September 2000

The Search for a Legal Presumption of Employment Duration or Custom of Arbitrary Dismissal in California 1848-1872

Donna R. Mooney

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https://doi.org/10.15779/Z381W6Q

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The Search for a Legal Presumption of Employment Duration or Custom of Arbitrary Dismissal in California 1848-1872

Donna R. Mooney†

I. INTRODUCTION ................................................................. 634
II. THEORY ............................................................................... 635
   A. Definition and Origins of the Legal Presumption of Employment at Will ................................................................. 635
   B. Theories Explaining the Appearance of the Legal Presumption of At-Will Employment .................................................. 637
III. EARLY CASE LAW .............................................................. 639
   A. The DeBriar Case Scrutinized ............................................ 639
   B. Provocative Explanation for DeBriar—Self-Interest by a Justice .................................................................................. 642
   C. Other Reasons to Disregard DeBriar .................................... 644
   D. Evidence that Arbitrary Dismissal Was Not a Custom at the Time of DeBriar ................................................................. 645
   E. Post-DeBriar Cases Decided Before the Civil Code of 1872 .......................................................................................... 646
IV. SOCIAL AND ECONOMIC ENVIRONMENT ............................ 648
   A. Exclusion from Freedom to Contract—Ethnic and Racial Hierarchy ............................................................................. 648
   B. Employment Relations Among Individuals with Contractual Freedom ................................................................. 654
   C. Factors Influencing Expectations of Employment Doctrines in California ................................................................. 655

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The purpose of this article is to illuminate employment jurisprudence and practices in California from 1848 to the introduction of the Civil Code in 1872, in order to discover the origins and application of the legal presumption that employment is at-will when no duration is specified. In this article I analyze case law, statutes, and custom from 1848 to 1872 as they pertain to expectations of workers and approaches of lawyers and judges regarding duration of employment. In particular, I examine case law for the presence of presumptions in situations where an employment contract in dispute was silent on duration. Evidence on employment custom was culled from judicial and legislative sources, historic treatises and dictionaries, and nonlegal historical sources.

The available evidence suggests that California courts did not invoke nor consistently apply a presumption of employment duration, and outside of the court there was no custom of arbitrary dismissal. Rather, courts of early California utilized a variety of approaches to resolve disputes between employers and employees on the sparse occasions in which they considered the issue of employment duration. Although provisions for both at-will employment and presumptions based on pay periods appeared in the first Civil Code, enacted in 1872, these provisions were not rooted in California common law. Numerous code provisions were irreconcilable and allowed courts to justify any one of a variety of conclusions when choosing to refer to the code. Conditions within the state argued against expectations of long
term, stable employment by either employer or employee. A social and legal
hierarchy existed that excluded numerous residents from the full freedom to
contract. Anecdotal evidence further suggests that dismissals, when they
occurred against employees who had the legal right to enforce a contract in
court, were for just cause.

II.
THEORY

A. Definition and Origins of the Legal Presumption of Employment at Will

California statutory law for more than 100 years has provided that,
“employment, having no specified term, may be terminated at the will of
either party on notice to the other.”1 As stated by the California Court of
Appeal, the presumption is that the employment contract silent on duration is
“terminable at any time at the option of either party.”2 Modern-day express
contracts of at-will employment provide, for example, “the right of the
employer to terminate the undersigned’s employment at any time, with or
without cause, without liability.”3 The at-will employment doctrine is based
on a freedom of contract theory. The premise of this theory is that individual
liberty includes the freedom of parties to impose mutually agreeable terms in
an employment relationship.4

The at-will doctrine has a curious past. Scholars disagree on the exact
time period when the doctrine was generally adopted in American
jurisdictions, perhaps due to a “confusion of principles.”5 By adopting the
doctrine, jurisdictions are said to have departed from the English common
law rule that an indefinite hiring was presumed to be for one year, known as

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Freightways, 29 Cal. App. 4th 354, 362 (1994) (Holding that employees can be “terminated at any time,
for any reason, with or without cause”); Linda Hendrix McPharlin, The Hiring Process, in Employment
According to McPharlin, lawyers should counsel their employer clients to use the following language:
“Employee understands that no promise of a specific term of employment has been made by [the
employer’s] interviewers. All employment at the company is at-will. Either the employee or the company
may terminate the employment at any time for any or no reason, with or without notice. This provision of
employment cannot be altered except in specific writing signed by the president of the company.”
5. See Jay M. Feinman, The Development of the Employment at Will Rule, 20 AM. J. LEGAL HIST.
118, 122 (1976); see also Sanford M. Jacoby, The Duration of Indefinite Employment Contracts in the
United States and England: An Historical Analysis, 5 COMP. LAB. L.J. 85 (1982); Joseph A. Grodin,
Toward a Wrongful Termination Statute for California, 42 HASTINGS L.J. 135 (1990); Deborah A. Ballam,
Exploding the Original Myth Regarding Employment-at-Will: The True Origins of the Doctrine, 17
the English hiring rule. At present, courts, including those in California, allow an at-will employee to be discharged with little or no notice at all. The practical effect of the transition is this: Where there was no evidence of the intended duration, the English hiring rule favored the employee; the more modern at-will doctrine compels a verdict for the employer.

In contrast to at-will employment, when the duration of employment is specified, termination may only occur for good cause. Modern courts define good cause as "a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power" and not "trivial, capricious, unrelated to business needs or goals, or pretextual." Historically, the law directed its attention toward the performance of the employee rather than the circumstances of the employer to determine whether good cause existed for termination by the employer.

Employment law developed over several centuries from a mix of policies including legal supervision of social relations, the exercise of police power, and freedom of contract. For centuries, under Anglo-American law, each individual belonged to a social class, and the relationship between master and servant was based on legal status, with most terms implied by law and not by bargaining. Nevertheless, some aspects could be arrived at by agreement. The common law also attributed a property right to the employee's labor. In the 18th century, it was not clear which workers were encompassed by the term "servant," or by the categories of servants other than slaves and apprentices. More obvious was that the "free and transient wage earner" did not fit in the social order, which was based on enduring relations found within, or resembling those of, a household economy.

The rise of free-market economic theory in the late 18th century brought about a shift toward a contractual model of employment and reduced the judicial supervision of the master-servant relationship. The master-servant relationship was no longer viewed by the courts as paternal or familial. For

8. See Feinman, supra note 5, at 736.
10. See infra note 257 and accompanying text.
11. See SELZNICK, supra note 6, at 122.
12. See id.
13. See id. at 123.
14. See id. at 127.
15. See id. at 129.
16. See id.
17. See id. at 130-31.
example, by the end of the 18th century English courts established the right of a master to dismiss a servant when the servant had committed a moral offense. Courts were less willing to recognize a master’s right to inflict corporal punishment on most types of servants, and they no longer held masters responsible for providing medical care to servants or for servant injuries sustained while working. The erosion of the historical concept of status, the influence of post-Revolutionary notions of democracy, and the onset of contract-based relations are reflected in a remark made by Alexis de Tocqueville, who toured the United States in the late 1830s: “The master holds the contract of service to be the only source of his power, and the servant regards it as the only cause of his obedience.”

B. Theories Explaining the Appearance of the Legal Presumption of At-Will Employment

Several modern scholars have presented theories about the rise of at-will employment. Philip Selznick asserts that the courts’ resort to the legal presumption of at-will employment occurred gradually in the last quarter of the nineteenth century. According to Selznick, the contract model in practice borrowed from the old master-servant relationship by incorporating implied terms that gave the employer full control. At the same time, the contract approach left behind the master’s personal duty and responsibility to the servant. The result was that the contract at-will solidified managerial authority and gave employers the power to reduce their workforces with the ebb and flow of business.

Sanford Jacoby, however, argues that the use by American courts of the at-will presumption reflected employment custom regarding manual workers and was then extended to salaried employees as a result of weakness of the trade unions and the lack of a clear distinction between blue and white collar workers. Jacoby acknowledges that American courts initially handled indefinite employment contracts not by the mechanical application of a presumption—either annual or at will—but through varying, confused

18. See Jacoby, supra note 5, at 92-93. One of the more peculiar aspects of early employment contract interpretation by American and English courts was the refusal to award on quantum meruit when a worker quit on a fixed-time contract. As a result, employers could be unjustly enriched when a worker quit before the expiration of the term, since the employers usually arranged for payment at the end of the term and thus received the benefit of part performance. Id.
20. See SELZNICK, supra note 6, at 133.
21. See id. at 136.
22. See id.
23. See id. at 135.
24. See Jacoby, supra note 5, at 85-86.
Jay Feinman argues that the at-will doctrine was part of the development of advanced capitalism, working to keep a clear distinction between "an industrial elite of owners of capital with absolute control of their businesses" and middle managers who needed to be refused "a voice in the determination of the conditions of work or the use of the product of their labor" if the capitalist system was to thrive. The rule further benefited employers by transferring the costs of capitalist crises, the wild economic fluctuations of the late 19th century, to the workers, who could be hired and fired as needed.

On the other hand, Deborah Ballam argues that the at-will doctrine has been "firmly embedded" in employment relationships since the birth of the nation. Specifically, she concludes from her review of historical evidence and case law from a number of states, including California, that courts expressly applying the at-will doctrine were simply maintaining the status quo, and that they had no need to cite authority for their holdings. In California, she asserts, the 1872 Civil Code codified existing law. Finally, Andrew Morriss argues that the at-will rule was developed to ensure judicial efficiency by keeping employment disputes out of the courts. He asserts that it was not driven by industrialization.

Theorists have debated whether the at-will rule was adopted in American jurisdictions before or after the last quarter of the 19th century. Selznick, Feinman and others credit author H.G. Wood, at least in part, with announcing and popularizing the doctrine in his 1877 treatise, The Law of Master and Servant. Wood based his support of the at-will doctrine on an imprecise reading of a few cases and by overlooking the application of the yearly hiring rule in American courts. In so doing, Wood laid out the principle:

With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed

25. See id. at 109.
26. Feinman, supra note 5, at 133.
27. See id. at 134.
28. Ballam, supra note 5, at 97-98.
29. See id. at 97-98.
30. See id. at 122.
33. See SELZNICK, supra note 6, at 133; Feinman, supra note 5, at 125. See also J. Peter Shapiro & James F. Tune, Implied Contract Rights to Job Security, 26 STAN. L. REV. 335, 341 (1974).
for whatever time the party may serve.\textsuperscript{34}

However, other commentators tend to argue that Wood's reading of the cases was accurate and that he did not invent the at-will doctrine but rather described an ongoing practice.\textsuperscript{35}

Legal and nonlegal historic sources do not indicate that courts embraced a legal presumption of at-will employment in California. Moreover, there seems to be no surviving evidence of a custom that individuals with contractual freedom were arbitrarily dismissed. Employment disputes brought to the state supreme court prior to 1872 seldom argued about the parties' intent regarding duration. The adoption of a civil code did little to clarify employment law and contained irreconcilable provisions. The court was left free to pick and choose provisions, or ignore the code altogether.

III.

EARLY CASE LAW

A. The DeBriar Case Scrutinized

California employment law developed in fits and starts. Because an insignificant number of Anglo-Americans populated California before the adoption of a state constitution in 1849 and an American court system in 1850, California law at that time was a hodgepodge of past territorial custom, written civil law, and notions of justice brought by newcomers. The courts did not routinely address disputes involving employment before the Civil Code was enacted in 1872. The brevity of the opinions and the paucity of citations within the opinions make them ripe for wide-ranging hypotheses regarding their meaning.

