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We are a nation of employees. Growth in the number of employees has been accompanied by increasing recognition of the need for stability in labor relations.[1]

The 1980s have witnessed dramatic changes in the development of labor law and industrial relations in this country. Innovations devised by unions and employers, as well as judge-made common law, increasingly reflect the newly felt economic and social needs of the nation. It is no exaggeration to say that these changes have altered the landscape of employee-employer relations throughout the country. These changes appear to presage more fundamental shifts in both industrial relations and labor law, which will reshape employment relationships in the coming century.

These shifts have inevitably affected workers' assumptions about the property and contractual interest which they have in their jobs, as well as the rules under which they are employed. The rise of wrongful discharge litigation in the unorganized sector of the economy and, more recently, in the shrinking unionized portion of the economy,[2] has induced employers to take ac-

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1. Pierce v. Ortho Pharmaceuticals, Corp., 84 N.J. 58, 66, 417 A.2d 505, 509 (1980).

2. The Court established guidelines relating to the preemption of wrongful discharge cases involving employees covered by grievance arbitration machinery in collective bargaining agreements in Allis-Chalmers v. Lueck, 471 U.S. 202 (1985). Despite the fact that *Lueck* held for preemption in the context of tort theories of liability, many cases find for state jurisdiction where either public policy or covenant of good faith and fair dealing theories are used. *See, e.g.*, Varnum v. Nu-Car Carriers, 804 F.2d 638 (11th Cir. 1986); Anderson v. Ford Motor Co., 803 F.2d 953 (8th Cir. 1986); Malia v. RCA Corp., 794 F.2d 909 (3d Cir. 1986); Williams v. Caterpillar Tractor, 786 F.2d 928 (9th Cir.), *cert. granted*,

count of due process for workers and to scrutinize and reevaluate their personnel policies and practices. But, in industries like auto, steel, and transportation, in which the labor movement has been well entrenched for at least the past half-century, both unions and employers have been prodded by competition, foreign and domestic, to focus their attention upon efficiency as well as equity.

This article first examines the legal relationship between employer and employee as it existed at common law, the reason why that legal relationship has changed, and the present contours of the existing law. After identifying some of the problems remaining in the law, the article describes a statutory system which would diminish these problems in the present economy and remain viable for future national economic development.

I. The Common Law of Terminable at Will

Until seven or eight years ago the assumption was that workers who were not represented by trade unions under collective bargaining agreements had no protection[3]—or virtually no protection—against either individual or collective dismissal. This lack of protection existed because America accepted a legal proposition founded in a laissez-faire economy which reached its

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107 S. Ct. 455 (1986); Heckler v. International Bhd. of Elec. Workers, 772 F.2d 788 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 1967 (1986); Garibaldi v. Lucky Food Stores, 726 F.2d 1367 (9th Cir. 1985) *cert denied*, 471 U.S. 1099 (1986); Orsini v. Echlin, Inc., 637 F. Supp. 38 (N.D. Ill. 1986); Scott v. New United Motor Mfg., 632 F. Supp. 891 (N.D. Cal. 1986); Hull v. Central Transp., 628 F. Supp. 784 (N.D. Ind. 1986); Rog v. Professional Window & House Cleaning, Inc., No. 84 Civ. 4198 (N.D. Ill. Aug. 4, 1986); Coffee v. Faber Enters., No. 86 Civ. 1089 (N.D. Ill. May 30, 1986); Gonzalez v. Prestress Engineering Corp., 115 Ill. 2d. 1, 503 N.E.2d 308 (1986); Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 472 U.S. 1032 (1985).

The issue of exclusivity of federal and state administrative fair employment practice procedures vis-a-vis common law wrongful discharge actions has been raised in numerous cases. The courts are split on the issue. Some courts allow the common law action. *See, e.g.*, Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984); Cancellier v. Federated Dep't Stores, 672 F.2d 1312 (9th Cir.) *cert denied*, 459 U.S. 859 (1982); Hentzel v. Singer Co., 138 Cal. App. 3d. 290, 188 Cal. Rptr. 159 (1982); Holien v. Sears, Roebuck & Co., 298 Or. 76, 689 P.2d 1292 (1984); Fye v. Central Transp. Inc., 487 Pa. 137, 409 A.2d 2 (1979). Other courts have held that common law actions are preempted. *See, e.g.*, Wolk v. Saks Fifth Ave., 728 F.2d 221 (3d Cir. 1984) (noting, however, that its interpretation may not be consistent with the position taken by the Pennsylvania Supreme Court in Fye v. Central Transp. Inc., 487 Pa. 137, 409 A.2d 2 (1979)); Bonham v. Dresser Indus., 569 F.2d. 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); Mahoney v. Crocker Nat'l Bank, 571 F. Supp. 287 (N.D. Cal. 1983).

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

zenith in the latter part of the previous century and the early part of this one.

The common law of the time, which represented a misreading of British common law,[4] held that absent an explicit provision to the contrary, an employment contract was terminable at will. But the attitudes of this decade are summarized well by the late Justice Tobriner of the Supreme Court of California who characterized the terminable-at-will doctrine as anachronistic in our contemporary society.[5]

Today a clear majority of jurisdictions have modified or created exceptions to the terminable-at-will principle.[6] Until this

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4. Miller & Estes, *Recent Judicial Limitation on the Right of Discharge: A California Trilogy*, 16 U.C. DAVIS L. REV. 651 (1982); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974). *See* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Summers, *Individual Protection for Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 485 (1976); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824-26 (1980). For more recent commentary, see Glendon & Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C.L. REV. 457 (1979); Murg & Scharman, *Employment at Will: Do The Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329 (1982). For an examination of a radical attack upon the modern wrongful termination cases, see Epstein, *In Defense of The Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

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

6. States have based exceptions to the employment at will rule on three theories: public policy, implied covenant of good faith and fair dealing, and implied contracts based either on past practices and oral assurances or on employment handbooks. Distinctions between the two implied contract theories, however, have not always been clearly drawn. *See, e.g.*, Weiner v. McGraw-Hill Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982). States that blur this distinction tend to categorize assurances contained in employment handbooks as a part of the totality of the circumstances which indicate the existence of an implied contract.

States that have adopted some form of public policy exception are: Alaska (Knight v. American Guard & Alert, 714 P.2d 788 (Alaska 1986)); Arizona (Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985)); Arkansas (M.B.M. Co. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980)); California (Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980)); Connecticut (Sheets v. Teddy's Frosted Foods, 179 Conn. 471, 427 A.2d 385 (1980)); Hawaii (Parnar v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625 (1982)); Idaho (Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977)); Illinois (Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 472 U.S. 1032 (1985)); Indiana (Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973)); Kansas (Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs., 6 Kan. App. 2d 488, 630 P.2d 186 (1981)); Maryland (Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981)); Massachusetts (Cort v. Bristol-Myers Co., 385 Mass. 300, 431 N.E.2d 908 (1982)); Michigan (Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976)); Missouri (Henderson v. St. Louis Hous. Auth., 605 S.W.2d 800 (Mo. Ct. App. 1979)); Montana (Keneally v. Orgain, 186 Mont. 1, 606 P.2d 127 (1980)); Nevada (Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984)); New Hampshire (Monge v. Beebe Rubber

happened, employees represented by unions under collective

Co., 114 N.H. 130, 316 A.2d 549 (1974)); New Jersey (Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980)); New Mexico (Zuniga v. Sears, Roebuck & Co., 100 N.M. 414, 671 P.2d 662 (Ct. App. 1983)); North Carolina (Sides v. Duke Hosp., 74 N.C. App. 331, 328 S.E.2d 818 (1985)); Ohio (Goodspeed v. Airborne Express, Inc., 121 L.R.R.M. 3216 (BNA) (Ohio Ct. App. 1985)); Oregon (Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975)); Pennsylvania (Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978)); South Carolina (Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985)); Tennessee (Clanton v. Cain-Sloan Co., 677 S.W.2d 441 (Tenn. 1984)); Texas (Sabine Pilot Serv. v. Hauck, 687 S.W.2d 733 (Tex. 1985)); Virginia (Bowman v. State Bank, 229 Va. 534, 331 S.E.2d 797 (1985)); Washington (Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984)); West Virginia (Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984)); Wisconsin (Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983)).

States that recognize the covenant of good faith and fair dealing are: Alaska (Conway Inc. v. Ross, 627 P.2d 1029 (Alaska 1981)); California (Cleary v. American Airlines, 111 Cal. App. 3d 43, 168 Cal. Rptr. 722 (1980)); Connecticut (Magnan v. Anaconda Indus., 193 Conn. 558, 479 A.2d 781 (1984)); Illinios (Martin v. Federal Life Ins. Co., 109 Ill. App. 3d 596, 440 N.E.2d 998 (1982)); Iowa (High v. Sperry Corp., 581 F. Supp. 1246 (S.D. Iowa 1984)); Massachusetts (Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d. 1251 (1977)); Montana (Gates v. Life of Montana Ins. Co., 668 P.2d 213 (Mont. 1983)); Nevada (Savage v. Holiday Inn Corp., 603 F. Supp. 311 (D. Nev. 1985)).

