justified on two grounds: freedom and efficiency. Freedom in this context means the ability to

229. A few states have in fact already enacted legislation which would remedy such situations. See notes 77-86 and accompanying text supra.


231. For this evaluation of the classical justifications for the at will rule, see notes 233-62 and accompanying text infra.

232. For a discussion of the costs of the at will rule, see notes 263-69 and accompanying text infra.

233. The presumption underlying the at will doctrine—namely that if the parties to a contract intended their agreement to endure for a definite period of time, they would have incorporated express terms manifesting such an intent in the contract—conformed to “a premise of complete social freedom; only if an individual clearly intended to obligate himself would the law enforce any restriction on his basic freedom.” Protecting At Will Employees, supra note 15, at 1825-26. In addition, by lifting the limitations on the employer’s freedom in the employment relationship, the at will rule was intended to further economic growth and entrepreneurship. See Feinman, The Development of the At Will Rule, 20 AM. J. LEGAL HIST. 118 (1976). In this manner, the at will rule enhanced the efficiency of the laissez-faire, capitalistic economic system.
choose, while efficiency refers to the careful allocation of resources at both the individual employer's level as well as throughout the entire economic system.\textsuperscript{234} Changes in the system, however, have rendered inapplicable these justifications for the at will rule.\textsuperscript{235}

The existence of a capitalistic system and the interplay of its necessary components were predicated upon three conditions: 1) full employment accomplished through flexible wages and prices;\textsuperscript{236} 2) the notion that labor, as one of the factors of production, was a commodity to be bought and sold;\textsuperscript{237} and 3) the equitable distribution of income according to contribution.\textsuperscript{238} Under the capitalistic model, the prices of goods and labor would fluctuate so that all labor would be employed and employees would accept their wages as an appropriate reward for their service. Unemployment would always remedy itself: wages would fall and employers would find it in their best interest to hire additional employees.\textsuperscript{239} Labor would also efficiently flow to the more desirable jobs, thereby penalizing bad employers and re-
warding the good employers. Consequently, a free labor market that is efficient and effective would insure that the individual desire for economic reward would also promote societal wealth and the public good.

B. Failure of the Classical Justifications

1. Freedom

In order for a worker to have freedom of choice, the underlying assumptions of full employment, labor as a commodity, and equitable distribution of income all must be met. However, none of them has proved to be valid and, consequently, the justification of the at will rule on the basis of freedom is illusory.

Full employment has never existed in the United States and it is highly unlikely that it will exist at any time in the foreseeable future. It is therefore meaningless to maintain that an employee

240. Freeman & Medoff, The Two Faces of Unionism, 57 PUB. INTEREST, Fall 1979, at 69.


242. Full employment has been defined as the level at which all those who are able, willing, and seeking work at prevailing wage rates are employed. H. Shapiro, Macroeconomic Analysis 342 (2d ed. 1970). Other economists define full employment as "the condition . . . when all available capital, labor, and management are being used to capacity," or, in a looser sense, as "the complete utilization of labor resources." J. Cronin, Economic Analysis and Problems 345 (1949).

While economists concede that while full employment is a desirable social goal, it is not possible due to the inevitable existence of unemployment in a free enterprise economy. N.F. Keiser, Economics: Analysis and Policy 14-16 (1965). There are four types of unemployment necessarily extant if the labor market is to function properly: 1) between-job or "frictional" unemployment; 2) technological or "structural" employment when jobs simply cease to exist; 3) seasonal unemployment; and 4) initial unemployment experienced by those entering the job market for the first time. M.A. Copeland, Toward Full Employment in Our Free Enterprise Economy 2-4 (1966). Consequently, even the concept of full employment must contemplate a rate of unemployment in the labor force of at least three to five percent. Gordon, Full Employment As a Policy Goal, in Employment Policy and the Labor Market 45-46 (A.M. Ross ed. 1965).

