Business Closings and Their Effects on Employees—Adaptation of the Tort of Wrongful Discharge

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This Article discusses the application of the tort of wrongful discharge to plant closure situations. After a historical review of the employment-at-will doctrine, which provides that an employer may terminate an employee at any time and without cause, the author suggests that a viable cause of action in the plant closing context could be based upon any of the three theories of wrongful discharge: breach of an express or implied agreement to terminate only for cause, breach of the covenant of good faith and fair dealing, or violation of public policy. The author concludes that although adaptation of the current law of wrongful discharge to the plant closing context is possible, abolition of the employment-at-will doctrine is appropriate and desirable. In its place she would substitute a standard of employer good faith and fair dealing, which would require at least a reasonable period of notice to employees of an employer’s intention to close a plant.

INTRODUCTION

Our economic age is characterized by increasingly fluid and fast-moving economic forces. As businesses shut down, relocate and cut back in some places in order to expand in others, the employees at the original locations lose their jobs. Job loss can be a devastating financial blow with both physical and psychological repercussions to the suddenly unemployed and their families. Under the current employment-at-will doctrine, the full impact of that blow is borne by the employees, their families, and their communities, rather than by the firm that makes the decision to move.

The main purpose of this Article is to adapt the emerging tort of wrongful discharge to provide compensation under certain circumstances to employees for sudden job loss due to business closings. First, the Article describes the increased frequency of plant closings, the lack of protection against job loss even in the unionized sector of the economy, and the damage caused to employees by sudden job loss. The second section discusses how the historical application of the employment-at-will doctrine has hindered recovery in this area. The third and main section analyzes

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the three categories of wrongful discharge cases—employer breach of express or implied terms of the employment contract; employer breach of the implied covenant of good faith and fair dealing inherent in the employment contract; and the "public policy exception" to the at-will rule—to demonstrate how each category applies to the business closing situation. Each wrongful discharge theory is applied to two hypothetical plant closing situations: 1) use of the threat to close to extract concessions from employees, followed by a closure which is not disclosed to the employees until the last minute; and 2) a closure with no advance notice at all to employees. The analysis demonstrates that liability can result from application of current wrongful discharge law to both of these fact patterns. Finally, the Article suggests that the courts abolish the employment-at-will doctrine. This doctrine should be replaced with a standard of fair conduct toward employees, which the employer must meet during plant closings as well as at all other times.

I

BUSINESS CLOSINGS—THEIR EXTENT AND DAMAGE

Firms in the United States have always gone out of business, changed location, and transformed into new business entities, but today business contractions and expansions occur more frequently and quickly than in the past. Due in large part to relatively recent technological innovations, especially those in air transport and computers, business capital is more mobile than ever before. The former allow business equipment to be quickly moved anywhere in the world; the latter allow storage of unlimited business information in very little space. American business responded to these technological changes by transferring its business capital, both within the United States and into other countries, at historically unprecedented rates. Partly in response to increasingly effective foreign competition, often fostered by American corporations and conglomerates, decisions have been made to deindustrialize and disinvest what were hitherto considered essential American industries, such

2. See id. ch. 1.
3. See id. at 6-7. The following chart, demonstrating the increase of American investment abroad in the United Kingdom, Sweden and West Germany between the years of 1973 and 1980, was compiled by Scott Pagel, Reference Librarian, Golden Gate University School of Law, based on figures collected yearly in U.S. Direct Investment Position Abroad, in 55-62 SURVEY OF CURRENT BUSINESS (1975-82) (covering 1974-81). These three countries were chosen because, unlike the United States, they closely regulate business closings, as detailed in JOINT REPORT OF LABOR UNION STUDY TOUR PARTICIPANTS, ECONOMIC DISLOCATION: PLANT CLOSINGS, PLANT RELOCATIONS, AND PLANT CONVERSIONS (1979) [hereinafter cited as JOINT REPORT]. Despite the existence of legislative regulation of capital mobility, American investment in each of these countries steadily increased during the years studied.
as steel, rubber, and automobile manufacturing. This phenomenon is not limited, however, to basic industries,\textsuperscript{4} nor does it affect only blue-collar nonprofessional workers.\textsuperscript{5} Throughout the economy, American firms have been shutting down, cutting back, relocating, contracting in some places and expanding in others—all at an astonishingly rapid pace.

Large numbers of workers are losing their jobs as a result of this increased mobility of business capital. Permanent business closings alone resulted in 47,255 Americans losing their jobs within the first three months of 1982.\textsuperscript{6} Moreover, the economic dislocation created by business closings is not confined to any one area of the country.\textsuperscript{7} During the years 1980, 1981, and 1982, in California alone, a Sunbelt state, 979 plant closings resulted in 105,171 lost jobs, plus other temporary and permanent layoffs in related industries caused by the ripple effect of the closings.\textsuperscript{8} Since closings constitute only part of the picture of accelerating deindustrialization and disinvestment, job loss resulting from the increased capital mobility that characterizes our current economy far ex-

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
   & United Kingdom & Sweden & West Germany \\
\hline
1973 & 11,040 & 859 & 7,650 \\
1974 & 12,537 & 1,041 & 7,971 \\
1975 & 13,927 & 1,117 & 8,726 \\
1976 & 15,137 & 1,141 & 10,497 \\
1977 & 17,434 & 1,144 & 11,071 \\
1978 & 20,416 & 1,198 & 12,731 \\
1979 & 23,539 & 1,395 & 13,521 \\
1980 & 28,605 & 1,476 & 15,418 \\
\hline
\end{tabular}
\caption{U.S. Direct Investment Position Abroad, Year End (Millions of Dollars)}
\end{table}

\textsuperscript{4} See B. Bluestone & B. Harrison, supra note 1, at 35-40 (for an account of both the industrial and geographical diversity of the deindustrialization wave of the late 1970's).

\textsuperscript{5} See id. at 53 (for a description of a study of employment status done on a nationwide sample of about 4,000 male workers, all over the age of 45). Based on the results of this study, Bluestone and Harrison conclude:

[...No one appears to be immune to job loss, no matter how well placed. Popular conceptions notwithstanding, displacement respects neither educational attainment nor occupational status. There is virtually no difference in educational background between those displaced and the total population at risk. Similarly, there were no substantial differences among professionals, clerical workers, operatives, and service workers in the chances of being displaced. [...] When a plant shuts down, or operations are permanently curtailed so that some workers receive layoffs without recall, engineers lose their jobs along with janitors.]

\textit{Id.} Note also that the downward occupational mobility caused by job displacement was most acute among professional and managerial workers. \textit{Id.} at 55.


\textsuperscript{7} See B. Bluestone & B. Harrison, supra note 1, at 39-40 (for a description of the extent of deindustrialization in the late 1970's in the Southern United States and in California, both regions geographically removed from the previously heavily industrialized Northeastern and Midwestern United States. These latter regions are the ones popularly believed to have suffered the major impact of disinvestment and deindustrialization.).

\textsuperscript{8} Staff of California Assembly Committee on Ways and Means, A Summary of Issues Relating to Plant Closures, Job Dislocation and Mass Layoffs 2 (1982) (prepared by C. Chavez).
ceeds these numbers. The estimated total effect of closings, relocations and permanent physical cutbacks in business establishments was the loss of as many as thirty-eight million American jobs during the 1970's.  

Of course, business openings also created millions of new jobs in the United States during the same decade. This fact provides scant comfort for the individual displaced, however, workers since the new jobs are likely both to be in different industries and locales and to require different skills.

The unionized workforce, currently estimated to be less than one-quarter of the American working population, has little more protection from closings than anyone else. Collective bargaining clauses that limit management's right to close for economic reasons are rare. In 1983, specific limitations on closings or relocations were mentioned in only eight-

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10. See id. at 29-31.
11. It is not difficult to imagine the economic and psychological effects of sudden job loss with little or no advance notice. Displaced workers will usually be eligible for unemployment benefits while they look for another job, but these benefits average only about 37% of the former wage. TAX FOUNDATION, INC., UNEMPLOYMENT INSURANCE: TRENDS AND ISSUES (RESEARCH PUB. NO. 35) 20 (1982). See id. at 21-22, tables 5-6 (for trends in average weekly benefits and their real buying power from 1940 to 1978). Ordinarily unemployment benefits run for a period of only 26 weeks, with an additional 13 weeks of extended benefits during periods of high unemployment. 1B UNEMPL. INS. REP. (CCH) ¶ 3001 (1982).

In addition to losing their incomes, displaced workers will probably lose any medical insurance covering themselves and their families. B. BLUESTONE & B. HARRISON, supra note 1, at 64. In fact, fewer than 30% of unemployed workers have any health insurance at all according to one official of the UAW. Id. Those who have health insurance must spend 20% to 25% of their unemployment benefits to continue coverage. Individual premiums are generally twice as expensive as those of group plans, while non-group health insurance pays an average of only 31% of all medical costs. Id.

Contributions to any pension plan will also cease. See id. at 58-59 (asserting that while the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1982), enacted by Congress in 1974, provides some protection against loss of pension benefits, that protection is still not complete). Fewer than 45% of the people covered by pension plans will ever collect their pensions, because of the combined effects of death, disability, and turnover. JOINT REPORT, supra note 3, at 6 n.2. Workers displaced by shifts of capital, of course, fall within the last category.

If the employer is a large corporation, its closing is likely to erode the local property and business tax base, adding further to the effect of current budgetary cuts on any social services the family might be eligible to receive because of its sudden downward turn in economic status. See B. BLUESTONE & B. HARRISON, supra note 1, at 67-78 (for a valuable summary of the "ripple effect" of business closings on the surrounding communities including the loss of public revenues at the time when the need for social expenditures can be expected to rise).

Just as the workers need to tap what is probably their largest category of savings, the accrued equity in their homes, property values are likely to decline precipitously, due to the adverse economic effect on a small community of the closing of a large corporation, or due to the effects on the local economy of a larger pattern of disinvestment. Because unemployed workers often lack an immediate cash flow to make up for lost income, they may have to make the difficult choice between selling their home immediately at the depressed market value, or facing foreclosure for failure to meet the payments.

een percent of 400 collective bargaining agreements sampled. Within
this eighteen percent, only thirty-eight percent included any require-
ment of advance notice to workers or discussion with workers prior to
closing.\footnote{13} Forty-seven percent of the sampled agreements required advance
notice of layoffs.\footnote{15} Of this forty-seven percent, however, only forty-five
percent stipulated a week or more notice to the employee about to lose a
job.\footnote{16} As for severance pay, in 1983 only thirty-nine percent of the sam-
pled agreements provided for it at all, and employees terminated as a
result of a permanent shutdown were eligible for severance pay in only
forty-seven percent of these severance plans.\footnote{17} Only sixty-four of the 400
sampled contracts (sixteen percent) made any reference at all to supple-
mental unemployment benefit plans.\footnote{18}

Thus, protection against the impact of closings for unionized work-
ners through the collective bargaining process is limited. Based on these
statistics, more than one-half of these workers are not entitled to any
advance notice or severance pay upon loss of their jobs. This situation,
characterized by lack of effective protection against closings even within
the unionized context, is not likely to change in the near future.\footnote{19}

At best, unionized workers who have unusual economic strength
can negotiate written contract clauses, often in exchange for workers’
concessions,\footnote{20} that prohibit management from closing or transferring

\footnote{13} BUREAU OF NATIONAL AFFAIRS, INC., BASIC PATTERNS IN UNION CONTRACTS 65 (10th
ed. 1983).
\footnote{14} Id.
\footnote{15} Id. at 53.
\footnote{16} Id.
\footnote{17} Id. at 36.
\footnote{18} Id. at 38.
\footnote{19} [I]n regard to collective bargaining, I doubt that very much in the way of new strategies
to control plant closings will arise. . . . [I]t is unlikely that there will be much extension of
the existing provisions beyond the current contracts and coverage. For example, during the
1970's, with all the concern and activity about plant closings, the proportion of major
contracts with provisions relevant to plant closings (e.g., advance notice, severance pay,
interplant transfer, relocation allowances) remained relatively low and remarkably stable.
Undoubtedly, plant closings will continue to be an issue in certain manufacturing indus-
tries where change and movement have been occurring, but it seems unlikely to spread
extensively to other bargaining relationships where plant closings and relocations are not
perceived to be immediate problems. Unions, as pragmatic and short-term oriented institu-
tions, simply may not negotiate shutdown provisions where there does not seem to be a
pressing problem. If they do, they may have to concede other immediately important bene-
fits. Such behavior would be unlikely for politically sensitive labor leaders. In addition, if
the proportion of the work force that is unionized continues to decline (currently unions
represent only one-fifth of the work force), collective bargaining as a means to deal with plant
closings generally will have even less impact and potential influence on shutdown decisions
than it had in the past.