States which recognize implied contracts based on oral assurances or patterns of behavior are: Alaska (Eales v. Tanana Valley Medical-Surgical Group, 663 P.2d 958 (Alaska 1983)); Arizona (Wagner v. Globe, 150 Ariz. 82, 722 P.2d 250 (1986)); Arkansas (French v. Dillard Dept. Stores, 285 Ark. 332, 686 S.W.2d 435 (1985)); California (Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981)); Connecticut (Finley v. Aetna Life & Casualty Co., 5 Conn. App. 394, 499 A.2d 64 *certif. granted*, 198 Conn. 802, 501 A.2d 1213 (1985)); Maine (Terrio v. Millinocket Community Hosp., 379 A.2d 179 (Me. 1977)); Ohio (West v. Roadway Express, 115 L.R.R.M. 4553 (BNA) (Ohio Ct. App. 1982) *cert. denied*, 459 U.S. 1205 (1983)); Washington (Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 568 P.2d 764 (1977)).

States that recognize implied contracts based on employment handbooks are: Arizona (Leikvold v. Valley View Hosp., 141 Ariz. 544, 688 P.2d 170 (1984)); Arkansas (Jackson v. Kinark Corp., 282 Ark. 548, 669 S.W.2d 898 (1984)); Colorado (Salimi v. Farmers Ins. Group, 684 P.2d 264 (Colo. Ct. App. 1984)); Connecticut (Finley v. Aetna Life & Casualty Co., 5 Conn. App. 394, 499 A.2d 64 *certif. granted*, 198 Conn. 802, 501 A.2d 1213 (1985)); District of Columbia (Washington Welfare Ass'n v. Wheeler, 496 A.2d 613 (D.C. 1985)); Georgia (Shannon v. Huntley's Jiffy Stores, 174 Ga. App. 125, 329 S.E.2d 208 (1985)); Hawaii (*Kinoshita v. Canadian Pac.* Airlines, 724 P.2d 110 (Haw. 1986)); Idaho (Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 64 (1977)); Maine (Wyman v. Osteopathic Hosp., 493 A.2d 330 (Me. 1985)); Michigan (Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980)); Minnesota (Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983)); Missouri (Enyeart v. Shelter Mut. Ins. Co., 693 S.W.2d 120 (Mo. Ct. App. 1985)); Nevada (Southwest Gas Corp. v. Amhad, 99 Nev. 594, 668 P.2d 261 (1983)); New Jersey (Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257 (1985)); New Mexico (Forrester v. Parker, 93 N.M. 781, 606 P.2d 191 (1980)); New York (Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982)); Ohio (Helle v. Landmark, Inc., 15 Ohio App. 3d 1, 472 N.E.2d 765 (1984)); Oklahoma (Vinyard v. King, 728 F.2d 428 (10th Cir. 1984)); Oregon (Yartzoff v. Democrat-Herald Publishing Co., 281 Or. 651, 576 P.2d 356 (1978)); South Dakota (Osterkamp v. Alkota Mfg., 332 N.W.2d 275 (S.D. 1983)); Washington (Thompson v. St. Regis Paper Co., 102 Wash. 219, 685 P.2d 1081 (1984)); Wisconsin

bargaining agreements—today about eighteen percent of the work force—were in a far better position than their non-union counterparts. Just cause provisions contained in collective bargaining agreements prohibited employers from dismissing a worker for anything other than proper or just cause. Seniority rules applicable to promotions and transfers allocated jobs when business conditions dictated layoffs so that the most junior or last hired would be first fired. But while reductions in the work force attributable to economic or technological considerations were governed by seniority principles and sometimes brought with them severance pay or other monetary benefits, the assumption always was that the employer's right to dismiss for economic reasons was essentially uninhibited by the collective agreement or by law. And in contrast to other industrialized countries, particularly Japan,[7] layoffs seemed to be the first, rather than the last response to cost-reduction.

In the United States, the response to the competitive assault from Europe and Japan and the newly industrialized countries has been both concession bargaining as well as a new-found union interest in issues of job security, employer decision making, and access to confidential information. The collective bargaining process has compelled the parties to reevaluate the assumptions behind the view that these matters were management prerogatives which were so inherently and tightly tied to the running of the business that the union could have no appropriate interest in them.

In the organized sector, these developments have occurred despite the law as interpreted by the Supreme Court and the National Labor Relations Board.[8] For example, in the Supreme Court's 1981 decision of *First National Maintenance Corp. v. NLRB*,[9] the Court held that employers are not obliged to bargain with unions before partially closing operations and dismissing workers in the process.[10] Part of the Court's reasoning

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(Ferraro v. Koelsch, 124 Wis. 2d 154, 368 N.W.2d 666 (1985)); Wyoming (Mobile Coal Producing v. Parks, 704 P.2d 702 (Wyo. 1985)).

7. W. GOULD, JAPAN'S RESHAPING OF AMERICAN LABOR LAW (1984).

8. *See* NLRB v. Bildisco and Bildisco, 465 U.S. 513 (1984); Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249 (1974); Milwaukee Spring Div. of Illinois Coil Spring Co., 268 NLRB Dec. (CCH) ¶ 16,029 (1984).

9. 452 U.S. 666 (1981).

10. *Id.* at 686. *See generally* Gould, *The Supreme Court's Labor and Employment Docket In The October 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1, 6-8 (1981); Harper, *Leveling the Road from Borg-Warner to First National Maintenance:*

was that the subject matter was a management prerogative, and that, in any event, Congress in enacting The National Labor Relations Act in 1935—the statute which was at issue in *First National Maintenance*—did not intend for labor to be an equal management partner in any sense of the word.[11]

Similarly, the United States Department of Justice has taken the view that union representation on the board of directors—an issue which employers could not be compelled to bargain about under the reasoning of *First National Maintenance*—could violate the antitrust law's prohibition against anti-interlocking directorates[12] if the union obtained representation on the boards of more than one employer in the same industry—in this case Chrysler and American Motors Corporation.[13] Although the "workers-on-the-board" approach to union involvement in employer decision making does not yet represent a general pattern or trend, in contrast to West Germany where it is provided for by law, the legal prohibitions do not seem to have completely eliminated union and employer interest in the subject.[14]

The Scope of Mandatory Bargaining, 68 VA. L. REV. 1447 (1982); Sockell, *The Scope of Mandatory Bargaining: A Critique and a Proposal*, 40 INDUS. & LAB. REL. REV. 19 (1986). I have set forth a more general discussion in Gould, *Fifty Years Under The National Labor Relations Act: A Retrospective View*, 37 LAB. L.J. 235 (1986).

11. The Supreme Court in *First Nat'l Maintenance*, 452 U.S. at 676-77 (citations omitted), explained:

> Some management decisions, such as choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. Other management decisions, such as the order of succession of layoffs and recalls, production quotas, and work rules, are almost exclusively "an aspect of the relationship" between employer and employee. The present case concerns a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but had as its focus only the economic profitability . . . apart from the employment relationship. This decision, involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all, "not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment."

12. *See* Wall St. J., May 11, 1981, at 8, col. 2; *see also* Gould, *Union Involvement in Employer Decision-Making: Some Reflections on America and Europe*, 58 TUL. L. REV. 1322 (1984); Note, *Labor Unions in the Boardroom: An Antitrust Dilemma*, 92 YALE L.J. 106 (1982).

13. *See* Wall St. J., *supra* note 12.

14. *See* Note, *supra* note 12. *See generally* Summers, *Codetermination in the United States: A Projection of Problems and Potentials*, 4 J. COMP. CORP. L. & SEC. REG. 155 (1982); Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367 (1980).

A. *Rethinking Terminable-at-Will*

The collective bargaining process is not designed or intended to articulate a line of reasoning, or an approach to issues, or to explain why issues are brought to the bargaining table. Rather, the discussions that take place between labor and management emerge from deeply felt needs. The courts and the administrative agencies, on the other hand, devise a rationale when called upon to do so. As the NLRB said long before *First National Maintenance*:

> [The employee has a stake in the enterprise because he has spent] years of his working life accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer. And just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood.[15]

The fundamental policy issue for society, of course, is whether the terminable-at-will rule should be modified. If the rule should be modified, this question also encompasses the additional issues of how it should be modified, by whom, and in what forum. Further, society must choose whether, in the organized sector of the economy, unions and employers should be providing more job security through the bargaining process than they have traditionally done under just cause and seniority contractual provisions. Moreover, the new common law of wrongful discharge has spotlighted *remedial* deficiencies in the contractual process of arbitration,[16] the contrasts between remedies provided by courts and arbitrators, and the ultimate question of whether either forum ought to modify its own rules.

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15. Ozark Trailers Inc., 161 N.L.R.B. 561, 566 (1966).

16. The weight of authority in arbitration awards under collective agreements is against the award of punitive damages. *See* Desert Palace, Inc., v. Local Joint Executive Bd. of Las Vegas, 679 F.2d 789 (9th Cir. 1982); Baltimore Regional Joint Bd. v. Webster Clothes, Inc., 596 F.2d 95 (4th Cir. 1979). However, some authority supports the view that where the agreement or conduct of a party warrants it, punitive damages may be awarded. Westinghouse Elec. Corp. v. Local 1805, International Bhd. of Elec. Workers, 561 F.2d 521 (4th Cir. 1977); International Ass'n of Heat & Frost Insulators & Asbestos Workers, Local Union No. 34 v. General Pipe Covering, Inc., 613 F. Supp. 858 (D. Minn. 1985); Westmoreland Coal Co. v. UMW, 550 F. Supp. 1044 (W.D. Va. 1982).