Unemployment has been a consistent part of American history. The highest unemployment rate between 1950 and 1970 was 6.8% of the civilian labor force in 1958. That figure marked an incredible reduction of unemployment since the depression when, for example, in 1933 approximately 25% of the civilian labor force was unemployed. M.A. Copeland, supra, at vi, 1. In the past ten years, the number of unemployed has fluctuated between 6% and 10% of the civilian labor force. For example, in the first half of 1981, 7.4% of the civilian labor force was unemployed. In 1980, the unemployment rate was 7% of the civilian labor force. The highest number of unemployed between 1970 and 1981 occurred in 1975 when 7.8 million people out of a civilian labor force totalling 93.1 million were unemployed. This represented 8.4% of the civilian labor force. Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract of the United States, National Data Book and Guide to Statistics 379 (102 ed. 1981) [hereinafter cited as Statistical
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who has no alternative employment available has the freedom to leave his job. The greater the level of unemployment, the more restricted is the choice of employment. With little choice, there is little freedom and in the present period of economic recession the worker is particularly lacking in choice.

Furthermore, as one commentator has observed, employees have rejected the notion that their work is a mere commodity and "that there is no relationship between man and his work other than the significance of the wage."243 Rather, many employees today believe that their labor is an integral part of their lives.244 Likewise, workers do not presently believe that they are equitably treated by the market place, especially in times of great unemployment.245 As one commentator has observed, employees feel they

Abstract. More recent unemployment figures have been increasingly dire. For instance, in September 1981, 10.1% of the civilian labor force over the age of 16 was unemployed. Arenson, On the Frontier of a New Economics, N.Y. Times, Oct. 31, 1982, at F1, col. 3.


244. Id. at 41. Some classical economists have maintained that labor is simply another commodity to be sold in its respective market subject to the laws of supply and demand. N.F. KEISER, supra note 242, at 523. Others, on the other hand, have maintained that the human personalities which make up the labor force cannot be perceived of as impersonal commodities. G. WATKINS, P. DODD, W. McNAUGHTON, P. PRASOW, THE MANAGEMENT OF PERSONNEL AND LABOR RELATIONS 85-86 (1950) [hereinafter cited as WATKINS & DODD]. For further discussion of the Watkins and Dodd approach, see note 245 infra.

While an employee's attitude towards his work is, of course, highly subjective, the Department of Commerce has attempted to quantify these attitudes in statistics. It recently reported a study on commitment to work by the National Opinion Research Center of the University of Chicago that was conducted in 1973-74 and 1976-77. The sample size of the 1973-74 study was 1,558 with 820 responding, while the sample size of the 1976-77 study was 1,514 with 842 responding. The participants in this study were asked whether they would continue to work if they had enough money to live on comfortably for the rest of their lives. In the 1973-74 study, 67% responded that they would continue working, while 33% would stop working. In the 1976-77 study, 69.6% would continue working, while 30.4% would stop working. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SOCIAL INDICATORS III, Commitment to Work 148, table 7/1 (1980) [hereinafter cited as SOCIAL INDICATORS III] (citing NATIONAL OPINION RESEARCH CENTER, UNIVERSITY OF CHICAGO, NATIONAL DATA PROGRAM OF THE SOCIAL SCIENCES, GENERAL SOCIAL SURVEYS, 1972-78: CUMULATIVE CODEBOOK (1978)).

245. J. BEHRMAN, supra note 230, at 52-53. The Department of Commerce reported that a dramatic decline in job satisfaction occurred between 1973-77 despite the continuing strong commitment to work. See SOCIAL INDICATORS III, supra note 244, at 306. See also WATKINS & DODD, supra note 244. These commentators have stressed that labor cannot be viewed as a commodity:

Labor resembles a commodity in that, like other objects of exchange, it commands a price on the market. The quality of exchangeability, however, does not reduce human beings to the level of impersonal things. The energy and skill which are sold by the laborer are inseparable from his life and personality; these are essentially a part of himself . . . . [The laborer's] own immediate welfare, the
are entitled to a “living wage” and a higher quality of work life. 246

Labor, therefore, is part of an economic system which, because of faulty assumptions, provides little mobility or freedom of choice. The lack of freedom is a result of, and exacerbated by unemployment, inequitable distribution of wealth 247 and an unacceptable, dehumanized view of labor as a factor of production. Consequently, it is specious to justify the at will employment rule on the basis of freedom of the worker.