Craft, Controlling Plant Closings: A Framework and Assessment, in PLANT CLOSING LEGISLATION
54 (A. Aboud ed. 1984) (emphasis added) (citations omitted).
\footnote{20} Concession bargaining by unions was unheard of 10 years ago, but during the first three
quarters of 1983, about 20% of the workers who were covered by contract settlements took wage
work during the term of the agreement, require management to invest in new machinery to avoid closing, or require management to secure from any successors or assigns an agreement to be bound by the pre-existing collective bargaining agreement. Although arbitrators and courts attempt to enforce all three clauses, organized labor is rarely powerful enough to secure them at the bargaining table.

Unionized or not, workers displaced by closings generally join the ranks of the unemployed; at least one-third of them suffer long-term unemployment. If their income loss is not offset by savings or by an employer-financed unemployment compensation system, the cost of their survival is borne by society through the decreasing number of tax-supported welfare programs that comprise the "safety net."

Like other unemployed workers, these displaced workers are more likely than the rest of the population to cause social damage through

cuts and another 20% received no wage increase. Summary of Developments: Slim First-Year Wage Gains, 114 LAB. REL. REP. (BNA) 1 (Nov. 7, 1983). Over the life of these contracts, wage increases averaged 2.8% annually, the lowest average for any comparable period in the 15-year history of the survey. Id. First-year increases in the contracts averaged only 1.7%. Id. When the same parties last bargained to settlement, average wages increased 9.1% in the first year and 7.3% over the life of the collective bargaining agreements. Id. The economic health of the entire unionized workforce is affected by workers having to accept wage cuts and freezes just to keep their jobs.

Recent decisions by the United States Supreme Court and the National Labor Relations Board leave unsettled the question of whether contract clauses limiting the right of management to close all or part of its business are mandatory subjects of bargaining, on which management must bargain with the union and risk the union's use of economic weapons if the bargaining process comes to impasse rather than agreement. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). See infra notes 52-53.

See Local Lodge No. 1266, Int'l Ass'n of Machinists v. Panoramic Corp., 668 F.2d 276 (7th Cir. 1981); Local 461, IUE v. Singer Co., 540 F. Supp. 442 (C.D.N.J. 1982); Jos. Schlitz Brewing Co., 58 Lab. Arb. (BNA) 653 (1972) (Lande, Arb.). Injunctions against closings and relocations are extremely rare, although they are an appropriate remedy pending arbitration to settle whether management's closing or transferring of operations violates the collective bargaining agreement when an immediate closing would permanently damage the employees involved.

In the instant case, had there not been an injunction pending arbitration to preserve the status quo, the employees at the Baltimore plant would have been totally and permanently deprived of their employment, and, . . . if the union prevailed at the arbitration, would have had a double burden of convincing the company not only not to move, which it had already done, but to return the plant. Lever Bros. Co. v. International Chem. Workers Local 217, 554 F.2d 115, 122 (4th Cir. 1976) (emphasis in original).

Many more workers are likely to be unemployed for a long period of time if the closing occurs during economically difficult times: A plant closing during a recession is likely to be even more devastating in terms of re-employment possibilities because of the absence of jobs in other sectors. Thus when Armour and Company closed its Oklahoma City meat-packing plant during the 1960-61 economic downturn and laid off four hundred of its work force, 50 percent remained unemployed for at least six months. More recently, the closing of a chemical company branch plant in Fall River, Massachusetts during the 1975 recession resulted in unemployment that lasted on the average nearly sixty weeks, with some workers idled as long as three years. Thirty-nine percent of the workers in the sample found jobs only after their unemployment compensation had long been exhausted.

Id. at 52 (citations omitted). Women and minority workers suffer even longer terms of unemployment after closings than their white male counterparts. Id. at 54-55.
drug and alcohol abuse, spousal and child abuse, and criminal conduct. Affected workers also suffer higher incidence of physiological and psychological ailments, exhibiting higher rates of heart disease, hypertension, diabetes, peptic ulcers, extreme depression, and anxiety than the general population. Workers displaced by business closings are particularly likely to suffer a permanent downward turn in economic and social status. For an employee, the loss of a job due to a business closing can easily be as financially and permanently devastating as that caused by a major automobile accident or injury due to a defective product.

II
THE EMPLOYMENT-AT-WILL DOCTRINE

The problem of uncompensated and devastating job loss as a result of business closings must be viewed against the backdrop of the common law employment-at-will doctrine. This legal theory, peculiar to the United States among advanced industrialized countries, holds that any

24. Id. at 64-65 (describing a study showing that a 1% increase in the aggregate unemployment rate sustained over a period of six years has been associated with approximately: 37,000 total deaths (including 20,000 cardiovascular deaths); 920 suicides; 650 homicides; 500 deaths from cirrhosis of the liver; 4,000 state mental hospital admissions; 3,300 state prison admissions).


The problems of capital mobility and major job losses are real and growing. The major victims are the laid-off workers and their families. The massive job cuts often flood the labor market, overwhelming local employment opportunities. States and municipalities also face severe fiscal difficulties, as their tax base erodes and public spending rises to pay for the social costs of economic dislocation, which include rapid increases in juvenile delinquency, crime, divorce, mental illness, and despair.

Id. at Preface (attributing the statement to William Schweke, editor of WASHINGTON D.C. CONFERENCE ON ALTERNATIVE STATE AND LOCAL POLICIES, PLANT CLOSINGS: ISSUES, POLITICS, AND LEGISLATION (1980)).

26. See B. BLUESTONE & B. HARRISON, supra note 1, at 51-63. Bluestone and Harrison summarize the effect of deindustrialization on the working class as a whole as follows:

Deindustrialization affects each . . . individual in a different way. . . . Workers who possess skills that are in great demand are more readily re-employed than those whose skills are made obsolete by disinvestment. Minorities fare worse than whites; in general women fare worse than men. But no one is completely immune. Young workers who are just reaching the point where they have a toehold in the economy can be permanently set back by a plant closing. Middle-aged workers who have reached their peak earning years face giant reductions in income if they are forced out of the jobs where they have experience and still many potential years of productive employment. Older workers face the prospect of being "too old to find new work, but too young to die."

Id. at 81.

27. E.g., Heinsz, The Assault on the Employment At Will Doctrine: Management Considera-
employment relationship not of a specified duration is terminable at the will of either employer or employee, without cause, and at any time. The originator of this doctrine appears to have been Horace Wood, who, in 1877, claimed it to be the American rule, citing no accurate authority. The employment-at-will rule was consistent with the American laissez-faire economics of that period. Along with other aspects of tort law which barred recovery, including contributory negligence, assumption of risk, and the “fellow-servant rule” (employer not liable if injury caused by negligence of co-employee), the at-will doctrine had the effect of protecting and fostering emerging industries. Thus, despite the contrary English rule, and despite the incorrect application of traditional freedom of contract principles in the doctrine’s underlying premise of a failure of mutuality, the at-will doctrine was quickly adopted in almost all states.

The primary effect of the at-will doctrine has been the understanding, common to employees, employers and the courts alike, that in the absence of a collective bargaining agreement, which generally contains an enforceable provision that individual discharge be only for just cause, any employee can be discharged at any time for any or no reason. Often, even express employer promises have not been enforced under the at-will doctrine. Such holdings are based on a requirement of


29. Note, Job Security, supra note 28, at 341. See also Note, Public Policy, supra note 28, at 1933 & n.14; Heinsz, supra note 27, at 859.


31. See PROSSER & KEETON ON TORTS 452, 569-72 (W. Keeton ed. 1984) [hereinafter cited as PROSSER]. The same economic interests were served by the requirement of employer negligence for recovery for accidental workplace injuries, unlike the no-fault system such as the later-enacted workers’ compensation schemes. See id. at 161, 572-76.


34. BASIC PATTERNS IN UNION CONTRACTS, supra note 13, at 6 (“cause” or “just cause” stated as a permissible reason for discharge in 83% of the 400 contracts analyzed).

35. See Note, supra note 32, at 449 & n.4.

“independent consideration,” other than the employee’s services, to support such an employer promise. The courts have reasoned that the employee’s services operated as consideration for the employer’s payment of wages, creating “mutuality of obligation,” thereby foreclosing the services from functioning as consideration for any further employer promises. Even explicit promises of permanent employment were sometimes deemed unenforceable on the basis of an arbitrary conclusion that a promise of permanent employment was the equivalent of employment of indefinite duration, and therefore exactly the type of employment contract deemed terminable at the will of the employer. Both of these theories signified the courts’ unwillingness to effectuate the intent of the parties to the employment contract when that intent ran counter to the at-will rule.

Although the employment-at-will doctrine has been eroded considerably by the currently emerging concept of wrongful discharge, and although the rule has been widely criticized by courts and commentators as both inequitable and anachronistic in the modern era of large employers and an increasingly immobile work force, its effects linger.

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37. See, e.g., Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 172 P.2d 867 (1946) (“A contract for permanent employment is only a contract for an indefinite period of time and terminable at the will of either party unless it is based on some consideration other than services to be rendered.”). Accord Fibreboard Prods., Inc. v. Townsend, 202 F.2d 180 (9th Cir. 1953); Mau v. Omaha Nat’l Bank, 207 Neb. 308, 299 N.W.2d 147 (1980); Smith v. Beloit Corp., 40 Wis. 2d 550, 162 N.W.2d 585 (1968); Lewis v. Minnesota Mut. Life Ins. Co., 240 Iowa 1249, 37 N.W.2d 316 (1949); Edwards v. Kentucky Util. Co., 286 Ky. 341, 150 S.W.2d 916 (1941).

38. See, e.g., Lewis, 240 Iowa at 1263, 37 N.W.2d at 324 (There is no mutuality, and thus no enforceable contract for permanent employment, when the employee insurance agent was “under no obligation to continue his service as an agent for the period of his lifetime.”).