1. The essential nature of employment

It seems to me that the starting point for evaluation of these issues is the realization that in a modern industrialized economy employment is central to one's existence and dignity. One's job provides not only income essential to the acquisition of the necessities of life, but also the opportunity to shape the aspirations of one's family, aspirations which are both moral and educational. Along with marital relations and religion, it is hard to think of what might be viewed as more vital in our society than the opportunity to work and retain one's employment status. The AFL-CIO Executive Committee has recently stated that protection against arbitrary employer conduct "qualifies as a basic labor standard" which is "the hallmark of a decent society."[16a]

As the Court of Appeals for the Fifth Circuit has said, the right to work in an environment free from discrimination and, it might be added, arbitrary treatment, is fundamental because it "deals not with just an individual's sharing in the 'outer benefits' of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses."[17] In one of the leading wrongful discharge cases, the Supreme Court of New Jersey had this to say:

> Job security is the assurance that one's livelihood, one's family's future, will not be destroyed arbitrarily; it can be cut off only "for good cause," fairly determined. [The employer's] commitment here [an employment manual providing that an employee will be terminated only for cause] was to what working men and women regard as their most basic advance. It was a commitment that gave workers protection against arbitrary termination.[18]

2. Employer-employee inequality

A second consideration relates to the power relationship between employee and employer. Is there inherent inequality between the employer and most employees? Economists advise us that there is no inherent inequality between employer and em-

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16a. AFL-CIO Executive Council, Statement on *The Employment-At-Will Doctrine* 3 (Feb. 20, 1987) (Bal Harbour, Fla.) (available from the author). A general discussion of this and related issues is contained in Gould, *The Rights of Workers*, THE CENTER MAG., July-Aug. 1984 at 2, 5-14.

17. Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970).

18. Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 300, 491 A.2d 1257, 1266, *modified*, 101 N.J. 10, 499 A.2d 515 (1985).

ployee because if either party fails to adhere to their part of the bargain, express or implicit, the other party can go elsewhere. The quit rate and the layoff rate are roughly equivalent at twenty-four percent per year. Thus, both employer and employee break the employment relationship with a fair degree of frequency.

But the difficulty with this model is that it holds true only where there is completely free competition. When this does not exist, choice is considerably reduced. Moreover, a relatively steep age-earnings curve in non-union establishments suggests a bonding between employer and employee, which creates an implicit contract, and acts as an incentive for an employer to renege on it as wages increase. In addition, the unorganized lack protection such as that provided by grievance arbitration machinery.[19]

That turnover occurs with more frequency in America than in either Europe or Japan[20] suggests that different laws and practices in those countries *may* have facilitated contrasting employment relationship contours. However, as Professor Robert Flanagan has pointed out, recent incursions upon the terminable-at-will doctrine in this country and the unwillingness to fashion substantial damages or reinstatement remedies in Europe means that the difference between the two continents is somewhat overstated.[21]

Some employees, of course, have considerable bargaining power because of their relatively unique skills. Frequently the result of such power is a written contract of a specific duration providing for notice in connection with dismissal and the like. Clearly the law ought to deal with such individuals differently than with employees who constitute the overall majority of the work force and whose bargaining power is considerably less. Such workers are not as mobile and are not generally able to

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19. *See* Flanagan, *Implicit Contracts, Explicit Contracts and Wages*, 74 AM. ECON. REV. 345, 345-49 (1984).

20. *See The Importance of Long-Term Job Attachment in OECD Countries*, OECD EMPLOYMENT OUTLOOK, Sept. 1984, at 55. For an examination of the experiences in some foreign jurisdictions, see W. GOULD, *supra* note 7, at 106-116 (1984); Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 AM. J. COMP. L. 310 (1985). *See generally* International Labour Conference, 67th Sess., 1981, Report VIII (1), Termination of Employment at the Initiative of the Employer; International Labour Conference, 68th Sess., 1982, Report V (2), Termination of Employment at the Initiative of the Employer.

21. *See* Flanagan, *Labor Market Behavior and European Economic Growth* (to be published in a collection of essays by the Brookings Institution in 1987).

bargain contracts, let alone "golden parachutes" with handsome salary or severance arrangements. However, the fact remains that contemporary common law in this country does not establish sharp limits between different categories of employees.

An example of institutional arrangements which created some *inequality* from the employee's vantage point—and one which sounds quaint today—is the relationship that existed between the players and the owners in major sports until the past decade. Quite obviously, the reserve clause or variations on that theme restricted the players' mobility and undermined their bargaining power substantially.[22] One need only look to modern collective bargaining agreements and the power and income (albeit now somewhat eroded)[23] that has been provided to players in baseball, football, basketball, and hockey to determine the extent to which equality had been previously denied.[24]

Another impediment to equality is to be found in transaction costs. In many situations it may be simply impossible or impracticable for employees to have the information which is important to intelligent bargaining and to know about the alternate opportunities. Accordingly, lack of information as well as inherent inequality and steep age-earning curves may contribute to the need for regulation of the employment relationship, in the interest of shaping a balance.

Reexamination of the status quo—not explicitly predicated upon any of these considerations—has been promoted most dramatically by both constitutional and common law developments. The United States Supreme Court decision of two years ago in *Cleveland Board of Education v. Loudermill*,[25] holding that public employees have a property right in continued employment where state law placed limitations upon their dismissal, has articulated some of the concerns which have produced change. The Court held that the Constitution does not create a property interest in employment *in vacuo*, but that such interests must be fashioned in light of "rules or understandings that stem from an independent source such as state law."[26] It then

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22. *See generally* R. BERRY, W. GOULD & P. STAUDOHAR, LABOR RELATIONS IN PROFESSIONAL SPORTS (1986). A reserve clause binds players to their respective teams.

23. Gould & Berry, *Labor Trouble is Brewing*, N.Y. Times, Aug. 10, 1986, § 5, at 2, col. 1.

24. *See supra* note 19.

25. 470 U.S. 532 (1985).

26. *Id.* at 538 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

concluded that under such circumstances the due process clause necessitates a pretermination proceeding of some kind. Said Justice White speaking for the Court:

> [T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.[27]

Justice Marshall argued for a more rigorous pretermination procedure than that adopted by the Court. On the position of the dismissed employee, he wrote:

> [T]he employee is left in limbo, deprived of his livelihood and of wages on which he may well depend for basic sustenance. In that time, his ability to secure another job might be hindered, either because of the nature of the charges against him, or because of the prospect that he will return to his prior public employment if permitted. Similarly, his access to unemployment benefits might seriously be constrained, because many States deny unemployment compensation to workers discharged for cause. Absent an interim source of wages, the employee might be unable to meet his basic, fixed costs, such as food, rent or mortgage payments. He would be forced to spend his savings, if he had any, and to convert his possessions to cash before becoming eligible for public assistance.[28]

The focus upon the dismissed worker as in Europe and Japan, alluded to above and developed below, and the concerns articulated in *Loudermill*, have become more considerable in *both* the unorganized and organized sectors of the economy. This is manifested in both the evolving law and also in practices of employers and unions.

B. Factors Influencing This Change in the Law

Why has this happened in the 1980s? Before assessing recent trends, it is important for us to step back and to examine the factors which have created them. As noted above, until the past seven or eight years, employees not covered by collective bargaining agreements were terminable at will. The employees in the organized sector had little or no ability to protest dismis-

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27. *Id.* at 543.

28. *Id.* at 549-50 (Marshall, J., concurring).

sal in the economic context except for the question of which employee would be dismissed and which would be retained.

1. *Economic dislocations in middle-management*

A major contributing factor to this new environment is that managerial and professional employees have been harmed by economic dislocation in unprecedented numbers. This has been the case since the recession of the early 1980s. The increase in mergers—a trend that is hardly abating—has meant the dismissal of employees in middle-management and frequently the merger of two or three jobs into one.

2. *Decline in union membership*

That fewer employees are represented by unions has also exaggerated this phenomenon. Employees represented by unions are generally protected by collective bargaining agreements which contain just cause provisions within them. But the percentage of employees with an avenue of recourse available to them under a collective bargaining agreement is declining. It is interesting to note, however, that employees covered by collective bargaining agreements increasingly attempt to circumvent such procedures, initiating wrongful discharge actions of their own. Courts have accepted some of these suits, applying wrongful discharge theories despite a collective bargaining agreement.[29] Thus, a contemporary and troublesome reality and concern for the labor movement is that the remedies in wrongful discharge actions are frequently more attractive for employees than those under collective bargaining agreements. The former provide for punitive and compensatory damages based upon the intentional infliction of emotional harm, defamation, and other tort theories. Such relief is unavailable in arbitration proceedings under labor contracts.

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29. *See* Garibaldi v. Lucky Food Stores, 726 F.2d 1367 (9th Cir. 1984) *cert. denied*, 471 U.S. 1099 (1986); Gonzalez v. Prestress Engineering Corp., 115 Ill. 2d 1, 503 N.E.2d 308 (1986); *see also* Scott v. New United Motor Mfg., 632 F. Supp. 891 (N.D. Cal. 1986) (no preemption under NLRA of wrongful discharge suit brought by probationary employee who had no recourse to collectively bargained arbitration process); DeTomaso v. Pan Am. World Airways, 184 Cal. App. 3d 344, 220 Cal. Rptr. 493 (1985) (no preemption under Railway Labor Act of defamation action arising out of dismissal for employee misconduct). For further discussion see *supra* note 2.