DeBriar v. Minturn\textsuperscript{36} is the starting point for discussion of at-will employment law in California because it has been trumpeted by some as a case that recognized the at-will doctrine, and coincidentally, was decided during the first year of California statehood. The DeBriar opinion, issued by the fledgling supreme court, consists of merely two paragraphs and continues to be a mystery to modern scholars for several reasons. In addition to its remarkable brevity, the opinion does not readily support the headnotes that accompany it. The headnotes state decisively that, "Where no definite period of employment is agreed upon between master and servant, the master has a right to discharge the servant at any time . . ."\textsuperscript{37} However, the facts of the

\begin{itemize}
\item \textsuperscript{34} See Wood, supra note 32.
\item \textsuperscript{36} DeBriar v. Minturn, 1 Cal. 450 (1851).
\item \textsuperscript{37} Id. The headnotes appear in the first edition of the California Reports, published in 1851, and in subsequent editions.
\end{itemize}
opinion show that *DeBriar* was primarily about whether an officer of the judiciary followed the rules, and whether the landlord's steps to evict the tenant were lawful.

The opinion states that an innkeeper employed a barkeeper for set monthly wages and allowed him to live in a room in the building while he worked there. After the innkeeper discharged the barkeeper, the barkeeper refused to move out upon receiving notice to vacate. The innkeeper caused him to be removed by force and the barkeeper brought an action "to recover damages for thus being ejected." The innkeeper appealed from an unfavorable jury verdict.

The supreme court reversed the verdict and ordered a new trial. The court stated:

We do not see how any action can be maintained upon the facts presented. The plaintiff had no right to remain in the defendant's house after being notified to leave, and the defendant had a right to eject him. It does not appear that any more force was used than was necessary, or that the facts would warrant anything more than nominal damages, even if an action could be sustained at all.

Subsequent courts and commentators have exploited the vagueness of *DeBriar* to support a variety of perspectives. The author of the first annotated version of the state Civil Code cited the case to annotate two employment provisions in the Code. An Idaho court cited the case for principles of landlord-tenant law involving the guest of an employee who lived with his employer. A New York court, on the other hand, determined that *DeBriar* stood for termination with notice through the month. The 19th century employment treatise author H.G. Wood cited the case to prove that American jurisdictions had adopted the at-will doctrine. More recently, Deborah Ballam cited the case to support the conclusion that at-will employment was embedded in California in practice and common law and subsequently codified by statute.

Nevertheless, an examination of the *DeBriar* pleadings, which are housed in the state archives, supports the argument that the case is irrelevant to employment duration disputes. The original complaint named Francis DeBriar and his wife as plaintiffs, and named Henry Mellone, a court clerk, and Jesse Lowe, a sheriff, as defendants. The DeBriars claimed that the

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38. *Id.*
39. *Id.* at 451.
43. *See Wood, supra* note 32.
44. *See Ballam, supra* note 5, at 144.
45. *DeBriar v. Minturn*, No. 95, WPA 512 (Cal. S.Ct. 1851) (on file with California State Archives, Office of the Secretary of State, Sacramento).
clerk and sheriff had issued and executed an illegal precept to eject the DeBriars from their residence on February 9, 1850. The complaint further alleged that sheriff's deputy John Yontz put plaintiffs and their possessions onto the street at nighttime, "contrary to all law and the common feelings of humanity." The couple sought three thousand dollars for injuries and damages. Opposing counsel, however, succeeded in substituting the owner of the residence, Lloyd Minturn, as defendant.46

The evidence introduced at trial further indicates that the parties litigated the case as a dispute concerning eviction rather than termination of employment. For example, the plaintiffs sought to establish that court clerk Mellone had executed a precept to evict the DeBriars and that deputy Yontz had indeed executed the order. Moreover, the plaintiff's attorney, Fred Sanford, himself testified that Mellone told him that the precept had been executed after nightfall.

Similarly, the defense offered into evidence Minturn’s affidavit for a writ of restoration dated February 9, 1850, stating that Mr. DeBriar had refused to vacate the room, despite receiving advanced notice, “purely for vexation and annoyance.” The defense also introduced as a witness Minturn's agent, a man referred to as G. Banker. Banker testified that Minturn had employed DeBriar in early January 1850 to be a barkeeper at Minturn’s inn. He further testified that, since the inn had not been completed, Minturn offered DeBriar half-salary until completion or full salary if he helped get the house ready. Minturn also provided DeBriar with a room at the inn. Banker testified that DeBriar gave no help at all in preparing the inn to open for business, and Minturn discharged him. Banker stated that Minturn told DeBriar to vacate the room by the end of January and gave notice again the day before the month ended. DeBriar asked for and received permission to stay an extra day. Only when DeBriar subsequently failed to leave did Minturn seek a writ of eviction. No other evidence was introduced regarding DeBriar’s termination of employment.47

According to the trial court documents, the jury returned a verdict for plaintiff for $600 and Minturn appealed. A hearing before the Supreme

46. Id. According to the case documents, the subject building was a place called the Mansion House in San Jose. Historical records indicate that an adobe structure by that name existed on First Street between Santa Clara and St. John streets, in what was known at that time as the Pueblo de San Jose. EDWIN A. BEILHARZ & DONALD O. DEMERS JR., SAN JOSE: CALIFORNIA’S FIRST CITY 36-37 (1980).

47. DeBriar, 1 Cal. at 450. Nonlegal historical sources provide more details of the surrounding events. At the time of the dispute, San Jose, as the oldest pueblo in the state, hosted the meeting of the first elected legislature. Legislators had begun arriving in mid-December 1849. Five hotels were under construction then, among them the Mansion House. The owner, Mr. Minturn, would have had reason to seek a partner or employee to prepare the place and also vacate the room occupied by the DeBriars since accounts indicate the city’s accommodations were crowded and uncomfortable, and obtaining housing for legislators was difficult. Approximately 3,000 people lived in San Jose in 1850, in adobe structures, wooden houses, tents, and wood shacks. Oscar Osburn Winther, The Story of San Jose 1777-1869: California’s First Pueblo, 14 CAL. HIST. SOC’Y Q. 152 (1935).
Court in San Francisco was scheduled for April 14, 1851. The file has no transcript of the hearing, but it is possible the parties agreed to forego oral argument. In the end, the Supreme Court ordered a new trial but there is no evidence whether a new trial was held.

It seems apparent from the papers that Mr. DeBriar failed to begin working, in breach of an agreement to move into a room in the house and then work as a barkeeper. He never began work at all and therefore was not entitled to a room. In the alternative, if we accept that he was "employed," he nevertheless was dismissed from employment for good cause—his refusal to work—and he forfeited any right to the room.\(^\text{48}\) DeBriar cannot support the principle of at-will employment. The facts and the demand in the complaint never raised as an issue the duration of employment. Therefore, we should ask why the headnotes are so definitive.

**B. A Provocative Explanation for DeBriar—Self-Interest by a Justice**

The incongruity of the headnotes with the published opinion begs for an explanation. The headnotes appearing in published form are not the first headnotes that were written for the 1850-51 opinions. The appointed reporter of the first supreme court decisions, Edward Norton, whose tasks included preparing the headnotes, had nearly completed his manuscript when it was destroyed by fire in May 1851. Norton resigned shortly thereafter.\(^\text{49}\) In the wake of Norton's departure, Justice Bennett took on the responsibility of reporter as well as judge. Thus, the same individual who wrote the DeBriar opinion also wrote the headnotes. Whatever Justice Bennett meant by writing the particular words that accompany the opinion cannot be determined by reading subsequent opinions since Bennett authored no decisions on employment law after DeBriar.

An intriguing and plausible explanation for Justice Bennett's crude announcement of at-will employment in the DeBriar headnotes is that Bennett created the precedent for his own benefit. DeBriar was a convenient although imperfect vehicle to announce the doctrine. As one of three justices on the first supreme court convened in the state, Bennett had been named to a term set to last six years, but he resigned in October 1851, less than two years after he had begun.\(^\text{50}\) Bennett said publicly that the pay was too low, an

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\(^{48}\) Among the twists of the DeBriar saga is the fact that H.G. Wood, author of the 1877 treatise on employment law, also wrote a treatise on landlord and tenant law, in which he announced that an employer may expel a servant from the dwelling house belonging to a master whether the servant was rightfully or wrongfully discharged, but did not cite DeBriar. See H.G. Wood, A TREATISE ON THE LAW OF LANDLORD AND TENANT § 20 (Banks & Bros., 1881).


\(^{50}\) See Oscar T. Shuck, History of the Bench and Bar of California 446 (1901); see also Johnson, supra note 49, at 39.
explanation that appeared mildly credible at the time. While the legislature set the justices’ salary at $10,000 per year, the nascent government struggled to raise revenue and resorted to issuing scrip, which turned out to be worth far less than face value when later traded for currency. The financial woes of the state are further apparent in the legislature’s act to reduce the salary to $8,000 the year after Bennett resigned.

A legal contemporary of Bennett later provided some eyebrow-raising details of Bennett’s resignation. Justice Bennett previously had decided two companion cases involving land titles, in which he reversed the lower court decisions, thus angering a powerful group of landholders and their lawyers. They obtained a rehearing and, to ensure a result in their favor, they offered to pay Bennett to leave the bench. Bennett accepted and left the state for more than a year. According to one version, Bennett took the offer in part because he had been promised that Edward Norton, the former court reporter who was a colleague he had known since his days in New York, would become his replacement. That version may be correct (even though Hugh C. Murray ultimately was appointed by the governor to replace Bennett) since Norton had represented the parties who had lost under Bennett’s decision in the land title cases.

One can then speculate that through DeBriar, Bennett intended to announce an employment principle that would allow an employee like himself to quit abruptly without forfeiting his salary earned to date and without creating an obligation to compensate the government which had employed him. Extending freedom from obligation to employers would require granting the same freedom to employees as well under the principle of mutuality. DeBriar was not the perfect case for Bennett’s aim, but it was within his reach as reporter to go back through the opinions of the past year, choose one that loosely referred to employment, and draft the headnotes to his liking.

Legal doctrine of the era indicates Bennett would have had legitimate worries about his obligation under a six-year employment term. For example, in a case appealed to the California supreme court just after DeBriar, a substantial amount of money was at stake regarding an alleged

51. See SHUCK, supra note 50, at 446.
52. See id.
54. See JOHNSON, supra note 49, at 39-40 (citing Dictation of John Currey, in INCIDENTS IN CALIFORNIA: STATEMENT BY JUDGE JOHN CURREY FOR BANCROFT LIBRARY 9 (1878) (on file with Bancroft Library, University of California, Berkeley)).
55. See id.
56. See id. at 39-40; see also CURREY, supra note 54, at 9.
57. See JOHNSON, supra note 49, at 39 (citing 2 PHELPS, CONTEMPORARY BIOGRAPHY OF CALIFORNIA’S REPRESENTATIVE MEN 380 (Alonzo, 1882)).
58. See Woodworth v. Fulton, 1 Cal. 295 (1850).
multi-year employment contract. The defendant employers answered a complaint seeking money for work and services rendered by claiming the plaintiff breached a five-year contract as a servant and owed them damages amounting to $10,000. The defendants alleged that the plaintiff was employed by them in 1849, and left "without any good or sufficient cause" in 1850. According to legal theories of the day, Bennett arguably could have owed the state money for leaving his post with more than four years remaining in his term. Bennett may have been concerned that state officials or the public might become angered by his departure and seek compensation from him. Bennett's *DeBriar* headnote may well have been his preventive measure.

Putting aside the Bennett theory, one would expect that, had the California courts considered *DeBriar* to stand for the at-will employment doctrine, successive supreme courts would have cited this first opinion, since the court had expressed early on its understanding and practice of stare decisis. Remarkably, *DeBriar* was not cited again by the California courts in a published opinion for more than 100 years! And the case has been cited only twice, both times in string cites to support the labor code statute on the presumption of at-will employment. *DeBriar* was sufficiently ambiguous to fit the needs of the court on these two occasions. The first citation was made during a time when labor organizing had grown strong and anti-union sentiment among business ran so high that a right-to-work measure was placed on the ballot.

The *DeBriar* opinion was referred to again in 1987 in an opinion discussing the termination by vote of a managing partner pursuant to a partnership employment agreement.