40. See infra text accompanying notes 65-69.

41. See, e.g., Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). The California Court of Appeal summarized its view of the employment-at-will doctrine as follows: “When viewed in the context of present-day economic reality and the joint reasonable expectations of employers and their employees, the ‘freedom’ bestowed [by the employment-at-will doctrine] may indeed be fictional.” Id. at 449-50, 168 Cal. Rptr. at 725. The court then observed that the case law interpreting CAL. LAB. CODE § 2922 (Deering 1976), which codifies the employment-at-will doctrine, demonstrates that the rule applied in its purest form leads to harsh effects on the employees, and declined to apply it to the facts at hand. See generally Note, Job Security, supra note 28.

42. See, e.g., Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404, 1405, 1412-13 (1967); Heinsz, supra note 27, at 862; Note, Job Security, supra note 28, at 338-39. See generally Tobriner & Grodin, The Individual and the Public Service Enterprise in the New Industrial State, 55 CALIF. L. REV. 1247 (1967) (assertion that the law must impose new obligations to remedy situations where the old laissez-faire and freedom of contract principles are no longer appropriate, in an age of large-scale enterprises that threaten to overwhelm individual concerns and bargaining power).
Many jurisdictions still enforce the terminable-at-will rule consistently, and even the cases that limit its applicability do so by bringing particular fact situations under one of the exceptions to the general rule. Commentators have suggested that the entire employment-at-will doctrine be abrogated in favor of a good faith, or a just cause, standard to govern employer conduct in discharging employees, but no court or legislature has yet reached this result. In fact, the influence of the employment-at-will doctrine has been so pervasive that it constitutes one of the basic values and assumptions that characterize American employment law.

Nowhere is that pervasive effect more marked than in the area of business closings and other cutbacks in the labor force assumed to be dictated by the inexorable demands of economics and profitability.

43. Jurisdictions where the employment-at-will doctrine generally does not yield to any exceptions include Florida, Georgia, Iowa, Kansas, Kentucky, Mississippi, New Mexico, North Carolina, Ohio, South Carolina, Tennessee, Texas, Utah, Vermont, and Virginia. See The Employment At Will Issue, News and Background Information, Part II, 111 LAB. REL. REP. (BNA) app. B (Nov. 19, 1982) [hereinafter cited as Employment At Will].

44. This is especially true of the whole branch of wrongful discharge analysis that analyzes the employer's conduct for a breach of public policy in order to bring it within the "public policy exception" to the employment-at-will doctrine. See generally Note, Public Policy, supra note 28.

45. See, e.g., Comment, supra note 27, at 1141-59; Note, Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 HARV. L. REV. 1816 (1980); Blades, supra note 42, at 1421-27.


47. All three major erosions of the employment-at-will doctrine under the rubric of wrongful discharge contain elements that require the employer's conduct to conform to accepted standards of good faith. See infra text accompanying notes 70-151. The decisions, however, stop short of creating a new uniform doctrine to replace the employment-at-will rule.

48. Heinsz, supra note 27, at 862.

49. See J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983), describing the employment-at-will doctrine as follows:

An important aspect of the law of employment contracts is that employees have no stake, interest, or investment in the "common enterprise" other than the right to receive wages for the sale of labor. The American common-law rule held that in the absence of an expressed term of employment, every contract of employment was terminable at will. Because the employee could leave at any time, "mutuality of obligation" meant that the employer could freely discharge an employee without notice and on any ground. Given these assumptions, it follows that employees have little investment in the enterprise in which they work. . . . As in the nineteenth century, judicial decisions repeat outmoded notions of individual bargaining power and the often illusory power of employees to quit. Although these decisions normally deal with the law of contracts, the underlying assumptions are nevertheless still reflected in NLRA and other labor decisions today. Id. at 15-16 (citations omitted). This book cannot be too highly recommended as an excellent study of how basic assumptions like the employment-at-will doctrine work their way throughout labor and employment law.

50. See generally PLANT CLOSINGS: PUBLIC OR PRIVATE CHOICES? (R. McKenzie ed. 1982) (reviewed in Rhine, Book Review, 6 INDUS. REL. L.J. 297 (1983)) (essays which expound the view, commonly held in "supply-side economics" circles, that corporations must be allowed unfettered freedom to move capital around in order to maintain a healthy economy in our free enterprise system). This author knows of no decided case compensating for loss of employment due to a business closing under a wrongful discharge or other tort theory. One California case, however, alleged inter
Employers view the right to close all or part of their businesses as basic to the system of free enterprise. Even when there is a collective bargaining agreement with a just cause provision, economic motivations for cutbacks in the work force have been viewed as supplying the contractual requirement of just cause, leaving only the effects of the cutback, such as the order of layoff or severance pay, to be bargained or grieved over. When unionized workers have requested compensation for business closings motivated by anti-union animus or the right to bargain with the employer over the decision to close all or part of a business for economic reasons, the United States Supreme Court has accorded the act of closing a special status.

To say that the employer has the fundamental right to make decisions regarding the basic allocation of capital, however, does not require the conclusion that such decisions may never give rise to financial liabil-

alia that discharges upon closing with no advance notice constitute wrongful discharge, based on the statutory requirement of notice in CAL. LAB. CODE § 2922 (Deering 1976). This class action suit survived a demurrer and settled for an amount equal to four weeks wages for each of the 537 employees who were members of the class, plus $390,000 in attorneys' fees. Carson v. Atari, Inc., No. 530743 (Santa Clara Cty. Super. Ct. filed Aug. 15, 1983), proc. ruling reported sub nom. Atari, Inc. v. Superior Ct., 166 Cal. App. 3d 867, 212 Cal. Rptr. 773 (1985).

53. See Darlington, 380 U.S. at 273-74 (unlike other employer acts motivated by anti-union animus, a business closing, even if motivated by vindictiveness toward the union, is not an unfair labor practice under the National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982)); FNM, 452 U.S. at 686 (the harm likely to be done to the employer's need to freely decide whether to close part of its business for economic reasons outweighed the benefit to be gained from bargaining with the union, thus the decision to close was not within the scope of the mandatory duty to bargain as defined in § 8(d) of the NLRA, 29 U.S.C. § 158(d) (1982)).

Regarding mid-contract changes, the Board has recently reversed itself to hold that a mid-contract management decision to close without the union's consent did not constitute an unlawful unilateral change in the terms and conditions of employment, since the collective bargaining agreement contained no clause purporting to limit management's right to relocate, and therefore the closing was not a violation of the employer's duty to bargain, Milwaukee Spring Div. II, 268 N.L.R.B. 601 (1984). See also Otis Elevator Co., 269 N.L.R.B. 891 (1984) (an employer's decision to terminate operations in one location in order to consolidate them elsewhere was not a mandatory subject of bargaining). The Board in Otis reasoned that management's decision did not turn on labor costs, although that might have been one of the factors that stimulated the evaluation process that led to the decision. Id. at 892. Thus, the decision to close and consolidate reflected a fundamental change in the nature and direction of the business, and despite its evident effect on the employees was not amenable to bargaining. Id.

These cases taken together create a serious doubt as to whether a contract clause seeking to limit management's prerogatives over those decisions involving fundamental reallocations of capital is itself a mandatory subject of bargaining, prior to the time that management feels constrained to make the decision. In other words, perhaps the union can no longer insist in negotiations that management discuss proposals that purport to limit its prerogative to close during the term of the agreement. If these clauses are only permissive subjects of bargaining, then management need not fear the union's exercise of economic power to secure what they want at the bargaining table. See R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 524 (1976). In that event, in the future we are likely to see even fewer contract clauses that effectively limit management's right to close or move its business.
ity for the employees’ loss. Such a conclusion is particularly unacceptable if the employer’s conduct in making and implementing the decisions reflects an intent to deceive the employees, or to keep them ignorant as to the true state of their job security. Strict adherence to the employment-at-will doctrine in the business closing context would mean that an employer could plan to close its place of business, misrepresent this plan by giving the employees false assurances of job security, use the workers’ fear of job loss as a lever to extract concessions from them, and then close as originally planned with no liability to the employees.54

Or, the employer could plan to close its place of business a year ahead of time, deliberately not disclose this plan to the employees in order to maintain a docile and tractable work force, and notify the employees of the imminent loss of their jobs only on the last day of the plant’s functioning.55

54. United States Steel’s decision to close its two large steel mills in Youngstown, Ohio, provides a fact pattern that may meet this description. There the company, through an extensive public relations campaign among its employees and the surrounding community, convinced the workers to make many concessions in the hope of averting the closings. See Local 1330, United Steelworkers v. United States Steel Corp., 631 F.2d 1264, 1270-77 (6th Cir. 1980) (a detailed account of both the company’s public relations campaign among the workers and the surrounding community, and the workers’ response to that campaign, in the form of concessions in the workplace and the foregoing of jobs and other possibilities in their plans for the future). Two and a half years later, despite company assurances that the efforts had been successful and the mills were now profitable (e.g., the following statement by a company representative to the press about the Youngstown facilities: “Company management has repeatedly said that the works will stay open if they become profitable. Well, now they are profitable.” Id. at 1272.), the employer began to close the facilities. The actual decision to close may have been made as much as four and one-half years prior to the misleading assurances of job security. See S. Lynd, The Fight Against Shutdowns: Youngstown’s Steel Mills Closings 135-37 (1982). “Mergers, transfer of operations, terminations, for instance, often occur without forewarning, and indeed, employees and unions are often misled about the nature of the situation.” J. Atleson, supra note 49, at 179-80 (emphasis added).

Many of the reported cases where employees or their unions have directly challenged closings demonstrate a repeating fact pattern of workers having been misled into believing their jobs were secure. See, e.g., Local 1330, United Steelworkers v. United States Steel Corp., 492 F. Supp. 1, aff’d as modified, 631 F.2d 1264 (6th Cir. 1980); Fraser v. Magic Chef-Food Giants Mkts., Inc., 324 F.2d 853 (6th Cir. 1963); Local 461, IUE v. Singer Co., 540 F. Supp. 442 (C.D.N.J. 1982); UAW Local 375 v. Northern Telecom, 434 F. Supp. 331 (E.D. Mich. 1977); Jos. Schlitz Brewing Co., 58 Lab. Arb. (BNA) 653 (1972) (Lande, Arb.). There are, of course, many other cases involving concession bargaining where it is not clear from the statement of facts whether the workers who gave the concessions in the hope that their place of business might stay open were also misled into believing that their jobs were secure. See, e.g., Abbington v. Dayton Malleable, Inc., 561 F. Supp. 1290 (S.D. Ohio 1983), aff’d, 738 F.2d 438 (6th Cir. 1984).

55. Ironically, at least one study has shown that advance notice to workers of business closings does not often lead to high numbers of workers leaving before the shutdown or to a lowering of productivity. Leighton, Plant Closing in Maine: Law and Reality, in PLANT CLOSING LEGISLATION 1, 9 (A. Aboud ed. 1984). Assuming the accuracy of the study’s data, perhaps the explanation is that employees search for new jobs during their off time, in order to have a situation ready when the old job ends and to avoid even a temporary loss of income. Management’s reluctance to give advance notice, fearing loss of a stable work force prior to closing, is perhaps unfounded.

