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EMPLOYMENT-AT-WILL & CODES OF ETHICS: THE PROFESSIONAL'S DILEMMA

SEYMOUR MOSKOWITZ*

I. INTRODUCTION

During the late 19th and early 20th centuries a new set of legal rules emerged in the United States governing the relationship between employer and employee. These rules were called "employment-at-will" and provided that, absent express agreement to the contrary, employment was for an indefinite time and could be terminated by either party, for any reason, or for no reason at all. This doctrine is a unique product of American common law, created by state and federal judges, and continues, substantially unchanged, until today. Because of the economic power of employers, especially large corporations, the rule gives management largely unfettered control over the workplace in most situations. I believe the development of the employment-at-will doctrine cannot be explained on the bases of precedent, legal history, or legal analysis. Rather, it emerged because of its congruence with the dominant business-oriented political ideology of a century ago, and was elevated to constitutional doctrine by the Supreme Court in the early twentieth century.

The employment-at-will rule, of course, applied only in the absence of an express contract or some contrary public law pronouncement. Since the 1930s, a number of these exceptions have been created limiting the employer's power to discharge. Most significant is the requirement that an employer show "just cause" for firing unionized workers covered by a collective bargaining agreement. As of 1985, eighteen percent of American employees were covered by this exception.¹ In addition, approximately seventeen percent of the workforce are public employees,² protected against arbitrary dismissal by civil service rules and constitutional protections. A third major exception to the at-will rule involves statutes which limit employer discharge power where the action is based on the worker's member-

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1. *Bureau of the Census, U.S. Dep't of Commerce Statistical Abstract of the United States* 409 (1987).

2. ROTHSTEIN, KNAPP & LIEBMAN, *EMPLOYMENT LAW* 204 (1987).

ship in a protected class, such as race, sex, and handicap,³ or is based on whistle-blowing to public authorities.⁴ Despite these exceptions, employees subject to the at-will doctrine still number more than half the American workforce.⁵

The American common law rules regarding employment functionally give the employer control of the terms and tenure of employment in the vast majority of work situations. Most employees are tied geographically to one locale, have invested time and knowledge in their particular jobs, and do not have the financial resources to readily change positions. While many employers do not abuse that economic control, numerous reported cases reflect the potential for overreaching which is inherent under existing law.⁶ Professional employees, such as lawyers, engineers, doctors, and nurses, who work full time for one employer, are particularly vulnerable. While management demands obedience and loyalty, the professional's work is impressed with a public trust. He must ensure that the power inherent in his work is intelligently and ethically exercised. Professional codes of ethics express the clear command that duty to clients, patients, and society as a whole is paramount to the duty owed the employer.

I believe the law should provide protection for professionals caught in this dilemma by creating a shield against reprisals for those willing to abide by the dictates of their professional conscience. A fundamental premise of modern labor law is that society cannot allow the employer's economic power to dominate individual workers when that power produces socially undesirable results. This article will present an argument for shielding professionals trapped between their code of ethics and their employer's demands. Part II reviews the history and background of the employment-at-will rule. Part III sketches statutory and contractual inroads on this doctrine, while Part IV examines recent judicially-crafted exceptions. Part V argues that codes of ethics should be treated as a public policy exception to the traditional American rule, based on the nature of the professional's work and society's deep interest in ethical behavior. Part VI presents a model for resolving the inevitable disputes which will emerge between professional workers and their employers, and advocates the creation of alternate dispute resolution mechanisms which could obviate costly and lengthy litigation.

3. See *infra* note 63 and accompanying text.

4. See *infra* notes 66-70 and accompanying text.

5. Approximately 60 million employees in the private sector are subject to the employment-at-will rule. See ROTHSTEIN, KNAPP & LIEBMAN, *supra* note 2, at 738-39.

6. See *infra* notes 87-91 and accompanying text.

II. HISTORY AND BACKGROUND

The employment-at-will rule is traditionally traced to an 1877 treatise on master-servant law, written by New York attorney H.B. Wood. Wood's treatise stated the rule in absolutely certain terms:

With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.⁷

Although Wood used this proposition as an evidentiary presumption,⁸ state courts in the late nineteenth and early twentieth centuries turned it into a substantive rule of law for employment relations.⁹ Those courts held that in the absence of a written contract (then, as now, rare in most work settings), an employer could discharge an employee at any time for "good cause, for no cause, or even for cause morally wrong."¹⁰ The quick and universal acceptance of Wood's Rule gave employers absolute control over their employees. The rule transformed an English and early American employment relationship that was based on concepts of status into contract doctrine with benefits concentrated on one side.

Modern courts, lawyers, and legislators tend to view the employment-at-will rule as long standing and of unquestioned validity. But Wood's Rule was not supported by precedent, legal history, or legal analysis. The very cases cited by Wood in his treatise did not support his rule.¹¹ American

7. H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1977) [hereinafter denoted in the text as Wood's Rule].

8. "[I]f the servant seeks to make out a yearly hiring, the burden is upon him to establish it by proof." *Id.*

9. *See, e.g.,* Harrod v. Wineman, 146 Iowa 718, 720, 125 N.W. 812, 813 (1910); Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895); Henry v. Pittsburg & Lake Erie R.R., 139 Pa. 289, 21 A. 157 (1891).

10. Payne v. W. & Atl. R.R., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 530, 179 S.W. 134, 138 (1915).

11. The cases cited by Wood are Wilder v. United States (Wilder's Case), 5 Ct. Cl. 462 (1869), *rev'd on other grounds*, 80 U.S. 254 (1871); DeBriar v. Minturn, 1 Cal. 450 (1851); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870); Franklin Mining Co. v. Harris, 24 Mich. 115 (1871). None of these cases directly support Wood's rule. *Tatterson* and *Franklin* are contrary, *DeBriar* was a real property eviction case, and *Wilder* involved a commercial contract to transport goods for the U.S. Army. Each was decided on unique facts and procedural issues, and not one stands squarely for the proposition that an indefinite hiring is terminable at will. These cases are analyzed in detail in Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 n.54 (1974). [hereinafter referred to as *Implied Contract Rights*].

courts in the nineteenth century often utilized the presumption that unless a contrary intent was found, the employment relationship was for a defined period, usually one year, or for the period of the wage payment.¹² As late as 1891, the New York Court of Appeals, in the very state where Wood wrote, held that employment for an unstated term was presumptively for the term of the periodic wage payment. "In this country, at least, if a contract for hiring is at so much per month, it will readily be presumed that the hiring was by the month, even if nothing was said about the term of service."¹³

Legal history also gives little or no support for the at-will rule. At the time Wood wrote his treatise, English law basically viewed employment as a master-servant relationship binding the parties to a continuing contract. Blackstone's Commentaries noted the rule to be "[i]f the hiring be general, without any particular time limited, the law construes it to be a hiring for a year."¹⁴ This rule evolved from the 1562 English Statute of Laborers which required certain persons to accept work, but also required notice for termination and provided that apprentices could be discharged only for "reasonable cause."¹⁵ Master-servant law was based on status relationships which both restricted and protected the servant.¹⁶ The early English doctrine obviously reflected an agricultural economy in which there was a mutual need of landowners for a guaranteed source of labor during planting and harvesting, and of employees' for support during unproductive seasons. The legal rules rested on the underlying duty to work, on prohibitions against leaving employment before the end of a term,¹⁷ and on the English Poor Laws, which used residency and employment to determine which geographical community was responsible for the support of indigents.¹⁸ The early English common law thus embodied a presumption of yearly hiring,¹⁹ and required a showing of just cause for discharge prior to the end of that year.²⁰ The presumption could be rebutted by facts showing contrary in-

12. See, e.g., *Margarahan v. Wright*, 83 Ga. 773, 777-78, 10 S.E. 584, 585 (1889); *State v. Fisher Varnish Co.*, 43 N.J.L. 151, 153 (1881); *Adams v. Fitzpatrick*, 125 N.Y. 124, 26 N.E. 143 (1891); *Tucker v. Philadelphia & R. Coal & Iron Co.*, 6 N.Y.S. 134, 135 (Sup. Ct. 1889); *Bascom v. Shillito*, 37 Ohio St. 431 (1882). *Contra*, e.g., *Haney v. Caldwell*, 35 Ark. 156, 168-69 (1879); *Perry v. Wheeler*, 75 Ky. 541, 548-49 (1877); *Finger v. Koch & Schilling Brewing Co.*, 13 Mo. App. 310, 310-11 (1883).

13. *Adams v. Fitzpatrick*, 125 N.Y. 124, 129, 26 N.E. 143, 145 (1891).

14. 1 W. BLACKSTONE, COMMENTARIES 425 (1878).

15. *Id.* at 426.

16. M. GLENDON, *THE NEW FAMILY & THE NEW PROPERTY* 143-50 (1981).

17. See generally Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 119-20 (1976).

18. *Id.*

19. 1 LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 156 (2d ed. 1913).

20. See *Implied Contract Rights*, *supra* note 11, at 340; Annotation, *Modern Status as to Duration of Employment Where Contract Specifies No Term But Fixes Daily or Longer Compensation*, 93 A.L.R. 3d 659, 662 (1979).

tent—specifically, custom of the trade and frequency of the periodic payments.²¹

The theoretical basis for Wood's Rule, founded in contract ideas of mutuality of obligation and equality of bargaining position, was as insubstantial as its precedent and its history. Wood's reasoning was that discharged workers had no legal protection because any presumed or continuing employment contract lacked mutuality. Employees could quit when they wished; therefore, employers could discharge whenever and for whatever reason they wished.²² This position misconceives the mutuality requirement. Consideration is the crucial element in contract law, not mutual obligations.²³ Mutuality, in the form of identical mirrored promises, has never been required in order to make agreements binding.

Mutuality does, however, preclude judicial enforcement of gratuitous or donative promises in which one party exacts a benefit from another without providing anything in return. The American employment law cases might have viewed the relationship as a continuing one, requiring objective cause to terminate, as easily as an at-will relationship. An employer can promise both compensation for work rendered and "just cause" before dismissal, while receiving services from the employee in exchange for both promises. That would be an enforceable contract.²⁴

21. See Feinman, *supra* note 17, at 120-21. What constituted reasonable notice was decided on individual fact bases; the custom of the trade was often determinative. *Id.* at 121, nn.20-26.

22. See, e.g., Gollberg v. Bramson Pub. Co., 685 F.2d 224, 228 (7th Cir. 1982) (since plaintiff-employee could not be forced to work for defendant-employer, the employer could not be forced to keep the plaintiff-employee working).

23. RESTATEMENT (SECOND) OF CONTRACTS § 81 (1979). See generally 1A A. CORBIN, CORBIN ON CONTRACTS § 152 at 12 (1963 and C. Kaufman Supp. 1982). Corbin notes that the key question is whether an employee has provided consideration by performance.

In a number of cases, it has been said that if one of the parties reserves a power to terminate the contract, it will be interpreted as giving a similar power to the other party. It may be that this interpretation is justified in some particular cases; but such an implication is not a necessary one and is not required by any general rule or doctrine of the law. It is quite erroneous to suppose that there is any rule of "mutuality" that requires such an implication.

Id. § 167, at 93.

24. See, e.g., Eales v. Tanana Valley Med. Surg. Grp., 663 P.2d 958 (Alaska 1983); Pugh v. See's Candies, 116 Cal. App. 3d 311, 325-26 (1981); Woolley v. Hoffman—LaRoche, Inc., 99 N.J. Super. 248, 491 A.2d 1257 (1985), *modified*, 101 N.J. Super. 496, 499 A.2d 515 (1985).

In most of the cases involving an employer's personnel policy manual, the document is prepared without any negotiations and is voluntarily distributed to the workforce by the employer. It seeks no return promise from the employees. It is reasonable to interpret it as seeking continued work from the employees, who, in most cases, are free to quit since they are almost always employees at will, not simply in the sense that the employer can fire them without cause, but in the sense that they can quit without breaching any obligation. Thus analyzed, the manual is an offer that seeks the formation of a unilateral con-

The American courts' adoption and application of the employment-at-will rule made it impossible for the employee, by accepting employment and working, to bind the employer to continue that relationship so long as the employee's work was needed and his performance was satisfactory. Even in litigated cases in which the worker was able to show a definite term, he was often denied relief on the ground that the worker had not given additional consideration to justify restrictions on the employer's absolute power to discharge.²⁵ Satisfactory work performance by the employee was held not to be sufficient consideration.²⁶ Moreover, even on its own terms, the mutuality rationale is ordinarily utilized only in bilateral contract situations. The typical employment relationship, however, is more logically viewed as a unilateral contract—an offer, followed by performance in reliance on the offer which constitutes acceptance. The employer's promise becomes irrevocable after the worker has labored, despite the employee's ability to depart at any time.²⁷

In a series of early twentieth century cases, the Supreme Court raised these dubious contract notions to constitutional status. In 1908, the Supreme Court declared unconstitutional a federal statute which made discharge of railroad employees, solely because of union membership,

tract—the employees' bargained-for action needed to make the offer binding being their continued work when they have no obligation to continue.

Id.

25. See, e.g., *Plason v. Youngstown Sheet & Tube Co.*, 332 F.2d 439 (7th Cir. 1964), cert. denied, 379 U.S. 914 (1964); *Adolph v. Cookware Co. of America*, 283 Mich. 561, 568, 278 N.W. 687, 689 (1938).

26. See generally Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 *FORDHAM L. REV.* 1082, 1099 (1984).

27. A promise by an employer to pay a bonus or a pension to an employee in case the latter continues to serve for a stated period is not enforceable when made; but the employee can accept the offer by continuing to serve as requested even though he makes no promise. *There is no mutuality of obligation*; but there is sufficient consideration in the form of service rendered. Indeed, the employer's offered promise becomes irrevocable by him as soon as the employee has rendered any substantial service in the process of accepting; and this is true in spite of the fact that the employee may be privileged to quit the service at any time.

