The Case Against Proposals to Eliminate the Employment At Will Rule

Susan L. Catler†

In this article the author considers and rejects various proposals for modification of the employment at will rule. Arguing that most judicial or legislative action to change the rule would be both inappropriate and ineffective, she concludes that employees must look primarily to the collective bargaining process to obtain meaningful protection from unfair dismissal.

I

INTRODUCTION

In the last few years, many commentators have criticized the legal treatment of the employment relationship in the United States. Specifically, these articles have commented unfavorably on the “at will” employment rule, which provides little protection from what the authors characterize as “unfair dismissals,” and have proposed legislative or judicial changes to the rule.

Neither judicial nor legislative imposition of a universal right to be dismissed only for “just cause” would be in the best interests of either individual employees or the American labor relations system. Although the effect of the at will rule seems at times to be harsh, especially to workers who, prior to dismissal, were unaware of or deluded about the legal status of their tenure, this paper will argue that, on balance, most of the proposed changes would be even harsher. The protection promised by the modifications appears desirable, but would in fact be much weaker in application than the protection from unjust dismissal offered by the models upon which it is based, especially collective bargaining. Because the inherent shortcomings of a legislative

Copyright © 1983, Susan L. Catler
† Harvard University B.A., 1978; J.D., 1982; Associate, Sherman, Dunn, Cohen, Leifer & Counts, Washington D.C.

It is the policy of the IRLJ to use feminine pronouns whenever a gender pronoun is required.
or judicial lifting of the at will rule are difficult to perceive, employees would be even more deluded about their legal status and about the relative value of those job security arrangements already available to them. Granting employees such illusory rights will further limit their ability to make anything approaching the intelligent job selection decisions envisioned by economists, in an imperfect job market which is already seriously marred by a lack of information and mobility. The result of adopting the proposed broad changes in the at will rule would be less, rather than more, job security for American workers and a weakening of many of the institutions in our industrial relations system.

This article first presents the currently accepted rule of law, explores its historical roots, and systematically delineates the exceptions to the rule. It then explains other commentators' objections to the status quo and describes the changes they propose to the employment at will doctrine. Finally, the paper critiques the proposed modifications.

II

EMPLOYMENT AT WILL: THE DOCTRINE AND THE EXCEPTIONS

Since the late nineteenth century, American common law has presumed that employment for an indefinite term is employment at will, which may be terminated at any time by either party for any reason or no reason at all.\(^1\) Until the 1930's, the only way that an employee could escape the operation of this common law rule was to obtain a contract for a set term from her employer.\(^2\)

After a treatise writer formulated the employment at will rule in 1877,\(^3\) it was quickly incorporated into the American legal system. The

---
\(1\). Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 VA. L. REV. 481, 484 (1976); Vernon & Gray, Termination at Will—The Employer’s Right to Fire, 6 EMPLOYEE REL. L.J. 25 (1980); Anno., 62 A.L.R.3d 271 (1975). In Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), overruled on other grounds, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915), for example, the court states that employers may discharge “for good cause, for no cause or even for cause morally wrong without being thereby guilty of legal wrong.”

\(2\). See notes 11-13 infra and accompanying text.


Wood’s creativity led to an American rule that is at odds with those found in other common law jurisdictions. D. Harris, WRONGFUL DISMISSAL 3-4 (1978). The English common law rule can be traced to the Statute of Labourers of 1562. 5 Eliz. I, c. 4 (1562). In general the statute did not favor workers, but it did prohibit masters from firing their servants without cause or notice. Id. at sections 5 and 6. The law was repealed in 1875. Conspiracy and Protection of Property Act, 38 & 39 Vict., c. 86, s. 17 (1875). The requirement of reasonable notice prior to termination has been incorporated into the English common law. D. Harris, WRONGFUL DISMISSAL 1-3 (1978).
United States, experiencing rapid growth through a developing industrial economy, favored rules that encouraged further expansion and investment. An employment policy that increased employers' discretion and reduced their potential liability for exercising that discretion fit the prevailing economic conditions of the country. In addition, the rule applied the emerging legal theory of contract to the employment relationship. In order to maximize individual freedom, contract theory required express contract terms for promises to be held enforceable. The employment at will rule fit a legal philosophy that was unwilling to imply any restriction on an individual's freedom to act unless she had clearly indicated an intention to obligate herself.

The Supreme Court elevated the employment at will rule to constitutional status in Adair v. United States. In that case, the Court struck down the section of a federal law banning discrimination by common carriers against their employees because of union membership. The Court held the law to be "an invasion of the personal liberty, as well as of the right of property, guaranteed by [the Fifth] Amendment." In Coppage v. Kansas, the Court took the same position toward a law forbidding "yellow dog" contracts, holding that state legislation protecting an employee's right to join a union violated an employer's right to determine whom to hire. These opinions have been characterized as "the high water mark of the Court's insistence on laissez-faire principles in the labor area, despite a growing concern by legislatures at the time that freedom of contract was a cruel illusion because of the extreme differences in bargaining power between em-

5. Id. at 1825-26.
7. Id. at 172. The Court went on to say that without "a valid contract between the parties ... it cannot be ... that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another." Id. at 175-76. In neither the Commerce Clause nor the police power did the Court find sufficient justification for this impairment of the freedom of contract.
9. A "yellow dog" contract is an agreement signed by a worker in which she promises not to join or continue membership in a labor organization while she is employed by that company. The Supreme Court, in Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 260-62, (1917), held these to be enforceable and enjoined the United Mine Workers from attempting to organize at will employees who had signed such contracts.
The Supreme Court has since recognized that Congress can constitutionally limit a private employer's freedom to discharge at will employees. In the 1930 case of *Texas & New Orleans Railroad v. Brotherhood of Railway Clerks*, the Court held that an injunction was properly granted to enforce the Railway Labor Act's provision prohibiting discharges for union activity; the law did not unconstitutionally interfere with employer rights. Seven years later, in *NLRB v. Jones & Laughlin Steel Corp.*, the Court upheld the National Labor Relations Act's (NLRA) similar provisions forbidding employer coercion or discrimination against employees because of their union activities. The Court made it clear that the provisions of the NLRA create exceptions to, but do not change, the employment at will rule. In finding the *Adair* and *Coppage* decisions inapplicable to its ruling in *Jones & Laughlin*, the Court explained that the NLRA "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them." Congress and a number of state legislatures continue to follow this approach, choosing to legislate exceptions to the rule rather than eliminate it.

There are three types of exceptions to the employment at will rule—legislative, judicial, and those created by a private mechanism.

### A. Legislative Exceptions

The four major statutory schemes creating exceptions to the rule are the NLRA and laws patterned after it, civil service systems, the Vietnam Era Veteran's Readjustment Assistance Act of 1974, and state unemployment compensation laws. The NLRA includes two kinds of protective exceptions to the rule, both of which have been incorporated into other laws. The first exception prohibits discrimination, including discharge, based on an employee's protected private activity or status. In the NLRA, sections 8(a)(1) and (3) forbid discrimination resulting from an employee's union participation or membership. Other examples in federal law of this type of provision include: section 703(a) of Title VII of the Civil Rights Act of 1964, which bars any discharge based on "race, color, religion, sex or national origin"; section 304 of

---

EMPLOYMENT AT WILL RULE

the Consumer Credit Protection Act,\(^{16}\) which prohibits discharge because of wage garnishment for one debt; and section 4(a) of the Age Discrimination in Employment Act of 1967,\(^{17}\) which outlaws discriminatory discharges of older workers.\(^{18}\) State laws\(^{19}\) and federal executive orders\(^{20}\) have also been used to protect employees from discharge because of their characteristics or activities.

The second type of employee protection included in the NLRA is found in section 8(a)(4),\(^{21}\) which prohibits discrimination based on an employee's participation in NLRB-proceedings or assertion of rights under the Act. Parallel provisions found in other federal statutes include: section 704(a) of Title VII of the Civil Rights Act of 1964;\(^{22}\) section 15(a)(3) of the Fair Labor Standards Act;\(^{23}\) and section 11(c) of the Occupational Health and Safety Act of 1970.\(^{24}\) Similarly, many states ban discrimination against employees who exercise specified


\(^{18}\) Additional examples of federal statutory provisions that prohibit discrimination based on an activity or status include § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. III 1979), which bans exclusion of otherwise qualified handicapped individuals from participation in federal agencies and programs receiving federal assistance; § 6(a)(1) of the Jury System Improvements Act of 1978, 28 U.S.C. § 1875 (Supp. III 1979), which bars employers from discriminating against or discharging their permanent employees who serve on federal juries, and § 5(7) of the Black Lung Benefits Act of 1972, 30 U.S.C. § 938(a) (1976), which forbids an employer from discharging a miner suffering from pneumoconiosis.

\(^{19}\) States have prohibited discharges based on an employee's race, religion, color, national origin, ancestry, physical handicap, or sex, see, e.g., Alaska Stat. § 18.80.220 (1981); Cal. Gov't Code § 12940 (West 1980); III. Rev. Stat. ch. 48, § 851 (1977); age, see, e.g., Alaska Stat. § 18.80.220 (1981); Cal. Gov't Code § 12941 (West 1980); Ill. Rev. Stat. ch. 48, § 884 (1977); marital status, change in marital status, pregnancy or parenthood, see, e.g., Alaska Stat. § 18.80.220 (1981); political activities, see, e.g., Cal. Lab. Code § 1102 (West 1971); service on a jury, see, e.g., Or. Rev. Stat. § 10.090 (1979); and mental handicaps unrelated to ability, see, e.g., Ill. Rev. Stat. ch. 48, § 851 (1977). California recently made it unlawful to require sterilization as a condition of employment. Cal. Gov't Code § 12945.5 (West 1980).


state-created rights. An unusually broad measure is Michigan's recently-enacted "Whistleblowers' Protection Act," which states:

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

The Act authorizes employees to bring civil actions for injunctive relief, damages or both. Possible remedies include reinstatement, back pay, back benefits and seniority, actual damages and costs of litigation, including reasonable attorney's fees.

Federal and state civil service laws and regulations provide job protection for government employees. The federal statute allows employee discharge "only for such cause as will promote the efficiency of the service." Many states and some municipalities have enacted universal civil service laws. More than half of all state and local government employees are estimated to have civil-service type protection.


27. Id. § 15.362.

28. Id. § 15.363.

29. Id. § 15.364. The practical effect of creating a single cause of action consolidating all the protections for exercising rights, reporting violations, and offering testimony rather than having such protections scattered throughout the statute books, included in some acts and not in others, remains to be seen. The Act is too new (it was passed in 1980 and went into effect on March 31, 1981) for there to have been significant experience under it.

30. Civil Service Reform Act of 1978, § 204(a), 5 U.S.C. § 7513(a) (Supp. IV 1980). This guarantee covers virtually all civilian employees of the federal government who have completed either a probationary period or one year of current continuous employment. Id. at § 7511. The removal provision applies to individuals who are serving in the competitive service or are preference eligibles in either the United States Postal Service, Postal Rate Commission or an Executive agency in the excepted service. Id. § 7511(a)(1). Excluded by statute from coverage are employees "whose appointment is made by and with the advice of the Senate" and those whose positions have been deemed confidential, policy-making or policy-advocating. Id. section 7511(b). However, the Office of Personnel Management has the power to include positions in the provision which have been excluded by its own regulations. Id. section 7511(c).

31. Summers, supra note 1, at 497-498.

32. Peck, supra note 3, at 8-9. According to Peck, this is because all states have covered at least some of their employees with a merit system, and practically all cities with a population of over 100,000 have comprehensive civil service laws. Teachers as a group are granted more job
Civil service systems provide strong protection against unjust removal. In most cases, a discharged employee is entitled to notice of the reasons for dismissal, a hearing on both procedural and substantive grounds, review by an administrative agency and appeal to the courts. In addition to civil service systems, more than half the states authorize public employee bargaining by statute, allowing public employees to obtain additional protection.

The Vietnam Era Veteran's Readjustment Assistance Act of 1974 requires former employers of inducted veterans to reemploy them after their honorable discharges if the veterans satisfy certain conditions. According to the statute, these employees "shall not be discharged from such position[s] without cause within one year after such restoration or reemployment."

---

33. Id.
34. Id. at 492. These laws protect public employees from discrimination, including dismissal, for union activity or membership.

The "cause" provision was inserted by Congress to provide the reemployed veteran with a protection of reasonableness similar to that enjoyed by a union member protected by provisions in a collective bargaining agreement limiting discharge to cause. The ultimate criterion, whether the employer acted reasonably, is the one generally applied where an employment contract is terminated by an employer because of employee misconduct, and that standard is appropriate under this Federal statute. We think a discharge may be upheld as one for "cause" only if it meets two criteria of reasonableness: one, that it is reasonable to discharge employees because of certain conduct, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be ground for discharge.

The burden is on the employer to prove that a discharge was for cause. Id. at 1247. Cause may result either from a veteran's conduct, see, e.g., id., or from economic circumstances totally unrelated to the employee's performance, such as the closing of the plant, see, e.g., Kent v. Todd Houston Shipbuilding Corp., 72 F. Supp. 506, 509 (S.D. Tex. 1947).

The enforcement procedures for the veterans provisions are comprehensive and protective. They grant jurisdiction to the federal district courts. Specific performance may be ordered as well as payment of lost wages or benefits. A speedy hearing and advancement on the calendar are required. Upon application, if the United States attorney is reasonably satisfied that the veteran is
State unemployment compensation laws also limit an employer's ability to discharge an at will employee without liability. When a discharged employee applies for unemployment compensation, the former employer is contacted and asked the reason for dismissal. If the reason given is one entitling the applicant to benefits, she may collect them as long as she meets the other conditions imposed by state law. If, on the other hand, the employer cites "misconduct" or some other explanation that will lead to denial of benefits, the applicant is entitled to an administrative hearing. In effect, this administrative proceeding determines whether or not the employer had cause to dismiss the employee. If the administrative agency, subject to court review, does not find cause, the employee becomes eligible for benefits even though the employer had no duty to retain the employee. The employer's experience rating, and, therefore, the taxes she will pay to the compensation system, are affected to the extent the employee collects. Thus, unemployment compensation legislation imposes a financial liability on an employer who dismisses a covered at will employee without good cause.