56. This author knows of no complete statistics on how often businesses close with no advance notice to their employees, but the existence of cases within the collective bargaining context that demonstrate management concealment of intent to close or relocate during union negotiations indicates that nondisclosure of plans to close may be quite common. See, e.g., ILGWU v. NLRB, 463
If the first fact situation occurred between parties to a commercial business transaction, any intentional misrepresentations would be actionable as deceit.\footnote{57} Even if the misrepresentations were negligent or innocent, they might result in tort liability.\footnote{58} Expanding notions of liability for nondisclosure indicate that the second fact situation could also give rise to liability within the commercial context.\footnote{59} Yet, because of the effects of the employment-at-will doctrine, there are no cases compensating employees for such employer misconduct.\footnote{60}

In both of these examples, employer conduct displays moral culpa-

\footnote{57} "[I]t has never been disputed that the 'scienter' or intent which is a basis for deceit is sufficient to justify relief in equity, restitution at law, the defense of fraud, or estoppel." PROSSER, supra note 31, at 742.

\footnote{58} "Liability in damages for misrepresentation in one form or another, falls into the three familiar divisions with which we have dealt throughout this text—it may be based upon intent to deceive, upon negligence, or upon a policy which requires the defendant to be strictly responsible for his statements without either." \textit{Id.} at 727.

Given the large number of employees victimized by a business closing, lawsuits by laid-off employees against their employers for misrepresentation may be brought as class actions. The most fundamental issue in a class action suit lies in the common question or community of interest requirement, which overlaps the typicality and adequacy requirements under the Federal Rule. \textit{Fed. R. Civ. P. 23}(2). Often, establishing a community of interest involves difficult questions of fact requiring individual proof, and when each member of the class must show whether she relied on the alleged misrepresentations, the common question requirement is not satisfied. San Jose v. Superior Court, 12 Cal. 3d 447, 525 P.2d 701, 115 Cal. Rptr. 797 (1974); Brown v. Regents of Univ. of Cal., 151 Cal. App. 3d 982, 198 Cal. Rptr. 916 (1984). Courts have found a community of interest: 1) when a written misrepresentation was made to all class members, Danzig v. Superior Court, 87 Cal. App. 3d 604, 151 Cal. Rptr. 185 (1978); 2) when an oral misrepresentation was made to all class members at the same time and place, Collins v. Rocha, 7 Cal. 3d 232, 497 P.2d 225, 102 Cal. Rptr. 1 (1972); and 3) where several oral misrepresentations, based on a uniform, standardized or "canned sales pitch" statement, were made to individuals in the class at different times, Vasquez v. Superior Court, 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971). But when individual proof of reliance by each or nearly every member of the class becomes more important, as when various written misrepresentations are included in numerous documents, each pertaining to a different period of time, federal and California courts are at odds as to whether a common question or community of interest exists. \textit{Compare} Blackie v. Barrack, 524 F.2d 891 (9th Cir.), \textit{cert. denied}, 429 U.S. 816 (1975) \textit{with} Slakey Bros. Sacramento, Inc. v. Parker, 265 Cal. App. 2d 204, 71 Cal. Rptr. 269 (1968).

\footnote{59} "[T]here has been a rather amorphous tendency on the part of most courts in recent years to find a duty of disclosure when the circumstances are such that the failure to disclose something would violate a standard requiring conformity to what the ordinary ethical person would have disclosed." PROSSER, supra note 31, at 739.

\footnote{60} When the union that represented the Youngstown workers in \textit{United States Steel}, joined by the local U.S. Representative and the Attorney General of Ohio, brought suit to enjoin the closings, the district court judge, although obviously dismayed by the result, found no specifically enforceable written promise and no other basis for relief:

This court has spent many hours searching for a way to cut to the heart of the economic reality—that obsolescence and market forces demand the closing of the Mahoning Valley plants, and yet the lives of 3,500 workers and their families and the supporting Youngstown community cannot be dismissed as inconsequential. \textit{United States Steel should not be permitted to leave the Youngstown area devastated after drawing from the life blood of the community for so many years.}

Unfortunately, the mechanism to reach this ideal settlement . . . is not now in existence in the code of laws of our nation.
bility, and has the effect of exacerbating both the monetary and emotional damage which the employees will suffer from job loss.61 The employer reaps a financial benefit from the employees staying on rather than finding new jobs, and often from employee concessions as well. In a legal system which incorporates the premise that there should be no wrong without a remedy,62 placing the economic burden of plant closings on employees, even when the employer’s dealings lack fundamental fairness, cannot be tolerated. Given the increased capital mobility that characterizes the modern economic era,63 it is time to develop a legal theory to deter employer misconduct through the imposition of financial liability. Employers deserve a clear statement of the type of conduct permissible so that they may avoid costly litigation. The emerging cause of action for wrongful discharge, currently eroding the employment-at-will doctrine in many states,64 provides an appropriate starting point.

III
WRONGFUL DISCHARGE

Recent cases indicate growing judicial dissatisfaction with the employment-at-will doctrine. Courts are increasingly willing to protect the employee’s interest in a continuing job, in addition to accommodating the employer’s interest in maintaining control, efficiency and productivity in its business.65 Currently about half the states have deviated from the at-will doctrine and recognized some form of wrongful discharge at common law.66 Grounds for granting relief for wrongful discharge vary

Local 1330, United Steelworkers v. United States Steel Corp., 492 F. Supp. 1, 10 (N.D. Ohio), aff’d as modified, 631 F.2d 1264 (6th Cir. 1980) (emphasis added).
61. See supra text accompanying notes 11-26.
63. See supra text accompanying notes 1-5.
64. It would be better to adapt a cause of action that has arisen out of the rather specialized employment context to remedy employer misconduct in the course of closing businesses, rather than one that arises out of the business context, such as misrepresentation, interference with prospective economic advantage, or unfair competition. See generally Ursin, Judicial Creativity and Tort Law, 49 GEO. WASH. L. REV. 229 (1980) (role of the common law in helping society to adjust its legal institutions to the changed social and economic reality that confronts it). However, there is no reason inherent in the nature of the various business torts that would preclude their adaptation to the employment context if necessary.
66. Perritt, Employee Dismissals: An Opportunity for Legal Simplification, 35 LAB. L.J. 407 (1984). See Employment At Will, supra note 43, at app. B (state-by-state review of wrongful discharge protection or lack thereof). This source indicates that 20 states currently grant relief for discharges in violation of public policy, and 13 states apply a broad reading to employment contracts to include the contents of company personnel manuals or handbooks and employment interviews, as
widely, but the imposition of liability is generally based on one of three rationales: 1) enforcement of employer promises, express or implied, not to discharge for a given time or without just cause, by interpreting the employment contract to conform to the intent of the parties rather than to the dictates of the employment-at-will doctrine;\textsuperscript{67} 2) the employer's breach of the implied covenant of good faith and fair dealing inherent in every contract, including employment contracts;\textsuperscript{68} or 3) the employer's violation of public policy in its motivation for plaintiff's discharge.\textsuperscript{69} This Article now examines these three grounds for wrongful discharge to determine their relevance and applicability to the business closing situation.

A. The Contractual Basis for Wrongful Discharge

1. The Doctrine of "Independent Consideration"

The employment-at-will doctrine has been justified by the notion that mutuality of obligation dictates that if the employee can leave a job at will, then the employer must be free to discharge that employee at will.\textsuperscript{70} If the employee furnished consideration independent of services, however, then such "independent consideration" might be considered adequate to support an employer promise, express or implied, of permanent employment subject to discharge only for cause.\textsuperscript{71} This "independent consideration" could take a variety of forms.\textsuperscript{72} Thus, even within the confines of the employment-at-will doctrine, if the court could find "independent consideration," an employee could recover contractual damages for breach of the implied promise read into the employment contract.

In states which still rigidly adhere to the employment-at-will doctrine, "independent consideration" provides a theoretical basis for

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{67} See, e.g., Note, supra note 32; Note, Job Security, supra note 28.
\item \textsuperscript{68} See, e.g., Comment, supra note 27.
\item \textsuperscript{69} See, e.g., Note, Public Policy, supra note 28.
\item \textsuperscript{70} See supra text accompanying note 38.
\item \textsuperscript{71} See supra text accompanying notes 36-37.
\item \textsuperscript{72} "Independent consideration" sufficient to support an employer promise of permanent employment has included the employee's surrender of a tort claim; the employee's contribution to the employer's business in the form of capital or the bringing in of a special account; the employee's furnishing of special training and expertise at a low cost to the employer over a long term of employment; the employee's sale of a business upon acceptance of a job with the employer; the employee's relinquishing of a good job or favorable opportunity to take a job with the employer; and the employee's reliance on employer recruitment techniques that appeared to assure job security. Note, Job Security, supra note 28, at 352-56 (authorities cited). Regarding the last category, see also A. Corbin, supra note 32, at § 684 (employer who negligently or intentionally misleads employee as to term of service is estopped from terminating employee at will).
\end{itemize}
\end{footnotesize}
awarding contractual damages in certain business closing contexts. For example, if upon the employer's request an employee foregoes another job opportunity in order to prevent the closing of an ailing business, this should provide sufficient "independent consideration" to support any express or implied promise by the employer to keep the business open upon achieving specified levels of productivity, profit or the like. The same reasoning applies if an employee gave any of the other forms of "independent consideration" with the understanding, reasonable in light of the surrounding facts, that such consideration was in support of a promise to stay open if specified goals were reached. Of course, if the employees gave specific concessions in the form of lower wages and/or benefits, less rigid adherence to work safety rules, or any other relinquishment or previous workplace advantages, these concessions could be viewed as consideration independent of the services offered on the previous terms of employment; they are potentially sufficient to support an express or implied, conditional or unconditional, promise of continued operation if productivity goals were attained.

The "independent consideration" doctrine, however, is at best a partial remedy for unfair employer conduct that accompanies a plant closing. An employer could still actively misrepresent an intent not to close, or simply omit mention of plans to close, reap the benefits of a stable workforce, and close by surprise without liability, as long as no "independent consideration" had been received from the employees. In addition, since the doctrine relies on employment-at-will as the normative employment relationship, the courts will vary widely on what will be deemed to constitute "independent consideration," depending largely on their philosophies concerning the at-will doctrine itself.