1A A. CORBIN, *CORBIN ON CONTRACTS* § 153, at 18-20 (1963) (emphasis added and footnotes omitted). See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* §§ 2-14, 2-18, 2-24 (2d ed. 1970). See also *Anthony v. Jersey Central Power & Light Co.*, 51 N.J. Super. 139, 141, 143 A.2d 762, 764 (1958).

The fallacy in the [defendant's] argument is the assumption therein that the company's offer was susceptible of acceptance only by the rendition of a promise or undertaking by the employee in exchange, i.e., that it contemplated the consummation of bilateral contract. Its natural construction, however, is the submission of an offer in return for rendition of services in employment by the employee until the occurrence of the condition stipulated a unilateral contract. This is the general present-day construction of employment stipulations for severance pay, bonuses or similar incentive plans.

unlawful.

The right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant Adair . . . to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so . . . to quit the service in which he has engaged, because the defendant employed some members who were not members of a labor organization. In all such particulars the employer and the employee have equality of right²⁸

The Court reasoned that "freedom of contract," then in constitutional fashion, allowed an employer to dispense with the services of an employee for "union membership," as well as for "reason . . . whim, caprice, prejudice, or malice."²⁹ Any public interference with this liberty of contract was a violation of the fifth and fourteenth amendments.³⁰

State courts were contemporaneously striking down statutes prohibiting "yellow dog" (anti-union) contracts with the same logic. Unrestricted freedom of contract became constitutional dogma, affirming the claimed liberty of both employer and employee to terminate the work relationship by dismissal or resignation.³¹ As one typical decision noted in striking down the Wisconsin statute forbidding discharge for union membership:

As each morning comes, the employee is free to decide not to work, the employer to decide not to receive him, but for this

28. *Adair v. United States*, 208 U.S. 161, 174-75 (1908).

29. *Id.* at 173.

30. *Accord*, *Coppage v. Kansas*, 236 U.S. 1 (1915) (striking down similar state legislation). Roscoe Pound condemned *Adair* as "mechanical jurisprudence," that failed to consider social changes in determining legal doctrine. In a 1909 *Yale Law Journal* article Pound attacked *Adair* as a decision which "exaggerates the importance of property and of contract, exaggerates private right at the expense of public right, and is hostile to legislation, taking a minimum of lawmaking to be the ideal." Pound, *Liberty of Contract*, 18 *YALE L.J.* 454, 457 (1909).

Legislation designed to give laborers some measure of practical independence, which, if allowed to operate, would put them in a position of reasonable equality with their masters, is said by courts, because it infringes on a theoretical equality, to be insulting to their manhood and degrading, to put them under guardianship, to create a class of statutory laborers, and to stamp them as imbeciles.

Id. at 463.

31. *See, e.g.*, *Goldfield Consol. Mines Co. v. Goldfield Miners' Union*, 159 F. 500 (C.C. Nev. 1908); *People v. Western Union Tel. Co.*, 70 Colo. 90, 198 P. 146 (1924); *Coffeyville Vitrified Brick & Tile Co. v. Perry*, 69 Kan. 297, 76 P. 848 (1904); *People v. Marcus*, 185 N.Y. 257, 77 N.E. 1073 (1906); *Jackson v. Berger*, 92 Ohio St. 130, 110 N.E. 732 (1915); *Bemis v. State*, 12 Okla. Crim. 114, 152 P. 456 (1915); *Commonwealth v. Clark*, 14 Pa. Super. 435 (1900); *State ex rel Zillmer v. Kreutzberg*, 114 Wis. 530, 90 N.W. 1098 (1902).

statute. That the act in question invades the liberty of the employer in an extreme degree, and in a respect entitled to be held sacred, except for the most cogent and countervailing considerations, we have pointed out. Hardly any of the personal civil rights is higher than that of free will in forming and continuing the relation of master and servant.³²

But freedom of contract in the employment realm was, in reality, as Justice Jackson has written, "the freedom of the sweatshop."³³ Equality of bargaining power between worker and management was a sham. The lack of power of workers was extensively aired before Congress in hearings on the 1935 National Labor Relations Act. As Senator Wagner noted,

[T]he fathers of our Nation did not regard freedom of contract as an abstract end. They valued it as a means of insuring equal opportunities, which cannot be attained where contracts are dictated by the stronger party. The law has long refused to recognize contracts secured through physical compulsion or duress. The actualities of present-day life impel us to recognize economic duress as well. We are forced to recognize the futility of pretending that there is equality of freedom when a single workman, with only his job between his family and ruin, sits down to draw a contract of employment with a representative of a tremendous organization having thousands of workers at its call. Thus the right to bargain collectively, guaranteed to labor by section 7(a) of the Recovery Act, is a veritable charter of freedom of contract; without it there would be slavery by contract.³⁴

Congress responded with explicit findings in section 1 of the NLRA.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.³⁵

32. *State ex rel Zillmer v. Kreutzberg*, 114 Wis. 530, 546, 90 N.W. 1098, 1104 (1902).

33. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 170 (1941).

34. 78 CONG. REC. 3678 (1934) (Speech of Senator Wagner introduced by Senator Barkley into Congressional Record), *reprinted in* 1 NLRB, *LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935* at 20 (1949).

35. Natl. Lab. Rel. Act of 1935, Pub. L. No. 198, 49 Stat. 449 (1935) § 1, 29 U.S.C. §

The Supreme Court soon followed a similar rationale. The legal philosophy in the early twentieth century constitutional decisions has been ideologically dead since the 1930s. *Adair* was effectively overruled in *Texas & N.O. R.R. v. Brotherhood of Ry. & S.S. Clerks*,³⁶ which accepted Congress' Commerce Clause power to protect workers' right to organize and to bargain collectively, free from the employer's discharge threats. By 1941, the Court noted that its decisions since *Adair* had sapped that case of its vitality.³⁷ The high court now diligently avoids constitutional scrutiny of business regulation and has recently reaffirmed that it is "well-established that a State in the exercise of its police power may adopt reasonable restrictions on private property."³⁸ It has likewise recently given explicit and long deserved recognition to a government worker's interest in retaining employment.³⁹

How then can we account for the uniform judicial acceptance of Wood's Rule in the late nineteenth and early twentieth centuries? I believe the at-will doctrine cannot be viewed apart from the contemporaneous activities of courts in allied controversies.⁴⁰ Judges in that period were embarked on a crusade to expand the prerogatives of business in the face of a growing challenge from the laboring classes. The weapons this activist judiciary provided to management were many and varied. In *Ex Parte Young*,⁴¹ for example, the Supreme Court de-fanged the Eleventh Amendment's prohibition against suits against the states. Progressive and labor forces had succeeded in passing many social welfare statutes in state capitals.⁴² *Ex*

151 (1982).

36. 281 U.S. 548 (1930).

37. *Phelps Dodge v. NLRB*, 313 U.S. 177, 187 (1941). *See also* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding constitutionality of the National Labor Relations Act which statutorily ends employment-at-will doctrine where the reason for the discharge relates to collective or union activity of workers).

38. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). *See also* *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983); *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

39. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

[T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of means of livelihood. . .

While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.

Id. at 543.

40. The unprotected position of the employee-at-will may be likened to the vulnerable position of the tenant-at-will in American landlord-tenant law. *See generally* *Armstrong & LaMaster, The Implied Warranty of Habitability: Louisiana Institution, Common Law Innovation*, 46 LA. L. REV. 195 (1985); *Humbach, The Common-Law Conception of Leasing: Mitigation, Habitability, and Dependence of Covenants*, 60 WASH. U.L.Q. 1213 (1983).

41. 209 U.S. 123 (1908).

42. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 489-92 (1973).

Parte Young thus made the regulatory activities of state officials against large corporations subject to federal court jurisdiction, at that time a forum quite hospitable to business interests.

During this historical period the judiciary also pioneered the use of equitable remedies against unions. Federal courts became known for "Gatling Gun" injunctions in labor disputes because of the number and frequency of equitable decrees granted employers in management-labor confrontations.⁴³ An astonishingly large number of court decrees were utilized to combat unionization in general, and strike activities in particular.⁴⁴ Frankfurter and Greene note that in this period injunctions against strikes and strike activities "grew in volume like a rolling snowball."⁴⁵ One scholar has documented 1,845 injunctions issued against labor-sponsored activities between the years 1880 and 1931.⁴⁶ In 1895, at the same time the employment-at-will rule was being adopted by state courts, the United States Supreme Court ratified the use of the labor injunction by affirming the jailing of Eugene Debs, leader of the Pullman strike of 1894.⁴⁷ Use of the federal injunctive power was highly selective, however. At the same time, the Court was denying equitable relief to disenfranchised black voters being purged from Southern voting rolls.⁴⁸

The federal courts, during the same period, turned the Sherman Anti-Trust Act,⁴⁹ a statutory measure obviously aimed at countering manufacturers' control over price and supply, into a weapon against labor unions. In 1908, the Supreme Court held a secondary boycott of a retailer doing business with a hat manufacturer to be a violation of the Sherman Act and sustained treble damages against individual employees.⁵⁰ The Court also created the state action doctrine to restrict the scope of the post American Civil War amendments,⁵¹ while constitutionally sanctioning the development of de jure segregation.⁵²

43. E. BATES, *THE STORY OF THE SUPREME COURT* 218 (1936). This abusive use of equitable powers in labor disputes led to the passage of the Norris LaGuardia Act, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§ 101-15 (1982)).

44. One federal judge noted "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful robbing, or lawful lynching." Atcherson, T. & S. F. R.R. v. Gee, 139 F. 582, 584 (D. Iowa 1905) *quoted in* FRIEDMAN, *supra* note 42, at 488-89.

45. F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* 21 (1930) *quoted in* FRIEDMAN, *supra* note 42, at 487-88.

46. E. WITTE, *THE GOVERNMENT IN LABOR DISPUTES* 84 (1932).

47. *In re Debs*, 158 U.S. 564, 599 (1895).

48. *Giles v. Harris*, 189 U.S. 475 (1903).

49. 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1982)).

50. *Loewe v. Lawlor*, 208 U.S. 274 (1908).

51. *Civil Rights Cases*, 109 U.S. 3, 25 (1883).

52. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

In parallel doctrinal developments, the Supreme Court created two interrelated constitutional themes as methods of checking legislative attempts to deal with the economic power of the newly emergent giant corporations: substantive due process, and limits on Congress' Commerce Clause powers. Substantive due process (and its cousin "liberty of contract")⁵³ enabled courts to strike down a wide variety of statutes aimed at regulating business and redressing social ills. *Lochner v. N.Y.*,⁵⁴ which invalidated a New York statute limiting working hours in a bakery to sixty per week and ten per day, is usually seen as the archetypical judicial intervention on behalf of business.⁵⁵ The Court soon also sharply curtailed Congress' power to regulate goods in interstate commerce. In *Hammer v. Dagenhart*,⁵⁶ federal regulation of child labor was found unconstitutional. State and local power over these subjects was likewise held unconstitutional as a violation of substantive due process.⁵⁷ The net result of these lines of cases was to produce, in Professor Corwin's phrase, a "political 'no man's land'"⁵⁸ in which no governmental body could constitutionally control business interests.

In sum, it was an age of unbridled laissez-faire capitalism, and judicial activism in support of management. The employment-at-will rule neatly coincided with the dominant business oriented ideology of the time. The effect of that rule was to strip most workers of the legal protection of a contract of employment and to grant employers absolute power over their workers.

53. The concept of "liberty of contract" was defined in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

The "liberty" mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen . . . to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

Id. at 589. *Allgeyer* was the first time a statute had been found unconstitutional on Substantive Due Process grounds.

54. 198 U.S. 45 (1905).

55. See L. BETH, *THE DEVELOPMENT OF THE AMERICAN CONSTITUTION 1877-1917* 138-66 (1971).

56. 247 U.S. 251, 272 (1918). "[P]roduction of articles, intended for interstate commerce, is a matter of local regulation." See also *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (distinguishing between manufacture and commerce, thus creating barrier to Congress' power to regulate interstate commerce).

57. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (Washington D.C. Ordinance regulating minimum wages for women and children unconstitutional under fifth amendment); *Murphy v. Sardell*, 269 U.S. 530 (1925) (same under fourteenth amendment); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936); *Tyson & Brother v. Banton*, 273 U.S. 418 (1927) (state regulation of prices unconstitutional under fourteenth amendment).

58. E. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* 34-35 (1934).

III. STATUTORY AND CONTRACTUAL INROADS TO AT-WILL EMPLOYMENT

The doctrinal bases for the at-will employment rule have long disappeared, never to be revived. Freedom of contract as a constitutional principle ended in the cases during the Great Depression.⁵⁹ The path was thus opened for statutory regulation of the workplace, primarily by the federal government. The general theme of such legislation is that public intervention is necessary to protect applicants and employees from the overwhelming economic power of their employers.

In this legislation, the prior presumption of equality of bargaining power is explicitly rejected.⁶⁰ Specific goals of these statutes include: promoting unionization and collective bargaining as a countervailing force against employer economic strength and workplace control;⁶¹ establishing a floor of economic security for workers;⁶² outlawing discrimination against minorities in employment decisions;⁶³ protecting employee health and

59. See *supra* notes 36-37 and accompanying text.

60. See *supra* notes 33-35.

61. The first major legislative abrogation of Wood's Rule in favor of organizational rights was the 1926 Railway Labor Act, 45 U.S.C. §§ 151-88 (1982). The statute was amended in 1936 to cover air carriers, 45 U.S.C. § 181 (1982). In 1935, rights of most American workers to self-organization, collective bargaining, and mutual aid and protection were guaranteed by the National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935). In adopting the NLRA, Congress found an "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association" National Labor Relations Act § 1, 29 U.S.C. § 151 (1982). Under section 8(a)(3) of the NLRA, it is unlawful for an employer to discriminate in regard to hiring, tenure of employment, or any term or condition of employment in order to encourage or discourage union membership, 29 U.S.C. § 158(a)(3) (1982).