B. Judicial Exceptions

Courts have used three basic approaches in their occasional attempts to remove a dismissed employee from the coverage of the at will employment rule. Under the first approach, which involves contract analysis, employees may rebut the presumption of indefinite employment that arises from the absence of an explicit durational term. Rebuttal requires proof that a promise of job security was either implied-in-fact or made enforceable by the employee's reasonable reliance upon it. The courts have sometimes found detrimental reliance when additional consideration supported either a promise of job security or "an inference that the employment was intended to continue for some reasonable period." Employees who use this plea generally do not escape the at will employment rule because courts narrowly define ad-

38. For a state government to obtain federal funds to cover the administrative costs of the unemployment insurance program, the state's law must contain the provisions required by the Social Security Act § 303(a), 42 U.S.C. § 503(a) (1976). Subsection 503(a)(3) mandates "opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." All states comply with the dictates of this section of the Social Security Act and with 26 U.S.C. § 3304(a) (1976 & Supp. V 1981) of the Internal Revenue Code. If a state's law were to fail to meet the requirements of I.R.C. § 3304(a), employers in that state would not be eligible to take the normal 90 percent credit against federal taxes for unemployment compensation payments.

40. Note, supra note 4, at 1820.
41. Id.; Shapiro & Tune, supra note 3, at 351-356.
ditional consideration. Similarly, courts rarely treat company personnel handbooks or policies as enforceable promises when they imply that employees have some job security or are entitled to pre-dismissal procedures.

Recent Michigan cases using contract analysis take a different course. In *Toussaint v. Blue Cross & Blue Shield of Michigan* the Supreme Court of Michigan could "see no reason why an employment contract which does not have a definite term—the term is 'indefinite'—cannot legally provide job security." The court went on to hold that the employer's statements of policy, contained in the company's employee handbook, which expressly limited the reasons for discharge, gave rise to contractual rights in employees.

If there is in effect a policy to dismiss for cause only, the employer may not depart from that policy at whim simply because he was under no obligation to institute the policy in the first place. Having announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force, the employer may not treat the promise as illusory.

In *Schipani v. Ford Motor Co.* a Michigan appellate court distinguished *Toussaint* because Ford's employee handbook contained disclaimers stating that the manual did not establish a contractual relationship. Nevertheless, the court reversed the lower court's grant of summary judgment for failure to state a claim. The court indicated that even where there are disclaimers, an oral promise may be enough to justify reasonable and detrimental reliance by an employee sufficient either to give rise to a contract, or to cause the doctrine of promissory estoppel to go into effect. The court felt Schipani raised a question of fact for the jury when he alleged that he relinquished a union job with contractual job security to accept a management position in reliance upon either the employer's oral promise not to terminate him before he reached age sixty-five, or "the handbook's allusions to the fairness of defendant in any termination."

---

44. 408 Mich. 579, 292 N.W.2d 880 (1980).
45. *Id.* at 610, 292 N.W.2d at 890.
46. *Id.* at 614-5, 292 N.W.2d at 892.
47. *Id.* at 619, 292 N.W.2d at 895.
49. *Id.* at 613-4, 302 N.W.2d at 310-311.
A second judicial response to recent dismissal cases has been the creation of a public policy exception in tort to the employment at will rule. When the employee’s dismissal contravenes a public policy, some state courts have held the discharge wrongful and allowed the employee to recover tort damages. A court’s reaction to a particular termination depends on the source of the public policy it is supposed to impinge. A policy clearly articulated in the state’s statutes presents the strongest case. This exception was first employed in such a situation. In *Petermann v. International Brotherhood of Teamsters* 51 a California appeals court stated that:

> It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury. . . . To hold otherwise would be without reason and contrary to the spirit of the law. The public policy of this state as reflected in the penal code . . . would be seriously impaired if it were held that one could be discharged by reason of his refusal to commit perjury.52

More recently, in *Tameny v. Atlantic Richfield Co.*, 53 the California Supreme Court ruled that an employee stated a cause of action in tort for wrongful discharge when he alleged that he was fired for refusing to participate in a gasoline price fixing scheme condemned by California and federal law.

Absent a state statute articulating a specific public policy, courts differ in their willingness to allow a tort action. In *Nees v. Hocks*, 54 the Oregon Supreme Court held that an employee fired for serving jury duty could sue her former employer for wrongful discharge even though no law stated this policy either explicitly or implicitly, as a criminal statute outlawing perjury “states” a policy against perjury. The court considered encouraging service on juries a substantial enough public policy to support the action, even without such a statute. In a similar case, a California court refused to allow a stenographer, fired for indicating her availability for jury service on an official questionnaire, to maintain a suit. 55 Although the court believed that allowing such a suit would be good public policy, it would not permit the action absent a statutory provision that could be construed as encouraging jury duty; it deferred to the legislature to create exceptions to the

---

52. *Id* at 188-189, 29 Cal. Rptr. at 400, 344 P.2d at 27.
53. 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980).
54. 272 Or. 210, 536 P.2d 512 (1975).
employment at will rule. Some states have held that the public policy inherent in a worker's compensation scheme is enough to allow tort suits for wrongful discharge when an employee alleges that she was fired because she filed a claim. In Illinois, however, the legislature had to add an anti-retaliation clause to the worker's compensation law for the courts of that state to recognize a cause of action.

Courts have been much more reluctant to find a public policy exception to the rule when an employee refuses to carry out an employer's order because of moral or ethical considerations or a difference of opinion and is discharged. If a court were to recognize such an exception, in the absence of clear statutory support, it would have to weigh the employee's values or opinion and then balance this against the employer's interest in directing his business without insubordination. "Courts are being asked to decide whether an employee may act in a manner inconsistent with the duty of an employee and be protected by the courts for what amounts to disobedience." Courts generally have been unwilling to hear such cases and when they have done so have ruled for the employer.

A recent note summarized the wrongful discharge tort: It is important to remember the premise that harm to the discharged employee is not sufficient to justify a cause of action in light of the employer's countervailing interests. The crux of the wrongful discharge tort lies in the harm, threatened or actual, to society should employers be free to discharge for a particular reason. It follows that if an employer's freedom to discharge for a particular reason would not affect society's interests as embodied in public policy, then the discharge should not be labeled tortious and no cause of action should lie. In cases in which the harm to society is minimal, most courts have upheld the general employment at will rule.

A third judicial response to the at will rule has been to find a

56. Mallard attempted to fit jury service into the California labor code's prohibition of discharge for political activity or the election code's ban on dismissal for service as an election official. The court refused to see jury service as a political activity. In reaction to this case, the California legislature included protection against discharge for jury service in the Labor Code at § 230 (1978). Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 451 n.4, 168 Cal. Rptr. 722, 726 n.4 (1980).


58. Vernon & Gray, supra note 1, at 29-30. Louisiana, Florida and Alabama have refused to recognize a public policy exception to the at will employment rule for retaliation for filing a worker's compensation claims. Id. at 30.


60. Vernon & Gray, supra note 1, at 36.

61. Id.


63. Id. at 635-636 (footnotes omitted).
breach of an implied covenant of good faith and fair dealing in a particular employee's discharge. The Supreme Court of New Hampshire first articulated this approach in *Monge v. Beebe Rubber Co.* The *Monge* court held that "a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract." *Monge* has been characterized as effectively abolishing the at will rule on general public policy grounds. No other court has gone as far as *Monge*; in fact, the New Hampshire Supreme Court itself has retreated from the broad language of the case. In a recent unanimous decision, that court stated: "We construe *Monge* to apply only to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn. See, e.g., *Nees v. Hocks*, 272 Ore. 210, 536 P.2d 512 (1975) . . . ."*67*

Courts in two other states have recognized an implied covenant of good faith and fair dealing. The Massachusetts Supreme Court in *Fortune v. National Cash Register Co.* held that Fortune's contract with NCR, even though it was clearly terminable at will, contained "an implied covenant of good faith and fair dealing, and a termination not made in good faith constitutes a breach of the contract." The court, however, did not decide "whether the good faith requirement is implicit in every contract for employment at will," resting instead on the narrower ground of preventing employer overreaching when it would deprive an employee of an almost vested benefit. In *Gram v. Liberty Mutual Insurance Co.* the Massachusetts court affirmed that it was not following *Monge*’s broad holding. It refused to allow an employee discharged without cause, but for no improper motive, to recover for breach of contract.

California has also recognized a cause of action for breach of the implied covenant of good faith and fair dealing in some circumstances.

---

64. 114 N.H. 130, 316 A.2d 549 (1974).
65. *Id.* at 133, 316 A.2d at 551.
69. *Id.* at 101, 364 N.E.2d at 1256.
70. *Id.* at 104, 364 N.E.2d at 1257.
72. "We have not decided, however, to impose liability on an employer for breach of a condition of good faith and fair dealing in the discharge of an employee simply because there was no good cause for the employee's discharge." *Id.* at 2294, 429 N.E.2d at 26. Because of the possible effect on the unemployment compensation system, the Court left the adoption of a broad rule to the legislature. *Id.* at 2299, 429 N.E.2d at 28. The Court did find that fair dealing in this case required the employer to pay commissions clearly tied to Gram's past service.
EMPLOYMENT AT WILL RULE

In Cleary v. American Airlines, Inc.\textsuperscript{73} an appeals court, emphasizing "the longevity of service by plaintiff—18 years of apparently satisfactory performance,"\textsuperscript{74} held that American Airlines could not discharge Cleary without good cause:

Termination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts. As a result of this covenant, a duty arose on the part of the employer, American Airlines, to do nothing which would deprive plaintiff, the employee, of the benefits of the employment bargain . . . \textsuperscript{75}

Because the court interpreted the company's establishment of a non-union grievance system to mean that the employer had agreed not to act arbitrarily, it did not have to decide whether the discharge of any long-term employee required some legitimate reason. Another panel of the appeals court similarly avoided announcing a sweeping rule by finding that there was evidence to support a jury determination that the employer had made an implied-in-fact promise to refrain from arbitrary conduct.\textsuperscript{76}

Some additional judicial responses to the employment at will rule only affect public employees. Although the Supreme Court has found no general interest in public employment, it has held that where a source, such as state law, gives a public employee an expectation equivalent to a "property" interest in his job, the due process clause of the fourteenth amendment protects that interest.\textsuperscript{77} In Elrod v. Burns\textsuperscript{78} the Court ruled that patronage dismissals are unconstitutional under the first and fourteenth amendments.

C. Private Mechanisms

Some employment relationships escape the operation of the employment at will rule. Most important, because of the number of people it affects, is employment governed by a collective agreement. According to estimates made by the Bureau of Labor Statistics, collec-

\textsuperscript{73} 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).
\textsuperscript{74} Id. at 466, 168 Cal. Rptr. at 729.
\textsuperscript{75} Id.
\textsuperscript{77} Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).
\textsuperscript{78} 427 U.S. 347, 373 (1976). The Court held that only policymaking, confidential employees may be discharged solely on the basis of their political affiliations. In Branti v. Finkel, 445 U.S. 507, 518 (1980), the Court modified its standard: "In sum, the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." In Branti, the Supreme Court affirmed lower court decisions which held that the new Public Defender of Rockland County could not terminate the employment of two assistant public defendants because they were Republicans.
tive bargaining covered 29.7 percent of the nonagricultural civilian workforce in 1978. Ninety-six percent of all collective bargaining agreements in the United States contain job security provisions; eighty percent allow dismissal only for "just cause." Grievance and arbitration procedures to safeguard contractual rights are included in ninety-nine percent of all contracts. According to Clyde Summers, "[e]mployees in the United States who are protected by arbitration under collective agreements probably have more complete and sensitive security against unjust discipline, more efficient procedures, and more effective remedies than employees in any other country in the world."

Individuals employed under contracts for a fixed term are by definition outside the employment at will rule. There are no reliable estimates of how many people are covered by such agreements. The number is thought to be quite small.

Finally, tenured faculty members in private universities are *sui generis*. They may be removed only for a serious lapse, and they did not bargain individually or collectively for this protection.

III

Objections to the Employment At Will Rule and Proposals for Change

When it comes to employee dismissal, according to Clyde Summers, "[t]he justification for legal protection should need no argument. Beyond the claim to equal treatment is the demand for simple justice and due process when an employee's valuable right is at stake—his right to his job." As this "right" to retain "one's job" has not been

---

81. Id. at 51:1 (1981).
82. Summers, Protecting All Employees Against Unjust Dismissal, 58 HARV. BUS. REV., Jan.-Feb. 1980, at 133.
84. The public sector parallel is to federal judges with life tenure "during good behavior." Because of its Constitutional source (Article III, § 1) this is a unique exception to the at will rule. Elected officials, of course, are excluded from the operation of the rule because their employment is for a fixed term.
85. Summers, supra note 82, at 133. St. Antoine puts his sentiments this way: "I take it as a given that employees should be protected against unjust discipline." St. Antoine, You're Fired!, 10 HUMAN RIGHTS 32, 35 (Winter 1982). A more reasoned explanation is found in Shapiro & Tune, supra note 3, at 337-340. The authors give three rationales for changing the rule: (1) the narrowness of the present protection, (2) employee expectations of job security, especially as seniority accrues, and (3) the importance of job retention to an employee's psychological well-being.
authors who criticize the at will employment rule have carefully set out their objections to the rule in order to justify their proposed changes. Because many similar arguments and suggestions for changing the legal framework have been made, a discussion of all the major objections followed by summaries of the main proposals is more useful than a serial review of each author’s positions.