3. The rise of labor legislation

A third consideration, the existence of labor legislation in the United States, has also promoted wrongful discharge litigation. As the Supreme Court noted a half-century ago in *NLRB v. Jones & Laughlin Steel Corp.*,[30] in which the constitutionality of The National Labor Relations Act was sustained, the Act fashioned a limitation, albeit a substantially narrow one, upon the terminable-at-will principle.[31] Employees have some protection against dismissal as well as other manifestations of forbidden discrimination. Similarly, Title VII of The Civil Rights Act of 1964[32] and other related legislation dealing with areas of social welfare law have carved out the same exception in connection with dismissals based on such grounds as race, sex, and religion. Undoubtedly, both The National Labor Relations Act and The Civil Rights Act of 1964 have been instrumental in facilitating rising expectations and demands which have made the courts more sensitive to the public interest in protecting employment relationships which have bonded because of the investments made by the employee and employer.[33]

Indeed, as pernicious for our societal fabric as it is, reverse discrimination litigation[34] might be seen as a complaint about the limited scope of fair employment practices legislation. Thus, the by-product of both Title VII and The National Labor Relations Act has been more attention to the concept of fairness on the job, and an increased sensitivity among minorities and women to such unfairness even where the complaint had nothing to do with the prohibition against discrimination or where discrimination could not be proven.[35] Thus, in the 1960s and 1970s, employers frequently were impelled to revise personnel policies to protect all employees against supervisory procedural and substantive unfairness well in advance of the advent of wrongful termination litigation. Indeed, non-union employers are now de-

30. 301 U.S. 1 (1937).

31. *Id.* at 45-46.

32. 42 U.S.C. § 2000(a)-(h) (1982).

33. Glendon & Lev, *supra* note 4.

34. United States v. Paradise, 107 S. Ct. 1053 (1987); Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986); Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 106 S. Ct. 3019 (1986); Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986). *See also* United Steelworkers v. Weber, 443 U.S. 193 (1979); Gould, *The Supreme Court and Labor Law: The October 1978 Term*, 21 ARIZ. L. REV. 621, 649-57 (1979).

35. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

vising peer review procedures which determine the propriety of both dismissals and promotions.[36]

All of these factors, it seems to me, have contributed to the evolution of the new common law in the wrongful dismissal arena in both the constitutional and common law context. These developments brought with them an avalanche of litigation. But, because of the perceived unsuitability of the judicial forum, as well as the vagueness of the adumbrated standards determining the circumstances under which employees may be dismissed,[37] a legislative response is necessary.

In the organized sector a number of factors have induced change. Foreign competition, frequently from Japan, and disproportionately centered in industries in which the unions have had strongholds, has meant economic devastation for employees. Many have either been placed on public assistance or been required to work in lower-paying service jobs. Thus, unions have seen that the protection afforded their workers was inadequate. They have watched as wrongful discharge litigation (with its attractive damage awards) has passed them by since it is out of the contemplation of collective agreements. Simultaneously, Japan's competitive example has stimulated employer initiatives to blur dividing lines between bargaining units and supervisory functions and to merge job classifications within the bargaining unit itself. Such initiatives have come to be associated with more flexible assignments, the elimination of archaic work rules, and an attempt to facilitate more employee interest, involvement, and loyalty in the firm.

In contrast to these developments, the changes in the unorganized portion of the economy have come about, for the most part, as law has facilitated the process and prodded management to devise new policies an as alternative to liability. True, there are limitations associated with the law (there are no restraints upon wrongful discipline yet)—but in the main the judge-made common law seems to have responded to deeply felt social and economic needs. In the organized sector quite the opposite is true. The initiative undertaken by unions and employers in the

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36. *See* Reibstein, *More Firms Use Peer Review Panel to Resolve Employees' Grievances*, Wall St. J., Dec. 3, 1986, at 33, col. 4.

37. CALIFORNIA STATE BAR AD HOC COMM. ON TERMINATION AT WILL AND WRONGFUL DISCHARGE, TO STRIKE A NEW BALANCE: A REPORT OF THE AD HOC COMMITTEE ON TERMINATION AT WILL AND WRONGFUL DISCHARGE, (Special Ed., Labor and Employment Law News, Feb. 8, 1984) [hereinafter TO STRIKE A NEW BALANCE].

private sector, where the writ of the Constitution does not run, seems to have been instituted *in spite of the law*! Here the law, consisting for the most part of statutory interpretation, has provided an opportunity for the parties to circumvent that exhaustion of the grievance procedures in collective bargaining agreements. This is contrary to federal labor policy as enunciated by the Supreme Court[38] in other contexts.

II. The Scope of the New Common Law of Wrongful Discharge

When Professor Clyde Summers advocated a wrongful discharge statute more than a decade ago, he noted that the common law, with its rigid adherence to the terminable-at-will principle provided no sustenance to employees not covered by collective bargaining agreements and denied them the property interest which arbitrators have long found present under just cause provisions in such agreements.[39] Thus, Summers' advocacy of a statute was predicated upon the assumption that the common law would not fill the vacuum. In the eleven years since Professor Summers put forward his bold and imaginative proposal, the common law has changed in a way he did not anticipate. It has provided such wide sweeping exceptions to the terminable-at-will principle that some speak of the exceptions swallowing the rule. Ironically, however, the need for a statute is as great as it was when Professor Summers first wrote. But the dynamics are totally different and have facilitated a climate which may prove more conducive to the enactment of unfair dismissal legislation.

A. Three Theories of Wrongful Discharge

How has this common law changed? Three theories have emerged to place limits upon an employer's unfettered discretion to dismiss employees outside the collective bargaining agreement—and, as previously indicated, some of them have also had an impact upon employees and employers covered by collective bargaining agreements.

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38. Vaca v. Sipes, 386 U.S. 171 (1967); Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).

39. Summers, *supra* note 4, at 483.

1. The public policy exception

The first exception to terminable-at-will is the so-called public policy exception which provides that an employee's dismissal is null and void if instituted for a reason inconsistent with public policy. In these cases, the courts have extended protection to employees who have been dismissed even though a statute does not explicitly provide a remedy for dismissal. The employee's dismissal is sometimes in direct violation of the law or a specific statute, but the cases clearly extend much further in most jurisdictions. The cases have protected workers, for instance, who have been retaliated against for protesting illegal behavior, who have engaged in "whistle blowing," and who have publicized or protested the illegal conduct of employers, as in the landmark decision of the Supreme Court of California, *Tameny v. Atlantic Richfield Co.*[40] Indeed, a number of state legislatures have enacted statutes which prohibit dismissal for "whistle blowing" and, in so doing, they have replaced or supplemented common law.[41]

The public policy cases have radiations beyond *Tameny*-type situations. For example, where an employer requires an employee to choose between his or her public obligation, such as serving on a jury when called to do so, and employment, the public policy exception has been applied.[42] The theory is that the purposes of state law will be eroded if employers can flout them so effectively.

Traditionally, the guarantees of the Constitution apply to public employees, thus providing them with, for instance, the right of free speech against governmental interference.[43] Under the public policy exception, some courts have extended this guarantee to private employees. The Court of Appeals for the

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40. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). In *Tameny*, an employee brought a wrongful discharge suit when he was fired for refusing to participate in an illegal scheme to fix gasoline retail prices.

41. *See generally Statutory Protection for Whistle Blowers Spreading in Public and Private Sectors*, Gov't Empl. Rel. Rep. (BNA) No. 1105, at 405 (March 18, 1985). There are currently nineteen states with some form of statutory protection for whistle blowers: California, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, New Hampshire, New York, Oklahoma, Oregon, Rhode Island, Texas, Washington, and Wisconsin.

42. Nees v. Hocks, Inc., 272 Or. 210, 536 P.2d 512 (1975); Reuther v. Fowler & Williams, 255 Pa. Super. 28, 386 A.2d 119 (1978).

43. *See* Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Board of Educ., 391 U.S. 563 (1968).

Third Circuit, for instance, has held that a private employer may run afoul of the public policy exception by penalizing an employee for freedom of expression.[44] In the case before it, the court concluded that an insurance company's dismissal of an employee for refusing to lobby for no-fault legislation was inconsistent with public policy because the employer was interfering with the employee's freedom of conscience. The court reasoned that freedom of expression and freedom of conscience were part of state public policy inasmuch as both the federal and state Constitutions protected such an interest.

In New Jersey the public policy exception has also been applied to privacy rights.[45] This has developed when employers, in response to the potential liability for sexual harassment litigation, have prohibited dating or cohabitation between supervisors and their employees. The employer's theory is that this policy is the only effective way to regulate supervisory conduct, given that sexual harassment can now constitute sex discrimination under Title VII.[46] Plaintiffs have sued for discharges based on the breach of such policies, analogizing their associational rights to the constitutionally based right of privacy found by the Supreme Court in cases involving both birth control[47] and abortion.[48]

The Supreme Court of Arizona, in *Wagenseller v. Scottsdale Memorial Hospital*,[49] held that the termination of employment for an employee's refusal to commit an act which might violate a state criminal statute proscribing indecent exposure constituted a basis for a wrongful discharge under the public policy theory. The employee in *Wagenseller* refused to comply with the alleged requirement of "mooning" on a company recreation trip. The requirement was held to constitute a basis for a wrongful discharge under the public policy theory. The court was careful to note that it was not expressing a view on whether the conduct complained of in fact violated a criminal law. It was enough to say that the policy of the law was inconsistent with

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

45. Slohoda v. United Parcel Servs., 207 N.J. Super. 145, 504 A.2d 53, *cert. denied*, 104 N.J. 400, 517 A.2d 403 (1986). *Contra* Crosier v. United Parcel Servs., 150 Cal. App. 3d 1132, 198 Cal. Rptr. 361 (1983). *Cf.* Rulon-Miller v. IBM, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984).