Similar protection against discriminatory discharges of employees for union support is also afforded by many state laws. See, e.g., N.Y. LAB. LAW § 704(5) (McKinney 1977); CONN. GEN. STAT. ANN. § 31-105(5) (West 1987); MASS. GEN. LAWS ANN. ch. 150A, § 4(3) (West 1982); MICH. COMP. LAWS ANN. § 423.16 (West 1978); PA. STAT. ANN. tit. 43, § 211.6(1)(c) (Purdon 1964).

62. See, e.g., Fair Labor Standards Act, 29 U.S.C. §§ 215(a)(3), 216(b) (1982 & Supp. IV 1986); Unemployment Tax Act, 26 U.S.C. §§ 3301-11 (1982 & Supp. IV 1986).

63. Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e (1982), makes it an unlawful employment practice for employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1982). Subsequent federal legislation prohibited discrimination in employment based on age, Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1982 & Supp. IV 1986) (prohibiting age based discrimination against persons between the ages of 40 and 70), or based on handicap, Vocational Rehabilitation Act, 29 U.S.C. § 793 *et. seq.* (1976).

Similar protection against discrimination in employment is found in various state statutes and local ordinances. See, e.g., ALASKA STAT. § 18.80.220 (1986); CAL. GOV'T CODE §

safety;⁶⁴ and guaranteeing a minimum level of security for retirement and for the survivors of wage earners.⁶⁵ The employment-at-will doctrine has also been altered by "whistle blower" statutes which provide reinstatement and back-pay to discharged employees who have reported, or testified at proceedings against, employer violations of environmental or safety standards. Illustrative federal statutes include the Energy Reorganization Act of 1974;⁶⁶ the Air Pollution Prevention and Control Act;⁶⁷ the Federal Water Pollution Control Act;⁶⁸ the Railroad Safety Act;⁶⁹ and the Occupational Safety and Health Act of 1970.⁷⁰ Such protections of workers are essential to effective enforcement of regulatory statutes. Many state and local legislative enactments mirror these federal restrictions on employers.⁷¹

12940(a) (West 1980 & Supp. 1988); N.Y. EXEC. LAW §§ 292, 296 (McKinney 1982 & Supp. 1988); OHIO REV. CODE ANN. § 4112.02(A) (Baldwin 1983); PA. STAT. ANN. tit. 43, § 955 (Purdon Supp. 1988). Among the many state statutes which prohibit discriminatory discharge because of physical handicap are, MINN. STAT. ANN. § 363.03(2) (West Supp. 1988); N.Y. EXEC. LAW §§ 292, 296 (McKinney 1982 & Supp. 1988); R.I. GEN. LAWS § 42-87-2 (1984).

64. Occupational Safety & Health Act, 29 U.S.C. §§ 651-78 (1982 & Supp. IV 1987).

65. Federal Old-Age, Survivors, and Disability Insurance Benefits (Social Security) Act, 42 U.S.C. §§ 401-33 (1982 & Supp. III 1985); Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1140-41 (1982) (prohibits discharge of employees in order to prevent them from attaining vested pension rights).

66. 42 U.S.C. § 5851 (1982), 29 C.F.R. § 24 (1987) (no employer shall discharge or otherwise discriminate against an employee who has "assisted or participated or is about to assist or participate in any manner in . . . a proceeding [under the Act] or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended." 42 U.S.C. § 5851 (a)-(3) (1982).

67. 42 U.S.C. § 7622 (1982) (an employer may not discharge or otherwise discriminate against any employee because the employee commenced, caused to commence or testified at a proceeding against the employer for violation of the Air Pollution Prevention and Control Act; reinstatement and compensatory damages, including back pay, are available).

68. 33 U.S.C. § 1367 (1982) (no employer may discharge or discriminate against an employee for instituting a proceeding or testifying at a proceeding against the employer for a violation of the Act; reinstatement and compensatory damages may be awarded).

69. 45 U.S.C. § 441(a) (1982) (a railroad company engaged in interstate or foreign commerce may not discharge or discriminate against an employee because the employee has filed a complaint, instituted or caused to be instituted any proceedings under or related to the enforcement of the federal railroad safety laws, or has testified or is about to testify at such a proceeding). *See also* 45 U.S.C. § 441(b) (1982) (prohibits discharge or discrimination against an employee for refusing to work under hazardous conditions; reinstatement and back pay may be awarded).

70. 29 U.S.C. § 660(c) (1982) (prohibits employers from discharging or discriminating against employees who have filed a complaint or instituted a proceeding against the employer for violations of the Act; Reinstatement and back pay may be awarded). *See Whirlpool Corp. v. Marshall*, 445 U.S. 1, 10 (1980).

71. Numerous state statutes seek to control employer power in different factual contexts. State restrictions on the use of lie detectors include, Psychological Stress Evaluators and Employment Law, N.Y. LAB LAW § 733-39 (McKinney 1988) (prohibits discharge for refusing to take "psychological stress evaluator examination," filing a complaint, or testifying under the statute); CAL. LAB. CODE § 432.2 (West 1971 & Supp. 1988) (prohibits employer from

All of the above statutes curtail the freedom of contract doctrine upon which the employment-at-will rule is based. They also provide minimum requirements of fairness, reasonable conduct, and consistency with publicly defined policies as part of any employment contract.

Another major exception to the employment-at-will doctrine was created in the public sector. Civil service laws for federal and state employees provide job security.⁷² These systems have long restricted discharge to a "just cause" standard and provided procedural due process protections to the aggrieved employee. Public employees also were able to call upon constitutional protections as a defense against arbitrary employer action. While no one has a right to a public job, the state cannot condition employment on forfeiture of constitutionally protected freedoms.⁷³ A teacher, for example, who publicly criticized her school board employer could not be discharged for expressing ideas on a matter of legitimate public concern.⁷⁴ Political patronage systems have been curbed under the same doctrinal analysis.⁷⁵

Unionization of the workforce created collective bargaining, the last major exception to at-will employment. Such bargaining, and the attendant collective agreement, restricts the employer's unilateral control over the job.⁷⁶ Contract rights are thus established, together with a measure of in-

demanding or requiring "polygraph" or "lie detector" test of prospective or current employees). State statutes protecting political activity of employees include, N.Y. CIV. SERV. LAW § 107(1) (McKinney 1983) (prohibits discharge on account of non-subversive political opinions, affiliations, or contributions); CAL. LAB. CODE § 1102 (West 1971). State protection of jury duty is found in N.Y. JUD. LAWS § 532 (McKinney 1975) (prohibits discharge of employees who, upon notice to employer, answer summons to serve as jurors); CAL. LAB. CODE § 230 (West Supp. 1988). State protection of "whistleblowing" is found in MICH. STAT. ANN. § 15.362 (Callaghan 1982); CONN. GEN. STAT. ANN. § 31-51(m) (West Supp. 1988); ME. REV. STAT. ANN. tit. 26 § 833 (1987). For a public policy discussion of whistleblowing, see Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 Wis. L. REV. 777.

72. With respect to federal civil service employees, see Civil Service Reform Act of 1978, 5 U.S.C. §§ 7503(a), 7513(a) (1982) (discharge of federal civil employees is permitted only "for such cause as will promote the efficiency of the service"). Federal civil service employees receive greater protection from discrimination and unjust discharge than state and local government employees. See *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 322, 171 Cal. Rptr. 917, 922 nn.10-11, *modified*, 117 Cal. App. 3d 520 (1981); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 21-22 (1979). With respect to due process protection of state and local public employees, see *Perry v. Sinderman*, 408 U.S. 593, 603 (1972) (where a public employee's "liberty" or property interests are at stake, he is entitled to due process protections of notice and hearing); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547-48 (1985).

73. *Keyeshian v. Board of Regents*, 385 U.S. 589, 603-04 (1967).

74. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

75. See, e.g., *Elrod v. Burns*, 427 U.S. 347 (1976).

76. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at

dustrial democracy. Federal and state statutes mandate this sharing of power with duly selected union representatives.⁷⁷ Almost all unionized employees have a clause in their collective bargaining agreement that prohibits discharge except for "just cause," with appeals to third-party arbitration in cases of dispute.⁷⁸ These provisions supersede the employment-at-will rule by express contractual provision.

IV. JUDICIALLY-CRAFTED EXCEPTIONS TO AT-WILL EMPLOYMENT

With minor exceptions,⁷⁹ there has been no major legislative intrusion into the employer-employee relationship since the early 1970s. Despite the developments cited in the previous section, more than half of the American workforce remains "at will" and subject to arbitrary employer action. The total number of private sector workers in 1985 was approximately 81.2 million.⁸⁰ The percentage of unionized employees has been shrinking steadily;⁸¹ the latest figures indicate that less than eighteen percent of the workforce is unionized.⁸² The number of discharges in this unorganized workforce is hard to calculate with precision, but is undoubtedly extremely large. Unpublished Federal Bureau of Labor Statistics figures show that between 1959 and 1971 the mean annual discharge rate in the manufacturing sector was 4.6 percent.⁸³ A Michigan State University study based on responses from 265 Michigan employers found an annual discharge rate of 6.8 percent for non-office employees and 5.3 percent for office employees during

reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party

29 U.S.C. § 158(d) (1982).

77. See, e.g., 29 U.S.C. § 158(a)(5) (1982), "It shall be an unfair labor practice for an employer- . . . (s) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

78. Such arbitration provisions can be found in an estimated ninety-six percent of all labor contracts. A. COX, D. BOK, & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 705 (10th Ed. 1986). Many arbitrators will infer a "just cause" limitation, even if it is not expressly contained in the collective agreement. F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 651 (4th ed. 1985).

79. See, e.g., the state "whistleblower" statutes collected in *supra* note 71.

80. *Current Labor Statistics*, 109 MONTHLY LAB. REV. 57, 80 (Nov. 1986).

81. While the number of employees unionized has increased because of growth in the workforce, the percentage in unions has steadily decreased. In 1956, thirty-four percent of private nonagricultural workers were organized. By 1980 that had declined to twenty-four percent. R. FREEMAN & J. MEDOFF, *WHAT DO UNIONS DO?* 221 (1984).

82. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE STATISTICAL ABSTRACT OF THE UNITED STATES 409 (1987).

83. Stieber, *Recent Developments in Employment-At-Will*, 36 LAB. L.J. 557, 559 (1985).

1980.⁸⁴ If these figures are even approximately accurate, we may estimate that several million at-will employees are discharged each year, without the right to a hearing by an impartial decision-maker.⁸⁵ Given present legal rules, it is impossible to determine the percentage of these discharges that took place without "just cause." If discharges of at-will employees are at all analogous to discharges of unionized employees, the number of aggrieved employees must be quite large. Studies of published arbitration decisions indicate that in over fifty percent of contested discharge cases the employer did not present sufficient evidence to justify the discharge.⁸⁶ It is apparent that very large numbers of employees are affected by the at-will rules.

While many employers have not utilized the dominant position provided by American employment law, numerous reported court cases provide insight into the potential for abuse. The published cases may be viewed as a cardiogram, detecting forces at work in the workplace. Reported opinions involve employees fired for reporting alleged accounting improprieties of supervisors,⁸⁷ filing worker's compensation claims,⁸⁸ refusing the sexual advances of supervisors,⁸⁹ serving on juries,⁹⁰ refusing to participate in illegal price-fixing agreements,⁹¹ as well as a host of other chilling examples of overreaching employer power. Given the difficulties and expense of litigation for discharged employees, these suits are indicative of numerous other unreported and unlitigated abuses in the workplace.

Faced with these situations, courts have begun to reexamine the at-will doctrine.⁹² A recent survey of the West Regional Reporter series and the

84. *Id.*

85. Professor Stieber calculates approximately two million at-will employees are discharged each year. *Id.* at 558.

86. G. ADAMS, GRIEVANCE ARBITRATION OF DISCHARGE CASES 41 (1978); Holly, *The Arbitration of Discharge Cases: A Case Study*, 10 NAT'L ACAD. ARB. PROC. 16 (1957). These calculations would result in almost one million unjust dismissals per year, given the assumption in the text. This number may, however, be artificially inflated because not every discharged employee will ask for an independent investigation of the discharge and only a small selected group of cases proceed to arbitration.

87. *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

88. *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Segal v. Arrow Indus. Corp.*, 364 So. 2d 89 (Fla. Dist. Ct. App. 1978); *Loucks v. Star City Glass Co.*, 551 F.2d 745 (7th Cir. 1977).

89. *Fletcher v. Greiner*, 106 Misc. 2d 564, 435 N.Y.S.2d 1005 (Sup. Ct. 1980); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

90. *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).

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

92. The judicial re-examination of employment-at-will was preceded and accompanied by extensive academic debate. Scholarly analysis of the doctrine began in a seminal 1967 article, *Blades, Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967). Since that time, numerous commenta-

specialized Labor Cases system of Commerce Clearing House found approximately 500 published decisions involving at-will employees between January 1980 and July 1986.⁹³ A far larger number of cases, obviously, are unreported, settled, or never brought at all. The state courts, in responding to such situations, have begun to serve as "laboratories,"⁹⁴ testing new legal theories as means of altering the existing common law employment rules.