A. Objections

Critics perceive the difference in treatment between workers covered by the employment at will rule and other groups of employees as a senseless anomaly. Comparisons are made between unionized and nonunionized workers, between those people and actions covered by Title VII and other specialized pieces of protective legislation and those left uncovered, and between public sector employees who enjoy legislated civil service systems and statutorily ignored private sector workers. Comparisons are also made between the protection offered by the American legal system and that provided by other countries. Stieber points out that the United States is almost unique among industrialized countries in its failure to provide statutory protection against unfair discharge for all employees.

A second objection to the rule is that it does not properly take into account the significance of her job to a worker. The argument takes one of two forms. In the first, the job is characterized as a property right. The fifth amendment of the Constitution, of course, makes no mention of employment. But it (and the fourteenth amendment) does prohibit deprivation of property without due process of law. Thus appellant’s assumption submits the fundamental question of whether or not there is a legally recognizable property right in a job which has been held for something approaching a lifetime.

Thus far federal law has sought to protect the human values to which appellant calls our attention by means of such legislation as unemployment compensation and social security laws. These statutes afford limited financial protection to the individual worker, but they assume his loss of employment. Whatever the future may bring, neither by statute nor by court decision has appellant’s claimed property right been recognized to date in this country.

(citations omitted) Charland v. Norge Division, Borg-Warner Corp., 407 F.2d 1062, 1065 (6th Cir.), cert. denied, 395 U.S. 927 (1969). This case and discussion were recently cited as precedent for finding no property right in the community of Youngstown, Ohio to have U.S. Steel’s Ohio and McDonald works continue in operation. Local 1330, United Steelworkers of America v. United States Steel Corp., 631 F.2d 1264, 1279-1282 (1980). But cf. Peck, supra note 3, at 26-28 and discussion infra note 93. (Peck does not address whether retaining one’s job is part of the interest in private employment he says is protected by the due process clause as an aspect of “liberty.”)

86. The fifth amendment of the Constitution, of course, makes no mention of employment. But it (and the fourteenth amendment) does prohibit deprivation of property without due process of law. Thus appellant’s assumption submits the fundamental question of whether or not there is a legally recognizable property right in a job which has been held for something approaching a lifetime.

87. See, e.g., Weyand, supra note 83, at 174; Summers, supra note 82 at 133, and text at note 82.

88. See, e.g., Peck, supra note 3, at 21.

89. See, e.g., Stieber, Protection Against Unfair Dismissal: A Comparative View, 3 COMP. LAB. L. 229 (1980).

90. See, e.g., id. at 229-240.

91. Stieber, supra note 89, at 229, 231-233.
right, the deprivation of which should not be allowed without due process of law.\textsuperscript{92} For example, Weyand states that "[f]or 90 percent of the American citizens, the only property they can claim is their job . . . . Thus, unless constitutional protection . . . is given, 90 percent of American citizens can be deprived of their only meaningful property without due process of law."\textsuperscript{93} In its second form, this argument characterizes the rule as "anachronistic and unfair in an era of increasing concentration of employment opportunities by large multi-state and

\textsuperscript{92} See generally Levine, \textit{Towards a Property Right in Employment}, 22 B\textsc{uffalo} L. R\textsc{ev.} 1081 (1973); Peck, \textit{supra} note 3; but see England, \textit{Recent Developments in Wrongful Dismissal Laws and Some Pointers for Reform}, 16 A\textsc{lberta} L. R\textsc{ev.} 470, 471 (1978). An early Washington Supreme Court opinion is one of the few American cases to support this view. Jones v. Leslie, 61 Wash. 107, 110, 112 P. 81, 82 (1910) declares:

\begin{quote}
It would be well to remember, in the beginning, that it is fundamental that a man has a right to be protected in his property. . . . Is, then, the right of employment in a laboring man property? That it is, we think cannot be questioned. The property of the capitalist is his gold and silver, his bonds, credit, etc., for in these he deals and makes his living. For the same reason, the property of the merchant is his goods. And every man's trade or profession is his property, because it is his means of livelihood; because, through its agency, he maintains himself and family, and is enabled to add his share towards the expenses of maintaining the government. Can it be said, with any degree of sense or justice, that the property which a man has in his labor, which is the foundation of all property and which is the only capital of so large a majority of the citizens of our country, is not property; or, at least, not that character of property which can demand the boon of protection from the government? We think not. To destroy this property, or to prevent one from contracting it or exchanging it for the necessities of life, is not only an invasion of a private right, but is an injury to the public, for it tends to produce pauperism and crime.
\end{quote}

\textsuperscript{93} Weyand, \textit{supra} note 83, at 215. The author of the Buffalo Law Review Comment, \textit{supra} note 92, analyzes the different ways constitutional protection might be extended to cover job terminations. One method would be to expand on Shelley v. Kraemer, 334 U.S. 1 (1948), and Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968). In those cases the courts impose constitutional restrictions on private activity by finding the application for judicial enforcement to be the requisite state action. "The argument would be that it is unconstitutional for a court to uphold a discharge which violated the employee's fundamental rights." Levine, \textit{supra} note 92, at 1106. This analogy is faulty, however, because in the cases cited, court involvement was necessary to accomplish the unconstitutional deprivation. In the employment situation, a court would merely be ruling on the correctness of an employer's decision. This involvement would not be sufficient to constitute state action.

A second way to broaden constitutional protection would be "to consider corporations as private governments, which should be subject to the same limitations as the state itself." \textit{Id}. The commentator acknowledges the shortcomings of this approach—it does not indicate when private action becomes state action and precludes remedies against small businesses which are certainly capable of abusively discharging their employees.

Peck, \textit{supra} note 3, at 21, argues that the extensive regulation of the employment relationship makes it legitimate to characterize the dismissal of a private employee as state action, necessitating due process protection. He acknowledges, however, that recent Supreme Court decisions do not support his theory.

Admitting "that a constitutional job right may be neither feasible nor desirable," the Buffalo commentator proposes the creation of a common law property right in a job as an answer to the need for employment protection. Levine, \textit{supra} note 92, at 1108. "[T]he institution of property is capable of performing the day-to-day function of protecting individual rights from both private and public encroachment . . . . It is essential, for the preservation of freedom, that man's most precious possessions not be subject to arbitrary confiscation. Legal protection must be afforded the worker's valuable interest in his employment." \textit{Id}.
multinational corporations. No longer may a worker shift from job to job; the theory of mutuality ignores present day realities."94

A third argument begins by proving that the rule is not required by the common law and concludes that it is actually inconsistent with our legal system. Authors point to the English common law rule, which requires a notice period prior to termination of employment, to show that the American rule is not required by the logic of the common law.95 Exploring the source of the American rule further confirms this view.96 Peck finds in the existence of the tort action for interference with contractual relations, under which a third party may be held liable for persuading the employer to fire an employee, something which the employer could have done anyway, evidence that the concept of employment at will is not integral to the common law.97 In addition, authors note that the American rule is inconsistent with contract law in general, which implies an obligation of "good faith and fair dealing" in every contract except employment contracts governed by the employment at will rule.98 Other evidence cited in support of this proposition includes a catalogue of the legislative inroads made into the rule's domain.99

A fourth objection to the rule is that it ignores the government's responsibility to protect the weaker from the stronger members of society, especially from those who wield economic power. Because most employers have greater power than individual workers do, the government must protect employees from the potential for abusive discharges that employers, restrained only by the at will rule, represent. England makes this argument and maintains that "[s]afeguards against the abuse of the dismissal power are equally as important, if not more so, than many of the employment interests currently protected by statute."100

Other criticisms of the rule are that it is inefficient and contrary to both public policy and employer self-interest. Two efficiency arguments have been presented. Getman, in an article on the editorial page of the Wall Street Journal, tried to convince managers that they would benefit from "good cause" statutory job protection.101 He suggested

95. See, e.g., Summers, supra note 1, at 485.
96. Id., and text and note at note 3.
97. Peck, supra note 3, at 13; Blades, supra note 83, at 1424-1427.
99. See text accompanying notes 14-40.
100. England, supra note 92, at 471.
that businessmen make a deal—accept the "good cause" standard for discharge in exchange for consolidation of all disputes resulting from a discharge. Efficiency is served by eliminating the series of lawsuits an employer now may face when he fires an employee covered by more than one piece of protective legislation (Title VII, ADEA, etc.). A Harvard Law Review Note\textsuperscript{102} advanced the other efficiency argument: "Courts must intervene . . . in order to bring about the substantive outcome the parties would have reached had transaction and information costs not precluded informed negotiation."\textsuperscript{103}

Those who object to the rule on public policy grounds contend that in states which have not recognized and generously applied a public policy exception to the rule, people lose their jobs for being "good citizens"—for pointing out the unsafe features of a company product to superiors\textsuperscript{104} or filing a worker's compensation claim.\textsuperscript{105} To countenance such dismissals, the argument goes, undermines other legitimate state interests. Finally, England contends that employer self-interest should favor dispensing with all unjust discharges. These dismissals could "undermine morale among workers and create resentment which may manifest itself in various forms of 'unorganized conflict,'"\textsuperscript{106}

B. Proposals

I. Statutory Proposals

Most of the proposed statutes seek to provide the employee with an avenue of appeal outside of the court system. Summers supports a statute that would "establish . . . the right of employees not to be disciplined except for just cause, and channel the adjudication of cases arising under the law into the arbitration process."\textsuperscript{107} Under his scheme, states would finance the arbitration process, just as they support the courts. In addition, although he would like the process to remain informal enough for employees to represent themselves, Summers envisions the state paying for an indigent's lawyer if one should be needed. A probationary period and the exclusion of small employers and top executives would limit the statute's coverage; the existing body of arbitration decisions, and not the legislation, would provide a working definition of "just cause."\textsuperscript{108}

\textsuperscript{102} Note, supra note 4.
\textsuperscript{103} Id. at 1830. "Either a false sense of security or a failure to realize the risks involved may therefore lead employees to seek wage increases rather than forgo some immediate benefits in return for an appropriate level of job protection." Id. at 1831-32. Very few employees understand that an offer of "permanent" or "indefinite" employment is generally unenforceable.
\textsuperscript{105} See, e.g., Loucks v. Star City Glass Co., 551 F.2d 745 (7th Cir. 1977).
\textsuperscript{106} England, supra note 92, at 471.
\textsuperscript{107} Summers, supra note 82, at 137.
\textsuperscript{108} Id. and Summers, supra note 1.
Weyand endorses a similar statutory system. Although she finds the body of arbitral law construing just cause “unduly lenient on employers,” she favors an arbitration system so as not to force any employee to “resort” to the courts. Under Weyand’s plan, all employees, whether or not organized, would have an unwaivable right to arbitration through the American Arbitration Association. An employee could contact the AAA as an individual, either through her own union, or through any union if she was not covered by a collective agreement. Nonunion employees would post a bond to cover the costs of arbitration.

Stieber’s proposed federal statute would cover employees after a six month probationary period. Otherwise unprotected workers could appeal unfair dismissals to a government arbitrator who would have the same broad remedial powers granted arbitrators under collective bargaining agreements. Government mediators would attempt to settle cases prior to arbitration. Stieber believes that a small fee would act like a union screening procedure and eliminate frivolous claims.

England’s ideal statutory system would require employee involvement in establishing workplace rules and representing dismissed employees. He feels that: procedures should be based on the principles of natural justice; the purpose of discipline should be corrective rather than punitive; implementation of fair procedures should be encouraged by doubling any penalties levied against employers who have not adopted them and by not allowing those companies to obtain government contracts; the government should pay for umpires; and reinstatement should be the primary remedy, but tort damages should be allowed.

St. Antoine favors legislative action because “the courts have no capacity to construct an administrative apparatus for enforcement purposes, and their more formalized processes are not readily accessible to rank-and-file workers.” He supports state establishment of arbitration procedures, with mediation to eliminate the bulk of the potential case load. Recognizing that suspensions, demotions, denied promotions and “an onerous job assignment” may be in effect a “constructive discharge,” he would allow review of these employer actions. Layoffs or other reactions to decreases in production would also have to be covered—“otherwise, there is simply too much opportunity to disguise

109. Weyand, supra note 83.
110. Id. at 196.
111. Id. at 213.
112. Stieber, supra note 89, at 239-240.
114. St. Antoine, supra note 85, at 36.
115. Id. at 37.
unfair treatment..." According to St. Antoine, however, this "hardly imposes an oppressive burden on employers. All they need do is establish a rational, verifiable criterion—seniority, skills, past productivity, etc.—as the basis for their job determinations."

Getman would not rely on arbitrators to rule on dismissal cases. He wants "[a]ll or nearly all current restrictions on firing . . . incorporated into a single standard, enforced through a single agency similar to the National Labor Relations Board." Howlett calls upon states to set up an agency primarily to mediate unjust and constructive discharge cases. Noting the political problems inherent in passing any such law, he recommends a limited plan. Its features include a one-year probationary period, the exclusion of supervisors (as defined by the NLRA) and all public employees from coverage, and no filing fee. To diminish business resistance to the bill, neither the agency nor the mediators should be involved in employer-union matters or the collective bargaining process. If possible, Howlett would include a second and final step, preferably arbitration, but fact-finding if that were to prove politically infeasible. To prevent the second step from being overloaded, the administrative agency would screen cases: just as in a union environment, where an individual employee has no power to submit his grievance to arbitration without union support, no case could reach an arbitrator without agency approval. The state would bear most of the system's expenses, including the cost of having "an experienced official of the administering agency . . . assigned to present the grievances to fact finding or arbitration." If the case were to proceed to arbitration, the employee would pay a $50 to $100 fee. Remedies, according to Howlett, should include reinstatement and damages.

2. Judicial Proposals

Blades was the first commentator to recommend judicial reconsideration of the employment at will rule. The focus of his concern is the plight of an employee discharged "as a result of resisting his employer's attempt to intimidate or coerce him in a way which bears no reasonable relationship to the employment." He suggests that modern employment contracts are analogous to adhesion contracts. Because courts have been willing to protect individuals against such
contracts in other areas, he envisions the judicial creation of a cause of action in tort for "abusively discharged" employees.