46. Meritor Savs. Bank v. Vinson, 106 S. Ct. 2399 (1986).

47. Griswold v. Connecticut, 381 U.S. 479 (1965).

48. Roe v. Wade, 410 U.S. 113 (1973).

49. 147 Ariz. 370, 710 P.2d 1025 (1985).

the conduct. Accordingly, based on all these cases, the radiations of particular aspects of the public policy exception are substantial indeed.

2. The covenant of good faith and fair dealing exception

A second line of cases, accepted in far fewer jurisdictions than those which have adopted the public policy principle, is the breach of the so-called covenant of good faith and fair dealing. This tort, first recognized in the insurance area,[50] has been applied to employment cases under certain circumstances. The doctrine, while rooted in contractual considerations, like the public policy exception, creates tort liability. This means that an employer's exposure for both punitive and compensatory[51] can be considerable indeed.

Under what circumstances will the courts find an implied covenant of good faith and fair dealing to be violated? There are two factors which seem important. In the leading decision *Cleary v. American Airlines*,[52] the California Court of Appeals noted that the employer's own procedures had been violated, and that the employee had been employed for a considerable period of time. Thus, a breach of an employer's own rules and employee longevity seem important—the latter also playing a role in arbitral consideration of whether an employer has dismissed an employee for just cause under collective bargaining agreements.[53]

3. The breach of contract exception

A third line of cases, in contrast to the covenant of good faith and fair dealing, are contractual in the pristine sense of the word. That is to say, these cases do not create tort liability for defendants. They divide themselves in two parts. The first is the so called implied contract in fact cases. Here, the employee has been employed for some considerable period of time, has received commendations, promotions, and the like, and then is

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50. *See* Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153, 161-67 (1981); *see also* Seaman's Direct Buying Serv. v. Standard Oil, 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

51. *See infra* note 59.

52. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); *see also* Caplan v. St. Joseph's Hosp., 188 Cal. App. 3d 1193, 233 Cal. Rptr. 901 (1987); Rulon-Miller v. IBM, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984).

53. *Id.* at 456, 168 Cal. Rptr. at 735.

dismissed. The courts have been willing to impose a good cause or good faith limitation under these circumstances.

A second group of cases impose a good cause or just cause standard upon employers by virtue of contractual promises which are deemed to flow from personnel manuals or booklets which have been distributed to employees. One of the leading cases in this area is a decision of the Supreme Court of New Jersey[54] in which that tribunal concluded that a manual was a binding agreement where the manual had been distributed. The New Jersey Supreme Court, like the Michigan Supreme Court,[55] has held that the employee need not prove that he or she relied upon the promises in the manual. The Hawaii Supreme Court has taken note of an obvious reality associated with manuals which contain promises of job security; these manuals are frequently designed in response to union organizational campaigns[56] or to thwart the potential for implied promises.

There is some doubt about the precise content of the covenant of good faith and fair dealing and the extent to which it differs from contractual obligations which do not contain tort liability. The best articulation of demarcation between ordinary contract and covenant of good faith and fair dealing is made by Judge Kaufman in *Koehner v. Superior Court*:[57]

> The covenant of good faith and fair dealing imposes obligations on the contracting parties separate and apart from those consensually agreed to; the obligations stemming from the implied covenant of good faith and fair dealing are imposed by law as normative values of society . . . .
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> . . . [T]he obligations imposed by the implied covenant of good faith and fair dealing are not those set out in the terms of the contract itself, but rather are obligations imposed by law governing the manner in which the contractual obligations must be discharged—fairly and in good faith. While the specific nature of the obligations imposed by the implied covenant of good faith and fair dealing are dependent upon the nature and purpose of the underlying contract and the legitimate expectations of the parties arising from the contract, those obligations are not the obligations that were consensually undertaken in the contractual provisions, and care must be taken in each case to determine whether the alleged breach is of an obli-

54. Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257 (1985).
55. Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980).
56. *See* Kinoshita v. Canadian Pac. Airlines, 724 P.2d 110 (Haw. 1986).
57. 181 Cal. App. 3d 1155, 226 Cal. Rptr. 820 (1986).

gation imposed by law and thus a tort or breach of an obligation consensually created by the parties in the terms of the contract and thus simply a breach of contract. In the case at bench, for example, an allegation that defendants' discharge of plaintiffs was without good cause would charge nothing more than a breach of contract.

What then in the employment discharge cases distinguishes a mere breach of contract from a breach of the covenant of good faith and fair dealing?

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. . . "There is little difference, in principle, between a contracting party obtaining excess payment in such a manner, and a contracting party seeking to avoid all liability on a meritorious contract claim by adopting a 'stonewall' position ('see you in court') without probable cause and with no belief in the existence of a defense. Such conduct goes beyond the mere breach of contract. It offends accepted notions of business ethics. Acceptance of tort remedies in such a situation is not likely to intrude upon the bargaining relationship or upset reasonable expections [sic] of the contracting parties."

. . . [T]he standard developed . . . is appropriate to distinguish between the simple breach of an employment contract by discharge of the employee without good cause and a breach of the implied covenant of good faith and fair dealing affording tort remedies. If the employer merely disputes his liability under the contract by asserting in good faith with probable cause that good cause existed for discharge, the implied covenant is not violated and the employer is not liable in tort. If, however, the existence of good cause for discharge is asserted by the employer without probable cause and in bad faith, that is, without a good faith belief that good cause for discharge in fact exists, the employer has tortiously attempted to deprive the employee of the benefits of the agreement, and an action for breach of the implied covenant of good faith and fair dealing will lie.[58]

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58. *Id.* at 1169-71, 226 Cal. Rptr at 828-29 (quoting Seaman's Direct Buying Serv. v. Standard Oil Co., 36 Cal. 3d 752, 769-70, 686 P.2d 1158, 1172, 206 Cal. Rptr. 354, 365 (1984) (citations omitted)); *cf.* Rulon-Miller v. IBM, 162 Cal. App. 3d 241, 248-49, 208 Cal. Rptr. 524, 529 (1984) in which the court held: "The duty of fair dealing by an employer is, simply stated, a requirement that like cases be treated alike." Although the employer behavior in *Rulon-Miller* was egregious, such extreme behavior was not present in DeHorney v. Bank of America, 777 F.2d 440 (9th Cir. 1985), in which the court of appeals also held that the employer's behavior violated the covenant of good faith and fair dealing. If these two cases are taken together, one excluding the longevity element and the other the egregious behavior element, they imply a much broader reading of the covenant.

B. Problems Caused by the Three Exceptions

These three lines of attack upon an employer's discretion and the terminable-at-will principle have created consternation for the business community for various reasons.

1. Exorbitant verdicts

Employers have complained that the juries before whom such cases are tried are inexpert, volatile, unpredictable, and favor employees. In California, from 1982 through 1986, plaintiffs obtained verdicts in seventy-three percent of the cases. The average total award in state court was $652,100, 1403% higher than defendants' settlement offer. What is even more startling is that the average award exceeded the settlement demand by 187%.[59] Clearly, plaintiffs are winning, the verdicts are large, and both employees and employers systematically underestimate the amount of damages that a jury will award. But meanwhile, the sense that the balance of power is still weighted in favor of employers vis-a-vis employees remains. In a sense, it would appear as though the law, while fashioning proper incursions upon the terminable-at-will principle, has given us the worst of both worlds.

2. Discriminatory effect

While employers are confronted with near unlimited liability in wrongful discharge cases, most of the employees in the work force have yet to benefit from the newly emerging doctrines. A disproportionate number of the plaintiffs are managerial and professional employees.[60] While this appears to be attributable to the considerable costs of litigation, even prior to trial itself,[61] it also has something to do with the theories employed. Most of the theories developed by the courts are of little help to the average employee—in sharp contrast to just cause provisions in collective bargaining agreements.

For example, while the public policy exception has a good

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59. Brown, *Summary of Wrongful Discharge and Related Cases Which Concluded With a Jury Verdict* (unpublished survey compiled from *Jury Verdicts Weekly* January 1982 to February 1986 by Frederick Brown of Orrick, Herrington & Sutcliffe, San Francisco).

60. *See* To Strike A New Balance, *supra* note 37, at 6-7; Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 Harv. L. Rev. 1931 (1983).

61. *See* To Strike a New Balance, *supra* note 37, at 6-7.

deal of overlap with just cause the fact is that its application is of little relevance to most workers. Most employees are simply not in a position to blow the whistle on the employer, let alone be in a position to complain about illegal behavior such as the alleged price fixing in *Tameny*. Furthermore, the freedom of conscience cases in which employees refuse, for instance, to lobby for a company, analogizing their position to constitutional free speech cases, are likely to be unusual and atypical. The same holds true of conflicts between public service and one's job. My sense is that it is relatively unusual for employers to require employees to choose between the two.