2. Removal of the Requirement of Mutuality

Modern contract theory, however, emphasizes that the court's function in enforcing all contracts, including employment contracts, is to effectuate the intent of the parties, rather than to substitute the court's judgment as to the adequacy of consideration. Under this theory, the courts should no longer assume that employee services can constitute consideration only for wages and benefits and nothing more. Such an assumption might run counter to the actual intent of the parties. The old categories of "independent consideration" still have important evidentiary value, though, in that any additional employee consideration indicates a greater probability that the parties to the employment contract intended a continuing employment relationship, rather than one termin-

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ble at will.\textsuperscript{74}

Once the employment-at-will doctrine's arbitrary requirement of mutuality of obligation is removed, the courts need no longer strain to find "independent consideration" when termination at will seems to violate the intent of the parties on entering the employment relationship. An employment contract which limits the employer's power regarding termination does not become unenforceable merely because the employee's ability to quit is not similarly limited.\textsuperscript{75} The court's function becomes that of ferreting out the true intent of the parties, as demonstrated by the language of the contract, the purpose to be accomplished by the contract, and the circumstances under which the contract was made.\textsuperscript{76} To determine that intent, the courts have inquired into a variety of factors aside from "independent consideration" that might support an implied-in-fact promise of continuing employment. Factors in individual wrongful discharge cases include: the employer's personnel policies, practices, actions, or communications which reflect assurance of continued employment; the employees' longevity of service; and the prevailing practices within the industry.\textsuperscript{77}

This modern tendency to broaden the judicial inquiry into virtually all facets of the employment relationship reflects the courts' increased awareness of the benefits realized by employers who provide and enforce orderly personnel practices, distribute recruitment materials stressing job security, or undertake other actions which imply an assurance of job security. As the Michigan Supreme Court has observed:

While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. \textit{The employer secures an orderly, cooperative and loyal workforce}, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly.\textsuperscript{78}

This same court went on to conclude that it would be manifestly unfair to permit the employer to gain the benefit of an announced policy without suffering the burden of it as an enforceable promise:

If there is in effect a policy, \ldots the employer may not depart from that policy at whim simply because \textit{it} was under no obligation to institute the policy in the first place. Having announced the policy, \textit{presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force}, the employer may not

\begin{footnotes}
\item 75. \textit{Id.} at 325, 171 Cal. Rptr. at 924 (authorities cited).
\item 76. Drzewiecki, 24 Cal. App. 3d at 703, 101 Cal. Rptr. at 174.
\item 77. Pugh, 116 Cal. App. 3d at 327, 171 Cal. Rptr. at 925-26 & nn.19-22.
\end{footnotes}
treat its promise as illusory.\textsuperscript{79}

To analyze the employment contract in this fashion is merely to remove the preferential treatment given to the employer by the employment-at-will doctrine, and to treat the employment contract like all other contracts.\textsuperscript{80} Courts have long been willing to look into the circumstances surrounding a commercial transaction in order to locate any implied-in-fact promises forming part of the bargain.\textsuperscript{81} If employers want to avoid such promises to their employees, they always have the option of disclaiming any promise of job security, making the at-will nature of the employment promise clear in personnel policies and recruitment materials, and accepting any resulting economic consequences.\textsuperscript{82} American business should no longer need judicial protection at the expense of fairness to employees and is not entitled to be excused from the bargains it has made with employees.

When an employer closes a business for any reason, including claimed insufficient profitability, the courts should still be willing to determine whether promises have been made by the employer for which employees have given consideration\textsuperscript{83} or on which employees have relied to their detriment.\textsuperscript{84} The words and actions of both employer and employees prior to the actual closing should be carefully scrutinized for promises of job security, particularly where employees have granted concessions in the workplace in the hope that the business would stay open. The employer ought to be held to any express or implied assurances of job security given to secure those concessions.

Longevity of employment of all or part of a given workforce is another factor to be considered in determining whether an implied promise was made by the employer not to close the business without some advance notice.\textsuperscript{85} Loyal long-term employees expect, and indeed may be

\textsuperscript{79} Id. at 619, 292 N.W.2d at 895 (emphasis added).
\textsuperscript{80} See A. Corbin, supra note 32, at § 152, at 13-17.
\textsuperscript{81} See id. § 562, at 286-91.
\textsuperscript{82} Toussaint, 408 Mich. at 612, 292 N.W.2d at 891.
\textsuperscript{83} See A. Corbin, supra note 32, at §§ 682-683, at 221-23.
\textsuperscript{84} See id. § 200, at 218-19 & Supp. at 286-87 (1984).
\textsuperscript{85} The California Supreme Court in Pugh included longevity of plaintiff's employment within the list of factors leading it to conclude that the employer's conduct gave rise to an implied promise not to act arbitrarily in dealing with its employees:

Here, . . . there were facts in evidence from which the jury could determine the existence of such an implied promise: the duration of appellant's employment, the commendations and promotions he received, the apparent lack of any direct criticism of his work, the
led to believe, that their jobs are secure. Employer conduct in proceeding with business as usual up to the eve of closing may give rise to an implied-in-fact promise to continue to operate at least for a period of reasonable notice, in exchange for having secured the advantage of an "orderly, cooperative and loyal work force."  

The California Supreme Court has expressed some shock at the sudden discharge with no severance pay of an employee of thirty-two years. Imagine its potential shock at a dismissal of an entire workforce, composed of longtime loyal employees, due to a closing planned some time in advance but not disclosed to the employees until they are all barred from their jobs by security personnel when they come to work one morning. What could have been more reasonable than the assumption
by these longtime employees that their place of employment would still be open on the next working day? It would seem reasonable that they would receive at least two weeks' or one month's notice commonly given prior to terminations for individual cause.

In a wrongful discharge case arising out of a business closing, the jury would determine the contents of the contract of employment after considering all the facts. Common practices in the industry, as well as past employer conduct in that particular workplace, should be legitimate subjects for jury inquiry. Juries and judges alike must act carefully to avoid interference with the legitimate exercise of managerial discretion and to avoid making too costly an employer's basic right to close its business. When a business closes, however, the employer should be held to the financial burdens of its bargains with its employees, as it would be at any other time.

Damages to the employees from broken express or implied employer promises would be measured by traditional contract damage concepts. Employees would usually be entitled to the salaries that they would have earned during the period the employer promised to remain open, less the amount they could have earned by making a reasonable effort to obtain similar employment under another employer.

The burden of proof would be on the employer to show that similar employment could have been obtained by reasonable effort on the part of the employees. If the employee can prove with reasonable certainty any specific injury that the employer could have reasonably foreseen when the implied promise to continue operations at the same location arose, the employer would also be liable for that consequential effect of the breach of its promise.

Courts may be reluctant to impose such damages in the face of employer arguments of unprofitability of the enterprise. Yet an employer is held to the cost of commercial contracts even if an unexpected business


90. See Toussaint, 408 Mich. at 621-24, 292 N.W.2d at 896-97 (description of the jury's function in individual wrongful discharge cases).

91. See, e.g., Pugh, 116 Cal. App. 3d at 327, 171 Cal. Rptr. at 925-26 (industry practices); Toussaint, 408 Mich. at 623-24, 292 N.W.2d at 897 (employer past practice).

92. See, e.g., Pugh, 116 Cal. App. 3d at 330, 171 Cal. Rptr. at 928 (judicial recognition of the importance of allowing an employer substantial scope in exercising subjective judgment in the choice of its managerial and confidential employees).

93. A. Corbin, supra note 32, at § 1095, at 514, 516. See id. at 514-21 (full description of the contract measure of damages normally recoverable by a wrongful discharge plaintiff).

94. Id. at 518.

95. Id. at 519.
failure intervenes making performance of those contracts burdensome, unless a bankruptcy proceeding relieves it of those obligations. As Professor Corbin, the noted contracts commentator, has stated, the same result should prevail when the employer contracts with its employees:

Apparently, not many attempts have yet been made to justify the discharge of an employee on the ground that unexpected events have made the business in which he works very unprofitable. This may be partly because so many employees are employed at will or under a short-term contract. During the long Depression, there were many instances in which employees took voluntary cuts in order to keep the business going and get at least "half a loaf." The risks of business losses are still carried by the capitalist enterpriser, even though caused by unexpected events. His eventual relief from obligations to creditors and employees is the bankruptcy court. 96

The ultimate effect of defining the bargains made between employer and employees during a plant closing only after considering all the circumstances, and then enforcing those bargains despite the closing, would be to encourage fair and open dealings between the parties during that difficult transition. Employers would always be free to share their doubts concerning the continuing viability of the enterprise with their employees while making it clear that the employees' staying on does not in any way guarantee continuing employment. Employees would then be free to make better informed decisions about their futures. Society's adjustment to the concurrent phenomena of increased capital mobility and decreased mobility of the labor force might be made a little easier.

Some commentators apparently believe that full enforcement of employment contracts would afford sufficient relief from the harsh effect of improper employer practices, even if damages were limited to traditional contract measures, so long as the courts take wide latitude to establish contract terms from all logical sources and apply the same standards of judicial review used when contracts between parties of unequal bargaining power affect the public interest. 97 The closing context, however, is one where large groups of employees and entire communities are profoundly affected by employer misconduct, whether or not the employer disclaims any promise of continued employment. Thus it is appropriate to examine the possibility of tort liability under the two remaining grounds of wrongful discharge, both of which sound in tort.

96. A. CORBIN, supra note 32, at § 1361, at 495-96 (citation omitted) (emphasis added).
97. See, e.g., Rohwer, Terminable-At-Will Employment: New Theories for Job Security, 15 PAC. L.J. 759 (1984). Note that certain technical aspects of hornbook contract law, such as the parol evidence rule and statute of frauds requirements, may have to be modified to afford proper contractual relief to the wrongful discharge victim. See, e.g., Brawthen v. H. & R. Block, Inc., 28 Cal. App. 3d 131, 104 Cal. Rptr. 486 (1972).
B. The Implied Covenant of Good Faith and Fair Dealing

In some employment cases, courts have tempered the rigidity of the employment-at-will doctrine by finding an employer breach of the covenant of good faith and fair dealing, said to be present in every contract. This covenant has been described as creating a duty that is unconditional and independent in nature. In essence, it states that neither of the parties to a contract will do anything which would injure the right of the other to receive the benefits of the agreement.

There are good reasons for the courts to turn to the implied covenant of good faith and fair dealing to grant relief in the employment context. Judicial enforcement of this covenant injects a measure of minimal fairness into the employment-at-will relationship, without requiring courts to overturn the employment-at-will doctrine itself. The covenant of good faith and fair dealing operates even when examination of the factual circumstances surrounding the employment contract yields no express or implied-in-fact employer promise not to engage in the conduct alleged to lack good faith. For example, a court may grant recovery when an employee has been terminated just before she or he was to receive deferred benefits that were part of the employment contract, even though the employment relationship was terminable at the will of either party.

An important aspect of this doctrine is that breach of the implied covenant of good faith and fair dealing in the employment context has been interpreted to give rise to tort damages. Tort damages are con-
siderably more extensive than contract damages, and allow the plaintiff to be compensated for damages beyond those which are ascertainable and foreseeable when the contract was entered into, including emotional distress and other intangible losses. Juries can also award punitive damages to punish a defendant for egregious misconduct, whereas punitive damages are not permitted in actions for breach of contract.

Unlike a commercial contract, the ordinary employment contract is often not a written document signed by both parties. Nor does it usually represent an arms-length transaction between parties of equal bargaining power. The employee is often dependent on the existence of the contract for economic survival, while the employer generally has a large labor supply from which to choose. Thus, the employer usually has an economic advantage over the employee, especially in times of high unemployment. The parties to the contract are actually entering into a complex relationship with one another, which is often characterized by a multitude of terms, both explicit and implicit. Given these characteristics, strict enforcement of an implied covenant of good faith and fair dealing is appropriate in the employment context precisely because the

839, 846 n.12 (1980), indicating that the California Supreme Court would extend tort remedies to breaches of the implied covenant of good faith and fair dealing in the employment context. See Seaman's Direct, 36 Cal. 3d at 769 n.6, 686 P.2d at 1166 n.6, 206 Cal. Rptr. at 362 n.6 (citing Tameny with approval). But see Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977) (where the Massachusetts Supreme Court expressly declined to award tort damages in a wrongful discharge case, despite its use of the theory of breach of implied covenant of good faith and fair dealing).

105. Where the defendant's wrongdoing has been intentional and deliberate and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award in the tort action "punitive" or "exemplary" damages. . . . Such damages are given to the plaintiff over and above the full compensation for the injuries, for the purposes of punishing the defendant, or teaching the defendant not to do it again, and of deterring others from following the defendant's example.