This judicial re-examination has produced innovative doctrinal developments which permit terminated workers to bring "wrongful discharge" actions for reinstatement and/or damages. While these suits are often based on traditional common law torts⁹⁵ or violations of anti-discrimination laws,⁹⁶ wrongful discharge claims can also be premised on several other theories. These theories include claims that the firing violated "public policy," breached an "implied contract," or breached an implied covenant of good faith and fair dealing between employer and worker.

A. Public Policy Exceptions

The most widely accepted limitation by courts on the at-will rule has been the so-called "public policy exception," utilized in approximately half of the American states.⁹⁷ The rationale for this exception is the duty of the

tors have examined its origins and contemporary applications. Among the most important are: Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Glendon & Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C.L. REV. 457 (1979); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Summers, *The Rights of Individual Workers: The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082 (1984); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); *Commission on Labor and Employment Law, At-Will Employment and the Problem of Unjust Dismissal*, 36 REC. N.Y.C.B.A. 170 (1981).

93. Hames, *The Current Status of the Doctrine of Employment-At-Will*, 39 LAB. L.J. 19 (1988).

94. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

95. *Alcorn v. Anbro Eng'g Inc.*, 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970) (intentional infliction of emotional distress); *Agis v. Howard Johnson Co.*, 371 Mass. 140, 355 N.E.2d 315 (1976) (intentional infliction of emotional distress).

96. See, e.g., *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822 (E.D.N.Y. 1980); *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Shaffer v. National Can Corp.*, 565 F. Supp. 909 (E.D. Pa. 1983) (claim of violations of Pennsylvania Human Relations Act joined with intentional infliction of emotional distress).

97. A sampling of the decisions permitting an exception to the at-will rule in cases

employer to refrain from firing an employee for reasons that contravene fundamental principles of public policy.⁹⁸ The factual patterns in these cases revolve around discharges for refusing to commit unlawful acts, or for performing important public obligations, or for exercising statutory rights. The policies underlying this exception are not derived from any agreement between the employer and employee. They emerge, instead, from the employment relationship and its connection to the rule of law in society; in effect, a judicial application of societal judgments of right and wrong to the employee's termination. Such actions for wrongful discharge are thus best viewed as tort rather than contract actions.⁹⁹

The first notable judicially-crafted exception to the at-will doctrine came in a 1959 California case, *Petermann v. International Brotherhood of Teamsters, Local 396*.¹⁰⁰ In *Petermann*, an employee of a labor organization alleged that he was discharged for refusing to commit perjury before a

where the discharge violates a statute or other important public policy includes: *Larson v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (1977); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); *Petermann v. Teamsters Local 296*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 421 N.E.2d 876 (1981); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Scrogan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. Ct. App. 1977); *Adler v. American Standard Corp.*, 291 Md. 631, 432 A.2d 464 (1981); *Trombetta v. Detroit, Toledo & Ironton R.R. Co.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Keneally v. Orgain*, 186 Mont. 1, 606 P.2d 127 (1980); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Chin v. American Tel. & Tel. Co.*, 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (N.Y. Cir. Ct. 1978) (dictum), *aff'd*, 70 A.D.2d 791, 416 N.Y.S.2d 160 (N.Y. App. Div. 1979); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Walsh v. Consol. Freightways, Inc.*, 278 Or. 347, 563 P.2d 1205 (1977); *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978); *Ward v. Frito-Lay, Inc.*, 95 Wis. 2d 372, 290 N.W.2d 536 (1980) (dictum).

A useful compilation of modern cases accepting or rejecting limits on the employment-at-will rule is contained in H. PERRITT, *EMPLOYEE DISMISSAL LAW & PRACTICE* § 1.12 (2d ed. 1987).

98. See, e.g., *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 176, 610 P.2d 1330, 1335-36, 164 Cal. Rptr. 839, 845 (1980) (citing W. Prosser, *Law of Torts* 613 (4th ed. 1971)).

99. See, e.g., *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981) (plaintiff articulated a public policy sufficient to allow a wrongful discharge action). Professor Peter Linzer, editorial reviser of the Second Restatement of Contracts has argued in a provocative article that the traditional distinctions and classifications between Contract, Tort, and Property are no longer useful. He maintains common law courts should approach problems in a functional fashion, assigning rights and duties in light of specific factors characterizing the relationship between the parties (e.g., relative power, express or implied assent, fairness, etc.). Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986). I believe Linzer is correct, but courts continue to utilize formal definitions in deciding practical questions of statutes of limitations, measure of damages, etc..

100. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

legislative committee at the specific direction of his employer. California courts had previously adhered strictly to the at-will doctrine. The California Supreme Court emphasized that state law prohibited the commission of perjury as well as the suborning of perjury. Although these laws gave no specific remedy to a plaintiff-employee, "the law must encourage and not discourage truthful testimony. The public policy of this state requires that every impediment, however remote to the above objective, must be struck down when encountered."¹⁰¹ The court did not attempt to define "public policy" specifically. It did offer the following:

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. [It is] principles under which freedom of contract or private dealing is restricted by law for the good of the community.¹⁰²

Since *Petermann*, many courts have held that an employer is not free to discharge an employee for conduct that would subject the worker to criminal prosecution, or would violate a state statute.¹⁰³ The condition of the employee in this circumstance is that of a helpless prisoner, caught between the employer's demand for active participation in criminal or illegal actions and his own job security. Using similar reasoning, courts have refused to allow job retaliation against employees engaged in a variety of important civic responsibilities, such as jury service.¹⁰⁴

Another judicially-crafted "public policy" exception to the employer's right to discharge involves firings for the exercise of statutory rights. In these cases, employees have been discharged for filing claims for worker's

101. *Id.* at 186, 344 P.2d at 27.

102. *Id.* In *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981), Justice Simon attempted to define public policy in these broad terms:

When a discharge contravenes public policy in any way the employer has committed a legal wrong. . . . But what constitutes clearly mandated public policy? . . . [I]t 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. . . . [The] matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed.

Id. at 130, 421 N.E.2d at 878-79 (citations omitted).

103. *See, e.g., McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979) (refusal to participate in illegal price fixing scheme); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (refusal to participate in illegal price fixing scheme); *Trombetta v. Detroit, Toledo, and Ironton R.R. Co.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978) (refusal to falsify pollution control reports).

104. *See, e.g., Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (discharge for jury service); *Reuther v. Fowler & Williams*, 255 Pa. Super. 28, 386 A.2d 119 (1978) (refusal to avoid jury service by committing perjury).

compensation,¹⁰⁶ for refusing to take polygraph tests where state law outlaws them,¹⁰⁶ or for exercising other legislatively granted rights.¹⁰⁷ The judicial reasoning here is analytically similar to the issues presented to federal courts when determining whether a private individual may imply a cause of action from a statute with no explicit right to sue.¹⁰⁸ The court must discern legislative intent and create a remedy if intent to protect plaintiff's class is found.

Despite these promising analytical possibilities, discharged employees frequently find little judicial protection under the public policy exception to the at-will doctrine. Many state courts reject any change in the established law.¹⁰⁹ Others find the claimed public policy too unclear¹¹⁰ or too general¹¹¹

105. See, e.g., *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976).

106. See, e.g., *Perks v. Firestone Tire & Rubber Co.*, 611 F.2d 1363 (3d Cir. 1979); *Polsky v. Radio Shack*, 666 F.2d 824 (3rd Cir. 1981).

107. *Savodnik v. Korvettes, Inc.*, 488 F. Supp. 822 (E.D.N.Y. 1980) (discharge to prevent vesting of pension protected by statute).

108. *Cort v. Ash*, 422 U.S. 66 (1975). See, e.g., *Cloutier v. Great A & P. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981) (the court found public policy embodied in the federal OSHA statute, and implied a cause of action); *Hentzel v. The Singer Co.*, 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982) (same for California OSHA statute).

109. A number of states have expressly declined to recognize a cause of action for alleged terminations in violation of public policy. See, e.g., *Hinrichs v. Tranquilaire Hosp.*, 352 So. 2d 1130 (Ala. 1977) (discharge of employee allegedly for refusing to falsify medical records); *Martin v. Tapley*, 360 So. 2d 708 (Ala. 1978) (discharge for allegedly filing a worker compensation claim and consulting an attorney); *DeMarco v. Publix Super Mkts., Inc.*, 360 So. 2d 134 (Fla. Dist. Ct. App. 1978), *aff'd*, 384 So. 2d 1253 (1980) (employee discharged after bringing personal injury action against his employer's stores); *Perdue v. J.C. Penney Co.*, 470 F. Supp. 1234 (S.D.N.Y. 1979) (applying Texas law); *Segal v. Arrow Indus. Corp.*, 364 So. 2d 89 (Fla. Dist. Ct. App. 1978); *Goodroe v. Georgia Power Co.*, 148 Ga. App. 193, 251 S.E.2d 51 (1978).

110. See, e.g., *Adler v. American Standard Corp.*, 291 Md. 31, 40, 432 A.2d 464, 470-71 (1981) (whistleblowing about falsified business records did not effectuate clear public policy).

111. Several courts have refused to modify the employee-at-will doctrine based upon the statements of policy found in state licensing provisions. In *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 590 P.2d 513 (1978), the plaintiff was a professional nurse responsible for the staffing of nurses on her unit. She objected to the failure of the hospital to provide sufficient personnel needed to meet the needs of her patients. Unable to resolve the dispute, she was discharged, and brought a suit for wrongful termination relying on the legislative declaration that nurses were to act consistently with the health and safety of their patients. The court noted that while other courts had found exceptions to the at-will doctrine, they did so only where "a specifically enacted right and duty" had been violated. *Id.* at 468, 590 P.2d at 515. The court concluded the legislature, in mandating that nurses be licensed, did not intend to overturn the common-law rule of at-will employment, and sustained the discharge. See also *Suchodolski v. Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982), where a senior auditor alleged discharge in retaliation for discovering and reporting poor internal management and questionable procedures. The Michigan Supreme Court found the case involved only a "corporate management dispute and lacks the kind of violation of a clearly mandated

to protect discharged workers. Often recovery is denied where no statute specifically requires reporting improper or illegal conduct.¹¹² Courts often view such a firing as an internal corporate management dispute, lacking public significance.¹¹³ Recovery has likewise been denied where no explicit statute existed,¹¹⁴ (although public policy ought not be restricted to statutory formulation), or where administrative relief is available.¹¹⁵ The unpredictability of these results, and the heavy costs and delay inherent in litigation, act to deter and hinder employees from reporting violations of law and vindicating important social interests. In a subsequent section, I shall argue that, at a minimum, professional employees acting in conformity with their ethical obligations under an accepted code of ethics should be able to assert a cause of action under this public policy exception.

B. Implied Contract Exceptions

In a number of states, contract doctrine has been used to allow the discharged employee to show a promise of job security implied from sur-

public policy that would support an action for retaliatory discharge." *Id.* at 694, 316 N.W.2d at 712 (emphasis added).

112. *See, e.g.,* Campbell v. Eli Lilly Co., 413 N.E.2d 1054 (Ind. Ct. App. 1980) (employee discharged for advising employer's counsel of violations by his superiors of the federal Food, Drug and Cosmetics Act); Martin v. Platt, 179 Ind. App. 688, 386 N.E.2d 1026 (1979) (employees discharged for reporting to company official solicitation by their immediate superiors of kickbacks from company suppliers); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (employee discharged for advising corporate officer that product was unsafe).

113. *See, e.g.,* Suchodolski v. Michigan Consol. Gas. Co., 412 Mich. 692, 696, 316 N.W.2d 710, 712 (1982).

114. *See, e.g.,* Tyco Indus., Inc. v. Superior Court, 164 Cal. App. 3d 148, 211 Cal Rptr. 540 (1985) (cause of action for violation of public policy must have statutory support); Read v. City of Lynwood, 173 Cal. App. 3d 437, 219 Cal. Rptr. 26 (1985).