A Hastings Law Journal Note also encourages the creation of a tort remedy for unjust dismissals. The author believes that the implications of Monge v. Beebe Rubber Co. would have been better if the New Hampshire court had not adopted a contract rationale: "Two distinct substantive advantages flow from the application of tort principles. First, the courts can prohibit contractual waiver of restrictions on the power of discharge. Moreover, the court can recognize an independent state cause of action for unionized employees." More recent articles have concentrated on defining the wrongful discharge tort.

A Stanford Law Review Note proposes that courts use an implied contract theory to strengthen employee job security:

Using dismissal for cause as a standard is equivalent to implying a covenant of good faith and fair dealing in the contract of employment . . . . However, since it is generally conceded that a breach discharges the obligation of the other party only if it is material, it would be proper for courts to balance the employer's justification for dismissal against the employee's interest in job security.

Longevity, the common law of the job, as well as the presence or absence of separate consideration determine the extent of a particular employee's interest. The common law of the job includes the policies of the firm, nature of the job and the common law of the industry; separate consideration encompasses both benefits to the employer and special reliance by the employee. The note also discusses the application of breach of contract principles to dismissals for economic reasons: Such dismissal corresponds to doctrines that make impossibility of performance and frustration of purpose grounds for discharge of a contractual obligation. As in the case of just cause firings, employer and employee interests must be balanced in case of economic dismissals. Courts generally do not allow parties to avoid a contract because it later turns out to be a bad bargain, and this principle should be utilized in the employment area as well.

Other note writers favor using contract notions to create exceptions to the employment at will rule. One advocates adapting two con-

---

125. Mathews, supra note 123 at 1454 (footnote omitted).
127. Shapiro & Tune, supra note 3.
128. Id. at 368 (footnote omitted).
129. Id. (footnotes omitted).
tract principles: promissory estoppel and the doctrine of unconscionability.\textsuperscript{130} Unfortunately, the labor cases he cites demonstrate the pitfalls of using section 90\textsuperscript{131}—courts generally hold that there is no enforceable obligation because of an absence of consideration. His unconscionability argument begins by asserting that an employer's ability to discharge a worker "without cause, for an abusive or capricious reason, rests on the assumption that such power is an implied term in the employment contract. Such a term surely could not have the employee's willing assent, and, at least from his point of view, is 'unconscionable.'"\textsuperscript{132} He was unable to find any cases that discussed unconscionability in the context of employment law. Another note writer supports judicial addition of a contract term prohibiting all but good faith discharges.\textsuperscript{133}

Blackburn claims that contract law is more appropriate than tort for changing the doctrine of employment at will for several reasons.\textsuperscript{134} First, to imply a right to be discharged only for good cause probably comports with the intent of both parties. Second, as any firing that was not for just cause would be a breach of such an implied term, contract is more protective than tort, which would prohibit only discharges for bad cause. Third, employers would be required to vary the discipline with the offense because only material breaches are cognizable in contract. Fourth, contract principles of impossibility would reduce an employer's ability to decrease employment when production levels drop. Fifth, if contract principles were to govern, the parties would be encouraged to enter into written contracts. Sixth, if an employer includes a waiver of the right to be discharged only for just cause in an employee's agreement, contract notions of unconscionability may be used to void the waiver clause. Seven, removing the threat of punitive damages, as contract does, will promote a good working relationship between employees and employers. Finally, Blackburn believes that specific performance is an available contract remedy if monetary damages are inadequate.

Three other authors have advanced theories to create a judicial remedy for unjust dismissals. The first proposes that courts redefine the notion of property to include an employee's interest in his job.\textsuperscript{135} A second argues that constitutional guarantees are violated by continued

\textsuperscript{130} Hyatt, \textit{supra} note 42.
\textsuperscript{131} Restatement (Second) of Contracts § 90 (1969).
\textsuperscript{132} Hyatt, \textit{supra} note 42, at 236.
\textsuperscript{133} Note, \textit{supra} note 4. The author also supports judicial creation of a tort duty obligating employers to discharge employees only in good faith.
\textsuperscript{135} Levine, \textit{supra} note 92. \textit{See} note 93.
adherence to the at will rule. Characterizing a private employer’s discharge of an employee as government action is key to his position that fourteenth amendment procedures must be followed. The third writer contends that the at will rule has already been abolished by judicial interpretation of Title VII.

IV

ANALYSIS OF THE PROPOSALS TO CHANGE THE EMPLOYMENT AT WILL RULE

The proposals to change the employment at will rule have an initial appeal to many people, for the cases cited to demonstrate the operation of the rule tend to be especially horrid. These cases often involve a long-term employee fired for acting in a way commonly regarded as either a privilege or a duty of good citizenship. They seem to justify any change in a rule that leads to such results.

Liberals seem to be the primary advocates of these proposals. Perhaps they like the emphasis on individual rights and find legally strengthening such rights in the workplace an attractive idea whether or not a union is present. At least part of this support is due to the appeal of the concept of a job as property. As Summers explains: “For most employees, their job is the most valuable thing they possess; it is not a figure of speech but a statement of economic and social reality to say that employees have property rights in their jobs.” The proposals’ appeal also stems from a paternalistic attitude: by relying on legislative or judicially imposed solutions there is no need to consider self-help, depending on unions or other private mechanisms, to shield the currently unprotected. Blades declares:

Then, too, there are many types of employees, like professionals and other members of the white-collar class, whose numbers are increasing.

   In 1976, the Supreme Court held in McDonald that the requirement of equal treatment applied to both whites and blacks. If an employer is required by the operation of Title VII to have good reasons for its personnel actions with respect to minorities and women, then, under McDonald it must apply the same principle and standards to its white male employees. The result is a de facto substantive law rule requiring the employer to produce good reasons or just cause for adverse personnel actions. Thus the common law rule is abolished in toto.
   Id. at 560.
138. See, e.g., Summers, supra note 82, at 132-33.
140. But see England, supra note 92, at 471 (analogy legally unsound).
141. Summers, supra note 1, at 532.
with the advances of modern technology, who have generally preferred not to be represented by labor unions. For such employees it is no answer to suggest that they should seek salvation in unions—that in order to maintain their personal autonomy in the face of the huge industrial employer they should surrender it to the massive labor union.143

Summers similarly concludes that "[j]ust as unions have provided legal protection by contract for many employees, society should provide legal protection by statute for other employees."144

People who would like to weaken labor unions should also be expected to be among the supporters of these proposals. To prevent employee organization, sophisticated nonunion companies pay wages and benefits that equal or better those provided by their union competitors. One major distinction remains between union and nonunion firms—generally, nonunion companies do not employ grievance procedures culminating in a decision by a neutral outsider.145 Therefore, obtaining arbitration is a major incentive for workers to organize.146 To neutralize this union selling point, nonunion grievance procedures have become popular.147 Some procedures even include outside arbitration.148 If an employer-established plan helps maintain nonunion status, by affecting employee perception of the marginal advantage of a union contract, so too would a statutory scheme or judicially mandated just cause standard.149 Currently unionized employers, as well as non-union ones, would benefit from generally decreasing the appeal of unioniza-

143. Blades, supra note 83, at 1410-11 (footnotes omitted).
144. Summers, supra note 1, at 532.
147. R. Berenbeim, supra note 145, at 20. Schauer predicts this trend will continue:
- If then an unorganized employer voluntarily offers an appeal procedure culminating in binding arbitration and otherwise provides its employees with competitive wages, benefits, and working conditions, what incentive will employees have to organize?
- Installment of appeal procedures for at least discharge cases will in the next five to ten years be a critically important factor in maintaining nonunion status.
148. They include Northrup Corp., TWA, American Electric Power, Lockheed, American Optical, Kraft Foods, Lifesaver Division of Squibb, and the Michael Reese Hospital in Chicago.
149. Note that advocates of company-established plans are adamantly opposed to government intervention in this area. They wish to avoid outside meddling by another bureaucracy. Interview with Roger H. Schnapp, Parker, Milliken, Clark & O'Hara of Los Angeles, California (Mar. 11, 1982); interview with Lawrence R. Littrell, Corporate Director, Industrial Relations,
tion. If union growth does not keep pace with growth in employment, employers will face weaker and weaker unions at the bargaining table. Even without a major change in the at will rule, unions have been shrinking: in 1978 union membership as a proportion of nonagricultural employment stood at 24.0 percent—the lowest penetration ratio since 1937.150

In spite of their superficial appeal, these proposals should be closely scrutinized before they are endorsed. Empirical research on the effects of dismissals covered by the employment at will rule is currently underway. Stieber is studying the frequency and impact of discharges for alleged misconduct; he hopes to be able to discern the magnitude of the problem and if such a discharge affects an employee’s ability to find new work. In the absence of completed studies directly on point, however, the proposals to change the at will rule must be examined theoretically and by analogy. In particular, the following issues must be addressed: Whether presently unprotected employees, or the economy and its institutions, would be better off if employees were granted an individual right not to be discharged except for cause; and whether creating an individual right not to be dismissed from employment without just cause is appropriate action for either the judiciary or the legislature. When this is done, the appeal of these proposals is greatly reduced.

A. Effect on Employees

Many employees already fall outside the ambit of the rule. In 1979, there were approximately 97 million employed civilians and 2 million people on military active duty.152 All military personnel are statutorily protected from dismissal before the end of their enlistments.153 Of the civilians, approximately 24 million belong to unions or employee associations and 16 million are public employees.154 In addition, 2.5 million farmers are employed on their own family farms.155 The self-employed and partners in partnerships are also outside the operation of the rule. The number of people covered by

Northrup Corp. of Los Angeles, California (Mar. 12, 1982). See also infra notes 205-208 and accompanying text.

154. STATISTICAL ABSTRACT, supra note 152, at tables 519 and 714, 318, 429. Union and association figures are for 1978.
155. Id. at Table 1240, 708.
tenure arrangements or individual fixed term contracts is unknown, as is the number of people elected to their jobs. In addition to those completely free of the rule, most people are protected when they assert legal rights deemed worthy of a statutory or judicial exception to the rule.\textsuperscript{156} Others are protected against discrimination because of their status or activities.\textsuperscript{157} Finally, preliminary economics research indicates that even when under no legal obligation to do so, many employers recognize seniority rights and would not lay off a senior worker before a junior one even if the junior one were better qualified.\textsuperscript{158} According to Medoff and Abraham, "approximately 70 percent of the nonunion employees in this country (outside of agriculture and construction) are covered by an implicit contract provision which affords extra protection against job loss to senior workers."\textsuperscript{159} Proposed changes to the rule are designed to protect those workers who manage not to fall into any of the categories described above.

A major argument for establishing a just cause standard for all discharges is its effectiveness in unionized firms. The following questions inevitably arise: Would the standard work if it were transplanted to a different environment or enforced by means of a different procedure? Is arbitration without a union substantially different from arbitration with one? Would a nonunion employee gain less protection from a publicly established mechanism than his union counterpart receives from his collective bargaining agreement?

Theoretically, the procedures accompanying a judicial or statutorily created right not to be dismissed except for just cause should be expected to provide an employee with less protection than those associated with a union contract. If the source of the right is judicial definition of a cause of action, there will be no procedures before suit. A court cannot establish an administrative framework.\textsuperscript{160} In addition, filing a court suit is substantially more complex, legalistic and costly than filing a union grievance and, thus, less accessible to employees.\textsuperscript{161}

If a statute creates an arbitration system to enforce a legislatively mandated standard such as just cause, the results can be expected to be quite different from those generated by arbitration under a union contract.\textsuperscript{162} First, there will be no employee involvement in setting the

\begin{itemize}
  \item \textsuperscript{156} See \textit{supra} notes 21-30, 53-65 and accompanying text.
  \item \textsuperscript{157} See \textit{supra} notes 14-20 and accompanying text.
  \item \textsuperscript{158} \textsc{Medoff and Abraham, Involuntary Terminations Under Explicit and Implicit Employment Contracts} (February 1981) (Working Paper HBS 81-75).
  \item \textsuperscript{159} \textit{Id.} at 23.
  \item \textsuperscript{160} St. Antoine, \textit{supra} note 85, at 36.
  \item \textsuperscript{161} \textit{Id.} at 37.
  \item \textsuperscript{162} Getman, \textit{Labor Arbitration and Dispute Resolution}, 88 \textit{Yale L.J.} 916, 934 (1979).
\end{itemize}
company rules that will form the basis for disciplinary action.\textsuperscript{163} Second, most of the proposals lack a pre-arbitration settlement mechanism.\textsuperscript{164} This is unfortunate because most grievances in a union setting are settled through such a mechanism. In the rest of the cases, each side has already learned the position of the other party and the evidence on which it will rely before the arbitration session. When there is no pre-arbitration procedure either side may be surprised by the other's arguments and evidence at the hearing, and trial tactics become important, to the disadvantage of the employee: "State mandated arbitration is structured as a substitute for a lawsuit (without the benefit of discovery prior to trial). Arbitration as it exists in collective bargaining agreements is a substitute for the strike weapon to compel agreement. . . ."\textsuperscript{165} Third, a nonunion employee must represent himself or hire someone to do this. The employee will probably have difficulty finding and paying for an appropriate advocate.\textsuperscript{166} Even assuming that the government were to provide attorneys for employees as some authors suggest,\textsuperscript{167} a union member still would be in a preferable position. Access to a shop steward or union official makes it easier for a union member to initiate a grievance. The union has a duty to fairly represent the employee through the steps of the grievance procedure and at the arbitration hearing. It has expertise in the workings of the industry and the particular company. The union officials involved also have an incentive to perform well: unlike a spokesman hired by the state or a lawyer paid to handle a single case, they wish to be re-elected and can be expected to act accordingly. Finally, an employee is at a disadvantage when selecting an arbitrator. Unlike a union or company, both of which handle these cases frequently, a discharged employee will most likely go through the procedure only once in a lifetime and will, therefore, know little about the available arbitrators: "[A]n arbitrator could improve his chances of future selection by deciding favorably to institutional defendants: as a group, they are more likely to have knowledge about past decisions and more likely to be regularly involved in the selection process."\textsuperscript{168}