PROSSER, supra note 31, at 9 (citation omitted).
106. See supra note 93.
107. No longer can unionists grumble about living with constant levels of unemployment that hover between 4% and 5% of the workforce. Between 1947 and 1970 unemployment rates varied from a low of 2.9% in 1953 to a high of 6.8% in 1958, dipping and then climbing again to 4.9% in 1970. UNITED STATES BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 135 (1976). Since 1970, the rates have not gone below 5.5%; in 1982, 9.5% of all American workers were unemployed. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES 374 (1982).
108. E.g., that which is said or written about wages, hours, benefits, working conditions, and personnel practices.
109. E.g., those practices which are actually followed concerning wages, hours, benefits, working conditions, personnel practices, and the multitude of other details that govern operations within a given workplace. The aggregate of these work rules is often referred to by arbitrators and labor law commentators as the "common law of the shop." See R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 585 (1976). There is thus a large body of developed arbitral law which could guide the civil courts in developing a legal approach more suitable to the reality of the employment context than a strict contractual analysis. See infra text accompanying notes 160-70.
employment relationship is rife with opportunity for unfair employer conduct.\textsuperscript{110} Like the insurance contract,\textsuperscript{111} the employment contract is one infused with broad public concerns requiring protection of the weaker party from unfair conduct by the stronger.

Within the context of business closings, an employer breach of the implied covenant of good faith and fair dealing should be found when the employer keeps secret its plans to close the workplace until an unreasonably short time before the closing, thereby giving employees insufficient advance notice to plan for their financial futures. Similarly, when the employer knows or should know that it will close despite increased employee effort or productivity, any false assurances of job security should be deemed violative of the implied covenant of good faith and fair dealing whether or not they rise to the level of enforceable promises. In both of these situations, the employer has an informational as well as an economic advantage over the employees. The concealment of information so key to employees' economic survival injures their right to receive the primary benefit of the at-will employment contract, namely the freedom to leave the position at any time. The workers would be far more likely to exercise that right if they knew the plant was about to close.

By its nature, the covenant of good faith and fair dealing will be breached only by seriously unfair conduct by the employer.\textsuperscript{112} When such employer misconduct occurs in the closing context, the resulting damage to employees and the surrounding communities is sufficiently severe, and the fault of the employer sufficiently high, that the financial risks of capital mobility should be spread to include the employer. Contract damages would not sufficiently spread the risk, since the employer would not be liable for the full measure of damages suffered by the employees. Also, punitive damages should be available in appropriate situations to deter egregiously unfair employer conduct in closing its place of business. The requirement of employer fair conduct implicit in the covenant of good faith and fair dealing has sufficient content and flexibility to serve as an appropriate substitute for the at-will doctrine, both in continuing businesses and in closing situations.\textsuperscript{113}

\textsuperscript{110} See Comment, supra note 27, at 1141-43.

\textsuperscript{111} For cogent judicial analyses setting forth the reasons that insurance contracts require vigorous application of the implied covenant of good faith and fair dealing, giving rise to tort damages, see Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967); Communale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958).

\textsuperscript{112} The California Supreme Court described the defendant's conduct in a case where the implied covenant of good faith and fair dealing was breached: "Such conduct goes beyond the mere breach of contract. It offends accepted notions of business ethics." Seaman's Direct, 36 Cal. 3d at 770, 686 P.2d at 1167, 206 Cal. Rptr. at 363.

\textsuperscript{113} See infra text accompanying notes 152-69.
C. The “Public Policy Exception” to the Employment-At-Will Doctrine

Many of the courts which declined to apply the employment-at-will doctrine to a particular situation did so because the employer’s discharge of the plaintiff violated a public policy of the jurisdiction in which the discharge occurred. This basis for allowing recovery for wrongful discharge is commonly known as the “public policy exception” to the employment-at-will doctrine. The weakness in this doctrine stems from the difficulty of precisely defining the parameters of public policy which impact on wrongful discharge liability.

1. Statute as Public Policy Source

Public policy wrongful discharge cases have generally involved employer conduct which violates a policy embodied in a state statute or regulation. One commentator has divided the cases into three broad categories: 1) those where the employee is fired for refusal to commit an unlawful act; 2) those where the employee is fired for performing an important public obligation, such as jury duty or “whistle-blowing” on illegal employer conduct; and 3) those where the employee is fired for exercising a statutory right or privilege, such as filing a worker’s compensation claim. All three of these categories involve public policy grounded in state substantive law, whether it be 1) state criminal laws; 2) state laws creating public obligations such as jury service or regulating employer conduct, violations of which the employee is attempting to report; or 3) state laws creating a right or privilege, such as the right to file a worker’s compensation claim. The state statute involved, however, need not explicitly prohibit the discharge of a worker on the public policy grounds embodied in the statute. In fact, the public policy wrongful

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114. See generally Note, Public Policy, supra note 28; Note, Guidelines for a Public Policy Exception to the Employment at Will Rule: The Wrongful Discharge Tort, 13 CONN. L. REV. 617 (1981); Note, Defining Public Policy Torts in At-Will Dismissals, 34 STAN. L. REV. 153 (1981). Within the last 10 years, courts in nine states have recognized the public policy exception, 16 more have indicated a willingness to move in that direction, and only nine have flatly rejected it. See Shepard & Moran, “Wrongful” Discharge Litigation, ILR REP. 26-29 (Fall 1982).

115. See Justice Grodin’s cautionary note in a California district court of appeal case resulting in wrongful discharge relief on public policy grounds: “We are mindful of the restraint which courts must exercise in this arena, lest they mistake their own predilections for public policy which deserves recognition at law.” Hentzel v. Singer Co., 138 Cal. App. 3d 290, 297, 188 Cal. Rptr. 159, 163 (1982).

117. Id. nn.50-52.
118. Id. nn.53-54.
119. See Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959). Petermann was cited with approval in Tameny, the seminal wrongful discharge case in California:

Thus, Petermann held that even in the absence of an explicit statutory provision prohibiting the discharge of a worker on such grounds, fundamental principles of public policy and adherence to the objectives underlying the state’s penal statutes require the recognition of a
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Discharge cases do not generally involve statutes that refer directly to employee discharge.

Thus, in the few states which regulate business closings by requiring advance notice to employees or other employer action regarding employee rights, employer conduct during a closing which contravenes these statutory guarantees ought to give rise to wrongful discharge liability to the employees involved. For example, a closing without the advance notice required by statute should give rise to a wrongful discharge cause of action for employees injured by the lack of notice of impending job loss. Employees should not be required to prove improper employer motive for their discharges. The basis of the wrongful discharge would be that the employer's failure to give notice violated the public policy embodied in the statute. Under ordinary negligence law, a defendant's violation of a statute intended to protect the class of persons to which the plaintiff belongs from the type of harm which occurs as a result of the violation generally gives rise to a presumption of negligence per se. Although the area of wrongful discharge is usually one of intentional or prima facie tort, similar considerations should govern.

Public policy wrongful discharge cases should give rise to full tort liability. Liability is based on the employer's violation of a duty imposed by society through legislation embodying and reflecting an underlying public policy. Thus, the full panoply of tort damages should be available barring an employer from discharging an employee who has simply complied with his legal duty and has refused to commit an illegal act.


120. As of 1982, only four states had passed legislation directly addressing the need to soften the impact of business closings on the workers and communities left behind: Maine (statute requires businesses employing 100 or more people which plan to relocate to give 60 days' notice to employees and municipal officers of the town where the business is located, and severance pay to employees when a business is relocated 100 or more miles), Wisconsin (statute requires that businesses give the State Labor Department 60 days' notice of merger, liquidation, relocation or closure), Rhode Island (statute merely requires that closing employers pay outstanding wages and benefits within 24 hours of dismissing the workers) and New Jersey (statute requires that the state legislature study and possibly assist employee plans to acquire operations slated for shutdowns). Labor Relations in an Economic Recession: Job Losses and Concessions Bargaining, News and Background Information, Part II, 110 LAB. REL. REP. (BNA) No. 23, at 56-57 (July 19, 1982).

121. PROSSER, supra note 31, at 229-30.


123. The California Supreme Court drew this conclusion in the Tameny case based on the following reasoning:

[We] conclude that an employee's action for wrongful discharge is ex delicto and subjects an employer to tort liability. . . . [A]n employer's obligation to refrain from discharging an employee who refuses to commit a criminal act does not depend upon any express or implied "promise[s] set forth in the [employment] contract" but rather reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes. As such, a wrongful discharge suit exhibits the classic elements of a tort cause of action. As Professor Prosser has explained: "[W]hereas contract actions are created to protect the interest in having promises performed," "[t]ort actions are created to protect the interest in freedom from various kinds of harm. The
able to the plaintiffs in such cases. In the example of the employer failing to give advance notice of a closing despite a statutory notice requirement, the employees would be entitled to relief for all damages caused by the lack of notice, including emotional distress and other intangible injuries, and to punitive damages, where appropriate.124

Only four states currently have statutes that explicitly protect the employees’ interests in the business closing situation.125 Strong business lobbies are likely to continue to prevent significant legislative regulation of this sort.126 Therefore, the wrongful discharge plaintiff’s lawyer will have to search the state’s statutory scheme for other sources of public policy. The following are some possible state public policy grounds which might support wrongful discharge claims arising out of plant closings. These examples are not intended to be an exhaustive list.

First, an employer’s negotiation of a collective bargaining agreement without informing its employees of its intent to close during the term of that agreement might violate the public policy behind a state statute encouraging the practice of collective bargaining.127 Since true collective bargaining cannot occur without access to information key to both sides’ respective positions at the table, the employer’s withholding of its intention to close might be interpreted as an attempt to undercut the public policy of promoting collective bargaining.128

Second, a particular employer might have been granted certain tax advantages authorized by state law as an incentive to locate within the state’s boundaries. If the employer then closes or moves out of state with no notice to employees or the surrounding community, after having reaped the benefits of those advantages, such action may give rise to wrongful discharge liability on the theory that it violates the public policy embodied in the statutory financing scheme.129

duties of conduct which give rise to them are imposed by law, and are based primarily upon social policy, and are based primarily upon the will or intention of the parties . . . .”
124. PROSSER, supra note 31, at 1029. Note that damages for emotional distress in this situation are not easily recoverable on any other theory. Intentional infliction of emotional distress requires extreme and outrageous misconduct by the defendant not generally present during plant closings. See id. at 60-63. Negligent infliction of emotional distress is a newly emerging tort; the few jurisdictions allowing recovery without a requirement of physical injury have not discussed the employment context. See id. at 361-67.
125. Maine, Wisconsin, Rhode Island, and New Jersey. See supra note 120 for further detail on the content of these statutes.
127. E.g., CAL. LAB. CODE § 923 (West 1976).
Third, state law might require an employer to file environmental impact statements before relocating an industrial facility. An employer could arguably be liable for wrongful discharge if it terminated employees at its prior site before meeting those statutory requirements.\textsuperscript{130}

Finally, lack of advance notice might violate the public policy underlying a statute which defines an employment contract that does not state a specific term of employment as terminable at the will of either party \textit{upon notice} to the other.\textsuperscript{131} In state courts amenable to public policy wrongful discharge cases, creative arguments may thus find their source in a wide variety of legislative enactments.