115. *See, e.g.,* Corbin v. Sinclair Mktg., Inc., 684 P.2d 265 (Colo. Ct. App. 1984) (no public policy tort pleaded under state employee safety statutes providing administrative remedies); Mein v. Masonite Corp., 124 Ill. App. 3d 617, 464 N.E.2d 1137 (1984) (no public policy tort for violation of state age discrimination statute); Tombollo v. Dunn, 342 N.W.2d 23, 25 (S.D. 1984) (no tort cause of action for sexual harassment within jurisdiction of state human rights commission); Wolk v. Saks Fifth Ave., Inc., 728 F.2d 221, 223 (3d Cir. 1984) (common law tort claim cannot be based on the Pennsylvania Human Relations Act, because that statute provides its own administrative remedies); Melley v. Gillette Corp., 19 Mass. App. Ct. 511, 475 N.E.2d 1227 (1985) (no public policy tort for age discrimination prohibited by state statute; must seek administrative remedies); Ohlsen v. DST Industries, Inc., 111 Mich. App. 580, 314 N.W.2d 699 (1981) (employee who refused to work in allegedly unsafe conditions has no cause of action for dismissal, since the worker must rely on the administrative remedy available under the protective statute which confers such rights); Ficalora v. Lockheed Corp., 193 Cal. App. 3d 489, 238 Cal. Rptr. 360 (1987) (retaliatory discharge claim preempted by California Fair Employment and Housing Act); Portillo v. G.T. Price Prods., Inc., 131 Cal. App. 3d 285, 182 Cal. Rptr. 291 (1982) (worker's compensation statute provides exclusive remedy for termination following claim for benefits).

rounding facts. In this category of cases, courts have utilized the employer's personnel handbook as a contractual obligation,¹¹⁶ and have applied traditional theories such as promissory estoppel¹¹⁷ and quasi-contract¹¹⁸ to protect employee reliance or to enforce employer promises. Employers have been quick to blunt the effect of these developments, however, even in the few states adopting them, by inserting, on applications and in employee handbooks and personnel policies, disclaimers of intent to provide contractual rights. Many courts have found such disclaimers effective.¹¹⁹

116. *Toussaint v. Blue Cross and Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980) (both oral statements in a job interview and employee handbook statements that referred to "just cause" for dismissal are deemed to be incorporated into the employment contract, and can change at-will employment status to one which requires just cause for discharge); *Damrow v. Thumb Cooperative Terminal, Inc.*, 126 Mich. App. 354, 337 N.W.2d 338 (1983) (handbook statements outlining progressive discipline policy may produce contractual obligation to utilize such steps prior to discharge); *Cain v. Allen Elec. Equip. Co.*, 346 Mich. 568, 78 N.W.2d 296 (1956) (handbook statements providing for the payment of severance pay may be enforceable); *Wiskotoni v. Michigan Nat'l Bank*, 716 F.2d 378 (6th Cir. 1983) (handbook statements regarding a probationary period may imply a "just cause" requirement for terminations after this period); *Rabago-Alvarez v. Dart Indus., Inc.*, 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 (1976) (worker is not an at-will employee where an employer tells employees at time of hire that it will not terminate arbitrarily, but only for cause); *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (implied contact not to terminate arbitrarily inferred from surrounding circumstances, such as length of employment and quantity of work); *Walker v. Northern San Diego County Hosp. Dist.*, 135 Cal. App. 3d 896, 185 Cal. Rptr. 617 (1982) (employee handbook may be part of employment contract and can constitute a promise of future employment); *Woolley v. Hoffman-LaRoche, Inc.*, 99 N.J. 284, 491 A.2d 1257 (1985), *modified*, 101 N.J. 10, 499 A.2d 515 (1985) (in the absence of a clear and prominent disclaimer, an implied promise in an employee handbook that workers will only be terminated "for cause" can be enforced against the employer, even though the employment was for an indefinite term and would otherwise be terminable at will).

117. *See, e.g., O'Shea v. RCA Global Communications*, 117 LRRM (BNA) 2280 (D.N.J. 1984) (court enforced employer's promise to make severance payments upon discharge of employees if jobs become obsolete, since employee continued to work after this expression in reliance upon these new terms of service); *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114 (Minn. 1981); (pharmacist resigned prior job in reliance on offer from employer); *Rowe v. Noren Pattern and Foundry Co.*, 91 Mich. App. 254, 283 N.W.2d 713 (1979) (employee left former position only to be fired two days before end of probationary period).

118. *Frederick v. Georgia-Pac. Corp.*, 331 F. Supp. 422 (E.D. Pa. 1971).

119. *See, e.g., Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344, 346 (E.D. Mich. 1980) (a wrongful discharge suit cannot be sustained where the employment application specifically states that employment may be terminated by either party at any time with or without cause); *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 461 (6th Cir. 1986); *Batchelor v. Sears, Roebuck & Co.*, 574 F. Supp. 1480, 1484-85 (E.D. Mich. 1983) (identical "disclaimer" yielded the same conclusions that Sears avoided a "just cause" standard for discharge through clear statements of at-will status); *Castiglione v. Johns Hopkins Hospital*, 69 Md. App. 325, 517 A.2d 786, 789-94 (1986) (enforced a handbook disclaimer that the document "does not constitute an express or implied contract"; handbook did not indicate any intention to limit the hospital's discretion to discharge only for cause since it expressly negated any contract); *Gianaculas v. Trans World Airlines, Inc.*, 761 F.2d 1391, 1394 (9th Cir. 1985) (disclaimer on employment application stating that employment was on an "at will" basis barred claim that

The most important potential contract remedy is judicial recognition of an implied term in the employment contract to discharge only for just cause, or to act only in good faith. Some courts have recognized such implied obligations, even in the absence of a writing, supported by the employee's performance of services over time.¹²⁰ The employer's just cause promise may be implied by communication of express job security assurances, longevity of employment, or formulation of discharge policies common to the industry. In essence, of course, courts in this analysis are simply utilizing normal contract principles, i.e., considering all surrounding circumstances, including reasonable expectations of the parties, to determine the existence of the implied promise.

An implied good faith obligation is present in most commercial contracts.¹²¹ The California Court of Appeals has noted that the covenant of good faith and fair dealing should be recognized because "certain . . . rights to job security [are] necessary to ensure social stability in our society."¹²² Indeed, beyond the immediate economic and psychological impact of a discharge, fired workers sustain longer periods of unemployment than workers who are unemployed for other reasons. Studies have shown that the job search of discharged workers is significantly longer than the job search of persons who had quit or been laid off.¹²³ One court has even held this covenant of good faith exists independent of the agreement of the parties. Violation by the employer is thus a tort, which qualifies for punitive damages.¹²⁴

But this theory has also provided only limited relief. This analysis has

employee handbook established implied contract to discharge workers without good cause); *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 482, 199 Cal. Rptr. 613, 622 (1984) (express terms of an employment contract may not be contradicted by terms implied in fact).

120. The California courts have led in fashioning these analyses. *See, e.g.*, *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (1980) (termination of long-term employee without cause violates the covenant of good faith and fair dealing implied in the employment contract); *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1318 (9th Cir. 1982), *cert. denied*, 459 U.S. 859 (1982) (longevity of service to employer and existence of representations (oral or in personnel policies) show an implied promise not to deal arbitrarily with employees); *Luck v. Southern Pac. Transp. Co.*, No. C-84-3-230 (S.F. Superior Court 1987) (discharge of computer programmer for refusing to submit to drug test breached covenant of good faith and fair dealing).

121. U.C.C. § 1-203 (1978). *See, e.g.*, *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 658, 328 P.2d 198, 200 (1958). "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *Id.*

122. *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (1980).

123. *Rodgers & Stieber, Employee Discharge in the 20th Century: A Review of the Literature*, 108 MONTHLY LAB. REV. 35, 39 (Sept. 1985).

124. *Gates v. Life of Montana Ins. Co.*, 205 Mont. 304, 638 P.2d 1063 (1982).

been adopted in relatively few states. "It would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination," held New York's highest court.¹²⁵ A covenant of good faith has been used only where manifest injustice would result if the discharge were allowed.¹²⁶ Moreover, an important limiting factor under all these contract theories is that damages are far more restricted in contract than in tort.¹²⁷

In sum then, since the end of the nineteenth century, employment law has basically recognized no legally enforceable interest in the worker. For a time, this doctrine had a constitutional overlay. When that ended in the Great Depression, legislation began to protect small, discrete portions of the workforce. Collective bargaining ended total employer control in unionized workplaces, and civil service and constitutional protections ameliorated the position of public employees. Some common law courts have now begun to view the transaction in more functional terms, employing tort and contract doctrines. These legal developments have been episodic, rather than smooth, and geographically diverse. Most of the labor force remains at-will, subject to discharge or discipline for any reason or for no reason at all. This is particularly true of professional employees.

V. CODES OF ETHICS AS A PUBLIC POLICY EXCEPTION TO EMPLOYMENT AT-WILL

The professional employee is often caught in a painful dilemma, trapped between his status as an employee-at-will and his ethical responsibilities. My thesis here is that courts and legislatures should recognize a privilege on the part of such workers to refuse to perform acts clearly contrary to their obligations under the code of ethics by which they practice. Such a privilege would form the basis for a cause of action against an employer who has discharged the professional for refusing to perform an unethical act, or for affirmatively performing his ethical duty. The nature of the professional's work, and society's interest in such ethical conduct, pro-

125. *Murphy v. American Home Prods., Corp.*, 58 N.Y.2d 293, 304-05, 461 N.Y.S.2d 232, 237, 448 N.E.2d 86, 91 (1983).

126. *See Vasques v. National Geographic Society*, 34 FEP Cases 295 (D. Md. 1982) (no action allowed for employees allegedly discharged on basis of national origin on theory that employer's conduct violated public policy); *Hong v. Commodore Int'l, Ltd.*, 115 LRRM 4022, 4026 (N.D. Cal. 1982) (no implied covenant of good faith for employee of 81 days where employer had no established policy regarding for cause dismissal); *Newfield v. Insurance Co. of the West*, 156 Cal. App. 3d 440, 445, 203 Cal. Rptr. 9, 12 (1984) (two years tenure is not sufficient longevity of employment to give rise to implied covenant).

127. *See, e.g., Valentine v. General Am. Credit, Inc.*, 420 Mich. 256, 362 N.W.2d 628 (1984) (refusal to allow recovery of mental distress damages for wrongful discharge in violation for an employment contract, limiting the plaintiff to remedies available for a cause of action in contract).

vide the bases for this public policy exception to the employee-at-will rule.

A profession is an occupation that regulates itself through required systematic training and collegial discipline. It is based in specialized knowledge and is service oriented rather than profit oriented, as institutionalized in its code of ethics.¹²⁸ These three unique characteristics of professional work and authority—collegial, cognitive, and ethical—demonstrate that professionals are not simply purveyors of expert services in the commercial marketplace. Each profession is subject to licensure, which creates a state authorized monopoly over these services.¹²⁹ The rationale for this monopoly is based, at least in part, on a corresponding obligation of the professional to regard duty to clients and to society as paramount to his own or his employer's economic self-interest. Edward Pellegrino, Director of the Kennedy Institute of Ethics, noted that the critical difference between a busi-

128. See generally Goode, *Encroachment, Charlatanism, and the Emerging Profession: Psychology, Sociology, and Medicare*, 25 AM. SOC. REV. 902 (1960). The National Labor Relations Act defines a professional employee as:

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes

29 U.S.C. § 152(12) (1982). For some of the attempts to define the essentials of a profession, see Greenwood, *Attributes of a Profession*, HARV. EDUC. REV. Winter 1953, at 33-50.

129. Licensure of professionals in the United States has a lengthy history. Professional associations, such as the American Medical Association, sponsored state licensing statutes during the late 19th century. The Supreme Court gave impetus to this in *Dent v. West Virginia*, 129 U.S. 114 (1889), which upheld the constitutionality of the West Virginia Medical Practice Act. By 1930 all states had some form of mandatory medical licensure. See generally R. DERBYSHIRE, *MEDICAL LICENSURE AND DISCIPLINE IN THE UNITED STATES* (1969). Many other health care workers, such as dentists, optometrists, pharmacists, veterinarians, practical and registered nurses, and dental hygienists are currently licensed in all 50 states. R. WEISFELD, *LICENSURE OF PRIMARY CARE PRACTITIONERS, A MANPOWER POLICY FOR PRIMARY HEALTH CARE*, INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES 8 (1977).

The Supreme Court has traditionally deferred to state regulation and licensing of professions:

We recognize that the States have a compelling interest in the practice of professions within their boundaries and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the state may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.'

Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) (citations omitted). Agencies also have the ability to regulate the practice of professionals. For example, the Secretary of the Treasury has the authority to suspend or disbar from practice before the IRS an attorney or an accountant who is shown to be "incompetent or disreputable." 31 C.F.R. § 10.50 (1987).

ness and a profession is that "at some point in a professional relationship, when a difficult decision is to be made you can depend on the one who is in a true profession to efface his own self interest."¹³⁰ In effect, the professional is the trustee of his ethical responsibilities.

Ethical standards create a moral tie between the professional and the public interest. The standards transform the sale of personal services into a calling, one impressed with a service obligation. The professional's work, at its best, reflects and shapes many of our country's distinctive and positive humane values. Lawyers often act as a buffer between the criminally accused and the prosecutorial power of the state,¹³¹ and ensure the review of bureaucratic determinations.¹³² Members of the bar have an obligation to provide public interest representation without fee or at reduced fee.¹³³ Doctors are required to recognize responsibility not only to patients, but also to "activities contributing to an improved community."¹³⁴ Engineers must "use knowledge . . . for the advancement of human welfare."¹³⁵ The public trust and responsibility of the professional is enforced by licensing statutes, peer review, civil damage suits, and ultimately even criminal statutes.¹³⁶ These communally-created control mechanisms attempt to ensure adherence to minimal standards. Violations of an ethical code will bring sanctions. Removal of the privilege to practice in the profession where licenses are required, and even civil and criminal penalties, may result from code violations.¹³⁷ In addition, many professional ethical rules permit conduct, but build in discretion, thus calling for individual professional judgment.¹³⁸

130. BODINE & LUNDBERG, *50 Hours for the Poor*, A.B.A. J., Dec. 1987, at 55 (quoting Edward Pellegrino, director of the Kennedy Institute of Ethics).

131. See *Powell v. Alabama*, 287 U.S. 45 (1932) (requires appointed counsel for indigent defendant in capital cases); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (same for prosecution that may result in imprisonment of any term); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (same for indigent defendant accused of felony).

132. See 5 U.S.C. § 555(b) (1982) (right to counsel in administrative proceedings).

133. MODEL RULES OF PROFESSIONAL CONDUCT AND CODE OF JUDICIAL CONDUCT Rule 6.1 (1983) [hereinafter MRPC]. "A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations . . ." *Id.*

134. AMERICAN MEDICAL ASSOCIATION, *Revised PRINCIPLES OF MEDICAL ETHICS*, no. VII (1980).

135. NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1974).

136. See *infra* notes 146-51.

137. See, e.g., DEL. CODE ANN. tit. 24, § 1925(7) (1987). "Whoever shall violate standards of nursing practice as adopted by the Board shall be fined not more than \$1,000, or be imprisoned not more than one year, or both." *Id.*

138. MRPC, *supra* note 133, Rule 1.5 (lawyers shall consider a number of factors in making fees reasonable). Rule 1.6(b) states that "A lawyer may reveal such information [relating to representation of a client] to the extent the lawyer *reasonably believes necessary* . . ." (emphasis added). *Id.*

But social responsibility and independent judgment often produce conflict with an employer when a professional is a full time employee. Management predictably focuses on loyalty to the enterprise¹³⁹ and "bottom line" profitability. These understandable goals, however, should not be permitted to outweigh a good faith and reasonable adherence to professional obligations. Enlightened public policy should foster ethical activity by such employee-professionals and must, therefore, refuse to tolerate discharges motivated by employee resistance to orders of superiors that are at variance with public responsibilities.