C. Other Reasons to Disregard DeBriar

In rebuttal to the argument that the *DeBriar* court did not follow the English hiring rule which presumed a one-year term of employment, and

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60. De La Riva v. Berreyesa, No. 287, WPA 785 (Cal. S.Ct. 1851) (on file with California State Archives).
61. Smith v. Morse, 2 Cal. 524 (1852).
62. See DeGonia v. Building Material, 155 Cal. App. 2d 573, 583 (1957) (foremen sued companies and their union regarding truck driving and overtime, alleging that the union, for financial gain, pressured the companies to replace them with nonmembers, and sought the discharge of the nonmembers); DeSimoni v. Brusco, 191 Cal. App. 3d 914, 916 (1987) (agreement authorized class of partners to vote to hire or fire managing partner).
65. See Ballam, *supra* note 5, at 122.
assuming arguendo that the court considered the dispute to center on employment, the California supreme court may have believed there was no reason to address yearly hiring because the state legislature had just passed an act adopting the common law as the law governing the courts of California.\textsuperscript{66} A better explanation is that the contract for services at issue in DeBriar was made while California recognized Mexican civil law, derived from Roman law as modified by Spanish and Mexican legislation, and not yet converted to common law.\textsuperscript{67} If the DeBriar court is presumed to have decided the case under civil law, it would have no precedential value because the legislature subsequently adopted the common law and repealed all previous laws. Because it appears that the contract at issue was made prior to the adoption of the common law, the DeBriar opinion should not have been cited thereafter. Even Justice Bennett had recognized that private rights were unaffected by U.S. conquest of Mexico.\textsuperscript{68} He also noted that a dispute arising in 1847-48 was controlled by Mexican law.\textsuperscript{69}

In summary, DeBriar is an illegitimate opinion which has little or no value in the assessment of employment law and practice in early California. We must turn elsewhere in the search for the notion of employment at-will during that era.

\textit{D. Evidence that Arbitrary Dismissal Was Not a Custom at the Time of DeBriar}

The DeBriar opinion does not stand alone as an illustration of employment relations of the time. Johnson\textit{ v. Pendleton}\textsuperscript{70} upheld a jury verdict rendered in favor of plaintiff, a store clerk who sought to recover wages from the defendant. According to the original pleadings, Elijah Johnson filed a complaint seeking wages for nearly six months work, or $3,560, as a clerk in a mercantile store, Pendleton & Co. in San Jose.\textsuperscript{71} No less than sixteen witnesses testified at the trial before a jury of twelve men.\textsuperscript{72} Their testimony is instructive. Witnesses for the defendant testified about

\begin{itemize}
  \item[66.] 1850 Cal. Stat. 219.
  \item[67.] See Fowler\textit{ v. Smith}, 2 Cal. 568, 569 (1852) (contracts made before April 22, 1850, must be interpreted under rules of the civil law; adoption of the common law was not to affect existing rights); \textsc{David Langum, Law and Community on the Mexican California Frontier} 163-186 (1987).
  \item[68.] Woodworth\textit{ v. Fulton}, 1 Cal. 295, 306 (1851).
  \item[69.] \textit{Id.} at 308.
  \item[70.] 1 Cal. 132 (1850).
  \item[71.] Johnson\textit{ v. Pendleton}, No. 53, WPA 532 (Cal. S.Ct. 1850) (California State Archives, Office of the Secretary of State, Sacramento). The three owners of the store answered by denying the allegations and claiming that plaintiff owed them $1,620, the balance remaining on his purchases from the store (such as a cloak, shirts, pants and handkerchiefs). The case reveals the colorful details of the life of the plaintiff, who is referred to sometimes as Dr. Johnson, and includes references that he ran for various public offices, including a seat in the state legislature, mayor and justice of the peace. \textit{Id.}
  \item[72.] \textit{Id.}
plaintiff's conduct. One witness said that plaintiff had gone to San Francisco for two weeks for electioneering and that such behavior is "highly incorrect" and "not a faithful discharge of his duties." A clerk from another company store in San Francisco testified that plaintiff at times was in bed intoxicated during business hours. This witness, as well as several others, also testified to seeing the plaintiff tending to business or at least present at the store. The remaining ten witnesses testified for the defendants. In the district court of Santa Clara, precursor to the modern-day superior court, the jury awarded $479 to the clerk. The supreme court refused to overturn the verdict, on the grounds that no rule of law had been violated and that the court had decided on other occasions that a jury's verdict on a question of fact would not be disturbed. Remarkably, none of the witnesses, attorneys or judges at either the trial or appellate level mentioned the concept of arbitrary dismissal or the phrase "at-will." To the contrary, the defendant at trial tried to show that the plaintiff had exhibited conduct amounting to just cause for dismissal.

E. Post-DeBriar Cases Decided Before the Civil Code of 1872

Later opinions involving worker disputes do not focus on a presumption of duration in the absence of agreement, but are instructive as examples of employment concepts of the era. After DeBriar and Johnson, the California supreme court decided several cases involving employment before the Civil Code was enacted. The underlying disputes most often originated in northern California, and of those, several were filed in the San Francisco court, which reflects the distribution of population at the time.

To summarize these cases, the supreme court refused a claim for quantum meruit on a fixed duration contract, held that contract terms are presumed to remain in effect when the employment relation continues

73. Id.
74. Id.
75. Id. Others testified about salary. One witness for plaintiff stated that plaintiff's services were worth $500 or more. A mercantile shop owner testified that he employed clerks at $125 to $200 per month, and had not heard of wages higher than $200.
76. Id.
77. Id.
78. Id. at 133.
79. See Hutchinson v. Wetmore, 2 Cal. 310 (1852) (holding that an eight-month contract for the employment of a couple, with a promissory note for half of the amount owed to be given at four months and the remainder at the end, was a contract in the entirety, causing the couple to forfeit any wages when the pair quit midway through the term); see also Hogan v. Titlow & Prince, 14 Cal. 255 (1859) (rather than taking one of two extremes—that plaintiff had to forfeit everything under a contract in entirety, or that defendant could recover nothing even though the contract was for one year—the court pointed to some evidence that the employer had promised to settle for something in between, and affirmed a jury award to the plaintiff pro-rated for the amount of time he worked).
beyond the stated duration, refused extra pay for extra services in the absence of a separate express contract, and announced that a civil defendant should be allowed to present evidence that the worker claiming wages had already received compensation in kind. The court also refused to allow a county government to defend its failure to pay a physician employed under a one-year contract because it eliminated the office.

In *Webster v. Wade*, the court held that an employer was obligated to honor a one-year contract when the employee was not permitted to work due to circumstances beyond the latter’s control. The court decided an employer, who agreed to a one-year contract for the employment of a boat steward at $100 per month, was required to pay the entire amount called for in the contract, even though the boat was laid up for repairs. The court stated in dictum that even if the employer had discharged the steward, the employer would be liable for wages since the termination would not have been for good cause. Chief Justice Stephen Field, who would later be instrumental in the enactment of Civil Code in California, wrote the opinion. Field’s dictum is noteworthy because he unnecessarily reached beyond the scope of the issue to find yet another reason why the employee should prevail, specifically, that no good cause was present. Furthermore, the court did not penalize the steward for assigning the contract to another individual before the year had expired, apparently because the worker gave notice of the assignment.

Other cases are relevant not only for the legal reasoning utilized but also for their facts, which reveal types of employment relationships existing at the time. *Bates v. Sierra Nevada Lake Water & Mining Company* involved a

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80. See Nicholson v. Patchin, 5 Cal. 474 (1855) (holding that quantum merit was unavailable and worker was bound by wage rate in the original agreement).
81. See Cany v. Halleck, 9 Cal. 198 (1858) (holding common law of contracts does not entitle worker to extra pay for allegedly extra services in the absence of a separate express contract).
82. See Angulo v. Sunol, 14 Cal. 402 (1859) (allowing defendant to introduce evidence that plaintiff was his wife); Moulin v. Columbet, 25 Cal. 509 (1863) (reversing a jury award to a plaintiff because the lower court erroneously refused to allow evidence that plaintiff’s services to defendant had been compensated in kind—apparently plaintiff, who was ill, was allowed to board and have his laundry done at defendant’s residence, and plaintiff provided services in exchange).
83. McDaniel v. Yuba County, 14 Cal. 444 (1859) (holding County Board of Supervisors liable under the agreement, distinguishing contract-making from the power to create or abolish an office by legislative act).
84. Webster v. Wade, 19 Cal. 291 (1861).
85. Id. at 292.
87. Webster, 19 Cal. at 292.
88. 18 Cal. 171 (1861). A secretary employed by an English business relocated to California to oversee operations there, and was later ordered to return to his former position in London. Apparently, the matter centered on a family feud involving an order from Josiah Bates that Joseph Bates cease employment in California and return home. Joseph refused to give up the post on receipt of Josiah’s order, but eight
contract made in England for an employee who relocated to California which included a provision on dismissal and duration, requiring the employer to give six months' notice.

In Stoddard v. Treadwell & Company,89 a Sacramento merchant became a clerk for the buyer of his inventory of goods under a five-year contract. The appeal centered on whether defendant buyer could countersue for damage to the business because plaintiff allegedly neglected his job, causing customers to go elsewhere. The court held the agreement was a contract in entirety, defeating the plaintiff's argument that the defendant had waived its rights to argue neglect by its failure to fire him early on.90

The mixed business and employment relationship is an example of the movement of individuals between positions of owner and employee which occurred frequently in California during this era.91 While certain individuals could be expected to rotate in and out of positions of ownership, others found their opportunities limited. The social order of that time explains this phenomenon.

IV.
SOCIAL AND ECONOMIC ENVIRONMENT

A. Exclusion from Freedom to Contract—Ethnic and Racial Hierarchy

A discussion of historic cases benefits from an examination of the social and political context from which they arise. The mercurial transformation of California from a perceived wasteland loosely under Mexican rule to a magnetic, resource-laden American state took place in the period of 1846 to 1852.92 Mexico officially ceded the territory to the United States at the conclusion of the war with Mexico in 1848. Once the message of phenomenal gold strikes in northern California in 1848 drew thousands of easterners and foreigners, the inhabitants created a constitution and elected a government.93

The structure of California society from 1848 to 1872 adds to the argument against a settled norm in employment terms. A remarkably heterogenous mix of people, arranged into a hierarchy as a result of

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89. 26 Cal. 294 (1864)
90. Id. at 307-08
91. See Kleps, supra note 86.
93. Id.
prejudice, comprised the population of California in the mid-1800s. The existence of a stratified society suggests that employment practices and master-servant relationships, along with their expectations, would vary greatly depending on the factors of race, ethnicity, national origin and language of the particular workers. Naturally, inhabitants who did not share the same freedoms as others, legally or socially, lacked true freedom of contract.94

Until 1848 the vast California territory historically known as Alta California had few inhabitants—7,000 non-Indians, 700 foreigners and a Native American majority—mostly located in the south.95 The discovery of gold and its nationwide announcement immediately attracted thousands from the U.S. and abroad, establishing the San Francisco Bay Area as the commercial capital of the state and the far west into the 1870s.96 In 1850, the first year of statehood, the official population count was less than 93,000.97 A state census of 1852 reported a total of 255,122 inhabitants, including more than 31,000 “domesticated” Indians.98 By 1860, the population approached nearly 380,000.99 A decade later, the state recorded more than 560,000 residents.100 Of the total population in 1870, a half-million were listed as white, more than 49,000 as Chinese, about 7,000 as Indian, and 4,000 as black or mulatto.101

Indians made up the lowest tier in California, as a result of their treatment by Spanish missionaries as heathens, followed by their incorporation into a peonage system after secularization of the missions during Mexican independence, and subsequent oppression by the dominant Anglo population.102 Of an estimated 100,000 Indians in California in 1848, a large number died from disease and maltreatment as more people arrived in the territory.103 One commentator stated that Americans had “little interest in

94. See Epstein, supra note 4, at 957 (“[T]he at-will contracting arrangement (in sharp contrast to slavery) typically works to the mutual advantage of the parties”); Deborah A. Ballam, The Traditional View on the Origins of the Employment-at-Will Doctrine: Myth or Reality, 33 AM. BUS. L.J. 1, 9 (“By definition, the English rule would not have been applied to unfree labor, whether indentured servitude or slavery.”).
96. Id. at 16, 22, 66.
98. U.S. CENSUS OF 1850 394, tbl I (California Census of 1852) (1854).
100. Id.
101. Id.
incorporating the Indian into society” and viewed the Indian as “a nuisance, an obstacle to settlement.”