2. Efficiency

The second justification for the at will rule—the efficient allocation of resources—is also without merit. This conclusion may be demonstrated through an examination of efficiency at both the macro (system-wide) and micro (company-wide) level.

The contention that the at will rule promotes efficiency at the macro level 248 is unsupportable because of the basic distortions in the market system as it operates today. The only component of the capitalistic system that remains valid or unchanged is economic motivation; the other components have been significantly altered. 249 Most significantly, individuals involved with production, those whose interests are represented by land, labor, and capital, have sought protection from the system through the government. Government intervention in response to this pressure has led to a mixed

welfare of his family, his future and consequently the future of those who depend upon his economic efforts, his health, and his very life—all are invariably involved in [the laborer's work product].

Id. at 85-86.

Furthermore, these commentators argue, laborers do not have the high degree of mobility which commodities enjoy, because workers are constrained by financial and familial considerations. A laborer is also characterized by extreme perishability; he cannot afford to wait for a better opportunity to sell his skill. Labor is further distinguished from commodities because once the labor force is diminished, it takes years to revitalize. Finally, laborers, unlike commodities, are not passive objects, but conscious human personalities. Id.

246. J. BEHRMAN, supra note 230, at 41. See also D. McGregor, The Human Side of Enterprise 33-49 (1960). The failure of these two assumptions is evidenced by the protection from the market place which the labor force has sought. For a discussion of labor’s effort to gain protection from the market place, see notes 253-55 and accompanying text infra.

247. For example, in 1970, 27.4% of American households earned incomes under $5,000, while .9% earned $50,000 and over. In 1979, 13.2% earned less than $5,000, while 4.1% earned over $50,000. Statistical Abstract, supra note 242, at 434.

248. The argument has been made that because the at will rule affords the employer complete freedom in the employment relationship, it enhances the efficiency of the laissez-faire economy. See Feinman, supra note 233.

249. J. BEHRMAN, supra note 230, at 35-58. For an enumeration of these six components, see note 234 supra.
economy with government playing a major role. Given the magnitude of its role, it is now untenable to maintain that the at will rule is necessary to promote efficient allocation of resources at the macro level.

Protectionism has taken a number of forms and has been sought by groups involved in all aspects of production. Industrialists and farmers sought "fair and reasonable" competition to assuage the effects of the market's "perfect" competition based upon the model of atomistic units of production. For instance, industry pressed for tariffs, quotas, subsidies, and even direct governmental support. Although tariffs were originally imposed to protect infant American industries, tariffs remain in force to protect a number of "mature" industries. Agricultural groups also obtained protection from the hardships of the market place through parities, subsidies, and quotas. As a result, efficient and system-wide allocation of resources became secondary to the protection of personal interests.

The labor force also sought protection from the market. This pressure resulted finally in protective legislation. For example, in 1932 Congress enacted the Norris-LaGuardia Act, which severely restricted the power of the judiciary to impose injunctions in labor disputes and declared that as a matter of public policy employees should be permitted to organize and bargain collectively. Shortly thereafter, Congress passed the National Labor Relations Act.

250. J. Behrman, supra note 230, at 37, 40.


Act\textsuperscript{255} and created the National Labor Relations Board, which further promoted the activity of organized labor.

Consequently, in view of the intervention of the government to protect the varied interests of industrialists, farmers, and the labor force, it is no longer possible on the macro level to cite efficiency as a justification for the at will rule.