\begin{thebibliography}{10}
\bibitem{163} England, \textit{supra} note 92, at 474, calls for worker/management rulemaking. Such a system would probably not be approved in the United States.
\bibitem{164} Some, such as Howlett's, \textit{supra} note 119, at 168, include a mediation step.
\bibitem{165} Erisco, Letter, \textit{58 HARV. BUS. REV.}, May-June 1980, at 206.
\bibitem{166} Finding an interested attorney may be getting easier. According to a recent Wall Street Journal article, on "August 26 [1982] the Pittsburgh Press carried . . . an advertisement by an attorney seeking clients with complaints of 'malicious discharge' and 'intentionally discouraging work assignments' against employers." Ewing, "Stockholders Can Lose When an Employee is Fired," \textit{Wall St. J.}, Jan. 3, 1983, at 22, col. 3. The skill and dedication of those entering this field remains to be seen. \textit{See} text and notes at notes 189-196.
\bibitem{167} \textit{See}, e.g., Summers, \textit{supra} note 1, at 524 (only for indigents); Howlett, \textit{supra} note 119, at 169.
\bibitem{168} Getman, \textit{supra} note 162, at 936.
\end{thebibliography}
The results under grievance procedures unilaterally established by nonunion companies are the major source of evidence available to test the proposition that nonunion employees receive less protection than union members at the hands of an arbitrator. The procedures that end with a decision by a neutral outsider are particularly relevant.\footnote{169} The plans differ markedly.\footnote{170} At TWA, American Optical (AO) and American Electric Power (AEP), only employees who could join a union under the NLRA are covered;\footnote{171} at Michael Reese Hospital all employees who are not union members may use the procedure;\footnote{172} and at Northrup, the grievance machinery is available for both "hourly and salaried" personnel.\footnote{173} TWA provides arbitration by a system board of adjustment, using a neutral outsider only for grievances involving terminations;\footnote{174} AEP,\footnote{175} AO,\footnote{176} Northrup,\footnote{177} and Michael Reese\footnote{178} allow almost all types of grievances to reach an outside arbitrator. AEP will pay for the attorney the employee chooses to represent her.\footnote{179} TWA allows an employee to be represented by someone outside the company only in discharge cases. Michael Reese will permit an employee to represent herself or to be represented by another employee of the medical center. On three occasions union spokesmen have been chosen.\footnote{180} As at Northrup, the TWA employee must pay for her spokesman at the final stage.\footnote{181} American Optical grievants usually rely on the ombudsman; in the one or two instances where they have retained outside counsel, the employee has paid.\footnote{182} The actual use of arbitration also varies among the companies. Northrup, Michael Reese and AEP purport to allow a case to go to arbitration only if the company's
position is strong. TWA has a policy of letting more cases go to arbitration, allowing the statistics to show that employees triumph under their procedure. All the companies except Michael Reese pay the full cost of the arbitrator; Michael Reese employees pay 10 percent with the hospital paying 90 percent of the fee.

Experience under nonunion arbitration generally supports what theory predicts. In none of the systems studied were employees covered by the plan directly involved in setting the rules. Consequently, the company could change the rules if an arbitrator were to interpret them in a manner it disliked. Unlike most of the statutory proposals, all of the company-initiated plans contained extensive pre-arbitration procedures for settling grievances. As expected, most grievances are settled at the early steps with relatively few cases reaching arbitration.

Each of the plans studied, except for Michael Reese's, provides for specialized company personnel to represent grievants at the early steps. At the arbitration stage the provision for representation differs. Employees at TWA and Northrup pay their own representatives. Both companies are aware of the problems this creates. At Northrup:

The company's employee relations managers feel that this is a weakness in the system which may be manifested in a number of ways. Where the employee represents himself, his lack of knowledge of the arbitration procedure often unduly delays the proceedings; the imbalance in the experience and skill of the grievant vis-a-vis an employee relations professional, forces the arbitrator to take a more active role

---

183. Littrell, supra note 173 at 9 (Northrup); Oscadal, supra note 172 (Michael Reese); Schnapp, supra note 149 (AEP). For Northrup statistics, see infra note 188. Since the procedure was instituted at Michael Reese Hospital in June 1978, fourteen arbitrations have occurred, nine of them in 1981. Approximately 3300 hospital employees are covered. Oscadal, supra note 172. In the last five years at AEP, sixty-eight cases have gone to arbitration—sixty under union contracts and eight under the nonunion plan. AEP has over 26,000 employees. Interview with Joseph Martin, Director of Labor Relations, American Electric Power, Columbus, Ohio (April 6, 1982).

184. Schnapp, supra note 149.

185. Oscadal, supra note 172. Michael Reese's plan is for advisory, not binding, arbitration. Since the plan's inception in 1978, the hospital has always taken the arbitrator's advice.

186. Employers look to trends in their industry and in general, as well as to union contracts, for ideas on what to include in the company handbook. The handbook closely resembles a union contract. Littrell, supra note 149.

187. At AEP there is an active suggestion system and the rules are changed constantly, often as a result of employee suggestions. Schnapp, supra note 149, believes that this process is superior to the collective bargaining method of generating rules. He states that if a negotiated rule proves unworkable, the parties must still live with it until the contract is reopened, while at AEP the offensive clause can be immediately removed. This flexibility, however, allows a company to destroy any precedent unfavorable to it with equal speed.

188. For example, Littrell provides the following statistics for Northrup's Burbank facility: "During the past five years at our largest division, it has been estimated that somewhere between 7,000 and 9,000 grievances have been resolved before reaching the second step of the grievance procedure. Three hundred sixty reached that step—the Administrative Officer, and twelve went to arbitration." Littrell, supra note 173, at 9.
than he might otherwise do; the arbitrator, if he feels that the contest is uneven, may unconsciously give the grievant the benefit of more doubts than he is really entitled to; and finally, as in one case . . . an arbitrator may even refuse to render a decision due to the lack of adversary counsel.\(^{189}\)

Northrup has considered and rejected various solutions. Both the company and the organized bar opposed using third year law students. The company feared that it would take too long to bring the students up to date on the cases, that students might provide less than adequate representation, and that some might be "activists."\(^{190}\) Another idea was to use employee representatives from other divisions of the company.\(^{191}\) This was rejected by the senior industrial relations managers, who felt that the plan might adversely affect the careers of employee representatives: if one were to win, overturning a supervisor's decision, that supervisor would not soon forget.\(^{192}\) An attorney who has represented both AEP, where the company pays for the grievant's lawyer, and TWA, where an employee must hire her own if she wishes to be represented, found the quality of the opposing counsel to be much lower at TWA than at AEP.\(^{193}\) One arbitrator, who has operated under the TWA nonunion grievance procedure, commented that the inability of the discharged employee to adequately pull together a case worked to the great advantage of the company.\(^{194}\) The quality of representation was not apparent from reading the nonunion TWA decisions of another arbitrator and comparing them to his decision under a union contract with the same company.\(^{195}\) That arbitrator speculated that the quality of representation paid for by the nonunion employee is probably inferior to that available in a unionized setting. He noted that although most employees hired lawyers, they were usually general practitioners; few appeared to have any substantial experience in labor arbitration.

---

189. Id.

190. Littrell, supra note 149.

191. This is the procedure used at American Airlines, a company with a highly developed grievance procedure that has as its ultimate trier a specially trained hearing officer, who is an operating executive, usually from a different facility. Schnapp, supra note 149.

192. Littrell, supra note 149.

193. Schnapp, supra note 149. He described the TWA employees' lawyers as often "really lousy" and "the kind that do tort, slip and fall cases."

194. Interview with Father Mortimer S. Gavin, S.J., Director of the Labor Guild, Archdiocese of Boston, in Roxbury, Massachusetts (April 7, 1981).

195. In one of the nonunion cases the absence of a union may have made the employee, who was representing himself, unable to muster the evidence necessary to prove a discriminatory pattern of enforcement. David J. Gooden (unpublished Sept. 21, 1977) (Stephen Goldberg, Arb.). In the one union case the arbitrator accepted more inferences supporting the employee than he did in the nonunion ones, which seemed to indicate superior advocacy in that case. Paul Sacharczyk, TWA/IFFA Case No. 78-804 (unpublished April 17, 1979) (Stephen Goldberg, Arb.). The arbitrator confirmed this suspicion. Interview with Professor Stephen B. Goldberg, Northwestern University School of Law, Chicago, Illinois (April 5, 1982).
While he contended that an activist arbitrator can make up for some of the deficiencies in an employee's presentation, he conceded that others, such as not coming forth with the necessary evidence, cannot be remedied by the arbitrator. The employee must be disadvantaged when counsel fails to articulate the appropriate arguments, leaving the neutral without the usual assistance.\textsuperscript{196}

TWA is able to exert more control over the selection of the arbitrator than is usual under a collectively bargained arrangement. The company composes and sends a list of five members of the National Academy of Arbitrators to the grievant. The employee ranks his preferences and returns the form to TWA, which then schedules a hearing with one of the arbitrators. Neutral participants must realize that the company can remove any "unsatisfactory" arbitrator from the lists sent to employees.\textsuperscript{197} Other companies use striking lists provided by the Federal Mediation and Conciliation Service\textsuperscript{198} or a state conciliation service,\textsuperscript{199} a permanent umpire,\textsuperscript{200} and appointment by the FMCS.\textsuperscript{201} No evidence is available to test whether arbitrators skew their awards to increase their chances of selection by companies, the side which will be involved in more than one arbitration, or whether employees are able to obtain the information necessary to choose intelligently among the neutrals.

A management attorney who has dealt with both nonunion and collectively bargained arbitration believes that one advantage to the employee of the nonunion plans is that she alone decides whether to proceed to arbitration after losing in the earlier stages; the worker does not have to convince her union to continue to press the claim.\textsuperscript{202} Some of the statutory proposals incorporate this feature.\textsuperscript{203} Others, in order to weed out frivolous claims, would require a state agency to approve all cases before they could be heard by a neutral.\textsuperscript{204}

\textsuperscript{196} Interview with Professor Stephen B. Goldberg, \textit{id}.
\textsuperscript{197} Schnapp, \textit{supra} note 149.
\textsuperscript{198} \textit{Id.} (AEP); Northrup used to use FMCS lists, but the FMCS has refused to provide any assistance for the last few years; they claim that their charter limits them to serving parties involved in collective bargaining relationships. Littrell, \textit{supra} note 173, at 9.
\textsuperscript{199} Littrell, \textit{supra} note 173, at 9 (Northrup).
\textsuperscript{200} Oscadal, \textit{supra} note 172 (Michael Reese).
\textsuperscript{201} Decataldi, \textit{supra} note 171 (AO).
\textsuperscript{202} Schnapp, \textit{supra} note 149. Most union contracts do not allow employees to initiate arbitrations. Under a typical clause, if the union refuses to go to arbitration, the grievance process stops unless the union is found to have violated its duty of fair representation. Vaca v. Sipes, 386 U.S. 171 (1967). The Supreme Court's recent decision in Bowen v. United States Postal Service, — U.S. —, 103 S. Ct. 588 (1983), which makes a union liable for part of the backpay award if the union failed to take a grievance to arbitration and the employee later triumphs in a duty of fair representation case, will probably encourage unions to take many more discharge cases to arbitration.
\textsuperscript{203} See, e.g., Summers, \textit{supra} note 1, at 528-29.
\textsuperscript{204} See, e.g., Howlett, \textit{supra} note 119.
It is interesting to note that managers connected with nonunion grievance arbitration systems are opposed to statutory imposition of such a plan on all employers. In general, they believe that there is too much government involvement in the employment relations area already, and that "a new governmental bureaucracy would further reduce the nation's productivity by ensuring—without understanding—that every 't' is dotted and every 'i' is crossed." 205 One manager pointed to the danger of the proposals' reliance on the "general common law of arbitration." He said that now arbitrators are applying contracts which the parties can change if they are not working; relying only on an arbitrator's conception of rightness will produce highly erratic results. 206 Another felt that companies want to retain the right to change or drop their nonunion plans at any point, something they could not do if the government were involved. 207 Finally, one cautioned that a program that works well in one company may not be successfully transferable to another. 208

Nonunion arbitration plans provide useful data for predicting some of the effects of a government arbitration system. It is unlikely that enough companies will adopt these plans to make government intervention seem superfluous. 209 While many managers believe that the systems help prevent unionization, 210 others caution that a little taste will only whet the employees' appetite for a union. 211 Cost is a major stumbling block to establishing an arbitration program, especially one that provides adequate representation for employees at every stage. 212 Also, "it takes a special attitude on the part of management to voluntarily permit their judgment to be challenged." 213

Potential remedies are another factor to consider when trying to determine whether creating an individual right not to be dismissed without just cause would leave those currently unprotected better off. The remedy for improper discharge in a unionized American firm has traditionally been reinstatement with or without backpay and benefits. 214 No judicially created just cause standard contemplates reinstatement as a remedy. The tension instead is over whether monetary

205. Littrell, supra note 173.
206. Littrell, supra note 149.
207. Oscadal, supra note 172.
208. Littrell, supra note 173, at 12: "And a 35 year old grievance system which works well at Northrup could be a disaster installed overnight for widgit workers in Waukegan."
209. Westin hints that if management would only voluntarily adopt nonunion arbitration procedures, the pressure for government action would be removed. Speech by Alan F. Westin, American Arbitration Association's Fifth Annual Arbitration Day Meeting (June 12, 1981).
210. See, e.g., Schauer, supra note 146, at 183-86.
211. See, e.g., Epstein, supra note 147, at 124.
212. Schnapp, supra note 149.
213. Littrell, supra note 149.
damages should be measured in tort or in contract. The legislative proposals, however, all consider reinstatement the preferred remedy for unjust dismissal. The question here is whether reinstatement would work in a nonunion environment.