Under the California Constitution of 1849, Indians were denied the right to vote and prohibited from testifying against whites in court. All employed Indians had to carry certificates from their masters under penalty of arrest. In Los Angeles, able-bodied loitering Indians were imprisoned and hired out by bid under contracts of four months or less. Indian slavery was reintroduced in southern California in 1858. After the reservation system was established, Indians outside the reservations worked as cowhands, herdsmen, and harvesters in pastoral agriculture. By 1880, the Indian population had dropped to 10,000, just ten percent of what it had been three decades earlier, mostly as a result of disease and persecution.

The elite Spanish-speaking California natives or “Californios,” who considered themselves of pure Spaniard blood, were overrun by newly arriving Anglo emigrants. A striking culture clash resulted in the eventual demise of the Californios. One modern scholar summarized the downfall of the Californios by stating that the newcomers swept aside those of a different cultural background while changing California into a commercial, city-centered and money-minded economy. “Unsophisticated Californios found themselves struggling with such unfamiliar institutions as property taxes, mortgages and professional moneylenders, American-style politics, and the Protestant work ethic.”

The state legislature in the mid-1850s passed laws affecting Spanish-speaking residents, including a ban on Sunday pasttimes associated with Californios, control of gambling, an immigrant tax, the renewal of the foreign miners tax, and an anti-vagrancy act also called the “Greaser Act.” At one point, these inhabitants considered colonizing elsewhere because of their

104. Id. at 230.
105. CAL. CON. ART. 2 § I (1849); BECK & WILLIAMS, supra note 103, at 239.
106. See BECK & WILLIAMS, supra note 103, at 237.
107. See id. at 241.
110. See id., at 243.
111. HEIZER & ALMQUIST, supra note 102, at 101 (explaining that Spanish nationals who stayed in California when Mexico became independent from Spain automatically became Mexican citizens); LISBETH HAAS, CONQUESTS AND HISTORICAL IDENTITIES IN CALIFORNIA 1769-1936, 36-37 (1995). The Californio identity was grounded in the Spanish mission system. Haas notes that “[A] pretense to aristocracy was not uncommon for the Spanish/mestizo population that came to identify themselves as Californios and Spanish Californians.” Id. at 37.
112. THE FAR WEST, supra note 95, at 148-49.
113. Id.; see also, W.W. ROBINSON, LAND IN CALIFORNIA 59-60 (1979).
poor treatment under American rule. As the completion of the rails opened up southern California, the ranches were sold off and the Spanish-speaking population became relatively diminished.

Although Californios perceived themselves as a distinct group, Anglos generally did not distinguish them from Mexicans, who were believed to be criminals expelled from populated areas of Mexico. As an example of the Anglo perspective, a legal brief described Mexicans as “lazy and idle” in comparison with the Chinese. After they were physically driven out of the mines in the placer years, they were invited back as cheap labor for American companies operating quartz mines.

During this period, the Chinese occupied yet another tier in California’s social structure. There were an estimated 4,000 Chinese residents in California in 1850. Ten years later, there were nearly 35,000 residents of Chinese descent, growing to almost 50,000 in 1870, and 75,000 in 1880. Chinese immigrants worked mainly as miners and traders from 1850-1865. From 1865 to 1879, the Chinese began shifting to agriculture, light manufacturing and common labor.

Like the Indians, the Chinese were prohibited from voting and testifying against whites. In 1852, a state senator proposed legislation to contract out Chinese labor on a 10-year basis. The 1850 state statute which prohibited testimony in court by Indians and blacks was construed by the state Supreme Court in 1860 to exclude the testimony of Chinese residents as well. The state legislature codified these decisions in 1863 and the law remained that way until 1872. Chinese residents were also penalized by the foreign miners tax laws first enacted in 1850. Law enforcement officials disproportionately prosecuted Chinese who practiced business or professions

116. See Heizer & Almquist, supra note 102, at 132, 152.
117. See id. at 151.
119. Heizer & Almquist, supra note 102, at 145.
120. Beck & Williams, supra note 103, at 246.
121. U.S. Census Of 1870; Sucheng Chan, This Bitter Sweet Soil 52 (1986); see also Ping Chiu, Chinese Labor In California: An Economic Study (2d ed. 1967).
122. See Chan, supra note 121, at 52.
123. See id.
126. See id.
127. 1850 Cal. Stat. 222. The Foreign Miners Tax enacted in 1861 provided that a foreigner living in a mining district was presumed to be a miner subject to the tax. In Ex Parte Ah Pong, 19 Cal. 106 (1861), the court held the statute unconstitutional on a petition for habeas corpus when a Chinese washerman was sentenced to jail for refusing to work on public roads to satisfy the tax.
paying license fees.\textsuperscript{128} Some criticized the economical practices of the Chinese as being "content with an abnormally low standard of living."\textsuperscript{129}

In the 1860s, Chinese were excluded from schools in the same manner as Indians and blacks.\textsuperscript{130} Chinese employees, however, were brought in from Asia by the thousands to build the railroads when the railroad companies decided against Mexican labor and could not get permission to use confederate prisoners.\textsuperscript{131}

Although fewer in number, blacks occupied a range of positions in early California society. Like Indians, Chinese and Mexicans, blacks did not have the same rights as white, English-speaking Americans. Black Mexicans already lived in the territory, having arrived as African slaves brought by the Spanish to work the land.\textsuperscript{132} When Mexico, including the California territory, achieved independence from Spain in 1821, the new constitution abolished slavery. American blacks arrived as servants to U.S. military men or as service personnel, although some were deserters of New England whaling ships, and others came overland with white American settler groups.\textsuperscript{133}

Although the state constitution in 1849 declared California a free state, southern slaveowners continued to arrive in California with their slaves and encountered little or no enforcement against slavery.\textsuperscript{134} Businessmen headed for the cities brought blacks as house servants in response to news that labor was expensive.\textsuperscript{135} The majority of blacks accompanied their masters to mining areas, and gold created a method to buy freedom for themselves and also their wives and children.\textsuperscript{136} When surface mining became fruitless, white masters hired out their blacks in various jobs.\textsuperscript{137} The number of blacks in California increased from an estimated 40 in 1848 to 2,000 in 1852.\textsuperscript{138} Blacks worked as cooks, launderers, water transportation stewards, barbers, farmers, bootblacks, businessmen, and cowhands.\textsuperscript{139} Blacks were discriminated against in a variety of ways. They were banned from libraries and forced to sit in the worst seats at the opera house.\textsuperscript{140} In the gold country, whites pushed blacks off of rich claims.\textsuperscript{141} Political disputes over the status

\textsuperscript{128} See Fritz, supra note 125, at 131.
\textsuperscript{129} See Beck \& Williams, supra note 103, at 249.
\textsuperscript{130} See id. at 220-21.
\textsuperscript{131} Rudolph P. Lapp, Blacks in Gold Rush California 1 (1977).
\textsuperscript{132} Id. at 8, 25.
\textsuperscript{133} Id. at 122, 131.
\textsuperscript{134} Id. at 42.
\textsuperscript{135} Id. at 21, 42.
\textsuperscript{136} Id. at 133.
\textsuperscript{137} Id. at 22, 49.
\textsuperscript{138} Id. at 78-108.
\textsuperscript{139} Id. at 269.
\textsuperscript{140} Id. at 59.
of blacks, exemplified by state legislation from 1852 to 1855 prohibiting a slave from running from his master within state borders despite California's status as a free state, prompted an estimated 400 to 800 blacks to move to Canada where they hoped for better treatment, a fresh gold rush, and available land.\textsuperscript{142}

A lower court in San Francisco dealt with the problem of transplanted slavery by turning to contract law.\textsuperscript{143} In \textit{Syer v. Gwin}, two slaves married to each other were brought to California with their owner from Mississippi.\textsuperscript{144} They filed a claim in San Francisco for reasonable wages for their work in California, arguing that they had become free the moment they entered the state.\textsuperscript{145} The court held that the only reasonable inference was that the services of plaintiffs were rendered without expectation of payment, since they became entitled to make a contract with their former master or seek employment elsewhere once they entered the state but had failed to do so.\textsuperscript{146} The decision recognized California as a free state while imposing no liability on the slave owner for any free labor received before the former slave asserted his or her independence.

California's upper social tier was comprised of white Americans and assimilating European immigrants. This group dominated the legislature, courts and business enterprise in the new territory.\textsuperscript{147} The state census of 1852 reported more than 54,000 foreign and mostly European residents, nearly half of whom were distributed between San Francisco and the relatively near mining area of Calaveras.\textsuperscript{148} On the domestic side, a total of 154,000 emigrants from within the U.S. were reported in California in the 1860 census.

The complex hierarchical structure of California negates the assumption of one general employment norm within the state. It is a misnomer to describe the employment of the lower caste inhabitants as at-will since the expectations of employer and employee had little basis in freedom of contract, but were instead grounded on status, as superior or inferior. Significantly, because non-whites were prohibited from testifying against whites for most of the period, they could have no expectation of a legally enforceable contract for labor. Thus, debate over employment "custom" in legal theory refers to the employment practices of white Americans and assimilated European immigrants. A closer examination of the dominant groups in California indicates the absence of a custom of arbitrary dismissal.

\textsuperscript{142} \textit{Id.} at 140, 148-54, 252.
\textsuperscript{143} \textit{Syer v. Gwin}, 2 Labatt's District Court Reports 55 (1857-58).
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{See infra} note 212.
\textsuperscript{148} \textit{U.S. Census OF} 1850 (California Census of 1852).
B. Employment Relations Among Individuals with Contractual Freedom

The cosmopolitan nature of the state is evident from government population statistics for the counties. In 1870, San Francisco's residents were almost evenly split between those born in the United States and those born abroad. Fewer than 40,000 were born in California. Santa Clara County had 17,000 American-born and 9,000 foreign-born residents, Alameda County had 14,000 American-born and nearly 10,000 foreign-born residents, and Sacramento County had 16,000 American-born and 10,000 foreign-born residents. In Los Angeles County, nearly 11,000 residents were American-born while 4,000 were foreign-born. The most common nations of origin for foreign-born residents were Ireland, Germany, China and Mexico. For example, San Francisco had nearly 26,000 Irish and nearly 14,000 Germans. Having been subject to English common law, the Irish probably would have been accustomed to the yearly hiring rule, if they had any exposure to employment law doctrines before their immigration.

Employment from 1848 to 1851 in California was dominated by self-employment in gold mining or mining ancillary services. The lure of gold caused workers to abandon their jobs in the towns and on sailing vessels. Initially, miners worked individually and were essentially self-employed. As discoveries of gold through rudimentary techniques dwindled in the mid to late 1850s, miners roved to other states, particularly to the silver-bearing Comstock Lode in Nevada in 1859. The increasing difficulty of extracting gold led to the introduction of sophisticated technology and economies of scale, which in turn led to the conversion of independent miners into hired workers for daily wages. Many small-time miners remained self-employed, becoming farmers by switching to agriculture and taking advantage of vulnerable title to real property.

Contrary to conducting individual employment negotiations, skilled tradesmen organized early on. In northern California, where the largest population increases occurred, labor organizing began during the gold rush and continued thereafter. As early as 1849, carpenters in San Francisco

149. U.S. CENSUS OF 1870.
150. Id.
151. Id.
152. Id.
153. Id.
154. Id.
155. See BECK & WILLIAMS, supra note 103, at 135; SELVIN, supra note 63, at 1.
156. See SELVIN, supra note 63, at 1 ("In the mines a man was his own master.").
157. See BECK & WILLIAMS, supra note 103, at 12.
158. See IRA B. CROSS, HISTORY OF THE LABOR MOVEMENT IN CALIFORNIA 12 (1935).
159. See BECK & WILLIAMS, supra note 103, at 272.
160. See CROSS, supra note 158, at 19-28.
161. See id.
and Sacramento were organized and successfully struck for higher wages in the first recorded strike in California. By 1863, unions in more than 20 trades had gone on strike for higher wages and usually were successful. These strikes included mechanics, carpenters, longshoremen, firemen, coal passers, masons, and hod carriers. The trade unions stabilized wages and established working conditions.