2. \textit{Other Sources of Public Policy}

Although the majority of "public policy exception" cases have relied on a fairly specific public policy embodied within the state statutory scheme, not all cases have been so limited. Some cases support a broader basis for public policy wrongful discharge liability in the closing context. A few cases found the necessary public policy embodied in state statutes cast in the most general terms.

For example, in \textit{Sherman v. St. Barnabas Hospital},\textsuperscript{132} a federal district court denied an employer's motion to dismiss a wrongful discharge suit where the plaintiff alleged that he had been discharged for resisting union pressure to place an employee on a shift where she was not needed. The court reasoned that the union demands violated the public policy embodied in a section of the New York Public Health Law declaring that "hospital and related services . . . efficiently provided and properly uti-
lized at a reasonable cost, are of vital concern to the public health.” 133 Thus, a discharge for refusal to bow to union pressure would have been improper and contrary to public policy, and, if proven, could therefore give rise to liability. 134

Similarly, in *Hentzel v. Singer Co.*, 135 a California court of appeal reversed the trial court’s grant of a demurrer to a complaint alleging discharge in retaliation for plaintiff’s protest against hazardous working conditions caused by co-employees’ smoking. Justice Grodin based his result in part on the broad public policy embodied in a state statute which set out the right of employees to designate representatives and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. 136 Justice Grodin noted that the statute had previously been read to protect courses of conduct engaged in by individual employees. 137 This reasoning finds the necessary public policy in a very broad reading of a statute, and links it to the facts of the given case. Perhaps even more importantly, it expands possible sources of state public policy to include the judicial decisions interpreting a particular statute or statutory scheme. 138

The case of *Palmateer v. International Harvester Co.* 139 provides further support for the notion of a broad range of possible public policy sources. There the plaintiff alleged that he was fired for informing local law enforcement authorities that a fellow employee might be committing criminal acts and for volunteering to assist in the investigation and trial of the co-worker if requested. 140 The Illinois Supreme Court reversed the lower court order granting the employer’s motion to dismiss; it held that in view of the clear public policy favoring investigation and prosecution of criminal offenses, the plaintiff had stated a cause of action for retaliatory (or wrongful) discharge. 141 This is classic “public policy exception” reasoning. The public policy relied upon is grounded in the criminal

133. *Id.* at 572. The relevant portion of the statute is set forth *id.* at n.11.
134. *Id.* at 572. The full reasoning is as follows:

It would have been improper and against public policy for the plaintiff to accede to the Union’s demands. It follows that it would be improper and contrary to public policy for the Union to retaliate against the plaintiff for exercising his public duty and for the Hospital, in turn, knowingly to yield to this retaliation. In such circumstances, the Hospital’s actions could be said to amount to a retaliatory discharge.

*Id.*

138. Justice Joseph Grodin, now sitting on the California Supreme Court, recognizing the broad ramifications of his reasoning, also grounded his holding in various state legislative enactments that demonstrated the legislature’s concern with the safety of employees in the workplace. *Id.* at 297-98, 188 Cal. Rptr. at 163-64.
139. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).
140. *Id.* at 127, 421 N.E.2d at 887.
141. *Id.* at 133, 421 N.E.2d at 880.
statute that the co-employee might have violated. The court reasoned that by enacting the criminal statute, the state legislature wished to protect citizen efforts to unearth violations of that statute.142

Significantly, however, the Illinois Supreme Court prefaced this specific public policy reasoning with a more expansive definition of public policy:

With the rise of large corporations conducting specialized operations and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic. In addition, unchecked employer power, like unchecked employee power, has been seen to present a distinct threat to the public policy carefully considered and adopted by the society as a whole. As a result, it is now recognized that a proper balance must be maintained among the employer’s interest in operating a business efficiently and profitably, the employee’s interest in earning a livelihood, and society’s interest in seeing its public policies carried out.

... But what constitutes clearly mandated public policy?

There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State’s constitution and statutes and, when they are silent, in its judicial decisions.143

The inclusion of judicial decisions as possible sources of the public policy violated by an employer decision to discharge, seen in both Hentzel and Palmateer, is significant because it allows the public policy exception to grow along with the common law. This case-by-case definitional process is, of course, the way most modern tort law has developed, and there is no reason why wrongful discharge within the closing context should be an exception.

The notion of relying on judicial decisions for guidance about appropriate public policy has potentially broad ramifications for the area of business closings, where discharges have not been subject previously to keen judicial scrutiny. Employer misrepresentations concerning its plans to close, for example, whether made intentionally or negligently, could be deemed to violate the state public policy embodied in prior judicial decisions concerning misrepresentation, promissory estoppel or unjust enrichment. In those decisions, the courts tried to draw the line between acceptable and unacceptable business practices in a legal system valuing competition and free enterprise. Similarly, closing with no advance notice to employees could be deemed to violate the state public policy embodied in prior judicial decisions concerning nondisclosure in the commercial context. In those decisions, the courts tried to determine what facts a seller must disclose to a buyer, consistently emphasizing the

142. See id. at 132-33, 421 N.E.2d at 879-80.
143. Id. at 130-31, 421 N.E.2d at 878 (emphasis added).
tortious quality of half-truths and uncorrected statements rendered untrue or misleading by subsequently acquired new information. These areas of the law can provide principles delineating acceptable from unacceptable employment practices.

This identification of a wide range of possible public policy sources on which to premise wrongful discharge liability is consistent with the California Supreme Court's seminal case on the tort of wrongful discharge, *Tameny v. Atlantic Richfield Co.* The court clearly stated that the source of public policy was not to be limited to statutes:

Over the past several decades . . . judicial authorities in California and throughout the United States have established the rule that under . . . common law . . . an employer does not enjoy an absolute or totally unfettered right to discharge even an at-will employee. In a series of cases arising out of a variety of factual settings in which a discharge clearly violated an express statutory objective or undermined a firmly established principle of public policy, courts have recognized that an employer's traditional broad authority to discharge an at-will employee 'may be limited by statute . . . or by considerations of public policy.'

The question remains, then—what is the full scope of the "public policy exception" if it is not to be limited to a state's specific legislative enactments or even to its judicial decisions? The *Palmateer* court's notion that public policy is to be found by asking "what is right and just and what affects the citizens of the state collectively" has been echoed in at least two other wrongful discharge cases. In *Petermann v. International Brotherhood of Teamsters*, relied upon by the California Supreme Court in *Tameny*, a California district court of appeal stated:

"The term 'public policy' is inherently not subject to precise definition. . . ." By "public policy" is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good . . . .

In 72 Corpus Juris Secundum, at page 212, it is stated that public policy "is the principles under which freedom of contract or private dealing is restricted by law for the good of the community. Another statement, sometimes referred to as a definition, is that whatever contravenes good morals or any established interests of society is against public policy."

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144. *See Prosser, supra* note 31, at 737-40.
145. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).
146. Id. at 172, 610 P.2d at 1332-33, 164 Cal. Rptr. at 841-42 (emphasis added) (citations omitted) (quoting *Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959) (discharge for refusal to commit perjury)).
Finally, in *Monge v. Beebe Rubber Co.* the New Hampshire Supreme Court granted relief to an employee discharged as part of a pattern of sexual harassment, apparently not illegal at the time, based on a very broad definition of public policy explicitly incorporated into the court's holding:

In all employment contracts, whether at will or for a definite term, the employer's interest in running [the] business as [it] sees fit must be balanced against the interest of the employee in maintaining [her] employment, and the public's interest in maintaining a proper balance between the two. *We hold that a termination by the employers of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good.* . . .

3. *Converging Wrongful Discharge Doctrines*

It is clear from these broad definitions of public policy that the "public policy exception" could swallow up the employment-at-will "rule." It is also clear that if, following *Monge*, a violation of public policy is to be equated with employer bad faith (which often includes broken promises), then the three branches of wrongful discharge doctrine—implied-in-fact contract principles, implied covenant of good faith and fair dealing, and public policy—begin to converge.

In plant closing situations, an employer's securing of employee concessions based on false assurances of job security, followed by closing and elimination of the employees' jobs, could be deemed a wrongful discharge under any one of the three theories. The employer conduct could be construed as an implied promise not to close if the goals were reached, at least without the notice deemed reasonable under the circumstances. The employer's conduct could be deemed to violate the fundamental no-
tion of good faith between the parties inherent in every contract, embodied in the covenant of good faith and fair dealing. Finally, the labor statutes of the particular jurisdiction could be read as indicating a legislative public policy that employees not be lied to by their employers as they face sudden job loss due to capital mobility. If the possible sources of public policy have been extended to include the state's judicial opinions, prior case law on wrongful discharge or other business torts could serve as a basis for characterizing this employer misconduct as tortious.

Similarly, a closing with no advance notice could be characterized as breaking an implied promise to stay open for a reasonable amount of time under the particular circumstances, as being so unfair that it violates the covenant of good faith and fair dealing, or as violating public policy, particularly under the broad definitions contained in the Palmateer, Petermann, and Monge cases.

IV
A NEW STANDARD

The degree of overlap between the theories eroding the employment-at-will doctrine, combined with the sweeping nature of each of the theories taken alone, indicates that it is time for the courts to abandon employment-at-will altogether. This doctrine has been the subject of comprehensive criticism for years now, both by legal scholars and by judges in the context of individual cases. The courts created the employment-at-will doctrine during an historical era in which a primary function of the common law was to protect developing industry. It is fully appropriate now, in an era of sophisticated and large-scale industrial enterprise, that the courts take the lead in dismantling this common law creation and substituting new principles of employer conduct that more fully protect the individual employees in their dealings with the large enterprises for which they are likely to work.

153. For example, the courts could construe legislative schemes regulating minimum wages and working conditions of employees to embody a legislative public policy favoring fair treatment of employees by their employers.

154. See, e.g., supra notes 45-46.


156. See Prosser, supra note 31, at 452. The authors conclude that the chief factor motivating the application of the contributory negligence doctrine to bar plaintiffs' recovery was the "uneasy distrust of the plaintiff-minded jury which grew upon the courts in the earlier part of the nineteenth century, and a desire to keep the liability of growing industry within some bounds." The authors go on to say: "The history of the doctrine has been that of a chronic invalid who will not die." Id. at 453. Thus, contributory negligence as a bar to recovery was still in full force in 1877, when Horace Wood originated the American employment-at-will doctrine. See supra text accompanying notes 27-33.

The employment-at-will doctrine is the last survivor of the major common law doctrines clearly favoring the employer over the employee. The "unholy trinity" of common law defenses—contributory negligence, assumption of risk, and the fellow-servant rule—any one of which completely barred recovery for workplace injuries, has been abrogated by the enactment in all fifty states of no-fault workers' compensation systems. The uniform characteristic of these systems is the guarantee of relatively certain, although limited, recovery by employees injured in the workplace. Even where fault concepts are still involved in a suit, due to possible third party liability, the financial risk of injury is spread among all parties at fault in the forty states that had adopted a comparative negligence system as of 1982. In these states plaintiff's recovery is diminished by his or her percentage of fault, rather than barred completely. Yet, the employment-at-will doctrine, to the extent that it has not been eroded, still operates to require the employee to shoulder the full risk of job loss due to capital mobility, even in situations where the employer has clearly acted unfairly.