On the micro level, it has been contended by business and accepted by a number of courts that the employment at will rule is essential to the efficient operation of business.\textsuperscript{256} Without the power to dismiss an employee, with or without cause, the employer, it is asserted, would lose control over his business.\textsuperscript{257} Although there is no study demonstrating conclusively whether termination of the at will rule would promote efficiency at the micro level, recent studies comparing unionized with nonunionized facilities indicate that there is no significant, if any, difference in managerial efficiency.\textsuperscript{258} To be sure, these analyses are confounded by the large number of variables beyond the right to terminate an employee at will.

In fact, elimination of the at will rule can promote efficiency. First, it would increase the loyalty of one's employees. By providing an employee with some degree of job security, an employer would promote the employee-employer relationship, reduce attrition, improve morale, encourage cooperation, and ultimately create a positive effect on productivity.\textsuperscript{259}

\textsuperscript{255} Ch. 372, § 1, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1980)). In enacting the National Labor Relations Act, Congress set forth certain "findings and declaration of policy" which suggest the relationship between the termination at will employment contract and the need for protective legislation:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between the industries.


\textsuperscript{257} Feinman, supra note 233; Note, Employment At Will Rule, 31 ALA. L. Rev. 421 (1980).

\textsuperscript{258} Steiber & Block, supra note 251; Freeman & Medoff, supra note 240.

\textsuperscript{259} Freeman & Medoff, supra note 240, at 70-82.
Comparisons with the experience of other countries lends further support to the proposition that the right to terminate employees at will does not necessarily increase efficiency. Statistics clearly show that “American productivity levels are very poor by international standards.” In 1979, the increase in productivity of all Japanese industries (which are typified by a lifetime employment commitment) was ten percent, while the corresponding increase in American productivity was less than two percent. Moreover, from 1973-1979 the annual percentage increase in manufacturing productivity for the United States was 1.4 percent compared with Japan’s 6.9 percent, Belgium’s 6.0 percent, Germany’s 5.3 percent, Netherland’s 5.3 percent, France’s 4.8 percent, Denmark’s 4.4 percent, Italy’s 3.7 percent, Sweden’s 2.4 percent, Canada’s 2.2 percent and United Kingdom’s 0.5 percent. Thus, with the exception of the United Kingdom, several countries that have eliminated the at will rule, have experienced productivity superior to that of the United States.

C. Cost of the At Will Rule

Having demonstrated the invalidity of efficiency and employee freedom as justifications for the at will rule, we will now examine the legitimate interest of the employee in maintaining his employment by exploring the costs that the rule imposes upon the employee and society. The economic costs to both the discharged employee and the economy are by no means trivial. According to the Bureau of Labor Statistics, in 1978 merely 23.6 percent of nonagricultural, private employees were members of unions and


Since the 1880’s, the rate of increase of productivity in Japan has been among the highest in the world. E. Hagen, THE ECONOMICS OF DEVELOPMENT 295 (1975). The Japanese industrial corporation is a unique creature of the Japanese culture. Because of that country’s cultural traits and the personality traits of its citizens, there is a lifetime employment commitment between an individual and his company. A company will generally hire workers as they leave school and retain them until retirement except in instances of most extreme provocation. Id. at 295-98.

only 19.7 percent of the total labor force belonged to a union.\textsuperscript{263} Professor Cornelius Peck has estimated that:

\begin{quote}
[A]t least 12,000 to 15,000 employees are discharged or disciplined each year under circumstances that would have led to arbitration if they had been working under a collective bargaining agreement and represented by a union. At least half of the discharges would have been found to be unjustifiable. There are no reliable statistics concerning the number of discharges that are withdrawn as a result of negotiations in the grievance procedures established by collective bargaining agreements, but if negotiation of discharge and discipline grievances produces settlements at a rate comparable to that experienced in other dispute settlement negotiations, the number of discharge and discipline cases in the nonunionized sector that would have been subjected to that process in a collective bargaining relationship could be as high as 300,000 a year.\textsuperscript{264}
\end{quote}

Professor Peck further points out the added difficulty a terminated employee will have finding new employment as prospective employers will usually inquire about their previous employment.\textsuperscript{265} Prospective employers tend to view with skepticism statements by an applicant that his previous employer had terminated him without explanation, or without cause or in bad faith.