It is also possible that an egalitarian philosophy found among some miners may have carried over after the early gold mining years. One commentator described this philosophy of egalitarianism as an "unconscious socialism," which may well have dissipated in later years as work shifted and gold became harder to extract. However, this ethos may have influenced contemporary perceptions of employment relations. The eradication of class and profession lines, even if briefly, worked against the notion that employers had the right to treat workers as fungible.

C. Factors Influencing Expectations of Employment Duration in California

Additional factors suggest that ongoing shifts within the economy precluded the stability that is necessary for an employment practice to develop to a norm. The influx of gold led to disputes over the value of gold, and over what types of coins could be circulated legitimately. A financial panic in 1855 bankrupted a number of banks. Deflation hit as the gold "rush" waned, resulting in a depression from 1854 to 1857. While the population continued to increase, thousands of short-term inhabitants left the state in search of easy-to-extract gold or opportunities elsewhere. Floods in 1861 and 1862 killed off an enormous number of cattle, destroying a quarter of the state's taxable wealth. Drought in the mid-1860s killed even more cattle, ruining ranchers and causing the transfer of land to organized business.

162. See id. at 14.
163. See id. at 23.
164. HUBERT HOWE BANCROFT, CALIFORNIA INTER POCULA 339 (1888).
165. CAUGHEY, supra note 124, at 475.
166. CHARLES HOWARD SHINN, MINING CAMPS: A STUDY IN AMERICAN FRONTIER GOVERNMENT 47-48 (1965).
167. Id.
169. See BECK & WILLIAMS, supra note 103, at 296.
170. CROSS, supra note 158, at 26.
171. BANCROFT, supra note 164, at 623 (in the years 1849 to 1857, 268,713 people arrived in San Francisco and 144,100 departed); Paul, supra note 95, at 69-70.
172. See BECK & WILLIAMS, supra note 103, at 274.
173. See id. at 274-75.
The 1860s also saw the first petroleum boom. While the Civil War did not draw large numbers of men out of the state, those who joined the war took positions within the state formerly occupied by regular soldiers transferred elsewhere. The completion of the railroad in 1869 suddenly flooded the northern California labor market with unemployed workers. Finally, state and local governments typically had difficulty raising funds during this era, forcing them to pay workers' salaries sporadically. All of these events indicate that the workforce was highly mobile by trade and area throughout the period.

D. Anecdotal Evidence of Employment Termination and Expectations of Duration

Published accounts of economic and social life in California during the mid-19th century, on the few occasions when dismissals were mentioned, describe good cause firing but not arbitrary dismissals. Again, modern courts define good cause as "a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power" and not "trivial, capricious, unrelated to business needs or goals, or pretextual."

William Tecumseh Sherman, better known as a Civil War hero, exposed the daily operations and his tasks as a banker for Lucas, Turner & Co. in San Francisco in the mid-1850s in regular letters to one of the partners in St. Louis. On a few occasions, Sherman terminated the employment of clerks. He upheld the decisions to fire one clerk for being drunk on the job after receiving a warning about his drinking, and to fire another clerk for stealing from deposits. Sherman wrote that the latter clerk's theft allowed him a clean conscience when he ended the clerk's employment. In addition, Sherman went so far as to hire back the drinking clerk days later.

Similarly, J. Ross Browne, who came to California as an agent of the federal government charged with reducing fiscal abuse by government

174. See id. at 293.
175. See CAUGHEY, supra note 124, at 340.
181. Id. at 54.
182. Id. at 54-55, 92.
183. Id. at 92.
184. Id. at 55.
workers, noted in an official order to federal employees on Indian reservations that they would be “promptly removed in case of misconduct.” Browne himself instigated the firing of more than a dozen San Francisco Customs House inspectors who did not work at all. He also initiated the dismissal of other employees for failure to follow orders, for committing fraud, and for vocally supporting local vigilantes.

One of the more notorious firings was the exit of Mark Twain from his position as a reporter from the San Francisco newspaper The Morning Call. Twain admitted he neglected his job at the time and his employer even offered to let him resign, despite the good cause for his dismissal.

Less widely published was the dismissal by a San Francisco resident of her domestic servant, an obnoxious youth whose antics included putting grease on the stove to make it smoke, hammering a nail into the tea kettle, and sticking burning matches under his employer’s nose. His employer remarked in a letter, “We thought it best to let him go . . .”

An emigrant to the mines in the 1850s who later became a justice of the peace wrote home in a letter that he had been hired to dig for a claim owner, and was “turned off” days later because the owner was losing money. As a business-related decision, the reason amounts to just cause. Furthermore, the employee did not seem bothered or surprised, and was not likely to pursue a legal claim given the mobile and speculative nature of mining. In another matter, stage line operator Jesse Douglas Carr, on a routine surprise visit to his employees at the opposite end of the route, was ‘obliged’ to discharge six hostlers and two drivers. Apparently, the supervisor found good cause for the firings, although he omitted the details.

On the flipside, workers appeared to have quit their employment for good reason as well. A lumberman in the forest reported that mill hands had left because the boss did “not pay up as he agreed to.” A day laborer’s

186. Id. at 51.
187. Id. at 98.
188. Id. at 102-03.
189. Id. at 141. Advocating the overthrow of the government is legitimate grounds for termination from government employment. Cal. Gov’t Code §1028 (West 1995).
190. Mark Twain, Innocents Abroad/Roughing It 848 (Library of America 1984) (1872).
192. Id.
194. Dictation of Jesse Douglas Carr 5 (1887) (unpublished dictation, on file with the Bancroft Library, University of California, Berkeley).
pocket diary paints a picture of a young man who took various jobs, quitting one job in a kitchen because he could not get paid, and apparently quitting another job in a sawmill because of a fight he had with another worker. His entries indicate his expectation that the duration of his jobs were equal to the period of time for which his wages were calculated, usually by the day, and articulated a hope for more long-term work.

Another historical document indicates duration of employment based on a legal event. A written contract from 1851 reveals an indenture agreement by an estate administrator for the care of a ranch and cattle for fourteen dollars per month, with the duration contingent on when the caretaker is “legally called for” to turn over possession of the ranch, cattle and tools—probably when the administration of the estate ended. A rancher in partnership with some others revealed in a letter home that he had hired a Californio cowhand for a month, and the cowhand left at the expiration of that month.

The absence of arbitrary dismissal in historical sources from 1848 to 1872 can be explained by economic conditions and labor opportunities during the era. Only a small minority of Americans, ten percent, were wage earners in the mid-19th century. Further, wage earners tend to remain a minority where markets are local and techniques are simple. Similarly, the wage-earning labor pool will not expand where land is available because, in an agrarian society, those who can readily obtain land tend to quit their employments to do so.

Mid-19th century California had these attributes. The state’s economy bore signs of independence and exported raw materials but few manufactured goods. In addition, there is no evidence of an expanding labor pool of ready and willing but unemployed workers. Due to clouded land titles that

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196. Diary entry of George F. Shaw (March 5, 1855, and July 25, 1855) (unpublished diary, on file with Bancroft Library, University of California, Berkeley).
197. *Id.*
198. Indenture between George W. Bellomy, administrator on the estate of Thomas B. Park deceased and Rafael Villa (Jan. 13, 1851) (unpublished indenture, on file with Bancroft Library, University of California, Berkeley).
202. *Id.* at 10.
204. Chiu, supra note 121, at 9 (noting that the first abundant supply of labor occurred in 1863 when many Chinese left the mines, but most were absorbed in railroad construction); Rodman W. Paul, California Gold 175 (Bison Books 1968) (1948). Although some miners were unemployed, they were not willing to do some types of work; Ballam, supra note 5, at 119 (stating, "A labor surplus did not
took nearly two decades to resolve, land could be taken by squatting or purchased in crisis sales after acquiring sufficient sums. While California at first existed as a mining economy, its agricultural production increased steadily over time. Numerous individual historical accounts depict young men who arrived in California to mine and, when disillusioned by the difficulty of finding the gold, turned to other pursuits (alone or in partnership) such as speculating on cattle or opening dry goods stores, and later buying land with the profits.

Among these remnants from the past, there is no indication of a practice of employees being fired, or quitting, arbitrarily—that is, without notice or cause. Instead, the available evidence indicates that employers and employees generally envisioned their relationship as consisting of a short, fixed-term during which each party had rights to continued employment.

V.

STATUTORY LAW AND LEGAL CULTURE

A. Sources of Law and Custom in Early California

Expectations of the inhabitants of the state were influenced by a remarkably diverse array of legal sources, including custom, civil law and common law. In the preface to the first volume of California supreme court opinions, Justice Nathaniel Bennett wrote,

“All the other States of our confederacy had, previously to their admission into the Union, an established government, on which their State appear in California until the mid-1870s.”.

205. ROBINSON, supra note 113, at 111-125; THE FAR WEST, supra note 95, at 188.
206. PAUL, CALIFORNIA GOLD, supra note 204, at 243.
207. See, e.g., Dictation of John Boggs (1887) (went to California for gold, turned to mule packing, took up a ranch, bought and sold cattle, bought land and sold wheat, went into government); Dictation of Jesse Douglas Carr (1887) (federal employment, farmed, raised stock, won contract for stage line); Journal of John Doble, supra note 191, (miner, government job); Hubert Howe Bancroft, History of the Life of Peter Donohue (1890) (miner, opened blacksmith shop with brother, expanded by opening iron works); Statement from Silas Darius Ingram (1886) (carriagemaker and blacksmith shop, cattle speculator, purchased ranch); Statement of Recollections of David Pierce Barstow (1878) (moved goods from ships into lighters, hotel cook, bought houses, bought and sold horses and cattle); Autobiography of Brown Lee (1893) (miner, started a store with partners, rented out furniture, bought interest in mines, sold store, bought hotel, took up land and had barley crop and milk ranch); Statement of Peter Dean (1878) (miner, bought store, bought and sold sheep and cattle); Statement of William Dunphy (1891) (miner, started store, raised cattle); Deposition of Thomas Fowler (1884) (drove cattle to California, bought and sold cattle); Dictation of Charles Theodore Romie (1880s) (opened general store, acquired land for ranch); Dictation of Nueschwander D. Julien (1888) (went in as partner with store owner, bought land, built hotel, butcher, farmer); Letters of Rollin Carrol Smith, in Postmarked Vermont and California (Fannie Smith Spurling ed. 1940) (school teacher, went into partnership with postmaster, bought Pony Express route); Interview of John H. Wise (1889) (federal employment, with partner started wool commission business). All of the above are on file with Bancroft Library, University of California, Berkeley.
organizations were based. The people of California, however, were driven from extreme necessity, growing out of the political and legal chaos in which they found themselves, to the formation of a state government.\textsuperscript{208}

He further wrote, "it can scarcely be said that any laws were in existence further than such as were upheld by custom and tradition."\textsuperscript{209}

Under the Treaty of Guadalupe Hidalgo, the United States agreed to recognize existing property rights of inhabitants who had received property by grant from the Mexican government.\textsuperscript{210} In the legislature, some members who were prior inhabitants of Alta California had lived under civil law, and before state statutory law was enacted the judiciary committee debated whether to adopt common law or civil law for making court decisions.\textsuperscript{211} A custom that departed from Mexican law regarding witnesses to wills was recognized by the supreme court.\textsuperscript{212} Dispute resolution customs of the miners in remote areas were also recognized in the courts.\textsuperscript{213}