The duties of professionals are typically expressed in a code of ethics, or equivalent minimum standards of practice. Each recognized professional group has such an organized body of standards.¹⁴⁰ They constitute a public admission of duties assumed, i.e., obligations imposed upon the practitioner to maintain the integrity of practice. Containing both general and specific provisions, such codes affirm the social importance of such services. Some examples may illustrate this point. Despite the desire for maximum productivity, accountants¹⁴¹ and lawyers¹⁴² are explicitly forbidden from handling matters they know they are not competent to discharge. The ethical code of the National Society of Professional Engineers requires engineers to regard their duty to public welfare as paramount "to their duty to their employers in situations where professional skill and knowledge may be contrary to human welfare."¹⁴³

There are several reasons to carve an exception to the at-will doctrine for professionals based on the codes of ethics. As noted earlier, each profession is based on distinctive knowledge and service to the community. Each helps shape our culture in significant ways. Law, medicine, and other professions play a direct role in the formation of public policy and its implementation. The practitioners in these highly trained professions possess specific skills needed to solve individual and communal problems. They must be given the leeway to address these problems in a manner consistent with ethical standards.¹⁴⁴ In addition, the at-will professional employee motivated by ethical concerns attempts to correct a problem at the risk of the substantial financial investment in his education, his long-term financial se-

139. "There is no more elemental cause for discharge of an employee than disloyalty to his employer." NLRB v. Local 1229, Int'l Bhd. of Elec. Workers, 346 U.S. 464, 472 (1953).

140. See, e.g., *supra* notes 133-35, and *infra* note 141.

141. AICPA, CODE OF PROFESSIONAL ETHICS, 2 CCH AICPA PROF. STANDARDS, Rule 201 (1974).

142. MRPC, *supra* note 133, Rule 1.1; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A) (1983).

143. NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1974).

144. See generally JENNINGS, THE PUBLIC DUTIES OF THE PROFESSIONS, 17 HASTINGS CTR. REP. 1 (1987).

curity, and his career standing and reputation. Even if fortunate enough to avoid dismissal (occupational capital punishment for the worker),¹⁴⁶ the professional employee may encounter more subtle retaliatory actions, such as less desirable work assignments, loss of prestige, and decrease in promotional and pay opportunities.

Moreover, state licensure exerts tremendous pressure upon the at-will professional employee. These statutes grant regulatory bodies the power of admission and expulsion from the profession. A professional license may be revoked because of the violation of statutes that allow discipline because of "unprofessional" or "unethical" conduct. The disciplinary statutes are based on violations of codes of ethics and state-promulgated rules and regulations.¹⁴⁶ In medicine, Chief Justice Rugg of the Massachusetts Supreme Court set forth the rationale for such requirements in 1921:

Soundness of moral fibre to insure the proper use of medical learning is as essential to the public health as medical learning itself. Mere intellectual power and scientific achievement without uprightness of character may be more harmful than ignorance. Highly trained intelligence combined with disregard of fundamental virtues is a menace.¹⁴⁷

Character evaluation has likewise traditionally been part of the bar admission of lawyers and of their continued practice. Justice Frankfurter explained this requirement by noting:

lawyers stand as a shield . . . in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries been compendiously described as "moral character."¹⁴⁸

Professionals are also legally accountable for their actions. Professional malpractice is based on breach of a duty of care which society imposes on the professional.¹⁴⁹ Any private agreement between professional and client

145. In assessing procedural due process claims of public employees, the Supreme Court has acknowledged the "severity of depriving a person of the means of livelihood." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1984). The Court has also noted that a discharged employee seeking new employment "will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job." *Id.*

146. *See, e.g., Forziati v. Board of Registration in Medicine*, 333 Mass. 125, 128 N.E.2d 789 (1955); *Bell v. Board of Regents*, 295 N.Y. 101, 65 N.E.2d 184 (1952) (using the Ethical Principles of the AMA as a guide in determining license revocations).

147. *Lawrence v. Briry*, 239 Mass. 424, 429, 132 N.E. 174, 176 (1921).

148. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring).

149. *See Seedkem, Inc. v. Safranek*, 466 F. Supp. 340 (D. Neb. 1979) (accountant's

to disclaim such a publicly imposed duty would be unenforceable.¹⁵⁰ In some limited instances, society may even impose criminal liability for actions related to professional work.¹⁵¹

Some examples from a variety of factual situations may demonstrate the perilous position of the at-will professional employee. Doctors and nurses working in the occupational health setting have ethical obligations to promote and safeguard their clients' care and safety.¹⁵² In many situations these obligations require that they investigate and report information concerning the effects of chemicals and other toxic substances in the workplace. The employer of these health care personnel often has an economic interest in not investigating and reporting such circumstances. Moreover, the Occupational Health Code of Ethics states: "Occupational health nurses should safeguard the employee's right to privacy by protecting information of a confidential nature, releasing information only as required by law or upon written consent of the employee."¹⁵³ Management, however, often demands information on the health status of a worker, even without consent, in order to assess the employee's job performance or potential. The nurse is also usually in a subordinate job role in the workplace.

In some situations the whistleblowing professional employee may voluntarily reveal damaging information to corporate officials rather than to outsiders. This revelation may likewise bring down the wrath of superiors.

standard of care); *Smith v. Lewis*, 13 Cal. 3d 315, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (standard by which lawyer is held negligent); *Cooper v. National Motor Bearing Co.*, 136 Cal. App. 2d 229, 288 P.2d 581 (1955) (malpractice liability of occupational health nurse); *Prooth v. Wallsh*, 105 Misc. 2d 653, 432 N.Y.S.2d 668 (1980) (doctor's standard of care); *Posnien v. Rogers*, 533 P.2d 120 (Utah 1975) (veterinarian's standard of care); *Bridgman, Legal Malpractice — A Consideration of the Elements of a Strong Case*, 30 S.C.L. REV. 213 (1979). See generally Annotation, *Negligence, Inattention or Professional Incompetence of Attorney in Handling Client's Affairs as Ground for Disciplinary Action* 96 A.L.R.2d 823 (1964); RESTATEMENT (SECOND) OF TORTS § 299(A) (1965) (discussion of the standards by which professionals are judged).

150. *Tunkl v. Board of Regents*, 60 Cal. 2d 92, 383 P.2d 441, 82 Cal. Rptr. 33 (1963) (charitable hospital policy of having patients waive possible claims of negligence against hospital as a requisite to admission invalid as contrary to public policy); *Emory Univ. v. Porubiansky*, 248 Ga. 391, 282 S.E.2d 903 (1981) (dental clinic could not ask patients to waive right to sue for negligence). See also *Robinson, Rethinking the Allocation of Medical Malpractice Risks Between Patients and Providers*, 49 LAW & CONTEMP. PROBS. 173 (1986); 57 AM. JUR. 2d *Negligence* § 35 (1971); MRPC, *supra* note 133, Rule 1.8(h); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-102(A) (1983).

151. See, e.g., 15 U.S.C. § 77x (1982) (criminal penalties for materially false statements in reports required by the SEC); 18 U.S.C. § 1001 (1982) (same for false statements to any government agency); 18 U.S.C. § 1341 (1982) (mail fraud).

152. See, e.g., AMERICAN NURSES ASSOCIATION CODE FOR NURSES, (1985) No. 3.1 ("The nurse's primary commitment is to the health, welfare, and safety of the client.")

153. *Klutas, Confidentiality of Medical Information*, 25 OCCUPATIONAL HEALTH NURSING 14 (1977).

Recently a New York accountant, an employee of twenty-three years and an assistant treasurer in a corporation, alleged that he had been fired for revealing to top management an illegal accounting practice involving at least fifty million dollars. Pension reserves had been improperly inflated, allowing certain corporate officers to receive unwarranted bonuses by a management incentive plan. He was fired for this disclosure, and the New York Court of Appeals held that there was no statutory or common law cause of action.¹⁵⁴

The well-publicized case of *Herbster v. North American Co. for Life and Health Insurance*,¹⁵⁵ may illustrate the dilemma of the lawyer-employee. Herbster, the chief legal officer of an insurance company and an employee-at-will, sued his employer after discharge. He alleged that documents in a pending suit against his employer had been demanded in discovery proceedings and that he had been fired for refusing corporate demands to destroy or hide the documents. The attorney maintained that management's request would have forced him to violate the provisions of the Model Code of Professional Responsibility by misrepresenting facts to the court¹⁵⁶ and suppressing evidence he had a legal obligation to produce.¹⁵⁷ Herbster's suit for abusive discharge was summarily dismissed by the trial court because of the personal relationship inherent between attorney and client.¹⁵⁸ The Illinois appellate court affirmed, despite the fact that obvious public policies were implicated by the discharge. The court held that Herbster could not utilize the normal Illinois retaliatory discharge cause of action because of his professional status and relationship with his corporate client.¹⁵⁹ "The mutual trust, exchanges of confidences, reliance on judgment, and personal nature of the attorney-client relationship"¹⁶⁰ precluded the application of the retaliatory discharge tort to this situation.

The result in this and similar cases is unconscionable and should be overturned. The professional ordered to do that which his ethical standards forbid him to do should have a cause of action for wrongful discharge. Lawyers may serve as an illustration. An individual client may dismiss her at-

154. *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

155. 150 Ill. App. 3d 21, 501 N.E.2d 343 (1986).

156. MRPC, *supra* note 133, Rules 3.3, 3.4; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A) (5) (1986) ("A lawyer shall not . . . engage in conduct that is prejudicial to the administration of justice."); *Id.* at DR 7-102(A) (3) ("[A] lawyer shall not . . . [c]onceal or knowingly fail to disclose that which he is required by law to reveal.")

157. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-109(A) (1986) ("A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.")

158. *Herbster*, 150 Ill. App. at 23, 501 N.E.2d at 344.

159. *Id.* at 26, 501 N.E.2d at 346.

160. *Id.* at 29, 501 N.E.2d at 348.

torney at any time and for any reason.¹⁶¹ Similarly, the lawyer may, under most circumstances, withdraw at any time.¹⁶² These parties are typically in an episodic, at-will relationship, in which each has many options. The full-time employee-attorney required to act unethically is in a far different situation. His employer is his only client, wielding total economic power. Clearly, lawyers and other professionals can be "employees."¹⁶³ Given the intimate personal nature involved in many such relationships, as the *Herbster* court recognized, reinstatement of the professional-employee may not be feasible in some instances. Damages, including front pay, would then be appropriate to the injury. In larger organizations, the professional should be entitled to either resume his position or seek damages. Regardless of varying remedies, courts and legislatures should explicitly recognize the duty of the professional to follow a clear mandate embodied in recognized professional standards. The position of Attorney Herbster was no different than any other worker ordered to violate the law and discharged for his refusal to comply.¹⁶⁴ The attorney is a helpless prisoner caught between the dictates of the law and the economic power of his employer. Society should refuse to countenance such choices.

Where adopted by the agency with jurisdiction over the bar, the ABA Code of Professional Responsibility or the new Model Rules have the effect of law and set mandatory ethical standards for lawyers.¹⁶⁵ For example, a lawyer may not initiate a frivolous lawsuit, no matter what instructions an employer may transmit.¹⁶⁶ Acceding to such a demand risks discipline, up

161. MRPC, *supra* note 133, Rule 1.16(a)(3); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(B)(4) (1986). *See, e.g.*, *Carlson v. Nopal Lines*, 460 F.2d 1209 (5th Cir. 1972); *Fracasse v. Brent*, 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972); *In re Phelps*, 204 Kan. 16, 459 P.2d 172 (1969), *cert. denied*, 397 U.S. 916 (1970); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1397 (1977) ("no lawyer can continue to represent a client who does not wish to be represented").

162. MRPC, *supra* note 133, Rule 1.16(b) ("a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client").

163. The National Labor Relations Act clearly recognizes that professionals are employees for purposes of that statute. 29 U.S.C. § 152(12) (1982). *See also* *Komel v. Commonwealth Edison Co.*, 56 Ill. App. 3d 967, 372 N.E.2d 842 (1978) (employee cannot sue doctor-employee because Workers' Compensation provides exclusive remedy); RESTATEMENT (SECOND) OF AGENCY § 223(a) (1958) ("[e]ven in the case of attorneys and physicians there may be the master and servant relation . . .").

164. *See* cases collected *supra* notes 103-04.

165. *See* H. DRINKER, LEGAL ETHICS 26-30 (1953). *See also* *Sperry v. Florida*, 373 U.S. 379 (1963) (a state court has no jurisdiction to discipline a lawyer not licensed to practice in that state); *In re Van Beaver*, 55 Ariz. 368, 101 P.2d 790 (1940) (a lawyer's conduct is subject to regulation by the jurisdiction in which he is licensed to practice). *Cf.* *State v. Pounds*, 525 S.W.2d 547 (Tex. Civ. App. 1975) (court retains jurisdiction to discipline attorney who has left the state for acts committed while still practicing in state).