In addition to the economic costs, there are also severe psychological costs. The psychological impact of discharge upon the employee, the employee’s spouse and family is now well documented.\textsuperscript{266} Unemployment and discharge have long been connected with suicide\textsuperscript{267} and mental disorder.\textsuperscript{268} More specifically, studies have linked unemployment and discharge to an increased sense of loneliness and abandonment, a sense of morbidity and personal frailty, an increase of distrust for employers, an increase

\begin{footnotes}

\textsuperscript{264} Peck, \textit{supra} note 15, at 10.

\textsuperscript{265} \textit{Id.} at 5.

\textsuperscript{266} Mental Health and the Economy (L. Ferman & J. Gordus eds. 1979); Dooley & Catalano, Economic Change as a Cause of Behavioral Disorder, 87 Psychological Bull. 450 (1980).

\textsuperscript{267} Mental Health and the Economy, \textit{supra} note 266; Pierce, The Economic Cycle and the Social Suicide Rate, 32 Am. Soc. Rev. 457 (1967).

\textsuperscript{268} \textit{Id.}
\end{footnotes}
in gambling, an increase in spouse and child abuse, and an increase in divorce rate.\textsuperscript{269}

D. Statutory Proposal

In view of the failure of traditional justifications for the employment at will principle as well as the tremendous hardship it imposes on employees, this rule must be abandoned. While courts have taken steps in this direction,\textsuperscript{270} the decisional law in this area suffers from a lack of uniformity.\textsuperscript{271} Accordingly, we propose legislative rather than judicial reform.\textsuperscript{272} More particularly, we propose that a Uniform Model Act be enacted and adopted by the individual states to supplement existing remedies. The Model Act would perform two major functions: 1) providing the employee with adequate protection while preserving the employer's legitimate interest in efficiently and effectively operating his business; and 2) avoiding unnecessary expense and discord within the system. This latter goal fundamentally distinguishes this proposal from other suggested approaches.\textsuperscript{273}

The Model Act would provide protection for all employees, except those covered by collective bargaining agreements or individual contracts of employment. The Act should limit an employer's right to terminate an employee, after the employee has been employed for a six month probationary period,\textsuperscript{274} to "just


\textsuperscript{270} For a discussion of the judicial modifications of the at will doctrine, see notes 123-229 and accompanying text supra.

\textsuperscript{271} See id.

\textsuperscript{272} For a discussion of other proposals for legislative reform, see Blades, supra note 15, at 1433; Summers, supra note 15, at 519; Committee Report, supra note 15, at 197. For a discussion of proposals for judicial reform, see Peck, supra note 15, at 3; Protecting At Will Employees, supra note 15, at 1817; Implied Rights, supra note 15, at 369. The legislation which we propose here would protect only those employees not already protected from unjust dismissal by the National Labor Relations Act. For a discussion of this Act, see notes 43-46 & 255 and accompanying text supra.

\textsuperscript{273} For a list of other commentaries proposing legislative reform, see note 272 and accompanying text supra. Professor Summers, for example, proposes that disputes regarding employment between employer and employee should be resolved through arbitration and that the cost of such arbitration be shared by the state, the employee, and the employer. See Summers, supra note 15, at 522, 524.

\textsuperscript{274} The Canadian and Italian unjust dismissal statutes have similar provisions for a probationary period. See notes 104 & 116 and accompanying text supra.
An individual who is unjustly dismissed should be able to collect damages or demand reinstatement, whichever he prefers. Moreover, the burden of proof should be on the employer to demonstrate just cause in dismissing the employee. It is our recommendation that just cause be defined as not including: 1) the exercise of a statutory right or fulfillment of a statutory obligation; 2) the refusal to violate a statute; and 3) under certain circumstances, the reporting of a violation or suspected violation committed by an employer.