\textbf{B. Legal Education, Culture, and References}

Unlike older, eastern states, California's legal culture was in its infancy at the time of statehood. Of the 48 delegates who were elected to the constitutional convention in 1849, the vast majority came from eastern states, while only seven were born in California and five were foreign-born.\textsuperscript{214} California's first public high school did not open until 1856 and its first public university until 1868.\textsuperscript{215} The first judges typically had grown up and received their education in other states. For example, Chief Justice Royal Sprague was born in Vermont and studied law in Ohio.\textsuperscript{216} Peter Burnett, the first American governor, was born in Tennessee, studied law in Missouri, and became a legislator in Oregon before moving to California.\textsuperscript{217} Histories of California's first lawyers show an influx from different points of origin.\textsuperscript{218}

Lawmaking in California borrowed from other jurisdictions. For example, the development of the state constitution around 1850 included "the slavish copying of the constitutions of New York and Iowa."\textsuperscript{219} A similar

\textsuperscript{208} Nathaniel Bennett, Preface to CALIFORNIA REPORTS, vol. 1, at v (1850).
\textsuperscript{209} Id. at vi.
\textsuperscript{210} See Teschemacher v. Thompson, 18 Cal. 11, 23 (1861).
\textsuperscript{211} See BANCROFT, supra note 108, at 317.
\textsuperscript{212} Tevis v. Pitcher, 10 Cal. 465, 477-78 (1858).
\textsuperscript{213} See SHINN, supra note 166, at 270-78.
\textsuperscript{214} See HEIZER & ALMQVIST, supra note 102, at 95.
\textsuperscript{215} BECK & WILLIAMS, supra note 103, at 296.
\textsuperscript{216} Proceedings of the Court on the Death of Chief Justice Royal Sprague, 43 Cal. 3 (1872)
\textsuperscript{217} BANCROFT, supra note 108, at 644 & n.1.
\textsuperscript{218} See generally SHUCK, supra note 50; JOSEPH BATES, HISTORY OF BENCH AND BAR OF CALIFORNIA (1912); KENNErH M. JOHNSON, THE BAR ASSOCIATION OF SAN FRANCISCO: THE FIRST HUNDRED YEARS, 1872/1972 (1972).
\textsuperscript{219} BANCROFT, supra note 108, at 296.
remark about state statutory law can be found in an 1854 court opinion, where a supreme court justice hinted at the origin of at least some California statutory law when he wrote, “our Statute being only a transcript of those of older states.”

More specifically, a few employment treatises were published from 1850 to 1870, and may have been familiar to lawyers arriving in California. Charles Manley Smith’s treatise, published in Philadelphia in 1852, asserted that a contract of unspecified duration is a hiring for a year. Smith excepted those situations where a well known custom would apply to take the contract outside of the yearly hiring rule. He also noted that such a custom existed for terminating the employment of domestic and menial servants on a month’s notice or paying a month’s wages. James Schouler echoed Smith in his Boston-published treatise of 1870. There is no evidence to suggest that these treatises were readily available to lawyers in California or customarily cited in legal papers or court opinions.

C. The Adoption of the Civil Code

California had been a state for only ten years when the codification movement found a voice among certain state politicians. Supporters of codification allied themselves with Bentham, rejecting judge-made law in favor of legislation, and believed a code would better familiarize citizens with the law. There was also increasing frustration among lawyers and others who had to leaf through 18 volumes of session laws or rely on unofficial compilations.

The codes of California were begun when the 1867 legislature established a commission to compile state laws. Given less than three years to do this job, the 1868 Commission reported that the task was impossible. The legislature charged a second commission, made up of three lawyers appointed by the governor, with recommending any laws necessary for the “completeness” of existing legislation and arranging the statutes into a

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220. People v. Hall, 4 Cal. 399, 400 (1854).
221. See CHARLES MANLEY SMITH, A TREATISE ON THE LAW OF MASTER AND SERVANT 34 (7th ed. 1922). The annual hiring rule applied to all contracts whether oral or written, and all types of service including husbandry, domestic, and clerks. Id.
222. Id. at 34-35
223. Id. at 38.
224. JAMES SCHOULER, A TREATISE ON THE LAW OF DOMESTIC RELATIONS 606-07 (1870).
225. SHUCK, supra note 50, at 191. P.C. Johnson of Amador introduced an assembly bill to provide for the creation of a code of laws. Id.
227. Kleps, supra note 86, at 771.
228. Id. at 771.
convenient scheme. Most notably, the second commission was not directed to codify the law and was required to complete its work by November 1871.

The second commission was comprised of Creed Haymond, J.C. Burch, and Charles Lindley. The code they drafted had its genesis in the Field Code, written by David Dudley Field, brother of California legislator and justice Stephen Field. The commission reputedly altered the Field Code for California. A joint committee of the state assembly and senate perfunctorily approved the code in its entirety and recommended its adoption. Despite the speed of its creation and a warning from Lindley that the code was not complete and needed thorough review, the code was forwarded to joint committees for brief examination and subsequently enacted by the legislature. Marked dissatisfaction with the code from the time of its enactment led the legislature to establish yet another commission in 1873 to examine the code. This commission recommended only minor changes and commented that the code was “perfect” in their analysis and “admirable in [its] order and arrangement,” quite possibly stemming from the fact that one of the three commissioners was Stephen Field, who was by then a U.S. Supreme Court justice. Shortly thereafter, a version of the code annotated by the commissioners was privately printed to aid in practitioners’ understanding of the code. The annotated edition is dedicated by the Code Commissioners to David Dudley Field.

Codification in the west has been regarded as providing new law “the states could grow into” rather than codifying old law. In addition to California, codes were adopted by the Dakota territory, Idaho, Montana and Colorado.

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230. Id.
231. See SHUCK, supra note 50, at 191.
232. See Lee, supra note 226, at 26; Jacoby, supra note 5, at 109 (referring to the Field Code as the proposed New York Civil Code and crediting David Dudley Field and Alexander W. Bradford with its creation).
233. See SHUCK, supra note 50, at 191-92 (asserting that Creed Haymond was called “the father of the codes”). However, there is no difference in the language of the employment provisions under discussion here, with the exception of changes from section 1036 of the Field Code to the comparable provision, section 2011, of the California Civil Code. The Civil Code of the State of New York (Weed, Parsons & Co. 1865); Cal. Civ. Code (Bancroft & Co. 1874). See also infra note 255 and accompanying text.
234. Report of the Joint Committee on Revision on the Civil Code, Appendix to Journals of Senate and Assembly 19th session vol. 3 (1872).
235. See KLEPS, supra note 86, at 775.
236. See id. at 777.
237. See id. at 779.
238. CAL. CIVIL CODE (Bancroft & Co. 1874).
239. See Lee, supra note 226, at 25.
240. See id. at 14.
D. Civil Code Provisions Regarding Employment

Employment provisions of the California Civil Code of 1872 show the unsettled nature of employment duration presumptions during that era. Section 1965, located in Title 6, defines "employment" as "a contract by which one, who is called the employer, engages another, who is called the employee[sic], to do something for the benefit of the employer; or of a third person." Section 1999, a subsequent provision within the same chapter as section 1965, provides for termination at-will: "An employment having no specified term may be terminated at the will of either party, on notice to the other, except where otherwise provided by this title." Clearly, while the wording represents the presumption of at-will employment and a rejection of the English hiring rule, the language hints at a reliance on custom to determine proper 'notice' since the term was not defined by statute or case law. It is also noteworthy that the provision encourages deferral to other applicable provisions.

Chapter II of Title 6, however, provides for "particular employments," with the first article made up of seven statutes under the heading "master and servant." In section 2009, a "servant" is defined as "one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master." It is unclear whether the code drafters intended a clear difference between employer-employee and master-servant for the application of the various code provisions. However, an annotation to Section 1965 in the first chapter states, "The scope of this chapter is not confined to servants, but includes factors, brokers, carriers, agents, and all similar classes of persons," and cites to a treatise. We can infer from the note that the drafters intended some overlap between the terms "employee" and "servant." Generally, the common law has blurred the distinction between "servant" and "employee"

241. See Jacoby, supra note 5, at 109.
242. CAL. CIV. CODE § 1965 (Bancroft & Co. 1874).
243. CAL. CIV. CODE § 1999 (Bancroft & Co. 1874).
244. Id. at §§ 2009-2015.
245. Id. at § 2009.
246. Id. at § 1965.
247. Despite the annotation to Section 1965, Ballam suggests that Section 1999 was adopted for independent contractors, while Sections 2010 and 2011 were adopted for employees falling within the "traditional definition of servants." Ballam, supra note 5, at 130 n.279. Additionally, the annotated Civil Code contemplates a nontraditional definition of servant. Section 2009, which defines servant, was annotated with the comment that, traditionally, master and servant related to apprentices, and that laborers hired by the day or longer were not considered servants, citing to Bouvier's Law Dictionary (citation omitted). The annotator added, "It will be seen, however, by the next section that the Code changes the understanding or definition of the term 'servant.'" The annotation also states that domestic servants are "not particularly recognized by law; they are menial servants." Cal. Civ. Code § 2009 (Bancroft & Co. 1874).
for more than a century.248

Within the same chapter of the code, section 2000 indicates that where there is an employment for a specified term, an employee can be dismissed for breach of duty.249 Similarly, section 2001 allows an employee to terminate an employment of specified duration when the employer is at fault.250 Another noteworthy provision, section 1980, prohibits an employer from enforcing a contract for personal services beyond two years.251

Additional provisions regarding employment duration are grouped separately from and appear to contradict the statutes previously described. For example, section 2010 provides, “A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for one year; a hiring at a daily rate, for one day; a hiring by piece work, for no specified term.”252 This provision contradicts section 1999, which calls for at-will discharge on notice. Yet another provision, Section 2011, provides, “In the absence of any agreement or custom as to the term of service, the time of payment, or rate or value of wages, a servant is presumed to be hired by the month, at a monthly rate of reasonable wages, to be paid when the service is performed.”253 The Field Code, on the other hand, originally specified a presumption of payment periods based on the type of work: domestics were hired by the month, clerks and others “not merely mechanical or agricultural” by the year, and all other servants at-will.254 These provisions of the California Civil Code of 1872, however, omitted any reference to specific occupations.255

The final statute in the article, section 2015, lists the conditions under which a master may discharge a servant: “misconduct in the course of his service,” “gross immorality,” or “if, being employed about the person of the master, or in a confidential position, the master discovers that he has been guilty of misconduct, before or after the commencement of his service, of such a nature that, if the master had known or contemplated it, he would not have so employed him.”256

248. See Bouvier’s Law Dictionary (1847) (defining “employee” to include “clerks, workmen and laborers,” while “servant” includes any workman whose work is controlled or directed by another).
249. CAL. CIV. CODE § 2000 (Bancroft & Co. 1874).
250. Id. at § 2001.
251. Id. at § 2001.
252. Id. at § 1980.
253. Id. at § 1980.
254. Id. at § 2010.
255. Id. at § 2010-2011.
256. Jacoby, supra note 5, at 110; see also The Civil Code of the State of New York § 1036 (Weed, Parsons & Co. 1865).
257. See Jacoby, supra note 5, at 110. The elimination of categories may have been driven by the assumption that section 2010 already provided presumptions along class lines to the extent that clerks and similar workers obtained yearly salaries, while domestics or agricultural workers obtained wages on shorter periods of time.
258. CAL. CIV. CODE § 2015 (Bancroft & Co. 1874).
Two factors favor the argument that the master-servant provisions superseded the general employment provisions. First, the at-will statute as written in section 1999 includes the phrase "except where otherwise provided by this Title," which indicates the legislature intended for the master-servant provisions to govern. This phrase was not eliminated from the provision until 1915. Second, under the general rule of statutory interpretation that a more specific statute applies over a general statute, one would think the courts would turn to "particular employments" over "service with employment."

The term "servant" was by no means archaic or obsolete in early California. The California supreme court in 1899 noted that the terms "employee" and "servant" are indistinguishable. Furthermore, many later cases use the terms "employee" and "servant" interchangeably. The only distinction the supreme court has made is that a "servant" is different from an independent contractor. The state legislature repealed the master-servant provisions, or sections 2009 through 2015, in 1969.