Theoretically, reinstatement can be expected to be less effective in a nonunion setting. The union, with its stewards watching and grievance procedure in place, serves to protect the returned employee from future employer discrimination. The nonunion returnee has no such infrastructure on which to depend:

The aggrieved employee needs protection, but his interests are better served by continuing income and assistance in finding a new job than by vindication of his rights. Restoration to a job where his future prospects are likely to be dim is a poor protection.

Even when a unionized shop is involved, there are divergent theories on the usefulness of reinstatement as a remedy:

One theory runs something as follows: He is a marked man, or he never would have been discharged in the first place. His number was up. Management will nail him again soon, and make it stick. Reinstating him merely throws him back into an impossible situation. His best bet will be to pick up his retroactive pay and find himself another job. At the other extreme, it is said that he was probably discharged by an impetuous supervisor in a fit of anger. Everyone is relieved when the arbitrator slaps him on the wrist and puts him back to work. Having been discharged once, he will now get religion and keep his nose clean. In fact he will become a model employee.

Evidence to evaluate the potential of reinstatement as a statutory remedy for unjust discharges comes from three major sources: reinstatement directed by arbitrators interpreting collective bargaining agreements, reinstatement ordered to effectuate a statutory policy, and the experience of foreign countries with reinstatement. A reinstatement is successful when the employee returns to work and is able to function normally in his job. Subsequent progress, discipline, resignations and discharges are all relevant.

Three studies of arbitrator-ordered reinstatement pursuant to a labor contract found that the remedy worked quite well. Ross looked at the cases reported in the 1950-55 Labor Arbitration Reports in which employees were reinstated after being discharged for cause. Of the 123 grievants, 10% never returned, 20% lasted less than a year, and al-

218. There have not been any studies of the success of reinstatements as a remedy in company initiated nonunion grievance/arbitration systems.
most 50% were no longer employed at the time of his survey. Cautioning that normal labor turnover rates must be considered, he concludes that the reinstated employee probably "is not more likely than other employees to resign, but is more likely to be discharged again."\footnote{220}{Id. at 43.}

From an operational standpoint, about two-thirds of the cases have worked out well. Employers say that two-thirds of the reinstated employees have proved satisfactory. About sixty percent have reportedly made normal occupational progress, although there is reason to believe that the reinstated employee is less likely to be promoted. Seventy percent have presented no further disciplinary problems. The attitude of supervisors has been favorable or neutral in about seventy percent of the cases. The reinstated employee's attitude is described as good in about sixty percent of the cases. Since reinstatement creates a delicate human situation in the shop at best, these responses indicate a generally mature and far-sighted adjustment to the difficulties.\footnote{221}{Id.}

Malinowski repeated Ross's technique.\footnote{222}{Malinowski, An Empirical Analysis of Discharge Cases and the Work History of Employees Reinstated by Labor Arbitrators, 36 ARB. J. 31 (1981).} He examined the discharge cases reported between September 1977 and October 1978 in BNA's Labor Arbitration involving reinstatement. Using a questionnaire similar to Ross's, Malinowski found that management said that it was dissatisfied with arbitrators' decisions. However, he also discovered "that employers find reinstated employees to be satisfactory employees. Such employees make normal progress, serious disciplinary problems do not recur, and the employees' attitude is good following reinstatement."\footnote{223}{Id. at 33.} Sixty-four percent of the 73 reinstated grievants were still employed when he conducted his survey, and 8% had been discharged again.

In a third study of reinstatement in the collective bargaining context, George W. Adams analyzed 645 disciplinary discharges recorded in the files of the Ontario Labour-Management Arbitration Commission covering the period July, 1970 to December, 1974.\footnote{224}{G. Adams, Grievance Arbitration of Discharge Cases: A Study of the Concepts of Industrial Discipline and Their Results 40 (1978).} Over 53% of the employees discharged were reinstated: One hundred fifteen were completely exonerated, and 230 more were reinstated with a lesser penalty.\footnote{225}{Id. at 52.} Of those who returned to work, 13% were later discharged, and 19% quit.\footnote{226}{Id. at 64.} "If a successful reinstatement is to be measured by the absence of any subsequent discipline, the collective success rate of the arbitration tribunals involved in this study is in the order of 63 per-
Adams concluded that this success rate “speaks well of the labour-management community. . . . The vast majority of affected employers absorbed the reinstated employees back into their ranks and treated them with the respect and fairness accorded to others in their workforces. Reinstated employees are therefore not ‘marked men’ as some have predicted.”

Unlike reinstatement awarded pursuant to a collectively bargained arrangement, statutorily mandated reinstatement, such as that provided for in section 8(a)(3) of the NLRA, has not been an effective remedy. Two studies have been done of the 8(a)(3) cases that arose in the National Labor Relations Board’s Fort Worth, Texas, region during 1971 and 1972. The initial probe concluded, and the follow-up paper confirmed, that reinstatement did not protect the rights granted an employee by the NLRA. The authors located 217 of the 229 people ordered reinstated. Of these, 59% chose not to return to their jobs. One hundred fourteen of the 129 who refused reinstatement cited fear of company backlash as one reason for their decision. Of the 72 who actually were reinstated, 86.9% had ceased working for that employer within one year, and 95.8% had left by November 1980. Sixty-five percent of those who left after reinstatement did so as a result of additional unfair company treatment. Chaney found that the hostility of other employees prompted a number of returning workers to seek new jobs. Although this co-worker reaction may be peculiar to the union campaign situation, the difficulty with supervisors probably is not. Immediate supervisors presented reinstated employees with the greatest problems. Chaney surmised that “it is the immediate boss who feels that his position of authority is threatened when the discharged employee returns.”

The evidence currently available indicates that reinstatement would probably be an unsuccessful remedy in a statutory scheme designed to protect employees against unjust discharge. While reinstatement works quite well in the unionized environment, the success of statutorily-mandated reinstatements would probably be more akin to that of statutory NLRA reinstatements than to that of collectively bar-

---

227. Id. at 66.
228. Id. at 95-96.
231. Chaney, supra note 230, at 359.
232. Id. at 363.
233. Id. at 363-4.
234. Id. at 364.
235. Id. at 361.
236. Id. at 363.
gained ones. It is likely, therefore, that monetary relief would evolve as the remedy of choice in a statutory unjust dismissal scheme.\(^\text{237}\) If the remedy is to be almost exclusively monetary, whether the whole procedure is worth the effort is open to serious question. Not wanting a worker to lose his place in "his job" except for just cause prompted the concern for protection. Monetary damages do not seem to satisfy this concern. This is especially true when the size of the awards is considered. In England in 1978 the median compensation in conciliated cases was approximately $300; the tribunals granted a median award of $800.\(^\text{238}\) In addition, if the relief is to be monetary, rather than setting up a whole new mechanism to vindicate employee rights it would seem to be much more efficient to modify the unemployment system to provide more compensation for readjustment. The unemployment system already allows employees to challenge the reason given for discharge in cases where the employer states that discharge has been for cause or a

\(^{237}\) Of course, reinstatement could still be ordered even if it were found to be almost totally ineffective, making a complete farce of the "protection" offered by unfair discharge legislation. I assume that the proponents of the legislation would not support such a cruel result. Once a statutory scheme is set in place, however, it is very hard to change. The N.L.R.A. is an example of a piece of legislation that needs revision, such as strengthened remedies, in light of experience with the original framework. Even with a well organized interest group supporting those changes it has been impossible to pass suitable legislation. If the nation's labor unions cannot bring about the basic labor law reform necessary to allow the N.L.R.A. to operate as envisioned, it seems ludicrous to expect unorganized workers to be able to get unfair dismissal legislation modified if the initial scheme does not function as desired. After all, one of the basic arguments for protecting them by law is that they either cannot or will not organize sufficiently in any manner (unions, lobbying) to protect themselves.

\(^{238}\) In other countries, where statutes guarantee protection against unjust dismissal, the legislation infrequently provides for reinstatement. Stieber, analyzing the situation in the Common Market countries, Norway, and Sweden found:

Reinstatement is rarely permitted and, where permitted, is rarely employed as a remedy by the labor or civil courts which have jurisdiction over dismissal cases in most countries. Compensation is the most common remedy available to a worker who has been unfairly dismissed. . . . Six months compensation in addition to notice payments is the maximum in several countries. Stieber, supra note 89, at 232-233.

England's law prohibiting unfair dismissal does allow reinstatement; however, this remedy is rarely used. Id. at 234. The British system has two steps. Conciliation is attempted first; the case may then be taken to an industrial tribunal. Of the 34,180 cases brought under the law in 1978, two-thirds were withdrawn or settled through conciliation, and the rest were decided by industrial tribunals. Only 2.1% of the cases resolved at the conciliation stage and 0.9% of the cases decided by tribunals resulted in reinstatement to the employee's former position or another job with the same employer. If a tribunal's reinstatement order is not obeyed, the tribunal can order additional compensation, but it cannot enforce a reinstatement order. Canada's Federal Jurisdiction has had an unfair dismissal law applying to nonmanagerial nonunion employees in effect since September 1978. G. Adams, Unfair Dismissal Legislation in Canada 1-3 (unpublished speech given at Michigan State University, Autumn 1980). The legislation covers approximately 140,500 employees. By March 31, 1980, Labour Canada had received 347 complaints. Of the 262 eligible claims, 54% were settled at the first stage of the process. Forty-five cases went to adjudication. Reinstatement was ordered in eleven of the nineteen cases decided in favor of the worker to date. This recent Canadian experience with an unjust dismissal statute is not conclusive, however, few people are being reinstated under the law.
voluntary quit.\textsuperscript{239}

Theoretically, granting a right not to be discharged without just cause might actually weaken the position of currently unprotected individuals. This would occur if, as a result of the statutory provision, employees voted not to unionize because the marginal value of a union contract was not sufficiently attractive to support an organizing drive. While it is never in the self-interest of the labor movement to decrease the marginal value of a union contract and, thereby, lessen the appeal of union organization, in some cases it has done just that. For example, unions continue to support increases in the minimum wage even though this is thought to make low wage workers harder to organize by reducing the union/nonunion wage differential. However, unfair dismissal legislation is even more disadvantageous to unions than the minimum wage in that nonunion workers are likely to perceive that the legislation grants them the same amount of protection that unionized workers have. A similar conflict between perception and reality does not cloud comparisons between the minimum wage and union wages. As argued above, the position of some at will employees would also be weakened if, as a result of the statutory provision, workers who would otherwise have sought jobs in unionized shops or positions covered by civil service legislation took jobs protected only by the statute.

Nonunion companies that provide outside arbitration have been very effective in keeping unions out. Since its plan was instituted in 1946, Northrup has defeated unions in five representation elections and three aborted attempts.\textsuperscript{240} American Electric Power, a frequent target, credits that company's higher than average success rate to its grievance procedure.\textsuperscript{241} American Optical has fought a union four or five times in 20 years at its main facility in Southbridge, Massachusetts. Even though the employees of its major competitors have chosen to organize, American Optical's employees have resoundingly rejected the union each time. While the firm does many things to keep the desire for representation from arising, the ombudsman, who has been with the company 35 years, 20 of those in his current position, is convinced that without the grievance procedure the company would not be nonunion today.\textsuperscript{242} The Teamsters recently tried to organize the gate attendants and ticket sellers who are covered by TWA's grievance procedure.

\textsuperscript{239} For further discussion of unemployment insurance see notes 283-90 infra and accompanying text.

\textsuperscript{240} Littrell, supra note 149. There are approximately 14 union members at Northrup. All are operating engineers. Twelve belong to a bargaining unit at Northrup's largest facility (13,000 employees) that was certified in 1942. The other two were "acquired" when the Aircraft Division won a contract to run an airport in 1974.

\textsuperscript{241} Martin, supra note 183.

\textsuperscript{242} Decataldi, supra note 171.
They failed miserably.\textsuperscript{243} While the experience with company-initiated plans cannot be expected to be identical to that under a government-mandated scheme,\textsuperscript{244} it seems to suggest that the presence of an efficient grievance procedure reduces the marginal propensity to unionize. No studies have been done on the effect such grievance procedures have on job selection.

Any analysis of whether unprotected employees would be better off with an individual right not to be discharged except for cause must explicate the values evidenced by the choice of this type of protection. The question is why this provision, rather than any other one, should be taken from another industrial relations system. Perhaps it would be better to imitate the broader scope of allowable organizing, the simpler certification of a bargaining agent or other such provisions found in the labor law of foreign countries? If the true concern is with the most vulnerable people—those outside of the scope of the NLRA, such as farmworkers, domestics, supervisors, managers—why is the alternative of including them under that Act never mentioned? Many of the proposed statutes even exclude them from coverage in the name of "political expedience."\textsuperscript{245} If conflict of interest is feared, supervisors and managers could form their own unions and be required, as guards currently are, to be in a different union from the people with whom they work.\textsuperscript{246} Limited purpose unions could be tried to provide grievance procedures and other desired provisions to managerial employees. Farmworkers, domestics, and student employees all could be served by regular trade unions if they were allowed to form appropriate bargaining units. Modifying our current labor law in these ways would be more consistent with our industrial relations system than creating an unjust dismissal law.\textsuperscript{247}

The authors of these proposals base their choice on the proposition that "the right of a worker to his job and the right not to be unjustly disciplined are so basic that an individual ought not to be required to

\textsuperscript{243} Interview with Professor Stephen B. Goldberg, Northwestern University School of Law, Chicago, Illinois (March 3, 1982).

\textsuperscript{244} Canada’s experience with a statutory plan, especially the one now in effect in the federal jurisdiction, would be ideal to test whether in fact workers are less likely to organize. However, no studies have yet been done. Comparing the overall union won/loss statistics before and after the law would not be enlightening. Proper analysis requires a multivariate approach, taking into account the many factors that are thought to influence the outcome of union representation elections. See generally Catler, Union Representation Elections: What Determines Who Wins (May 1978) (senior honors thesis available in Harvard University Archives).