Application of the first proposed legislative exclusion from discharge for "just cause" would avoid the inequitable results reached in Dockery v. Lampart Table Co. and Bender Ship Repair, Inc. v. Stevens. In upholding an employer's right to terminate an employee for filing a workers' compensation claim and for serving on a grand jury, respectively, these cases contravene sound public policy. An individual should not be punished for exercising his legitimate rights or performing his duty to society.

The second legislative exclusion would eliminate the situation where the employee is forced to choose between violating the law and retaining his employment. The proposal adopts the position taken in Petermann and Tameny that "[t]he employer cannot condition employment upon required participation in unlawful conduct by the employee." The third legislative exclusion from termination for just cause, the reporting of a violation or suspected violation, presents a more difficult issue. Nevertheless, without this protection, public spirited
individuals who seek to protect the welfare of society must bear the entire cost.284 How can one expect a person such as George Geary286 to protect the public interest if he must bear the total burden? If society wishes employees to prevent violations that jeopardize the public safety and welfare by reporting unsafe products or price fixing conspiracies, the public must protect and defend the public advocate.

Yet, as the New Jersey Supreme Court recognized in Pierce v. Ortho Pharmaceutical Corp.,286 employees are not private attorneys general with unlimited authority and discretion; their protection should therefore be limited. We propose that an employee's reporting of violations should be protected only if the following three conditions are satisfied: 1) the harm to be caused the public is serious; 2) the employee first exhausts all in-house steps for remedying the problem; and 3) the employee has a reasonable basis for making his allegations.287

Finally, the legislation should establish its own alternative dispute resolution mechanism to reduce expense and discord. This is necessary to avoid the adversarial relationship between labor and management which has placed American business at a disadvantage in the international market288 as well as the high cost of legal conflict.289 We propose the following system of intercompany dispute resolution followed by mandatory arbitration as an appropriate method to accomplish both of these goals. The first level of dispute resolution should be at the company level and should take the form of Control Data Corporation's290 ombudsman approach,291 which

285. For a discussion of the Geary case, see notes 211-19 and accompanying text supra.
286. 84 N.J. 58, 417 A.2d 505 (1980).
287. DeGeorge, Ethical Responsibilities of Engineers in Large Organizations: The Pinto Case, 1 BUS. AND PROF. ETHICS J. (1981).
288. See Thomson, supra note 260; Revitalizing the U.S. Economy, supra note 260, at 56.
290. The Control Data Corporation was organized as a Minnesota Corporation on July 8, 1957. It became a Delaware Corporation in 1968 when it combined with the Commercial Credit Company. It is principally involved in a worldwide computer business although one of its subsidiaries is also engaged in finance and insurance. In December 1981, the Control Data Corporation employed 60,627. 1 MOODY'S INDUSTRIAL MANUAL 1216-17 (1980).
has been recently advocated by the Center for Public Resources as a practical method of employee dispute settlement. Under this proposal the company would appoint an Ombudsman to serve primarily as an advocate for problem resolution and secondarily as an advocate for the employee when the system fails to provide adequate safeguards. The aggrieved employee is free to contact the ombudsman at any time. The grievance system would operate as follows:

1. The employee should talk to his/her manager about any work-related problems. The manager should know more about the employee and his/her job than any other member of management and is in the best position to handle the work-related problem quickly and satisfactorily. If the employee does not receive an answer within two working days or if the answer received is not satisfactory to him/her, then Step 2 should be pursued.

2. The employee should contact his/her Personnel Manager. If the employee does not know who the cognizant Personnel Manager is, he/she should ask his/her manager or call the Employee Advisory Resource Ombudsman. The Personnel Manager will insure that the employee fully understands the complete Procedure on Employee Work-Related Problems, discuss the work-related problem with the employee and attempt to attain a solution. If an answer satisfactory to the employee is not received within two working days, the employee should go on to Step 3.