E. Early Annotations Regarding the Civil Code's Employment Provisions

In the first annotated version of the California Civil Code published in 1874, no California case is cited to support section 1999, which demonstrates that commentators at the time did not consider DeBriar to stand for at-will employment. Instead, three cases from other jurisdictions, and a treatise by Justice Story, are cited, none of which is on point. In Hathaway v.

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257. Id. at § 1999 to 2072.
259. White v. City of Alameda, 124 Cal. 95, 98 (1899).
262. 1969 Cal. Stat. 1537. Assemblyman W. Don MacGillivray introduced the legislation, AB 591, that eliminated the measures. Years later as part of a state oral history project, MacGillivray stated that he did not remember what the bill was about. See W. Don MacGillivray and Mary E. MacGillivray, Oral History Interview, Conducted 1989 by Carlos Vasquez, UCLA Oral History Program for the California State Archives State Government Oral History Program (OH 90-18) 73-74.
263. CAL. CIV. CODE § 1999 (Bancroft & Co. 1874).
264. Id. (citing Story on Agency, §§ 462, 476, 477; Hathaway v. Bennett, 10 N.Y. 108 (1854); Ward v. Ruckman, 34 Barb. 49 (1861); see Beeston v. Collyer, 4 Bing. 309 (1827).
Bennett, a New York court decided whether an individual who paid for an exclusive newspaper route given up by a carrier had any right against the newspaper publisher, who chose another carrier. The two justices agreed that no contract existed. Probably the only reason the case is cited at all is that the opinion summarized counsel's arguments, including the proposition that under English law a servant is entitled to one month's notice. In Ward v. Ruckman, the second case cited, a minority partner in a schooner venture had been captain of the ship, which entitled him to a percentage of the ship's earnings, until the majority owner appointed someone else captain. The former master brought suit, claiming a distinction between his interest as captain and his interest as owner, and sought damages greater than his ownership interest. The New York court held that a ship's captain has no right to continue in command just because he is part owner.

The third case, Beeston v. Collyer, was decided in England and is noteworthy because it recites the English annual hiring rule and not at-will termination. In that case, a clerk paid by the month was held to have been hired by the year. The court commented that, "it would be, indeed extraordinary, if a party, in his station of life, could be turned off at a month's notice, like a cook or scullion." Finally, the citation to Story's treatise on agency is misplaced. Agency is addressed separately in the Civil Code.

The annotations for section 2010, which creates the presumption that the term of employment will equal the time period for payment of wages,

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265. Hathaway v. Bennett, 10 N.Y. 108 (1854). Interestingly, the attorney for one of the parties in this case was David Dudley Field.
266. Id.
267. Id. at 113.
269. Id.
271. Id. at 311. A second judge writing separately stated, "There can be no doubt that a general hiring is a hiring for a year. In domestic service there is a common understanding that such a contract may be dissolved on reasonable notice; as a month's warning, or a month's wages. There does not appear to be any such practice with respect to servants in husbandry, and we have no evidence what is the custom with clerks. We must, therefore, decide this case according to the general rule, and hold that the contract between the parties to be a hiring for a year." Id. at 313.
273. CAL. CIV. CODE § 1999 (Bancroft & Co. 1874). The annotation cites to Story at Sections 462, 476, and 477. Section 462 of Story's treatise states that an agency may be dissolved by an act of principal or agent or by operation of law. This corresponds with Civil Code Sections 2355 and 2356, although there is no annotation to Story under Section 2355, and an annotation only to Story's provision regarding insanity under Section 2356. Section 476 and 477 state that a principal can revoke an agent's authority at any time, unless the authority is coupled with an interest. Story provides as examples the power of attorney to levy a find as part of a security to a creditor, and letter of attorney to sell a ship upon a loan of money. This corresponds with Section 2356 of the Civil Code, which addresses power of an agent coupled with an interest.
includes a citation to an English case.\footnote{274}{CAL. CIV. CODE § 2010 (Bancroft & Co. 1874) (citing Davis v. Marshall, 4 L.T.R 216 (N.S.) (1861), Cany v. Halleck, 9 Cal. 198 (1858)).} In \textit{Davis v. Marshall},\footnote{275}{\textit{Davis}, 4 L.T.R 216.} an appeal decided by the English Court of Exchequer in 1861, plaintiff was hired at a yearly salary as manager and keeper of a colliery. The plaintiff, as part of the agreement, lived at the shop. After five months the owner fired him, put him out of the house, and seized his belongings. The plaintiff’s claims included wrongful dismissal and unlawful seizure of his goods. The jury rendered a verdict for the plaintiff and awarded him a half-year’s salary plus damages for having his goods seized.\footnote{276}{Id.}

The Court of Exchequer refused to set aside or reduce the verdict, rejecting the employer’s argument that because plaintiff was paid monthly, the employment was a monthly hiring. The court held that monthly payments are not inconsistent with a yearly contract. The court took into account that “short periodical payments are absolutely necessary to persons in the position of life of the plaintiff.”\footnote{277}{Id.} As an indication of the ongoing struggle for a clear principle, the court stated the general rule that notice of termination need not be any longer than the period of payments, only to abandon the general rule later.\footnote{278}{Id. at 202.} After the cite to \textit{Davis}, the annotator of the Civil Code then editorialized that, “It seems eminently proper, also, that the presumption, in the absence of express agreement, should here follow the same rule adopted for rent.”\footnote{279}{CAL. CIV. CODE § 2010 (Bancroft & Co. 1874).}

In the also-cited California case \textit{Cany v. Halleck}, the Supreme Court affirmed a decision for the defendant employer, holding that plaintiff must show an express agreement entitling him to extra pay for the alleged extra work.\footnote{280}{Cany v. Halleck, 9 Cal. 198 (1858).} However, the case is not on point because the plaintiff there did not dispute either the monthly salary paid to him, or the time period he had worked for the employer, but argued merely that he provided extra services that obligated his now deceased employer to pay him in addition to the original salary.\footnote{281}{Id. at 202.} Nevertheless, the code annotator described the case as “directly in point.”\footnote{282}{Id.}

In the annotations for section 2011, which establishes a presumption of a
one-month hiring term in the absence of terms on duration, payment time, or pay rate, the annotator cites four California cases and one English case. The first case cited in the annotation for section 2011 is wholly out of place. In *Fawcett v. Cash*, an English court found that a written statement to employ the plaintiff at a monthly rate with specified annual raises constituted a yearly hiring. The court stated, "The general rule is, that if a master hire[ sic] a servant, without mentioning the time, that is a general hiring, and in point of law a hiring for a year." The *Fawcett* court noted the exception for domestic servants, who could be dismissed with a month’s notice or wages, in accordance with the longstanding custom. Contrary to suggestions of the code annotator, *Fawcett* did not stand for the proposition that the default rule is a monthly hiring. Further, the case does not address the rule when no salary is specified.

None of the remaining cases cited under section 2011 addresses the absence of a term of service. The mysterious *DeBriar* is cited here for the cryptic proposition that only nominal damages can be recovered. The other California cases are cited as examples of fixed-term employment, a contract for the entirety of employment under which no payment is available for part performance, and an agreement for payment of part performance.

The code also contains a provision, section 2012, which creates a presumption that the same wages and term of employment are renewed when there is a continuation of the employment relationship. In support of the proposition, the annotator cites *Deckert v. Camden & Amboy R.R.*, supposedly a general term United States Supreme Court case from 1864, but no such title appears in published reports of the U.S., California or New York supreme courts. An additional citation, to the California case *Nicholson v. Patchin*, does support the code provision. In that case, the supreme court held that a clerk employed for a month at one hundred dollars was entitled only to the first month's rate of pay for subsequent months of employment, rather than the quantum meruit payments the clerk sought. The dispute may be a reflection of the problems caused by severe inflation in the Bay Area in the early 1850s. The referee below had granted reasonable pay for

283. *Id.*
285. *Id.*
286. *Id.*
293. *Id.* at 475.
plaintiff, but the court reversed, citing a New Hampshire decision and commenting that the referee had “mistaken the rule of law.”

Section 2015, the provision permitting discharge for misconduct regardless of the hiring duration contains annotations to numerous English common law cases. DeBriar appears here too - firing for cause. Another California case, Webster v. Wade, is cited for the principle that an employer is liable for discharging an employee without good cause where the duration is fixed. After a lengthy dormancy, the statute was cited in a 1956 case, Rench v. Watsonville Meat Co., by a company that unsuccessfully argued it was entitled to fire a manager upon discovering the employee had previously been convicted of embezzlement and was pardoned.

The Civil Code of California not only failed to sort out employment law, it also failed to win followers. The code shrank in significance in less than 20 years. Instead, scholar Lewis Grossman argues that California courts adopted the views of Professor John Norton Pomeroy of Hastings College of the Law, who advocated treating the Civil Code as an embodiment of existing common law to be interpreted by using common law precedents and customs rather than viewing the Code as the sole source of law. At the turn of the century, the legislature added a provision within the Code itself requiring that code provisions similar to existing statutes or common law must be construed as continuations of them and not as new provisions. Ultimately, courts have stated “the adoption of the codes did not abrogate the common law in California.”

F. Missed Opportunity to Cite the Code’s At-Will Provision: Lord v. Goldberg

Had the at-will doctrine become entrenched in California, we would expect to see references to early applications of the doctrine by the supreme court. We would also expect to see citations to section 1999, the at-will statute adopted by the California legislature in 1872. However, opinions from the 1850s through the remainder of the 19th century do not indicate that a legal presumption of at-will employment, or a custom of allowing arbitrary dismissal, ever existed. One particular case decided in 1899 is illustrative.

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294. Id. (citing N.H. Iron Factory Co. v. Jonas Richardson, 5 N.H. 295 (1830)).
295. CAL. CIVIL CODE § 2015 (Bancroft & Co. 1874).
296. Id.
300. Id.
301. Id.
because the California supreme court decided it as though section 1999 did not exist.

The first employment duration case addressed by the California supreme court since the making of the Civil Code appears to be Lord v. Goldberg. Plaintiff Edward Lord filed a complaint against a grocery business, Goldberg, Bowen & Co., for wrongful termination of a position as salesman "without just or reasonable cause." The plaintiff alleged that the parties signed a written agreement that the plaintiff would solicit customers as a "permanent" employment, and they orally agreed that the pay would be at $20 per week, to be increased if business increased. A written memorandum from the company included the phrase, "the greater the number of friends and their patronage that he can bring to our store, the greater will be his income from us, and his position is permanent so long as he desires to make it so." Just over four months later, he was dismissed.

At the trial court level, the defendant grocer argued that the plaintiff was not offered permanent employment and asserted in its answer that there never was any agreement between the parties for "any specific period." Instead, the plaintiff had represented that he would bring in $2,000 to $3,000 in business monthly, and the grocer agreed to pay him $20 per week until they figured out how much business plaintiff actually brought in. After the plaintiff failed to generate more than $400 of business in a month, the defendant presented the plaintiff with a new pay plan based on a percentage of new business. The plaintiff, according to the grocer, rejected the new proposal and left the position voluntarily. After a bench trial, the court found the defendant liable for the amount of $190 for dismissing the employee "wrongfully and without just or reasonable cause." Damages were calculated based on the time of plaintiff’s termination until the trial, at $20 per week, less $250 dollars that plaintiff allegedly had borrowed.