Even the other theories—covenant of good faith and fair dealing and implied contract—have had a limited impact. Both theories appear to be predicated upon substantial longevity with the employer. While arbitrators also consider seniority when assessing the question of just cause, the fact is that employees are eligible under most contracts to protest dismissals when they have been employed anywhere between thirty to ninety days. That is in vivid contrast to the number of *years* which are a prerequisite in the wrongful discharge cases.

Only the employee manual or booklet cases through which contracts are implied appear to have a wide sweep to them. As noted above, the policies behind these manuals are the traditional response to union organization drives. They are devised to assure workers that they already have everything that a union could promise, let alone deliver.

But now the confluence of perceived union lethargy and exposure to wrongful discharge litigation have made numerous companies cast such strategy and discretion to the winds. Many employers, by their insistence that applicants, and sometimes existing employees,[62] sign forms agreeing to be terminated at

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62. For an examination of the lawfulness of such contracts, see Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984). Some cases have held that an explicit provision in an employment application stating that employment is terminable at will, with or without cause by either party, may bar a wrongful discharge suit by a former employee based on a breach of implied contract grounded in the employment policy manual. *See* Reid v. Sears, Roebuck & Co., 790 F.2d 453 (6th Cir. 1986); Crain v. Burroughs Corp., 560 F. Supp. 849 (C.D. Cal. 1983); Summers v. Sears, Roebuck & Co., 549 F. Supp. 1157 (E.D. Mich. 1982); Novosel v. Sears, Roebuck & Co., 495 F. Supp. 344 (E.D. Mich. 1980); Ferraro v. Koelsch, 124 Wisc. 2d 154, 368 N.W.2d 666 (1985). *But see* Steiner & Dabrow, *The Questionable Value of Inclusion of Language Confirming Employment-at-Will Statutes in Company Personnel Documents*, 37 LAB. L.J. 639 (1986):

> [A] disclaimer in an employee manual will not bar a future claim in public

will or without just cause, are attempting to erode the contractual protection which the courts have extracted from such manuals. Some employers now seek the same objective through arbitration or, more frequently, peer review. In my view, if such contracts purport to preclude wrongful termination litigation, it is doubtful they will survive public policy attacks rooted in a contract of adhesion theory, despite the policy supporting arbitration.[63] But many employees who rely upon personnel manuals can take little comfort in this conclusion in light of the remaining reluctance of some courts to view such documents as contracts.[64]

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policy cases. There is simply no consideration independent of the general employer-employee relationship for enforcing a disclaimer as a contractual bar to retaliatory discharge suits. Since neither party knew the dispute would arise in the future and neither party had a good faith claim or defense at the time of the disclaimer the classic contractual analysis supporting the validity of settlement agreements does not apply to disclaimers. Moreover, in future cases, courts are likely to limit acceptance of disclaimers in public policy cases for the same reasons that created the public policy exception in the first instance.

Id. at 643-44. However, still other cases support the proposition that causes of action should be maintained in furtherance of significant public policies. Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

63. However, the California Supreme Court in Graham v. Scissor-Tail Inc., 28 Cal. 3d 807, 623 P.2d 165, 171 Cal. Rptr. 604 (1981), reviewed the use of arbitration clauses in an employment contract in a non-union setting. While the court found the particular clause under consideration unconscionable, the court held that under California law, contracts that bind parties to arbitrate disputes are valid even where the designated arbitrator is not a neutral party. It should be noted, however, that in addressing the issue of applicability of the federal common law of labor contract, this court noted that the contracts in question appeared to be employment contracts in form only.

However, the court's opinion in *Dryer* v. *Los Angeles Rams*, 40 Cal. 3d. 406, 709 P. 2d 826, 220 Cal. Rptr. 807 (1985) indicates that there is a difference between California and federal common laws of labor contract. Here, in ruling that federal common law controled in a unionized setting, the court stated that its review of the federal common law reveals no fairness standard of the type it applied in the *Graham* case, the interference being that a fairness standard would apply in cases involving employment litigation under California law. Thus, the applicability of California's arbitration statute to employment cases may not be settled. *Cf.* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg., 363 U.S. 564 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

64. *See* Note, *Employee Handbooks and Employment-At-WillContracts,* 1985 DUKE L.J. 196. *But see* Weiner v. McGraw-Hill Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982). *See also* Comment, *Limiting the Employment-at-Will Rule: Enforcing Policy Manual Promises Through Unilateral Contract Analysis,* 16 SETON HALL L. REV. 165 (1986); Connolly, Murg & Scharman, *Abrogating the Employment-at-Will Doctrine: Implications for an Employer's Personnel Policies and Handbooks,* 2 PREVENTIVE L. REP. 53 (1983)): NOTE, *The Employment Handbook as a Contractual Limitation on the Employment at Will Doctrine,* 31 VILL. L. REV. 335 (1986).

In short, neither the tort nor contract theories provide employees with anything analogous to the protection afforded employees under collective bargaining agreements. Ironically, however, those employees who are covered by collective bargaining agreements and make resort to the courts can obtain substantial monetary damages superior to those normally provided unionized employees. And, as noted above, employers are faced with liability in an environment which is both volatile and unpredictable. Society, with the courts now clogged by an increasing number of such cases, has the worst of all worlds. The need for state legislation is obvious.[65]

III. What Legislation Should Provide

In my view,[66] legislation should contain three basic ingredients.

A. Arbitration

The first basic ingredient should be arbitration, its virtues being speed, economy, and informality. Yet there are problems with the use of this forum since arbitration is an institution which has gained such prominence in the organized sector. One of the most perplexing problems relates to the impartiality of arbitrators. It is one thing to have near unbounded confidence in impartiality where two institutions are contending with one another and arbitrators can expect to deal with both of them in the future. But in wrongful discharge cases, unless unions intervene in a good number of them to represent the unorganized, it is a contest between the individual employee and the employer.[67] Can arbitrators be counted upon to demonstrate the same degree of impartiality where they know that it is unlikely that the

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65. A federal statute, while the most desirable option, is simply not a practical solution which can be realized in the near future. *Cf.* Steiber & Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute,* 16 U. Mich. J.L. Ref. 319 (1983).

66. Gould, *Reflections on Wrongful Discharge Litigation and Legislation,* in Arbitration 1984: Absenteeism, Recent Law, Panels, and Published Decisions 32 (W. Gershenfeld ed.) (Proceedings of the 37th Annual Meeting, National Academy of Arbitrators); Gould, *Protection from Wrongful Dismissal,* N.Y. Times, Oct. 22, 1984, at A21, col.3.

67. The Canadian experience indicates that the major problem that unorganized employees will have with an arbitration statute is employer resistance to the arbitrator's award. Employers often petition for judicial review, and when this occurs, the employee must obtain a lawyer. *See* Trudeau, *Statutory Protection Against Unjust Dismissal for Unorganized Workers,* (Harvard Law School, April, 1985).

individual employee will ever appear before them again—in contrast to dealings with unions and employers where the opposite is likely to be true? No response to this question is completely reassuring. But Canada has now had arbitration for unorganized employees at the federal level for nine years,[68] and there do not seem to be major problems with impartiality. To date, the system in that country seems to be working well.

A virtue of the arbitration system is that it would provide for not only a swift resolution of an unfair dismissal complaint, but also the remedy of reinstatement rather than punitive and compensatory damages. The assumption is that this is what the average worker wants most—especially if the remedy could be obtained quickly. But one problem with this approach is that again, unless the unions become involved, there is no institution which can monitor management attempts to harass and rid itself of the employee who has been foisted upon it through the reinstatement remedy. This may be the reason (aside from common law tradition in Britain) why reinstatement is so apparently infrequent in Europe. Even in this country, a very substantial number of employees do not take the reinstatement remedy offered under The National Labor Relations Act[69] and arbitration—even though an exclusive bargaining agent is on the scene to monitor potential harassment. Accordingly, potential evasion of a reinstatement order is likely to be present in wrongful discharge cases—although this fact may simply argue for a more discriminate and cautious approach to use of the reinstatement remedy in such arbitrations.

A third concern, besides impartiality and reinstatement, re-

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68. *See generally* England, *Unjust Dismissal in the Federal Jurisdiction: The First Three Years*, 12 MANITOBA L. J. 9 (1982); Simmons, *Unjust Dismissal of the Unorganized Workers in Canada*, 20 STANFORD J. INT. L. 473 (1984).

69. *See* Chaney, *The Reinstatement Remedy Revisited*, 32 LAB. L.J. 357 (1981); Gold, Rodney, Dennis & Graham, *Reinstatement After Termination: Public School Teachers*, 31 INDUS. & LAB. REL. REV. 310 (1978); Malinowski, *An Empirical Analysis of Discharge Cases and the Work History of Employees Reinstated by Labor Arbitrators*, 36 ARB. J. 31 (1981); McDermott & Newhams, *Discharge-Reinstatement: What Happens Thereafter?*, 24 INDUS. & LAB. REL. REV. 526 (1971); Stephens & Chaney, *A Study of Reinstatement under the National Labor Relations Act*, 25 LAB. L.J. 31 (1974).