\textsuperscript{245} See, e.g., Howlett, supra note 119, at 166-168.


\textsuperscript{247} Of course, organizing is never easy. In many industries, firms, and occupations workers now have the right to join or form unions and have not chosen or been able to do so. Making organizing easier or more widely available will not magically protect all currently vulnerable employees, but it will make private provision a more reachable and realistic option.
join a union to obtain protection of those rights." On the definition of basic employee rights reasonable minds may differ. Some might think that no employee's benefit package should be allowed to omit health insurance. Others might conclude that employees should be accumulating pension rights constantly. Congress, however, has been loath to impose positive minimum requirements on employers. Employers must pay at least the minimum wage and, under OSHA, provide a workplace that will not physically harm their employees. Beyond that, our labor relations system relies on the individual worker to select the type of job that best suits her needs and desires. Workers who place a premium on job security should try to join unionized firms or enter employment covered by civil service or tenure arrangements. Job security is simply a characteristic of an occupation, and American workers are capable of evaluating and choosing jobs for themselves. The fact that a particular employee may regret her choice when she is discharged for less than just cause, does not prove that she had any less protection than she was willing to pay for when she took the job.

B. The Economy and Its Institutions

The previous section focused attention on the effect proposed laws and judicial actions would have on individual employees. Analysis from that perspective assumes labor law exists primarily to serve employees and create employee rights. Acceptance of this premise means that the system can be attacked if it does not satisfy some employees. Labor laws, however, should also serve the needs of society as a whole, as the stated purpose of the NLRA illustrates:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.  

248. Summers, supra note 82, at 139.

249. While OSHA protects workers from both safety and health hazards, the health provisions are the ones that set it apart from other potential employment regulating legislation. The information problems are so acute when dealing with hazardous workplace substances that there is no possible way for workers to make informed, rational decisions. Just two of the major problems are: first, a high degree of scientific sophistication and exploration is necessary to ascertain the existence of any danger and second, the lag time between exposure and resultant illness is sometimes quite long. Because of the incapability of workers to make well founded decisions in this area and the dire consequences to society of erroneous ones, occupational health is a unique area requiring legislative solutions.

This section will concentrate on the effect proposed legislation or judicial action would have on the economy and its institutions.

A successful policy transferred from one industrial relations system to another does not necessarily produce the same results in the second system. As discussed above, many benefits of procedures and remedies developed in a unionized setting are lost when they are imposed on a nonunion one. Care is also needed when copying a procedure developed to meet the needs of another country’s industrial relations system. All the proposals that rely on arbitration have this “transfer” problem because compulsory arbitration is substantially different from voluntary arbitration. Dean Shulman described the role of the arbitrator in a voluntary arbitration as follows:

He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement. They are entitled to demand that, at least on balance, his performance be satisfactory to them, and they can readily dispense with him if it is not.

To the extent that the parties are satisfied that the arbitrator is properly performing his part in their system of self-government, their voluntary cooperation in the achievement of the purposes of the collective agreement is promoted.

Contrast the position of an arbitrator under an unjust dismissal statute: “Professor Summers’ proposal and others like it envision or would lead to decisionmakers who would be described as ‘arbitrators,’ but would be selected by government, would apply officially established rules, and would make enforceable decisions concerning the lives of people compelled to use the system.” Getman contends that arbitration under these conditions would be “almost indistinguishable from agency adjudication.”

Labor and management generally oppose the use of compulsory arbitration. Two of the arguments against this procedure are particularly pertinent here. First, it does not generate acceptable solutions to disputes. It is “a dictatorial and imitative process rather than a creative one.”

253. Getman, supra note 162, at 938.
254. Id.
255. F. ElKouri & E. ElKouri, supra note 214, at 17 (The exception is when non-peaceful resolution of the dispute will lead to severe hardship to the general public or third parties).
256. Id. at 19.
The parties . . . cannot specify the standards or criteria for the arbitrator's decision. If terms of employment are determined . . . by arbitration required by law, rules may emerge for uniform application to all parties regardless of their individual character and needs. Compulsory arbitration means an imposed decision which will often fail to satisfy either party, rather than an acceptable settlement based upon a meeting of the minds. Compulsory arbitration, then, would change the contract-making function. Currently, arbitration decisions are generally not considered binding precedent, especially upon other parties' contracts. If arbitrators are not responsible to the parties and bound by a particular contract, but instead are employed by the government and make their decisions on implied general principles of fairness, then their awards will become much more significant to third parties. If, for example, an arbitrator rules in the absence of a contract that, as a matter of fairness, employees may not be discharged for lateness without at least two warnings, that standard in effect becomes a minimum below which due process does not allow a contract provision to fall. The economy will suffer if courts or arbitrators write minimum employment contracts. Those who argue against compulsory arbitration predict that once there is governmental determination of one term of employment, others will inevitably follow. This type of Government regulation "threatens not only free collective bargaining but also the free market and enterprise system." It also substitutes the uniformity of law for the diversity of private contract. Workable uniform standards of behavior are impossible to devise in a complex economic system. For example, an airline would be less tolerant of the safety mistakes of its employees than most other employers. Uniformity does not allow for such deviations from the norm.

Compulsory arbitration will lead to less acceptable results than voluntary arbitration of the same dispute because the parties involved affect the outcome. An individual challenging company action is unconcerned with precedent or the future of the enterprise. All she wants is the best possible outcome for herself. In contrast, both union and management are committed to the continued health of the enterprise; they will both be there long after a particular case is resolved. "The group may be affected by the future implications of the ruling to an extent that far outweighs the individual claims to damages . . . the union is the natural spokesman for future implications." These insti-

257. Id.
258. Id. at 365-88.
tutional constraints of voluntary arbitration will lead to a dispute resolution with which the parties can live.

The relation of the ultimate decisionmaker to the dispute in a compulsory arbitration situation should also mean less acceptable conclusions are reached. According to Madison in a discussion of judicially created causes of action in this sphere: "The problem, simply stated, is that the ultimate exercise of discretion regarding whether to approve employee discharges will be shifted from employers to the courts, with no more concrete legal standards to guide courts than have restrained employers until now."262 In other words, in the absence of a union/management relationship, who should make the unilateral decision to dismiss an employee: the employer or a court or arbitrator? Again, when the effect on the economy and its institutions is the issue, analysis must emphasize commitment to the enterprise, this time on the part of the decisionmaker. The judge or statutory arbitrator is not responsible to the parties, but to the state. She may be unfamiliar with the peculiar nature of the employment situation. She certainly will not have to live with her mistakes. The employer, on the other hand, is at least somewhat constrained by the market for her product and the labor market from which she draws her employees. An employer who continually fired good workers without cause would soon have a company unable to competitively produce its product and possibly unable to attract and retain employees.263 As a matter of economic policy it seems unwise to transfer the final decision on whether a worker will continue to be employed at a particular job from the employer, who is committed to the continuity of the enterprise, to an outside arbiter, who is not.

The second argument against compulsory arbitration is that it creates formidable enforcement problems unknown to voluntary arbitration. Rarely is court action required to obtain compliance with a voluntary award.264 Compulsion, unlike a voluntary agreement to accept the arbitrator's decision, generates resistance, and if companies refuse to comply, the government looks impotent.265 In addition, employers can use subterfuge to evade the law. For example, without the seniority provisions that are present in most union contracts, employers can "lay off" those employees it cannot fire. Summers would require employers to use an "objective standard" to determine lay-

262. Madison, supra note 98, at 432.
263. For evidence that employers do act rationally see Medoff and Abraham, supra note 158. Employers who said that they would lay off a junior nonunion hourly employee before a more senior one when both were worth the same to the company overwhelmingly reasoned that: "[s]uch action would have undesirable effects on our current workforce." Medoff and Abraham survey (unpublished data).
265. Id. at 19.
Getman points out that under Summers' proposal, employers can lay off first and justify later in the absence of a contract. He also notes that in the nonunion context individual contracts of employment would be allowed and that "much of the legislative protection proposed by Summers may be offset by individual agreements." Finally, the obedience rate will suffer, according to Getman, because there is no union structure to protect the successful grievant from future harassment. If company treatment leads him to quit, the award is worth nothing.

When arbitrators must deal with external law, the process of arbitration itself changes. According to Feller, the recent development of substantive federal regulation of the terms and conditions of employment signals the end of the period when courts enforced arbitrators' decisions as if they were foreign judgments entitled to full faith and credit.

His judgments on the external law are no longer entitled to 'full faith and credit' because, rather than acting as an adjudicator in a foreign jurisdiction, the arbitrator is more like a lower court whose decisions are subject to review by higher courts. And it seems probable that once undertaken, judicial review will not be limited to review of the arbitrator's resolution of the issues of external law. Feller concludes that the result of this "may be that arbitrators become primary but not necessarily final adjudicators." In the collective bargaining context of which he speaks this change may not be that significant; often the parties will accept the decision and not appeal to an external tribunal in deference to their ongoing relationship. In a compulsory arbitration situation, however, the arbitrator's decision would probably not carry the advantage of finality, contrary to the claims of the proponents of statutory protection.

Another objection to compulsory arbitration is the expense, which includes both the direct cost to the government and the indirect cost to the economy of the reallocation of resources. The uncertainty of exposing management decisions to outside review and possible reversal increases business costs as do the procedures needed to justify decisions.

---

266. Summers, supra note 1, at 527.
267. Getman, supra note 162, at 935.
268. Id. Getman seems to be referring to adhesion-type contracts of employment, not individually bargained ones.
269. Id. at 935-36.
271. Id. at 109.
272. Id. at 129.
273. See, e.g., St. Antoine, supra note 85, at 37: "Another advantage of the arbitral model is that the award is final and binding, without the need for agency adoption or review as in the case of a hearing officer's report or decision."
to courts or arbitrators. The incidence of the costs also must be examined. In a unionized setting, union and company split the costs of arbitration, with each side paying its own legal fees. The legislative proposals all call for government provision of arbitration services for nonunion employees. The question then arises whether providing free arbitration to nonunion employees is a sensible transfer of resources. From the employer's point of view, the answer must be no. In collective bargaining the employer can demand a *quid pro quo* for giving up his freedom to discharge at will; here she is required to relinquish her freedom to manage the workforce and obtains nothing in exchange. From the unionized employee's point of view this transfer also makes no sense. A nonunion employee given the arbitration protection negotiated by unions is in effect a free rider on unionized workers. Finally, the taxpayers, many of whom are employers or union members, may not want to subsidize protection for one group of employees through general tax revenues when other people pay for this service on their own.

Consider too the nonmonetary costs of regulation, such as its effect on pre-existing institutions. Creation of an individual right not to be discharged except for just cause introduces a tension between this individual right and those collective rights that arise under a union contract. Some of the proposals have sought to minimize this problem by excluding union workers from coverage, as the Canadian Federal Jurisdiction law does. However, it seems unfair to condition an indi-

---

274. Some would have the discharged employee pay a small fee to discourage frivolous suits. See, *e.g.*, Stieber, *supra* note 89, at 239-40.

275. Union members fully understand the free rider concept, as the experience under § 9(e) of the NLRA demonstrated. Added by the 1947 amendments, this section required the Board to poll unionized employees to determine if a majority wished to authorize a union-shop clause in their contracts. Such a clause could require that employees join and pay dues to the union that was their certified bargaining representative. The requirement of a vote before entering into a union-shop agreement was eliminated in 1951, presumably because it was a waste of time—employees almost always approved the provisions.

During the 4 years and 2 months in which the union-shop poll was required, the Board conducted 46,119 such polls, in which a total of 6,542,564 employees were eligible to vote. Negotiation of union-shop agreements was authorized in 44,795 of these polls, or 97.1 percent. A total of 5,547,478 employees, or 84.8 percent of those eligible to vote, cast ballots and 5,071,978, or 91.4 percent of those voting, voted in favor of the union shop. Those voting in favor constituted 77.5 percent of those eligible to vote. (Footnotes omitted).

SIXTEENTH ANN. REPORT OF THE NLRB 54 (1951).

276. This same point has been raised with regard to the taxpayer financing of the compulsory grievance arbitration system mandated by the Railway Labor Act. H. NORTHROP, COMPELSSORY ARBITRATION AND GOVERNMENT INTERVENTION IN LABOR DISPUTES 72 (1966). Northrup also argues that this is one of the key reasons for the failure of that system. Grievances are not settled at the local level, generating a huge number of arbitration cases and a tremendous backlog for the arbitration board because according to Northrup, the parties bear only a tiny fraction of the total cost of their actions. *Id.* at 71.

individual right on a circumstance that is easily changed and freely chosen. To put it another way, while special government treatment of the poor or minority groups may be justified by reference to their disadvantaged status generally, the same cannot be said for nonunion workers. Not all nonunion workers are disadvantaged, nor are all union workers advantaged. The fairness of granting highly paid white collar employees a government-funded right while denying that right to unionized workers earning the minimum wage is questionable. Treating employees working at different plants of the same company, one union and one nonunion, differently also appears to be unjust. Reasonably assuming that fairness requires equal statutory protection for all employees from unjust discharge, efforts to limit the undermining of collective bargaining by excluding union workers from coverage will fail.