On appeal to the Supreme Court, attorneys for the grocer argued both that no action for wrongful dismissal can be maintained unless the duration is

303. Lord v. Goldberg, 81 Cal. 596 (1889). The prior year the Supreme Court cited Sections 1996 and 1998 in holding that the death of the employer terminates employment, unless further work is necessary to protect the interests of the employer’s successor in interest. Weithoff v. Murray, 76 Cal. 508 (1888).
304. Id. at 598.
305. Id.
306. Id. at 600.
307. Lord v. Goldberg, No. 12544, WPA 13245 (Cal. 1889) (on file with California State Archives, Office of the Secretary of State, Sacramento) (Transcript on Appeal 10).
308. Id. at 9.
309. Id. at 10.
310. Id.
311. Id. at 13-14.
fixed and that the employer had "good cause" for offering lower pay to plaintiff, namely that the company was taking a loss at the higher pay.\textsuperscript{313} Finally, the appellant argued that regardless of the permanence of the employment, the parties had not agreed that the amount of salary would be permanent.\textsuperscript{314}

Counsel for the salesman defended the trial court judgment by arguing that at common law an employment contract will not fail for uncertainty, and while section 1980 of the Civil Code prevents an employer from enforcing a contract beyond two years, it is not appropriate to prohibit an employee from enforcing the same.\textsuperscript{315} Respondent’s brief further argued the parties were “free to contract” and the proprietors “could have inserted a provision enabling them to terminate employment upon reasonable notice,” if they had not intended the contract to continue indefinitely.\textsuperscript{316}

The Supreme Court reversed the trial court decision and ordered a new trial.\textsuperscript{317} The court first noted that plaintiff voluntarily left the employment. The court went on to state that permanent employment means that the job was to continue “indefinitely, and until one or the other of the parties should wish, for some good reason, to sever the relation.”\textsuperscript{318} Rather than look to the Civil Code or California case law, the court in focusing on the word “permanent” drew guidance from other jurisdictions. The court noted that the Kentucky Supreme Court in \textit{Perry v. Wheeler}\textsuperscript{319} held permanent employment to be for an indefinite period, unless a party became dissatisfied and could be relieved of obligations “upon fair and equitable terms, and after reasonable notice.” The \textit{Lord} court also cited the English case \textit{Elderton v. Emmons},\textsuperscript{320} which construed the term “permanent,” in the context of a company agreeing to put an attorney on retainer, to mean a general employment as distinguished from a special or occasional employment, but not a job for life.\textsuperscript{321}

The California supreme court also found that plaintiff’s salary was not permanently fixed at $20 per week. Therefore, the court held, the grocery concern had merely experimented for several months and was entitled to negotiate the compensation and to terminate plaintiff’s employment when he would not accept the new offer. The court’s emphasis on \textit{Perry} and the

\begin{itemize}
\item \textsuperscript{313} California State Archives, Appellant’s Points & Authorities 5-7.
\item \textsuperscript{314} \textit{Id.} at 6.
\item \textsuperscript{315} California State Archives, Respondent’s Points & Authorities 3, citing \textit{Wallis v. Day}, 2 M.W. 277.
\item \textsuperscript{316} \textit{Id.} at 4.
\item \textsuperscript{317} \textit{Lord v. Goldberg}, 81 Cal. 596 (1889). This decision was written by a court commissioner, with two other commissioners and one justice concurring.
\item \textsuperscript{318} \textit{Id.} at 601-602.
\item \textsuperscript{319} Perry v. Wheeler, 12 Ky. 541 (1871).
\item \textsuperscript{320} 4 Com. B. 478 (1847).
\item \textsuperscript{321} \textit{Id.}
\end{itemize}
language of its own decision makes clear that it did not embrace the notion that an employee could be discharged for any reason. Instead, the court expressed that some “good reason” had to exist for the discharge to be permissible and that reasonable notice must be given to the discharged employee.

G. Subsequent Court Decisions’ Failure to Apply the At-Will Doctrine

The California supreme court failed to cite any of the foregoing employment provisions contained in the Civil Code until nearly 25 years after their enactment. Similar to Goldberg, the court in the unreported case Luce v. San Diego Land Etc. Co. affirmed a bench trial decision finding that a yearly employment contract had been made. A law firm filed a complaint to recover the balance of an alleged yearly salary from an employer-client. The court had before it some letters between the law firm and client, none of which gave a duration of employment but merely named various lengths of time for payment. The law firm offered evidence that it told the client it would only be employed by the year. The court did not cite to the Civil Code or mention a presumption of at-will employment, but instead analyzed the intent of the parties and found there could have been no meeting of the minds on any term other than a hiring by the year.

In 1896, the court considered an appeal by a railroad company, which had hired a man named E.B. Rosenberger as clerk and discharged him four months later. Rosenberger claimed that during the hiring process the defendant company had asked what salary he would accept, to which he answered, “1,800 or 2,000 a year.” Rosenberger was hired at $1,800 per year and paid by the month. After his discharge he brought suit for wages through the remainder of what he claimed had been a yearly hire. A jury found for the plaintiff.

The California supreme court affirmed. The legal arguments from appellant and respondent cited no state statute. The court, on the other hand, based its decision on provisions of the Code. The court relied solely on Civil Code sections 2010 and 2011, ignoring the at-will provision in section 1999 in favor of the presumptions of hiring terms in a master-servant

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322. 4 Cal. Unrep. 726 (1894).
323. Id. at 730. The court held that if no contract had been made from the letters, then a contract for yearly employment had been made by the company’s general manager, who in a conversation had assured the law firm that “We would no more employ you by the month than you would be employed by it; for we are no more anxious to have you leave us in the lurch at some time in the future, or jump your salary on us - raise it again - than you are willing that we should have the right of discharging you at any day that we saw fit.” Id. at 729.
325. Id. at 316.
326. Id. at 315.
relationship. As already noted, section 2010 states a presumption that the employment duration is the length of time that the parties adopt for the estimation of wages. The court also applied section 2011, which states that if the term of employment is not fixed, it will be presumed to be the length of the pay period. Because the employee had given his salary requirement in annual terms, the court reasoned, his employment was for a year-long term.

The California supreme court similarly failed to apply the at-will doctrine a few years later, in the case of White v. City of Alameda. In 1899, the supreme court took up the appeal of a city worker who was hired for sixty dollars per month to drive a wagon and later was terminated. The worker claimed he had been paid for two months but was owed an additional five months’ salary although no work had been furnished to him. The court first noted that there is no difference between the terms “servant” and “employee.” The court also decided there was no specified duration of his employment. While the court could have applied the at-will statute, section 1999, it again based its decision on the presumption codified in section 2010 that a hiring is for the length of time the parties adopt for the estimation of wages, in this case one month.

Finally, in the 1903 case Davidson v. Laughlin, an employer argued before the supreme court that a contract for employment for an indefinite time is terminable at the will of either party, citing Lord v. Goldberg in support of this proposition. This case is of interest because the defendant employer cited only Lord, and did not cite the at-will statute. Furthermore, as already discussed, the Lord decision does not support a modern conception of at-will employment. Had the at-will doctrine been embedded in the prior fifty years of California jurisprudence, one would expect the defendant’s attorneys to cite more than one case and to call attention to the state at-will statute. The Davidson court ultimately avoided discussion of at-will employment because the plaintiff employee sought only the actual value of service.

The Rosenberger, White, and Davidson decisions are important because they unmistakably demonstrate that the California supreme court did not recognize the at-will doctrine and consistently refused to apply section

327. Id. at 316-317.
328. Id.
329. White v. City of Alameda, 124 Cal. 95 (1899).
330. Id. at 96.
331. Id. at 98.
332. Id.
333. Davidson v. Laughlin, 138 Cal. 320, 326 (1903) (citing Lord v. Goldberg, 81 Cal. 596 (1889)).
334. Id.
335. Id. Plaintiff had accepted below-market pay because he expected to be promoted soon after.
1999's at-will provision as late as the turn of the century. Instead, the supreme court was willing to presume monthly and yearly terms of employment during which employers could terminate employees without good cause or notice only if the employee was compensated for the remainder of the term.

However, evidence that at-will employment has not been a part of California history since the inception of statehood also appears in later court cases. In Shuler v. Corl, the court held that a job offer for as long as the plaintiff chose to work for defendant was a monthly contract, and made no mention of at-will employment or the Civil Code's employment provisions. In 1929, the court did cite section 1999, but applied the provision to favor of the employee. In Anderson v. Van Camp Sea Food Company, the plaintiff alleged that he fished exclusively for defendant company in exchange for wages and a cash deposit toward the purchase from defendants of a fishing boat. Plaintiff alleged that before the boat was paid off the defendant sold the boat to someone else. Affirming judgment for the plaintiff, the court held that since the contract was silent as to the term of employment, it could be terminated only upon notice as required by the language of section 1999. It held that in the absence of notice, the contract was still in effect. While the court recognized and applied section 1999, it still imposed a notice requirement upon employees wishing to terminate an employment relationship.

H. Lessons from History—Reconciling Theories

The legal and historical evidence discussed above supports the theories of Selznick and others who suggest that at-will employment appeared no earlier than the last quarter of the 19th century in California. Whether

338. Id. at 789.
339. Id. at 792.
340. Id. at 794. The Courts could invoke notice requirements to suppress union activity. In Patterson Glass Co. v. Thomas, 41 Cal. App. 559 (1919), a window glass manufacturing company in Stockton sought an injunction to prevent a union from persuading the company's employees to quit. The employer had a contract with artisans to work for him during a season and both employer and employee had promised to give seven days' notice in the event of discharge. An organization of glass workers allegedly trying to reduce its output to keep prices and wages up attempted to postpone the employees' start date by four months. The lower court sustained a demurrer brought by the union. On appeal, the association argued the employees worked at-will and could quit. In its discussion of the employer-employee relationship, the appellate court spoke volumes when it admitted to "some difficulty in determining just what was intended by the legislature in the enactment of section 1999 of the Civil Code." The court reversed the demurrer, holding that the employees could not quit without giving seven days' notice and without paying any travel money advanced by the employer. Notably, the dissent stated there was no necessity to discuss at-will employment, that "we have a right to assume that it was for a longer period than one month" and the exact duration was capable of ascertainment.
Feinman’s theory holds true, that the at-will doctrine accompanied the maturation of capitalism, depends on an investigation of jurisprudence and employment practices post-1872, but cannot be said to apply to California’s budding economy relative to the eastern states. The notion that Wood influenced the adoption of the at-will presumption cannot be true in California because *DeBriar*, decided in California and on which Wood’s theory relies in part, was not cited by the California courts for a century, involved a contract made under civil law, and is engulfed in questionable circumstances.

Certainly, California did not adopt a legal presumption of at-will employment from its earliest days. Ballam’s supposition that at-will employment has always been the custom and law in the state is unfounded. Additionally, Ballam’s speculation over the meaning of early case law, particularly *DeBriar*, is wholly unsupported after examining historical sources. Morriß’s theory, that the courts adopted the presumption of employment at-will to prevent crowded dockets, does not appear instructive as to the time period examined in California in light of the infrequency that the courts encountered employment disputes, particularly employment duration.

VI. CONCLUSION

The concept of employment at-will in California made an unheralded entrance in the hastily compiled Civil Code in 1872 with no basis in state common law or custom. Instead, the phenomenon of the gold rush, coupled with a caste-like organization of society based on race and status, formed an environment inhibiting a legal presumption of at-will employment. In addition, geographic isolation, the high rate of self-employment, shared production, availability of land, and a spirit of egalitarianism among early emigrants made the at-will doctrine unnecessary and distasteful in subsequent years. The volatile state of California’s nascent economy, manifested in currency crises, labor fluctuations, and labor organizing conflicts also militates against the notion that at-will employment or arbitrary dismissal was the rule.

Furthermore, the at-will doctrine remained dormant for decades after the adoption of the Civil Code. Early case law reflects no adherence to the

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341. Ballam, *supra* note 5, at 97-98. Ballam stated that historical evidence of seasonal employment and various odd jobs “suggests that California followed employment-at-will.” *Id.* at 121. To the contrary, the evidence shows that the workers expected to work for the length of the season and no longer. Thus, their work ended with the farm season and not arbitrarily. In Ballam’s analysis, she erroneously merged the concepts of the legal doctrine of at-will employment with the custom of short-term employment.

342. *Id.*
doctrine, and cases as late as the turn of the century indicate that the California supreme court had still not recognized the at-will presumption. Instead, an in-depth review of statutes, case law, and work arrangements suggests California courts did not adopt at-will in practice until well into the 1900s. The examination of employer-employee law and relations in early California should inform the ongoing debate whether the doctrine offers any value to the economic and social organization of California society.