A comparison of these studies indicates that the reinstatement remedy is more effective in cases decided by arbitrators under collective bargaining agreements than in cases decided under the NLRA. However, there may be a flip side to this argument. The relative lack of success of reinstatement under the NLRA could be due to anti-union animus that brings about violations of sections 8(a)(1) and 8(a)(3), not always present in arbitration cases. If this is the case, then reinstatement might be a viable remedy in the wrongful discharge context.

lates to the potential avalanche of arbitration cases. Part of the rationale for substituting arbitration for the courts is that more substantial employee access can be obtained. Yet if all dismissed employees decide to roll the dice and go to arbitration, that system may grind to a halt. In the organized sector, unions sift out grievances which are unmeritorious or less important. No similar entity can play a role under wrongful discharge legislation—although it is interesting to note that the numbers of Canadian cases at the federal level has recently diminished not increased.[70]

The answer here would seem to be, as the California State Bar Committee advocates,[71] that mediation and informal discovery be used to diminish the number of cases. The imposition of financial costs equally shared by employee and employer would also help. True, the fifty-fifty sharing will often be unfair to the employee since he or she will have less resources than the corporation. But this system not only will diminish the number of cases that would otherwise go to arbitration, but it also is more fair to the employees than the status quo which, more often than not, employees find too expensive to pursue.

A related concern is the number of arbitrators. Arbitrators acceptable to both labor and management are already in short supply. Whatever the success of statutory mechanisms in reducing the number of cases that proceed to hearings on their merit, the demand for arbitrators will increase substantially if such legislation is passed.

But this is a problem, like the question of impartiality, which affects the development of alternative dispute resolution processes as a general matter. Does anyone believe that if the entire membership of the National Academy of Arbitrators were to vanish from the face of the earth, that most unions and employers would eliminate their arbitration clauses in collective bargaining agreements? While most of us like to see ourselves as indispensable, programs that have been adopted on a limited basis for the training of new arbitrators could go a long way toward filling the supply that will be needed if such legislation is passed.

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70. *See Unjust Dismissal Statutes*, 10 ARBITRATION SERVICES REPORTER 1, Published by Arbitration Services, Federal Mediation & Conciliation Service (April 1986).

71. TO STRIKE A NEW BALANCE, *supra* note 37, at 24.

B. The Just Cause Standard

The second ingredient of a statute should be the promulgation of a proper standard to be employed by arbitrators in deciding discharge cases. As noted above, the standard under either the implied contract theories or the covenant of good faith and fair dealing is by no means clear. Professor Summers, again, has advocated resort to the common law of arbitration that has emerged in connection with the just cause standard in most collective bargaining agreements negotiated between unions and employers.[72] A principal difficulty here is that management employees traditionally have not been covered under these agreements because of a conflict of interest, and so the common law standard has not been applicable to them. But inasmuch as there is no justification for excluding managerial and professional employees from a wrongful discharge statute on the ground of potential conflict of interest, a standard should be used which can apply to all employees, regardless of their position. Given that managerial employees have carried the litigation load which has made employers more interested in alternate dispute resolution procedures, it would be both wrongheaded and impractical to exclude them—unless their exclusion meant that they could use existing common law, a proposition which is an anathema to business.

The California State Bar Committee advocated that while just cause should apply to all employees, much more substantial deference should be given to employer decisions in connection with higher-echelon employees, given the subjective nature of the work involved.[73] The alternative—good faith or some other standard less exacting than just cause—would raise more questions than it would answer. For instance, while traditional application of progressive discipline ought not to apply to managerial and professional types even under a just cause standard, would that concept be present at all under a good faith standard? What kinds of offenses would be exempted from a statutory just cause standard? Problems such as these would be difficult to handle through legislative decree and it may be that this, more than anything, argues effectively for the adoption of the just cause standard such as that advocated by both Professor Summers and the California State Bar Committee.

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72. Summers, *supra* note 4, at 521-24.

73. To Strike A New Balance, *supra* note 37, at 11-12.

C. Labor Law Remedies

Finally, there is the matter of remedies. The attractiveness of legislation for employers is limited liability. The California Bar Committee advocated a combination of remedies present in both The National Labor Relations Act and Title VII, such as reinstatement, back-pay with interest, attorneys' fees and costs for the prevailing employee, and front-pay up to two years where reinstatement is inappropriate. Clearly, because of the lack of any policing mechanism such as a union, reinstatement may be *inappropriate* in a far greater number of instances than is the case under the National Labor Relations Act or arbitration.[74]

IV. The Propriety of Wrongful Discharge Legislation: Reflections on Europe and the United States

The debate about the propriety of wrongful discharge litigation or legislation is complex. It is complicated by the conservative view, articulated by the Chicago school of economists, that all attempts to limit employer authority are misguided in that they interfere with the market.[75] One of the main arguments in support of this view is that the higher rate of unemployment in Europe is attributable to job protection legislation such as unfair dismissal and plant-closing laws, the latter providing unions and workers with notification of the closing and the opportunity for subsequent consultation, retraining, and relocation allowances.

These laws, conservatives argue, make employers reluctant to hire and anxious to fire those whom security has made lethargic. But this misses the mark for a number of reasons.

In the first place, the common law of wrongful discharge in this country makes it difficult to draw sharp contrasts with Europe. America already has its own inefficient version of unfair dismissal law which could well produce some of the same problems that exist in Europe. This therefore casts doubt upon the proposition that the higher unemployment rate endured in most of Europe is caused by unfair dismissal machinery. One must look elsewhere for the real causes of the different unemployment rates in the two continents.

Second, Professor Robert Flanagan of the Graduate School

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74. Many reinstated workers have not returned to work in Canada. *See* Trudeau, *supra* note 67.

75. *See* Epstein, *supra* note 4.

of Business at Stanford has calculated that employers are more reluctant to hire applicants in Europe—not because of unfair dismissal machinery, but rather because of pay compression which makes entry level labor too expensive.[76] In the United States, in contrast, the much larger non-union sector of the economy has what economists call a sharp age-earnings curve which is far steeper than that present in the American economy's organized sector, or in Europe. That is to say, beginners are paid much less than their more experienced colleagues in the non-union sector. All of this has at least three immediate consequences.

The first and most obvious is that Europe's job protection laws are not the source of its economic ailments. Indeed, Germany, the continent's most successful economic engine, pioneered reforms in this arena since the early 1950s. Second, wrongful discharge legislation providing for arbitration would only benefit American non-union employees where labor is cheap at the entry level. Since the pay compression feature that Professor Flanagan has identified as at the heart of Europe's unemployment is absent in the non-union sector here, it seems unlikely that legislation would produce the same untoward economic results that plague Europe.

Third, since non-union labor is paid relatively poorly at entry in this country, there is a special incentive for employers to renege on what has been characterized as an implicit contract.[77] The contract is that the employee will receive more than the market would otherwise provide as he or she becomes older in recompense for what has been lost due to low wages at the early stages of the worker's career. Age discrimination litigation dem-

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76. *See* Flanagan, *supra* note 21.

> A major objection to the adoption of such job security legislation in the U.S. is that it is largely responsible for Europe's low job growth and high unemployment, and thus thought to be a repetition of their mistakes. This conclusion is *not* supported by the evidence available to date. Macroeconomic policy, residual inter-country barriers, more nationalized industries and a lower spirit of entrepreneurialism all seem to contribute significantly more than employment security legislation to this problem. Moreover, employer surveys in Europe show that they are not upset with advance notice and consultation requirements but with the administrative complexity of such legislation.

REPORT OF THE SECRETARY OF LABOR'S SUBCOMMITTEE ON THE FOREIGN EXPERIENCE OF THE TASK FORCE ON ECONOMIC ADJUSTMENT AND WORKER DISLOCATION, EVALUATION OF PROGRAMS TO ASSIST DISPLACED WORKERS IN FOREIGN INDUSTRIALIZED COUNTRIES 9 (Dec. 1986).

77. *See* Flanagan, *supra* note 21.

onstrates the frequency with which such implicit promises are broken. The age-earnings curve demonstrates both the inequality of the relationship and the need for protection.

V. The Organized Sector

Long before the advent of wrongful discharge litigation, employees initiated an attack upon the employers' right to dismiss workers under collective bargaining agreements. As noted above, much of this activity has taken place in connection with just cause and seniority provisions in labor contracts. But a quarter of a century ago the proposition that seniority rights were contained in the collective agreement and were thus "vested" and could not be taken from the worker by either union or employer, received some support from the Court of Appeals for the Second Circuit.[78] Ultimately, however, that court itself along with the Sixth Circuit retreated from this holding.[79]

The Court of Appeals for the Sixth Circuit, along with the weight of authority,[80] has held that the right to a job under a collective bargaining agreement is not a property right within the meaning of the Constitution which would amount to an unlawful "taking" in the event that the worker was deprived of his job. The persuasiveness of this position is manifest by virtue of the fact that unions and employers frequently renegotiate seniority provisions in response to unanticipated contingencies such as mergers, acquisitions, and the like[81] regardless of the ex-

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78. Zdanok v. Glidden, Co. 288 F.2d 99 (2d Cir. 1961), *affirmed*, 370 U.S. 530 (1962).

79. *See* Local 1251, UAW v. Robertshaw Controls Co., 405 F.2d 29 (2d Cir. 1968).