166. MRPC, *supra* note 133, Rule 3.1.

to and including disbarment.¹⁶⁷ Not only must the lawyer refuse to initiate a frivolous lawsuit, if a supervising lawyer gives such an order the supervisor must be reported to the appropriate disciplinary authorities, unless such report would violate a legally protected privilege.¹⁶⁸ The ethical codes of professions, other than law, can be enforced through licensure¹⁶⁹ and even criminal statutes.¹⁷⁰ Each of these demonstrates a public determination that ethical behavior on the part of the professional is of special concern to the community.

Some courts have already acted to protect the professional-employee faced with this dilemma. The Supreme Court of New Jersey has determined "an employer's right to discharge an employee-at-will carries a correlative duty not to discharge an employee who declines to perform an act that would require a violation of a clear mandate of public policy."¹⁷¹ The court recognized that "in certain instances, a professional code of ethics may contain an expression of public policy."¹⁷² In these circumstances "professionals owe a special duty to abide not only by federal and state law, but also by the recognized code of ethics of their professions."¹⁷³ In a subsequent New Jersey case, a wrongful discharge claim was based on public policy expressed both in state regulations regarding pharmacies and in the Code of Ethics of the American Pharmaceutical Association.¹⁷⁴ The plain-

167. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 legal history (1984). *See, e.g.*, *People v. Kane*, 655 P.2d 390 (Colo. 1982) (three year suspension for filing frivolous appeals); *In re Jafree*, 93 Ill. 2d 450, 444 N.E.2d 143 (1982) (lawyer disbarred for instituting numerous frivolous and defamatory suits).

168. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A), EC 1-4 (1983) (A lawyer having "unprivileged knowledge of a violation" of a Disciplinary Rule "shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.") (emphasis added). The Model Rules take a less stringent approach and do not require reporting if reasonable minds could differ. MRPC, *supra* note 133, Rule 5.2(b) ("A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."); Rule 8.3(a) (requires informing the appropriate authority when the conduct "raises a *substantial question* as to the lawyer's honesty, trustworthiness or fitness as a lawyer . . .") (emphasis added).

169. *See, e.g.*, N.J. STAT. ANN. § 45:1-21 (West Supp. 1987) (grounds for suspension or revocation of any certificate, registration or license by appropriate board); DEL. CODE ANN. tit. 24, § 1922(a) (1981) (grounds for revocation of nursing license, including unprofessional conduct). *See also* cases cited *supra* note 146; *Murphy v. Rowland*, 609 S.W.2d 292 (Tex. Civ. App. 1980).

170. *E.g.*, criminal liability may be imposed on accountants for making false statements in reports required by the SEC or in his accounting or auditing responsibilities. 15 U.S.C. § 77 (1982); 18 U.S.C. § 1001 (1982) (same for false statements to any government agency); 18 U.S.C. § 1341 (1982) (mail fraud).

171. *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 71, 417 A.2d 505, 512 (1980).

172. *Id.* at 72, 417 A.2d at 512.

173. *Id.*

174. *Kalman v. Grand Union*, 183 N.J. Super. 153, 443 A.2d 728 (App. Div. 1982).

tiff, an at-will pharmacist, claimed that he was discharged when he refused to cooperate with his employer's plan to operate an unstaffed pharmacy in a supermarket. The employer's action violated state regulations which required a registered pharmacist to be on duty, and the pharmacist was required by the Code of Ethics of the American Pharmaceutical Association to "expose, without fear or favor, illegal or unethical conduct in the profession."¹⁷⁵

The professional ordered to perform an unethical act is thus trapped in the same dilemma faced by workers ordered to do acts barred by statute or public policy. Numerous courts have imposed liability on an employer who has discharged a worker for refusing to perform such acts.¹⁷⁶ Similar treatment should be accorded when the employer orders an act in violation of an ethical code. If such standards can be used as a sword to punish the professional who transgresses them, they should likewise be a shield to protect the professional who follows them. In this realm, autonomy and independent judgment are crucial. Neither can exist without protection against reprisal.

Not every claim of adherence to a professional code of ethics will, of course, be justified. In many instances the employer's discipline is based on legitimate reasons that are far removed from any ethical considerations. Management properly resents outside interference with employee relations. A judicially developed exception to the at-will employment rule must contain some limits to unnecessary interference. Two such limits appear commonly in other contexts and might be applied in this instance: the employee must rely on a recognized professional code of ethics, and the claim must be made in good faith and be reasonable as measured by an ordinary profes-

N.J. STAT. ANN. § 45:14-1 (West 1978 and Supp. 1987) regulates the board of pharmacy in New Jersey.

175. *Kalman*, 183 N.J. Super. at 158, 443 A.2d at 730 (emphasis in original); *See also* *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (Law Div. 1978). In *O'Sullivan*, a paraprofessional x-ray technician was discharged for refusing to perform catheterization of a patient. *Id.* The court held that a cause of action for retaliatory discharge might lie based on New Jersey public policy favoring proper medical care and illegality of the procedure. *Id.*

176. *See, e.g.,* *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (discharge for violation of labeling and licensing statutes); *Trombetta v. Detroit, Toledo & Ironton R.R.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978) (refusal to falsify pollution reports); *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978) (discharge for reporting illegal overcharging practices on prepayment of installment loans); *See also* *Local P-1236, Amalg. Meat Cutters v. Jones Dairy Farm*, 519 F. Supp. 1362 (W.D. Wis. 1981), *aff'd*, 680 F.2d 1142 (7th Cir. 1982). In this case a Wisconsin district court overturned an arbitrator's decision upholding a meat processor's rule prohibiting employees from reporting contamination problems to the U.S.D.A. *Id.* The worker had revealed violations to the agency. The arbitrator viewed the rule as a reasonable means of ensuring internal management control. The district court enjoined enforcement of the decision because it contravened public policy. The rule prohibited employees from reporting violations even if unsanitary conditions were uncorrected after being reported to management. *Id.*

sional situated in a similar situation. Moreover, if effective internal procedures for resolving such problems have been created,¹⁷⁷ exhaustion of those procedural mechanisms should be required.

Judicial and statutory protection for the ethical professional is long overdue. Such protection would provide the individual employee with a greater sense of security, without burdening the employer with unwarranted obstacles to efficient personnel management. A significant disincentive to achieving public purposes would be removed. Most importantly, meaningful discussion of ethical norms would be stimulated, and conduct in conformity with professional standards would be significantly encouraged.

VI. ALTERNATE DISPUTE RESOLUTION

The preceding material on ethical conflict as an exception to the at-will doctrine advocates recognition by courts and legislatures that professionals have responsibilities beyond client loyalty and obedience to their employers. I believe that management likewise has a responsibility to prevent unethical acts, to avoid conflicts with professional employees, and to vindicate employees who refuse to engage in unethical conduct. Employers should ensure that ethical conduct is a condition of employment. My thesis here is that employers should be pro-active on this subject. Systems for resolving the inevitable disputes between professional employees and their superiors should voluntarily be put in place, and would benefit all concerned. The approach proposed here is based on preventive education, voluntary mediation, and a final dispute-resolution process. Taken as a whole, such a system, whether constructed within the firm or using outside arbitrators, could substitute for wrongful discharge litigation based on ethical claims.

The essential attributes of such a system are clear. An educational effort should be required, apprising employees and supervisors of the relevant ethical norms and heightening awareness of required behavior. When disputes emerge about what ethical conduct requires, the system should produce prompt resolution, with opportunity for fair presentation of positions by the opposing sides. An opportunity for mediation and conciliation is always appropriate. Open communication is indispensable. Resolution of the dispute at this point allows the parties to frame their own agreement, without outside interference. Advisory opinions may be useful before irrevocable action is required. Measures for protection against reprisal or intimidation must be present. A neutral decision making process should be available, with professional mediators and arbitrators utilized where the size of the organization makes this feasible. The range of presently available procedural mechanisms includes mediation, arbitration, and peer review.

177. See notes 195-98 and accompanying text.

What advantages does such a private dispute resolution system present? For the employer, it would avoid both the direct costs of litigation, (the possibility of large jury verdicts,¹⁷⁸ attorney fees and other costs¹⁷⁹) as well as the loss of productivity and disruption which attends court cases. Experience teaches that employees who feel they have been heard and fairly treated rarely sue.¹⁸⁰ Such a system would enhance the employer's image and status with its employees, and improve productivity and communication with valued professional employees.¹⁸¹ A private dispute resolution system would also be useful as a management tool, monitoring employer policies in the day-to-day work environment of its professional employees. The employer likewise has an interest in not having employees act in an unethical manner. Violations of ethical codes may be used by the consumer of the professional services as evidence of a breach of the legal duty owed to the client, setting the stage for malpractice lawsuits. Such a mediation-arbitration system may thus appropriately be viewed as a risk-management tool, a means of assuring fewer negligence lawsuits against the organization employing the professional.

Internal dispute resolution may also promote union avoidance, a factor important to many employers. Employees may no longer view collective bargaining as the sole means of assuring fairness for themselves. Moreover, if employers do not voluntarily create a method of dispute resolution, they will inevitably be confronted with litigation, or with new public dispute resolution systems far less palatable than one privately and voluntarily

178. See, e.g., *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312 (9th Cir. 1982) (award of \$1.9 million to three employees). In California, during 1982-86, plaintiffs in wrongful discharge cases won 73% of cases, and the average award was \$652,100. Gould, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885, 905. These statistics may present an exaggerated picture since California law on employment relations has moved much further than other states.

179. The cost of just the pretrial stages of a wrongful discharge suit can be more than \$10,000. Gould, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMPLOYEE REL. L.J. 404, 413 (1987). A speaker at a recent conference reported attorney's fees in a typical wrongful discharge case totalled between \$15,000 to \$40,000, up to the summary judgment phase alone. *Alternative Dispute Resolution Applied to Employment Context*, 5 Empl. Rel. Weekly (BNA) 477 (April 13, 1987). In addition, under many federal civil rights laws, a losing employer must pay the employee's attorney's fees as well as its own. See, e.g., Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982); 42 U.S.C. § 2000e-5(k) (1982) (Title VII provisions for attorney's fees); 29 U.S.C. § 216(b) (1982) (ADEA statutory attorney's fees).

On the cost of litigation, see generally Olson, *Controlling Litigation Costs: Some Proposals for Reform*, LITIGATION, Summer 1976, at 16. See also Rosenberg, Rient & Rowe, *Expenses: The Roadblock to Justice*, JUDGES J., Summer 1981, at 16, 17.

180. See, e.g., *Alternative Dispute Resolution Said to Save Time, Money in Discharge Actions*, 5 Empl. Rel. Weekly (BNA) 208 (Feb. 16, 1987).

181. See, e.g., Coulson, *Arbitration for the Individual Employee*, 5 EMPLOYEE REL. L.J. 406-13 (1979-80).

constructed.

What incentive do professional employees have for using such a system? First, the ordinary processes of court adjudication are extremely slow and prohibitively expensive.¹⁸² These factors are often determinative for many individuals who feel themselves aggrieved, especially where the employee has been discharged. Moreover, the uncertainty and personal anguish of such prolonged litigation often negatively affects the personal and professional lives of these individuals. A lawsuit almost invariably means an end to the relationship with the employer and can distract the worker from renewed productive work. These results may not be in the long-term interests of the individual. A professional employee will ordinarily prefer a private resolution of issues, particularly ethical ones, that relate to work performance. Employees thus have an interest in inexpensive, prompt, and fair adjudication of ethical disputes within the organization.

There is also an important public interest in such private dispute resolution systems. These systems would reduce the caseloads of state and federal agencies, especially equal employment opportunity agencies, overwhelmed with backlogged cases.¹⁸³ The load on courts would also be

182. The costs of litigating abusive discharge cases are often as great for plaintiff as those for the defendant employer (see *supra* note 179), but the individual typically has far fewer resources. The financial costs of a suit may thus make that course impossible. On the delays inherent in common law adjudication, see generally Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Lewin, *New Alternatives to Litigation*, N.Y. Times, Nov. 1, 1982 at D1, col. 1. "The average arbitration takes 141 days from filing to award, in contrast with the national average of 20 months for a civil suit to get from filing to trial in the federal courts." *Id.* at D2, col. 2.

The length of equal employment opportunity litigation, analogous to wrongful discharge suits of professionals, is legendary. The pre-trial period may last years, with subsequent hearings before district courts. See, for example, the history of *Bowe v. Colgate-Palmolive Co.*, 443 F. Supp. 696 (S.D. Ind. 1977), a sex discrimination case first filed in 1967. "After more than 11 years, 387 docket entries here in the trial court, and 3,934 pages of transcripts, the case is now before the court for an award of attorney fees." *Id.* at 698. See also *Pettway v. American Cast Iron Pipe Co.*, 17 Fair Empl. Prac. Cas. 1712 (5th Cir. 1978):

This case presents a striking illustration of the limitations of a court, and particularly an appellate court, in resolving satisfactorily the complex and difficult issues that are raised in the Title VII context. The questions before us today have been at once highly technical and disturbingly elusive. They have required an examination of a voluminous and at times impenetrable record and have necessitated an exceedingly lengthy opinion. After twelve years in the courts and scores of pages of appellate consideration, we still cannot say with confidence that the end of this struggle is in sight.

Id. at 1761.

183. The federal Equal Employment Opportunity Commission historically has been unable to manage its caseload. The number of charges filed with the EEOC increased from 8,854 in fiscal year 1966 to 77,000 in fiscal year 1976. Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law* 2 INDUS. REL. L.J. 1, 71 (1977). Clarence Thomas, Chairman of the EEOC, acknowledged that the system for handling EEOC complaints of federal workers is "a bottleneck . . .

lightened.¹⁸⁴ Valuable discussion and precedents would accumulate within firms and professions. Most significantly, equitable and impartial decision-making regarding ethical issues would provide an important incentive to such workers to abide by clearly defined ethical norms. Clients and the public would benefit.