3. The employee should return to the Personnel Manager and request that the work-related problem be put in writing and a meeting arranged with his/her manager’s manager. Within three working days, the Personnel Manager will accompany the employee to this meeting and assist him/her in presenting the case. If the answer received at this step is not satisfactory to the employee, begin Step 4.

4. The employee should return to the Personnel Manager and request that an interview be set up with the next level of management, in most cases the Division General Manager, Subsidiary President, or equivalent.\(^{292}\)

If this grievance system fails to resolve the work-related problem, the employee may request that it be considered by the highest

\(^{292}\) Id. at IV.A. 8-9.
levels of the company's management. For smaller companies a more streamlined reconciliation process should be established.

If the disagreement is not successfully resolved at the company level, we suggest that the following binding, dispute resolution procedure be utilized. This process was suggested by Professional Arbitrator Bernard Wray and proffered by the Center for Public Resources and offers significant advantages in terms of cost and time. First, the parties would select an individual from a list of arbiters approved by the state, the federal government or some other accepted organization. The arbiter would be the presiding officer at a “mini trial.”

The “mini-trial” would proceed as follows:

- Let the case be tried on affidavits without live witnesses. This would drastically cut hearing time in taking testimony. This procedure has worked well in labor injunction cases in the 4th and 5th Circuits.
- Both sides would have two weeks to submit all affidavits to the presiding officer and to each other. Both sides would then have an additional ten days to submit any rebuttal affidavits.
- One week later, each side would be given one-half day to present a case. The litigant could have counsel present his case. The corporate general counsel could have the vice-president of operations or any other officer of his choice to aid him.
- No more than fifteen days after the hearing, the presiding officer would write a decision, including findings of fact, conclusions of law, and a proposed remedy. The written decision would remain secret in perpetuity, and the presiding officer would be barred from testifying in any other proceeding involving the matter.
- There would be no post-hearing briefs, motions to clarify, or any other legal proceedings.
- At any time during the one-day hearing, the presiding officer would allow the parties to suspend presentation for settlement discussions without being penalized with loss of time for presentation of the case.

The arbiter's fee should be paid by the employer if it loses and should be divided equally if the employee loses.

293. Id.
294. Id. at IV.B-3.
Conclusion

The at will employment doctrine, which allows employees to be terminated at the whim of their employer, is an anachronism. Borne of a laissez-faire era, it is out of step with contemporary economic and social theory. The at will rule can no longer be justified as necessary to the capitalistic system. The underlying assumptions of the rule are unsound. Not only is it unrealistic to assert that labor is freely mobile and that the rule promotes economic efficiency, either at the macro level, or at the level of the business enterprise, but the social, economic, and psychological costs of the rule are immense. The at will doctrine imposes a heavy burden on the employee without a commensurate benefit to society.

Admittedly, judicial decisions and federal and state statutes have restricted the at will doctrine in several, albeit limited, areas. Nonetheless, many employees are not protected from unjust or unfair dismissals because judicial and statutory protection has thus far been incomplete and often inconsistent. As society evolves, so too should the legal system. Other advanced industrial countries have rejected the at will rule and replaced it with a system providing increased job security under statutes prohibiting dismissal without cause. The at will rule should similarly be abandoned in the United States. We have proposed a statutory solution for the individual states that will protect an employee’s right to continued employment and allow dismissal only for just cause. To achieve these goals, we propose a statute that includes a dual level dispute resolution mechanism that will make it possible to resolve employment disputes quickly, efficiently, and inexpensively. It is hoped that this proposal, if adopted, would alleviate the burdens that the at will rule imposes. It is also hoped that it will protect those individuals who exercise legitimate rights and perform a public service by providing them a safe opportunity to protect the public interest. Such a statute would thrust the doctrines governing the employment relationship into conformity with contemporary economic and social reality.