80. Hass v. Darigold Dairy Prods. Co., 751 F.2d 1096 (9th Cir. 1985); Cooper v. General Motors Corp., 651 F.2d 249 (5th Cir. Unit A 1981); Baker v. Newspaper and Graphics Communication Union, Local 6, 628 F.2d 156 (D.C. Cir. 1980); Ekas v. Carling Nat'l Breweries, Inc. 602 F.2d 664 (4th Cir. 1979); Charland v. Norge Div., Borg-Warner Corp., 407 F.2d 1062 (6th Cir.) *cert. denied*, 395 U.S. 927 (1969). The Court has held that no property rights exist when there is a plant relocation as was the case in *Charland* or a total plant shut down as was the case in Local 1330, United Steelworkers v. United States Steel, 631 F.2d 1264 (6th Cir. 1980). The latter case involved the shutdown of two large steel plants in the Youngstown, Ohio area causing the dismissal of 3500 workers. The union sued on a variety of theories including one that stated that the members of the community had a property interest in the steel plants given the long standing relationship between U.S. Steel and the town. The court citing *Charland* rejected this cause of action as well. Oddie v. Ross Gear & Tool Co., 305 F.2d 143 (6th Cir.) *cert denied*, 371 U.S. 941 (1962).

81. *See* Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 How. L.J. 1, 1-7 (1967).

pectations that may have been acquired under previous collective bargaining agreements.

Whether job security issues are arbitrable in the event of plant relocations, mergers, and other such events is dependent upon the collective bargaining agreement. Injunctions have been granted to prevent the loss of jobs attributable to such management decisions on the ground that they would cause irreparable injury to the employee.[82] This, then, is a more limited proposition than the one accepted by the Supreme Court in *Loudermill*. There, the Court required pretermination hearings in the public sector, effectively ruling that public employment was property within the meaning of the due process clause of the fourteenth amendment.

That *First National Maintenance Corp. v NLRB*[83] excludes the unions from employer decision making on such issues as partial closure of operations would appear to circumscribe employee rights in the organized sector. But this has not happened for two reasons.

First, notwithstanding the Court's rejection of the proposition that labor and management are "partners" under the federal statutory scheme, a number of new collective bargaining agreements have proceeded upon that very assumption. For instance, the agreement negotiated between Saturn Corporation and the United Auto Workers states that there shall be "full participation by the union" and "free flow of information and clear definition of the decision-making process."[84] The union is regarded as a "full partner".[85] The "work units" are to have responsibility relating to, among other matters, "producing a quality product [and] performing to budget," and they will "constantly seek improvement in quality, cost and work environment."[86]

The Strategic Advisory Committee, of which the union is a

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82. *See* Local Lodge No. 1266, Int'l Ass'n of Machinists v. Panoramic Corp., 668 F.2d 276 (7th Cir. 1981). *See generally* Lever Bros. v. International Chemical Workers Union, Local 217, 554 F.2d. 115 (4th Cir. 1976). *See also* Nolde Bros. v. Local 358, Bakery Workers Union, 430 U.S. 243 (1977) (arbitrability of disputes arising out of a collective bargaining agreement); W. GOULD, STRIKES, DISPUTE PROCEDURES, AND ARBITRATION 129-58 (1986).

83. 452 U.S 666 (1981).

84. Memorandum of Agreement Between Saturn Corporation and the International Union, United Automobile Workers, at 5 (July 1985) (on file with author).

85. *Id.* at 11.

86. *Id.* at 9.

part, "will undertake the strategic business planning necessary to assure the long-term viability of the enterprise, and will be responsive to the needs of the marketplace relative to quality, cost and timing."[87] Each work unit is to have responsibility and authority with regard to job design. And the Saturn employees initially hired from GM plants and eighty percent of the employees with the greatest seniority shall have "permanent job security eligibility".[88]

The collective agreement between the UAW and New United Motor Manufacturing, Inc. (the General Motors-Toyota joint venture) also contains provisions granting broad powers to employees. Under the agreement, management obliges itself, as frequently happens in Japan, to cut its own salaries before instituting layoffs.[89]

The quid pro quo for such enhanced job security has been union agreement to merge job classifications. This allows management to reduce costs through flexibility of work assignment. The fact that all of this has taken place in spite of labor law rather than because of it is truly remarkable—and a vivid contrast to the new law of wrongful discharge.

The second reason that employee rights under collective bargaining agreements have not been circumscribed is that wrongful discharge law—state law, not federal law—has made an impact upon employees covered by collective agreements as well. The Court of Appeals for the Ninth Circuit in *Garibaldi v. Lucky Food Stores*[90] held that when a plaintiff covered by a collective bargaining agreement litigates a wrongful termination on a public policy theory, the state's interest in adhering to and implementing its own public policy is paramount to federal preemption. The Court of Appeals for the Third Circuit has concurred at least where the public policy protects an employee against retaliation for invoking a state law such as a workman's compensation statute.[91]

This rule has been extended to covenant of good faith and fair dealing cases where some courts have held that if the em-

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87. *Id.* at 10.

88. *Id.* at 17.

89. Collective Bargaining Agreement between New United Motor Manufacturing, Inc. and the International Union, United Automobile Workers, Section III, Job Security, at 5 (July 1985) (on file with author).

90. 726 F.2d 1367 (9th Cir. 1985), *cert. denied*, 471 U.S. 1099 (1986).

91. Herring v. Prince Macaroni of New Jersey, Inc., 799 F.2d 120 (3d Cir. 1986).

ployee does not have a remedy under the collective bargaining agreement it is anomalous for the agreement and preemption doctrine associated with it to deprive the employee of the cause of action enjoyed by all others in the state.[92]

The practical impact of these wrongful discharge actions proceeding under either public policy or covenant of good faith and fair dealing theories is that (1) unions will have to concern themselves with pressing for expansive remedial provisions in their agreements, and (2) unions may seek more uniformity between wrongful discharge actions and the collective bargaining agreement by opting for legislation which will create symmetry and thus statutorily deprive unionized employees of the right to proceed in court.[93]

VI. Conclusion

The key feature of recent job security developments is that the common law and the parties themselves have led the way. Thus far Congress and the state legislatures are in the rear guard. For a variety of reasons, expectations and demands about the employment relationship have increased and both the courts, through the common law, and the parties themselves in the collective bargaining process have responded to it.

On the other hand, both Congress and the state legislatures initially paved the way with legislation of a more limited nature. The idea that the contract of employment need not be terminable at will has its origins in the modern labor legislation of more than half a century ago. First the state legislatures through the enactment of fair employment practices laws and then Congress, by its adoption of Title VII of the Civil Rights Act of 1964, created a new environment in which the courts would be responsive to the need for more bonding and permanence in the employment relationship. Then as now the need for stability, productivity and a constructive employer-employee relationship was a driving force.

The challenge now is to provide that the law mirror these societal developments in a sensible and rational way. In the

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92. Scott v. New United Motor Mfg., 632 F. Supp. 891 (N.D. Cal. 1986).

93. Curiously, the AFL-CIO Executive Council, without referring to the status of organized workers, supports compensation for "consequential injuries" as well as back pay for non-union employees. *See supra* note 16a. This suggests that the AFL-CIO Statement may be more rhetoric than reality.

wrongful discharge litigation arena, that task is for the state legislatures. In the organized sector, Congress could assist labor and management representatives who want more cooperative relationships through amendment of the National Labor Relations Act.[94] The fact that Germany and Japan have intelligently addressed these issues has something to do with their success in the years since the defeat of those nations in World War II.[95]

The very tasks which those countries addressed are before us today. They are not likely to vanish or dissipate in the 1990s, but rather intensify and be with us for years to come.

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94. The beginning of this can be found in the Labor-Management Cooperation Act, 1978, 29 U.P.S.C. 173(e) which authorized and directed the Federal Mediation and Conciliation Service to encourage establishment of labor-management committees to and with which the Service may make grants and enter into contracts. *See also* U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR-MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION 104 (1986). Congress could enact legislation requiring or encouraging consultation with unions and workers prior to plant closures. Four states have some form of plant closure legislation: Connecticut, Maine, Massachusetts, and Wisconsin. *See* Comment, *The NLRA Preemption of State and Local Plant Relocation Laws*, 86 COLUM L. REV. 407 (1986). Federal plant-closing laws have been proposed periodically over the last few years. The latest bill, H.R. 1616, 99th Cong., 1st Sess., 131 CONG. REC. 10,465 (1985), was defeated on November 21, 1985 by a 208-203 vote. H.R. 1616 would have required a 90-day notice for a layoff or plant shutdown affecting 100 or more employees, or 50-100 employees where the laid off employees constituted at least 30% of the workforce. Even a task force created by the Reagan Administration has advocated notification prior to plant closings. *See* REPORT OF THE SECRETARY OF LABOR'S TASK FORCE ON ECONOMIC ADJUSTMENT AND WORKER DISLOCATION, ECONOMIC ADJUSTMENT AND WORKER DISLOCATION IN A COMPETITIVE SOCIETY (1986); *Debate on Plant Closing Notification Requirement*, 124 L.R.R.M. (BNA) 174 (1987); *Plant Closings: Warnings, Not Laws*, N.Y. Times, Mar. 14, 1987, at 14, col. 1.

Developments in both Europe and Japan make it clear that access to information on a continuous basis is far more important than notification, consultation, or bargaining at the time of plant closure. *See* Gould, *Union Involvement in Employer Decisionmaking: Some Reflections on America and Europe*, 58 TUL. L. REV. 1322 (1984).

95. *See generally*, W. GOULD, *supra* note 7.