Can the use of a procedure such as that outlined above for professional employees be made mandatory? While there is little precedent on this precise question, the answer should be yes. Arbitration of commercial disputes has long been specifically enforceable.¹⁸⁵ The Supreme Court has given consistent support to such alternate systems in a variety of contexts, emphasizing strong federal policies in favor of arbitration.¹⁸⁶ If fair procedures¹⁸⁷ and voluntary agreement are present, such contracts should be binding.¹⁸⁸ In a well known case, the Michigan Supreme Court noted "a written agreement . . . to discharge only for cause could . . . provide for binding arbitration on the issues and cause and damages."¹⁸⁹ With some limited exceptions,¹⁹⁰ failure to exhaust such dispute resolution remedies should bar a

a labyrinth." *Federal Employee Discrimination Complaints: EEOC calls for Major Changes in Processing System*, 128 Lab. Rel. Rep. (BNA) 205 (June 13, 1988).

184. Between 1960 and 1980 the number of filings per capita in federal district courts nearly doubled. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 669 (1986).

185. See, e.g., *AMF, Inc. v. Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985). See also *Tac Travel Am. Corp. v. World Airways, Inc.*, 443 F. Supp. 825 (S.D.N.Y. 1978) (claim for libel and slander subject to arbitration under contract calling for the arbitration of "any dispute between the parties with respect to this agreement").

186. In *Shearson/American Express v. McMahan*, 107 S. Ct. 2332 (1987), claims under the Securities Exchange Act of 1934 were held arbitrable where the parties had entered into a valid, pre-dispute agreement, despite long-standing contrary precedent. Use of grievance and arbitration machinery under the National Labor Relations Act is commonplace. See, e.g., *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 573 (1960).

187. *Renny v. Port Huron Hosp.*, 427 Mich. 415, 398 N.W.2d 327 (1987) (key procedural elements included representation by counsel, ability to confront and present evidence, and a neutral decision-maker).

188. See *United States v. Eric Elevator Corp.*, 214 F. Supp. 947, 948 (D. Mass. 1963).

189. *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 624, 292 N.W.2d 880, 897 (1980).

190. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Supreme Court held that statutory Title VII claims were not preempted by an arbitration award. The same result has been reached in other civil rights type claims. See, e.g., *Barrentine v. Arkansas - Best Freight System*, 450 U.S. 728 (1981) (employees not barred from suing under federal F.L.S.A. after negative decision of grievance committee). See also Hoellering, *Finality in Arbitration: How Final?*, 34 NYU NAT'L CONF. ON LAB. 119, 123 (1982). In most of these situations, however, the arbitration was part of a collective agreement signed by the union and never signed by the individual employee. See, e.g., *Gardner-Denver*, 415 U.S. at 39-42. While courts are reluctant to allow waiver of specific statutory civil rights, they are not adverse to extra-judicial processes as a whole. At a minimum, they may thus uphold a contract provision requiring arbitration as a condition precedent to the trial of a discharge case and accept only review of arbitration decisions rather than undertake a full de novo examination of the case.

later suit,¹⁹¹ even for issues not raised in the proceeding.¹⁹² Even if the employee raises a claim of abusive discharge based on a violation of public policy, the agreement to arbitrate should be given effect.¹⁹³

Whether subsequent court suits based on a violation of a professional code of ethics, or some other public policy, may be absolutely precluded by a prior neutral decision-maker's award has not been definitively settled.¹⁹⁴

Id. at 60 n.21. "We adopt no standards as to the weight to be accorded an arbitral decision. . . ." *Id.* at 60. See generally Blumrosen, *Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 MICH. J.L. REF. 249, 268-71 (1983). A few wrongful termination claims, based on strong public policy (e.g., protection of health and welfare), have also been held not preempted by arbitration awards. See, e.g., Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2319 (1985).

191. See *Fulghum v. U.P.S.*, 130 Mich. App. 375, 343 N.W.2d 559 (1983) (strong policy in favor of resolution and deference to arbitration decisions); *Viestenz v. Fleming Companies, Inc.*, 681 F.2d 699 (10th Cir. 1982), *cert. denied*, 459 U.S. 972 (1982); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978). See generally Annotation, *Exhaustion of Grievance Procedures or of Remedies Provided in Collective Bargaining Agreement as Condition of Employee's Resort to Civil Courts for Assertedly Wrongful Discharge*, 72 A.L.R.2d 1439 (1960).

192. As to issues not raised in arbitration, see *Cook v. Caterpillar Tractor Co.*, 85 Ill. App. 3d 402, 407 N.E.2d 95 (1980); *Deatrick v. Pacific Stationary & Printing Funk Seas Int'l*, 109 Ill. App. 3d 998, 441 N.E.2d 669 (1982).

Allowing claim and issue preclusion within a judicial system rests on the assumption that the rendering court and the recognizing court have the same jurisdiction, similar to identical rules of procedure, and equal judicial "dignity." The nature of the initial tribunal affects the scope of preclusion. Relitigation may be permitted when there are significant limitations on the quality or extensiveness of the procedures followed by the two courts. The comparison of procedures should focus on the practical aspects of the procedures involved and not simply on matters of form. For example, proof-taking in an administrative or arbitration tribunal may be relatively informal but may nevertheless permit the parties to present substantially the same evidence that might be adduced through the more formal procedures characteristic of courts. RESTATEMENT (SECOND) OF JUDGMENTS §§ 83, 84 (1980). Employers designing a voluntary and private dispute resolution system should build in appropriate procedural protections. See *Port Huron Hosp.*, *supra* note 187.

193. The Michigan Court of Appeals has indicated that a public policy claim is the kind of dispute that is subject to arbitration. *Ryoti v. Paine, Webber, Jackson & Curtis, Inc.*, 142 Mich. App. 805, 371 N.W.2d 454 (1985). Where there is a collective bargaining agreement the "just cause" provision and applicable arbitration under the contract may preclude tort claims. See, e.g., *Smith v. Greyhound Lines*, 614 F. Supp. 558 (W.D. Pa. 1984) (public policy claim); *Basak v. Asplundh Tree Expert Co.*, 122 Ill. App. 3d 240, 460 N.E.2d 1197 (1983) (public policy claim).

194. In a number of cases, courts have held that claims for retaliatory discharge and other torts are not subject to contractually agreed-upon grievance and arbitration procedures since those claims arise independent of the contract. See, e.g., *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984) (public policy claim); *Harper v. General Dynamics Corp.*, 117 L.R.R.M. (BNA) 3197 (D. Cal. 1984); *Messenger v. Volkswagen*, 585 F. Supp. 565 (S.D. W. Va. 1984) (public policy claim); *Alpha Beta, Inc. v. Nahm*, 160 Cal. App. 3d 1049, 207 Cal. Rptr. 117 (1984) (claim for intentional infliction of emotional distress); *Stocking v. Fred Meyer, Inc.*, 68 Or. App. 598, 683 P.2d 1021 (1984) (public policy claim).

The Supreme Court has recently ruled that § 301 of the LMRA does not preempt a state

Certainly, procedural fairness and explicit protections against reprisal would help courts view such arbitration, or mediated decisions, as final and binding. Guidance may be secured from The Restatement of Judgments, which sets out a series of requirements necessary for fair adjudication in administrative arbitration proceedings. These include:

- 1) Adequate notice to persons who are to be bound by the adjudication;
- 2) The right to present evidence and arguments and the fair opportunity to rebut evidence and argument by the opposing side;
- 3) A formulation of issues of law and fact;
- 4) A rule specifying the point in the proceeding when a final decision is rendered; and,
- 5) Other procedural elements . . . necessary to ensure a means to determine the matter in question . . . determined by the complexity of the matter . . . the urgency with which the matter must be resolved and the opportunity of the parties to obtain evidence and formulate legal contentions.¹⁹⁵

These principles should be useful to employers attempting to create procedural mechanisms to resolve such disputes. Processes used in analogous situations, such as revocation of physician staff privileges¹⁹⁶ may be helpful analogies in securing judicial acceptance.

To maximize the possibility that exhaustion would be required on all issues, employers should obtain a clear, voluntary statement from the employee that the grievance/arbitration procedure is applicable to all such claims. In addition, there should be an agreement or consent by the employee: to submit such claims to arbitration; to exhaust such procedures prior to litigation; and to have the award judicially enforced. While the employee thus loses his right to sue, he gains alteration of his previous at-will status. Employers would include such agreement and procedures in separate contracts, or in personnel policies or handbooks.

The outlines of such a system of education, mediation and decision making may well be evolving in the legal profession. Lawyers are unique in that their professional standards typically have legal effect, either through legislation or judicial rule. The new ABA Model Rules of Professional Con-

law claim of retaliatory discharge if that claim can be decided without interpreting the applicable collective bargaining agreement. *Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988). Since most professionals do not work under collective bargaining agreements, such preemption issues rarely arise in connection with their discharges.

195. RESTATEMENT (SECOND) OF JUDGMENTS § 83(2) (1980).

196. *See, e.g., Silver v. Castle Memorial Hosp.*, 497 P.2d 564 (Haw. 1972); *Storrs v. Lutheran Hosp. & Homes Soc'y*, 609 P.2d 24 (Alaska 1980).

duct provide that supervising lawyers must make "reasonable efforts," to ensure that the conduct of all lawyers conforms to the rules of professional conduct.¹⁹⁷ The comments to this rule make clear that this creates an affirmative duty, with enforcement varying with the size of the firm. In small firms, informal supervision is sufficient; in larger settings more elaborate and formal procedures may be necessary.¹⁹⁸ In such larger organizations, educational and dispute resolution mechanisms should be established.

Clearly, law firms may not punish a lawyer who refuses an order that violates the Model Rules.¹⁹⁹ Moreover, a subordinate is required to report such unethical directives to disciplinary authorities.²⁰⁰ A duty is created on lower level subordinate attorneys to follow the Rules, despite contrary demands by a supervisory lawyer.²⁰¹ Even if he feared that he would lose his job the subordinate would be liable for the misconduct, although the supervisory demand could be considered in mitigation.²⁰² The supervisor is likewise liable to discipline if he induces a violation.²⁰³ Finally, there may be financial sanctions against lawyers who fail their ethical obligations. Civil liability may be incurred if a plaintiff can prove that the absence of institutional safeguards proximately caused injury as a result of unethical conduct. Courts often look to code obligations to define professional duties.²⁰⁴ Courts are also now routinely imposing monetary sanctions on advocates

197. MRPC at Rule 5.1(a).

198. *Id.* at Rule 5.1. The Comment to this rule states that "The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice."

199. *Id.* at Rule 5.1(b) ("A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.").

200. MRPC at Rule 8.3(a) requires that a lawyer report "a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respect." "Substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. *Id.* at Rule 8.3 Comment.

201. *Id.* at Rule 5.2(a).

202. *See, e.g., In re Mogel*, 18 A.D.2d 203, 238 N.Y.S.2d 683 (1963); *In re Knight*, 129 Vt. 428, 281 A.2d 46 (1971); *In re Lemisch*, 321 Pa. 110, 184 A. 72 (1936); *In re Goldberg*, 321 Pa. 109, 184 A. 74 (1936); *In re Kiley*, 22 A.D.2d 527, 256 N.Y.S.2d 848 (1965). These cases, however, involved situations in which the associate was involved in clearly wrongful conduct. Rule 5.2(b) states that a lawyer does not violate the Model Rules of Professional Conduct if he "acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." There is, as yet, no specific case authority dealing with Model Rule 5.2(b).

203. MRPC at Rule 5.1(a).

204. For example, violation of Model Rule 1.3 (due diligence required in representation) may subject a lawyer to civil liability when the violation proximately causes damage. *See, e.g., Woodruff v. Tomlin*, 593 F.2d 33 (6th Cir. 1979), *aff'd in part, rev'd in part and remanded*, 616 F.2d 924 (6th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980).

who act unethically or who violate rules and statutes.²⁰⁵

VII. CONCLUSION

The employment-at-will rule emerged a century ago. The rule was entirely judge-made, and reflected ideas that powerfully influenced the judicial imagination of that time. Those underlying ideas have now been thoroughly discredited. No other industrialized society continues to give these ideas operative force.²⁰⁶ Even two American jurisdictions have recently enacted statutes which alter the legal status of employees.²⁰⁷ The United States is unique in not providing legal protection against unjust dismissal, or non-litigation alternatives for resolving employment disputes.

The employment-at-will rule produces unjustifiable results in many instances. For professionals employed full-time by one employer the rule often creates intolerable conflict between ethical duty and economic prudence. But there is little political pressure on legislatures for transformation by statute in the vast majority of states. As a judge-made common law doctrine, employment-at-will is ripe for judge-made change.²⁰⁸ Alternatively, alterations may emerge through the voluntary agreements and processes of private organizations and individuals. Hopefully these developments will occur soon.

205. See, e.g., FED. R. CIV. P. 11; 28 U.S.C. § 1927 (1982); *Davis v. Veslan Enterprises*, 765 F.2d 494 (5th Cir. 1985) (sanctions for improper removal petition); 2A J. MOORE, J. LUCAS, G. GROTHEER, JR., *FEDERAL PRACTICE* ¶ 11.02 [2], [3] (2d ed. 1987).

206. See generally Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).

207. Both Montana and the Virgin Islands now effectively limit discharge of non-probationary employees to a "good cause" standard. See MONT. CODE ANN. §§ 39-2-901 to -914 (1987); V.I. CODE ANN. tit. 24, §§ 76-79 (1987). These exceptions, however, illustrate the general state of the law.

208. "I take judge-made law as one of the existing realities of life." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 10 (1921).