Employers can and should be held to a consistent standard of fundamental fairness when they deprive employees of jobs which often comprise their entire livelihood. All three of the theories of wrongful discharge emphasize this basic notion. The implied contract theory

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158. PROSSER, supra note 31, at 526-74.
159. Id. at 471.
160. Loss of a job can be as devastating a blow to the individual employee as injury by a defective product is to the individual consumer. There are striking parallels between the state of common law right before Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), as it strained against anachronistic limitations to afford recovery to injured consumers in an age of mass marketing, and the state of the common law now, as it strains against the anachronistic at-will doctrine to provide relief to employees wrongfully discharged in an age of large-scale industry and capital mobility. The legal devices which often barred plaintiff's recovery in products liability cases were being chipped away when the California Supreme Court set out a new basis of liability in Greenman, reasoning that since prior decisions had in effect already arrived at a new theory, it was time to name and define it directly. The at-will doctrine is now at a comparable state of demise.

By 1963, when Greenman was decided, liability in negligence no longer required privity between plaintiff and defendant. See PROSSER, supra note 31, at 681-83. Some courts were stripping the warranty doctrine of its requirements of privity and notice, and disallowing defendant disclaimers of liability. See id. at 690-92. Yet the old limitations on recovery still had a powerful impact; in Greenman the manufacturer argued that the plaintiff, who had been injured by a defective power tool, should be barred from recovering because he had not given notice to the manufacturer of the breach of warranty within reasonable time. Greenman, 59 Cal. 2d at 60-61, 377 P.2d at 899-900, 27 Cal. Rptr. at 699-700.

Chief Justice Traynor, speaking for a unanimous California Supreme Court, first held that the notice requirement was not appropriate in a case which involved personal injury and notice to a remote seller. Id. Instead of stopping there, however, and simply reinstating plaintiff's jury verdict, Chief Justice Traynor went on to declare that the abandonment of the privity requirement for warranty, and the refusal of courts to allow manufacturers to disclaim liability for defective products, "make clear that the liability is not one governed by the law of contract warranties, but by the law of strict liability in torts." Id. at 61-63, 377 P.2d at 901, 27 Cal. Rptr. at 701.
evinces an increasing judicial willingness to imply promises from the entire context surrounding a given employment contract, indicating that the courts want employers to live up to the expectations that the employers have generated. This is a concept of fundamental fairness. It rests, however, on a minute examination of the individual employment context in an age when employers regularly make decisions that affect hundreds and thousands of employees. It allows employers, generally large entities looking for labor in a market that has come to tolerate long-term endemic unemployment,161 to disclaim any promise of stable employment, and even to disclaim the notion that the employment relationship will be governed by fairness. Such disclaimers may not prevent an employer from securing its necessary work force, but they will often result in employee job loss in circumstances that lack basic fairness.

The "public policy exception" to the employment-at-will doctrine is potentially adequate as a theory of employer conduct that has the necessary vision and breadth, particularly when "it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively."162 The problem with the "public policy exception," however, is that the concept of public policy itself is vague and slippery. Many courts will limit their search for an embodiment of public policy to state statutes and, if they fail to find it there, will declare that the employer conduct involved does not violate public policy.163 As long as the "public policy exception" is set against the backdrop of the court-created employment-at-will doctrine, it will be at best a makeshift solution to the problem of wrongful discharge:

But the Achilles heel of the principle lies in the definition of public policy. When a discharge contravenes public policy in any way the employer has committed a legal wrong. However, the employer retains the right to fire workers at will in cases "where no clear mandate of public policy is involved."164

The third theory of wrongful discharge, breach of the implied covenant of good faith and fair dealing, has the most promise as a source of a consistent and fair doctrine of employer responsibility, recognizing "that a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out."165 "Good faith and fair dealing" implies that an employer is required to treat its employees in a manner that a civilized society can countenance for important interactions between its citizens. It is a stan-
standard that suggests that an employee should not lose an individual job in the absence of individual just cause, a flexible and well-developed concept that has already received extensive treatment in the collective bargaining context. The standard of good faith and fair dealing also suggests, however, that even when an employer feels compelled to cut back its workforce due to low profitability or productivity, the employer must conduct the discharge in a manner that comports with basic fairness.

Fairness, like negligence, is a standard that, while amenable to legal definition on a case-by-case basis, also rests on an intuitive common sense assumption that the average juror can understand it and apply it to the facts at hand. Jurors know that employers must have the flexibility necessary to run a profitable business, even when this means that employees must lose their jobs. But jurors can also be expected to know, perhaps from their own experience, that some employer conduct is out-of-bounds because it is simply not fair. When that happens, they will assess damages accordingly. This is as it should be—the new standard for employer conduct, breach of which will constitute wrongful discharge, should be one that employers, employees, and jurors alike can understand and apply. In the short run, a standard of fairness extracted from the covenant of good faith and fair dealing would spread the risk of job loss from economic factors to employers, at least when the employer responds to these factors in a fashion that is unfair to its employees. In the long run, such a standard would help deter such an unfair employer response.

For example, returning to the hypothetical of an employer who closes after extracting concessions from employees, if a jury found that the closing was planned all along, or that employees received little or no advance notice of the final decision to close, it would probably conclude that this conduct lacked fairness. A jury should be allowed to make a similar finding in the situation where an employer closes unexpectedly with no notice at all to its employees, if it feels the particular circumstances warrant the conclusion. If this approach is adopted, the employer's conduct would breach a duty that the society, through its common law process, deemed owed by all employers to their employ-

166. See, e.g., Stickler, Limitations on an Employer's Right to Discipline and Discharge Employees, 9 EMPL. REL. L.J. 70 (1984); Dunlevy, Employee Discipline, Suspension or Discharge, "For Cause." 5 WHITTIER L. REV. 395 (1983).

167. Again, it is instructive to study the development of the new theory of strict liability in tort, originated in Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), that now permits consistent compensation for plaintiffs injured by defective products, for guidance as to the basic nature of this common law process. Greenman, a landmark opinion, was only the beginning of the modern and complex tort theory of products liability. Strict liability in tort has greatly expanded the potential financial liability of manufacturers and those in the product's distributive chain, giving rise to a predictable spate of criticism that the judicial creators and proponents of the new theory overstepped the bounds of their proper roles. See, e.g., McClung, In Defense of Reasonableness: A Critical Analysis of Monolithic Theories of Tort Liability, 22 S. TEX. L.J. 1 (1982); Schwartz & Bares, Federal Reform of Product Liability Law: A Solution That Will Work, 13
ees, regardless of the particular prevailing contractual terms.

In both of these situations, the breach would give rise to a cause of action in tort, rather than in contract. The employees who suffered as a result of this conduct would be compensated for actual loss, rather than a limited loss based on the contract notion that the only damage is that of temporary lost wages in a job market where the worker can be expected to quickly find another job. Of course, if the worker can soon get a new job, the actual damage from the employer's wrongful conduct is quite minimal. But in today's economy that worker may very well never secure an equivalent position. The doctrine of avoidable consequences that limits tort damages would be available to curb any employee conduct that pushes damages to an artificially high level. In the interest of deterrence, punitive damages should be available when appropriate.

Employers will immediately object that any application of the doctrine of wrongful discharge to a situation involving a business closing will unduly hamper mobility of capital and inhibit the entrepreneurial spirit. All this doctrine would inhibit, however, is unfair conduct toward employees in the course of closing, conduct which ought to be deterred. As for employers who cannot afford to relocate unless they treat their employees unfairly, these relocations are based on such marginal financial considerations that their inhibition can be expected to be useful, rather than detrimental, to the economy. To the extent that the cost of this suggested wrongful discharge liability is passed on to the consumers, perhaps market mechanisms will work to eliminate products whose profit is generated by such shoddy employment practices. To the extent that the loss is insurable, perhaps the insurance companies will use their formida-

Cap. U.L. Rev. 351 (1984). In fact, the opponents of this new turn at common law are seeking legislative action both on a state and national level that would transform the area into one governed by statute and sharply reduce industry's liability. See, e.g., id.; Smith, Uniform Product Liability Law—But On Whose Terms? 5 Cal. Law. 34 (Jan. 1985). Perhaps their well-organized lobbying efforts will succeed, and in that event the courts' function would shift to one of definition and enforcement of legislative intent, as long as the statute enacted did not contravene any state or federal constitutional guarantees.

In the meantime, however, the political initiative necessary to secure a change in the law has shifted from an undefined interest group of potentially injured plaintiffs that could not even be identified, let alone unified into an effective lobby, to an interest group of highly-organized commercial entities who constitute actual and potential defendants in products liability suits. The common law process, which had been the major source of the pre-existing obstacles to plaintiffs' recovery, has now adjusted to the modern level of economic development, mass advertising, and technological complexity that by 1963 had revolutionized the terms of the bargains made between consumer and seller. It is time for a similar adjustment to replace the employment-at-will doctrine. Such a development would be proper within the terms of our legal system, which has assigned policy roles to both the judicial and legislative spheres. See Ursin, Judicial Creativity and Tort Law, 49 Geo. Wash. L. Rev. 229 (1980).

168. See supra text accompanying notes 103-06.
169. See supra text accompanying notes 11-26.
170. See Prosser, supra note 31, at 458.
ble resources to encourage employers to eliminate employment practices that are fundamentally unfair to their employees.

The time has come for the anachronistic employment-at-will doctrine to fall. Employers should be liable in tort when they discharge employees in a manner that lacks good faith and fair dealing. That liability should attach when group discharges are part of a business closing or other major shift of operating capital, as well as when only individual discharge is involved. Society's contemporary standards of ethics and morality in the context of a free enterprise system dictate that such discharges are wrongful. It is logical and just that these wrongful discharges be deterred, and their victims compensated.

**Conclusion**

Economic factors concerning rate of profit and productivity often dictate employer decisions to close operations at a given location and to terminate the employees working there. Historically, this fact has obscured the equally compelling consideration that employers have a legal and moral obligation to deal fairly with employees, even as they are forced out of business. There is no reason in a free enterprise system to permit employers to lie or to conceal the essential facts from their employees, thereby causing the burdens of capital mobility to fall disproportionately on those who lose their jobs. The legal analysis necessary to reach the desired result of compensation for employees damaged by unfair employer conduct in the closing situation, as well as in other aspects of the employment relationship, has until now been unduly hampered by the anachronistic employment-at-will doctrine. The emerging tort of wrongful discharge, however, contains at least three separate analytical threads, all of which can and should be used by plaintiffs to get compensation when they have been treated unfairly in the closing context.

The employment-at-will doctrine, already riddled with exceptions, is unsuited to our age of large and powerful business enterprises. It is time for state court judges to fashion a comprehensive doctrine of wrongful discharge that is no longer haunted by the vestiges of the employment-at-will rule. Employers should owe their employees a duty to treat them with fundamental fairness, and if they fail to do so to the detriment of their employees, they should be liable in tort for wrongful discharge. Within the context of plant closings, this means that plaintiffs who plead and prove that their employers either actively misrepresented or failed to disclose essential facts during the process of closing, or gave their employees false assurances of job security, or closed their businesses with so little notice that their conduct was unreasonable under the circumstances, should be fully compensated for the damage, emotional and physical as well as economic, caused thereby. Finally, employers who
Engage in egregious misconduct toward their employees while closing their businesses should be assessed punitive damages in order to deter other employers from doing so in the future.