When union members are covered by unjust discharge legislation, determining which forum shall have the actual decisionmaking power is a problem. The experience in England under the Trade Union and Labour Relations Act of 1974 illustrates the tension between individual rights and collective decisionmaking through collective bargaining. Disagreeing with the enforcing tribunal's apparent belief that if an employer follows the appropriate collective agreement she has acted reasonably and therefore will be upheld under the Act, Concannon says that the tribunal's duty is to make a separate evaluation.278 "The fear may well be that to do so would be construed as acting contrary to and undermining the process of collective bargaining. If so, it seems misplaced in a scheme of statutory rights for individual employees against unfair dismissal."279

The Supreme Court seems to believe that employees should be able to sue over individual rights created by statute even after the rendering of a "final and binding" arbitration decision on the same issue. In Alexander v. Gardner-Denver Co. 280 a unanimous Court held that an employee who alleged that his discharge was racially motivated was entitled to pursue his claim in federal court under Title VII even though an arbitrator had rejected the claim in the contractual grievance procedure. More recently, the Court acknowledged that a "tension arises . . . when the parties to a collective-bargaining agreement make an employee's entitlement to substantive statutory rights subject to contractual dispute-resolution procedures."281 The Court went on to decide that the employees could pursue their asserted Fair Labor Standards Act rights in federal court even though the grievance was

---

279. Id. at 902.
covered by the contract, and adjudicated under it without any violation of the union's duty of fair representation. If, as seems likely, the Court were to find that a union could not compromise an individual's statutory right not to be discharged except for just cause, the right would be preserved after arbitration under a collective bargaining contract, and the collective bargaining process would be unable to reach a final decision.

C. The Appropriateness of Judicial Action

The competence of the courts is severely limited in the discharge area. Courts have been required to judge the correctness of management decisions to dismiss workers in both unemployment benefits and returning veterans cases. In neither have the courts developed principled doctrines.

Liebman and Connor examined the administrability of the initial eligibility test for unemployment compensation. This decision, whether an employee has left her previous job for a reason that entitles her to collect unemployment benefits, is similar to the one that would be required if judges were to create a tort or contract right not to be discharged except for just cause. This is because "unemployment insurance can be seen as society's recognition that self-reliance and hard work do not guarantee continuity of the opportunity to work and to earn." According to Liebman and Conner, courts feel compelled to evaluate the reasonableness of the employer's rules. They must separate the "worthy" from the "unworthy," for "society is thus seeking to enforce a set of policies and judgments—evaluations of individual character as well as attempts to achieve public purposes through specified intervention—that seek to influence (and even overcome) individual economic calculations."

Liebman and Conner conclude that the most significant aspect of the unemployment insurance system is its caseload. In 1978, over 18 million new claims were filed. "This is just too heavy a load of inherently difficult determinations to permit an adequate percentage to be concluded predictably, coherently, consistently—in a word, fairly." Although fewer people can be expected to attempt to take advantage of a judicially created cause of action, the number of cases could still be formidable.

283. Id. at 13.
284. Id. at 45-47.
285. Id. at 52.
286. Id. at 66.
287. Id. at 84.
Time has not improved the performance of the courts in unemployment compensation cases. As a result, there is no clear doctrine for the administrators to apply:

[Forty years of application of essentially the same statutory policies has produced a remarkably low level of doctrinal coherence. The few cases that reach the highest levels of the judiciary cannot be assembled into generalizations helpful to administrators faced with the next day's versions of the human comedy. Thus, with facts so varied, values so relevant, and administrative control so weak, it is likely to be the case that decisions vary tremendously depending on the office a claimant enters, the line in which he or she chooses to stand, the mood and work-load of the reviewing official.]

Moreover, the authors do not believe that time alone will be able to improve the judiciary's performance:

UI's "separations" work-tests are an example of what Liebman wrote about as to disability programs: a legitimate social policy, more or less accurately reflecting public mores, that is not administrable in the real world, because there are too many cases, the situations cannot be standardized, our worthy desire to let each case be considered (indeed, revellied in) in its full context and circumstances prevents classification, society cannot devote the resources to prepare and adjudicate so many cases in the depth required for application of all the relevant policies to all the facts that are posed, and we cannot devise a scheme of partial adjudication—a way to decide some cases in full, and to let these actions guide the primary conduct of others, or coerce still others into satisfactory consensual agreements.

Decisions made under the Vietnam Era Veteran's Readjustment Assistance Act of 1974 and its predecessors reflect many of the same difficulties as the unemployment cases. The fact patterns are peculiar, the questions unsuitable for judicial determination. A court cannot intelligently determine whether an ex-GI baseball player has been "discharged without cause" when the team contends that he is now too slow for league play. It is senseless to ask a court to decide whether it is "conduct unbecoming an employee" of the FBI for a file clerk to have a female friend spend two nights in his apartment (and bed without having sexual relations). Liebman and Conner captured this notion when they described the unemployment cases: "Thus,

288. Id. at 79.
289. Id. at 81.
291. See supra notes 35-37 and accompanying text.
inevitably, the cases respond to cultural change, and show elite judges imposing their values on economic sectors with which they may not be entirely familiar.\textsuperscript{295}

The lesson that courts should learn from the difficulty they have in administering these two laws is clear. The courts are not competent to develop consistent rules of decision in discharge cases. To judicially create a cause of action for unjust dismissal would be even more confusing than interpreting the statutes examined. Even though the UI and veteran’s laws are not very specific, at least there is statutory language and legislative debate with which to start the analysis. Although the caseload would depend on the definition of the cause of action, the volume of claims could be quite heavy, as in the unemployment experience. Any tort or contract action would require a finding of fault with its attendant difficulties, like the veteran’s provision. Courts should not blithely muddle into an area and begin regulating if they cannot perform well and are not statutorily required to act.

The competence of the courts is also limited because they have no standard to apply to discharges in a nonunion setting. One suggested standard is for courts to balance the employer’s interest in running her company against the employee’s interest in retaining her job. Unfortunately, this gives the courts no clue as to how to weigh the competing interests.

Another suggestion is to apply the principle of good faith and fair dealing to the employment contract.\textsuperscript{296} This, too, has little content, although discharges based on personal animosity rather than on job failings could be said to be not in good faith. However, it is unclear whether a court should protect one party when there is a personality conflict preventing further productive working relations. This seems to call for legislated severance payments more than a judicial finding of fault. In the absence of bad faith, the standard would be fair dealing. It is beyond the competence of the courts to determine what is fair in a particular situation. Requiring the employer to adopt procedures similar to those negotiated by unions in order to insure fairness would be unfair to both the employer, who would have no opportunity to bargain for a quid pro quo, and to unionized employees, who bargained for the protection nonunion free riders would be getting at the court’s behest. Determining what procedures are necessary to satisfy a requirement of fair dealing on a case by case basis would force a court to delve deeply into the workings of a particular employer, an inquiry courts have neither the time nor the skill to perform. In addition, such a case

\textsuperscript{295} Liebman & Conner, supra note 282, at 50.

\textsuperscript{296} See, e.g., Madison, supra note 98, at 427.
by case determination would lead to substantial uncertainty and make employer efforts to satisfy a fair dealing requirement very expensive.

A third suggestion is to have courts imply a discharge standard so as to correct the inefficiency resulting from employees' lack of information and consequent inability to rationally bargain about job security.\textsuperscript{297} Unless courts are to assume, without proof, that all people would rationally choose only a just cause standard, the courts are in just as difficult a position as employees. A court cannot know how much security a particular employee would have bargained for if she had had perfect information.

A final problem involved in establishing a discharge standard is determining where on the spectrum, from good cause to no cause to bad cause, the line should be drawn. Although courts could draw this line, the question is whether they should. Deciding whether society will or will not allow employers to discharge workers for no cause without liability appears to be a legislative task, outside the role of the courts.

The public policy exception to the at will rule is one area in which courts are competent and should create new causes of action. The current legislative exceptions to the at will employment rule represent specific policy choices. They are situations in which the Congress or a state legislature chose not to allow discharge in order to further a specific goal. By identifying only certain discharges as undesirable, these statutes illustrate a legislative intent not to define the retention of a job as a fundamental right. The public policy exception, which, in most of its incarnations, requires that the discharge thwart a policy articulated in some way by the legislature, is sufficiently similar to the statutory exceptions to ensure judicial administerability. The courts must balance the reason for discharge against the legislative goal—a process they are more comfortable with and more capable of than determining whether a particular discharge was "fair." Another advantage of the public policy exception is that many of the employees whose dismissals form the horror stories used to illustrate the inherent evil of the at will rule would be protected by it.

\textit{D. Legislation}

Increasingly, courts are providing a forum, creating a cause of action, and awarding damages for bad cause discharges.\textsuperscript{298} Thus, a legislature that wants to increase employee protection from unjust dismissals can authorize a different forum for bad cause discharges

\textsuperscript{297} Note, \textit{supra} note 4, at 1830-33.
\textsuperscript{298} Westin, \textit{supra} note 209.
and/or define a cause of action for no cause dismissals.\textsuperscript{299} The first option, transferring the decision-making authority for bad cause discharges, is, as discussed before,\textsuperscript{300} a change of form, but not of substance. The influences on the decisionmakers are virtually identical; whether they are called courts, agencies or arbitrators is unimportant. In addition, the only remedy that can be awarded effectively is monetary damages. Reinstatement will probably not work in a nonunion setting, no matter who orders it.\textsuperscript{301} Consequently, unless the state's courts are unwilling to acknowledge a public policy exception to the employment at will rule, it makes little or no sense for a legislature to take any action with regard to bad cause discharges.

Creating a right not to be dismissed without cause would be a substantive legislative decision. The question is whether government should care about no-cause discharges. By definition, no public policy is involved or affected by this type of employer behavior. Because no misconduct has been alleged, the worker is entitled to collect unemployment insurance, a limited form of statutory protection. The government is really being asked to protect whatever interest it feels a worker should have in continuing to hold the same job.

The authors who favor legislative changes do so because of their views of the appropriate role of government. To England, government "has a clear responsibility to protect weaker members of society against those who exercise superior power over them."\textsuperscript{302} Another commentator states that "the rationale for the protective legislation must be that in today's society members of those classes do not have the power to achieve what a sense of justice indicates is properly theirs without the assistance of law."\textsuperscript{303} A third writer explains that "[i]ust as unions have provided legal protection by contract for many employees, society should provide legal protection by statute for other employees."\textsuperscript{304}

Is this really the duty of government? Government should be much more willing to act when the problem is not amenable to private provision. Where an individual firm's adoption of the desired policy puts that firm at a substantial competitive disadvantage, there is a strong argument for legislative enactment. For example, if one steel company agreed to install pollution control devices, its costs would be higher than its competitors and it would soon fail. If we as a society

\begin{footnotes}
\item[299.] It is assumed that no one wants to stop employers from discharging workers who have provided good cause for dismissal.
\item[300.] See supra notes 253-54 and accompanying text. These statements refer to the quality of the adjudication. Of course, costs may vary according to the deciding forum, and the effect of any new cause of action on the court system's caseload should also be considered.
\item[301.] See supra notes 214-239 and accompanying text.
\item[302.] England, supra note 92, at 471.
\item[303.] Peck, supra note 3, at 39.
\item[304.] Summers, supra note 1, at 532.
\end{footnotes}
want pollution control devices on steel mills, we will have to legislate their installation on all mills. This is simply not the case with protection from unjust discharges. The adoption of a just cause standard and a grievance and arbitration procedure to enforce it does limit the union or nonunion employer's flexibility; however, this alone does not put the employer at a significant competitive disadvantage. If anything, a grievance procedure tends to lower the turnover rate, by providing a voice mechanism, and thereby lower costs.305

The problem of job security is amenable to private provision. Employees can unionize and bargain for a "just cause" clause. Nonunion employers can unilaterally adopt a meaningful grievance procedure. Finally, when initially seeking a job, workers who value job security highly can select positions that provide protection from unjust discharge. People who could be fully protected through organization do not need legislative modification of the employment at will rule.

Although the government should not provide coverage for employees now unprotected from discharge, it may assist them in obtaining job security. First, barriers to organizing could be diminished or eliminated, by including more employees within the coverage of the NLRA as well as by facilitating certification. Second, as most people, according to Weyand,306 believe all employees are protected already from unjust discharge, the government, through the NLRB, could publicize the actual situation. Third, to increase the efficiency with which discharge cases now covered by legislation are handled, forums and actions could be consolidated so that all legal causes of action relating to a particular discharge were dealt with at one time. In addition, the Michigan approach of a blanket prohibition against discrimination for exercising rights granted by any law should replace the practice of enacting provisions banning discrimination for exercising rights under particular acts.

V

Conclusion

The demands for legislative or judicial abolition of the employment at will rule should be rejected. The problem of unfair dismissals is amenable to private provision. Therefore, government regulation should be limited to ensuring judicial recognition of a public policy exception to the at will rule and to facilitating bargaining procedures that will lead to enhanced employee job security. Many of the proposals calling for more extensive legislative interference provide for the establishment of arbitration mechanisms; neither the economy, its insti-

305. Freeman & Medoff, The Two Faces of Unionism, 57 PUB. INTEREST 69-93 (Fall 1979).
306. Weyand, supra note 83, at 211.
tutions, nor the employees themselves would be made better off by the imposition of such a system. Compulsive arbitration, in addition to imposing direct monetary costs, would work to the detriment of society by changing the contract-making function and increasing intrusive government regulation, as well as undermining the credibility of a judiciary incapable of effectively overseeing administration of the system. Experience with existing statutory limitations on employee dismissals demonstrates that enforcing such legislatively-mandated protection is beyond the competence of the courts.

The most disturbing aspect of tampering with the doctrine is that the proposed modifications, doomed at best to provide little advantage to employees, could actually harm those who, absent such changes, would have sought and obtained better job protection. Analysis of grievance procedures established by nonunion companies supports the proposition that statutorily mandated arbitration would result in less procedural and remedial protection for workers than that afforded by arbitration conducted pursuant to collective bargaining agreements. The only way that employees can insure continued job security is by organizing themselves.

As the Reagan Congress erodes the legislated reforms of the 1960's, and the Burger Court modifies the judicial positions of the Warren years, employees must minimize their reliance on the courts or the legislature for protection of their interests. As Samuel Gompers wrote many years ago:

Year by year man's liberties are trampled underfoot at the bidding of corporations and trusts, rights are invaded and law perverted. In all ages and wherever a tyrant has shown himself he has always found some willing judge to clothe that tyranny in the robes of legality, and modern capitalism has proven no exception to the rule.307