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FAIR DEALING IN EMPLOYMENT ASSOCIATIONS: THE RECIPROCITY OF RESPECT

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“One of my greatest teachers was my maternal grandmother, a most remarkable woman, and one of the many things she taught me was that dignity is not negotiable.”¹

From the beginning, we have maintained that all individuals are entitled to be treated with equal dignity and respect. However, for over a century, we have countenanced a principle in private, non-collective bargaining employment associations which permits one individual—the employer—to treat another—the employee—without regard to the latter’s dignity and self-respect.

In reaction, the courts² and commentators³ have over the last

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1. Hamburger, *Profiles: Searching for Gregorian*, THE NEW YORKER, April 14, 1986 at 46, col. 2.

2. For a recent review of case law development see Koys, Briggs & Grenig, *The Employment-at-Will Doctrine: A Proposal*, 17 LOY. U. CHI. L.J. 259, 260-70 (1986); Comment, *The Employment-at-Will Doctrine: Time to Collapse Another Citadel*, 11 U. DAYTON L. REV. 399, 402-19 (1986) [hereinafter Comment, *The Employment at Will*].

3. See, e.g., Blades, *Employment At Will v. Individual Freedom: On Limiting the Abu-*

twenty years vigorously, if somewhat haphazardly, sought to modify or eliminate the principle. This reaction has focused on the employee's side of the equation. It has not often addressed the employer's co-equal right to be treated with dignity, to have his or her interests treated with respect.

There is a duty of reciprocal respect inherent in every private, non-collective bargaining employment association. Employers owe respect to employees; employees owe respect to employers. The first section of this article will discuss this. The following sections will examine the development of the principles governing the private, non-collective bargaining employment association and the interests involved. The final section proposes a model for insuring that the parties act toward each other in a manner which respects and enhances their individual dignity.

I. EQUAL PEOPLE, EQUAL DIGNITY, EQUAL RESPECT

When we declared our independence in order "to assume . . . the separate and equal station to which the Laws of Nature and of Nature's God" entitled us, we held it "to be self-evident . . . that all men are created equal"⁴ Eighty-seven years later, Lincoln reminded his audience that our nation was "conceived in liberty and dedicated to the proposition that all men are created equal."⁵ A recent analysis of constitutional values concluded that "the fundamental value in the American polity has become the dignity of each human being."⁶

sive Exercise of Employer Power, 67 COLUM. L. REV. 1404 (1967); Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 UMKC L. REV. 189 (1983); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); 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) [hereinafter Note, *Protecting At Will Employees*]; Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983) [hereinafter Note, *Protecting Employees*]; Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974). For a catalog of articles and decisions, see Greenbaum, *Toward a Common Law of Employment Discrimination*, 58 TEMP. L.Q. 65, 65-80 (1985); Naylor, *Employment at Will: The Decay of an Anachronistic Shield for Employers?* 33 DRAKE L. REV. 113 (1983).

4. Declaration of Independence, *reprinted in* SOURCES OF OUR LIBERTIES 319 (Perry ed. 1978).

5. Gettysburg Address, *reprinted in* PRATT, A SHORT HISTORY OF THE CIVIL WAR 225 (1963).

6. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 708 (1980). Professor Murphy concluded that "[t]he basic value in the United States Constitution, broadly conceived, has become a concern for human dignity." *Id.* at 745. Accepting this conclusion has "[t]wo real advantages . . . (1) the notion is an inherent part of constitutionalism and is also congruent with democratic theory; and (2) more particularly, it fits the spirit, structure, and

All persons need the opportunity to plan, direct, shape their lives and follow their changing desires and aspirations.⁷ They need to be freed of the circumstances of birth and afforded an opportunity to fulfill individual goals. They need a freedom of movement, physically, socially, and economically. These, in conjunction with other freedoms or liberties, nurture the individual's feeling of dignity and sense of personal freedom and integrity, values which are essential to a satisfying life.⁸

A central focus of our political and social system is the protection and enhancement of these freedoms and the goals of individual independence and dignity.⁹ Underlying this is the "definitional core of constitutionalism: the belief that each person should be free because he or she has inherent worth as a responsible, autonomous human being."¹⁰ Individuals are not subordinate to society. They are equal to and free from all others. They are entitled to be treated and are obligated to treat others with equal respect and dignity.¹¹

purposes of the constitutional document and the development of this country's political ideals." *Id.* at 754.

7. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1230 (1979) (footnotes omitted). This autonomy:

involves such essentially human capacities as thought and deliberation, speech and craftsmanship. The competent exercise of such abilities in the pursuit of one's life plan forms the basis of self respect without which one is liable to suffer from despair, apathy, and cynicism . . . [S]elf-respect might be thought of as the primary human good.

Id.

8. See Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 63 (1974) [hereinafter Richards, *Free Speech*]; "Self-respect or self-esteem occupies a place of special prominence. People desire general goods—liberties, opportunities, wealth—in order to attain self-respect through the fulfillment of their life plan; self-respect will thus be referred to as the primary human good." Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281, 1305 (1977) [hereinafter Richards, *Unnatural Acts*].

9. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 118 (1978).

The nexus between fairness and human dignity has been noted in much of our political and moral philosophy and has occasionally been viewed as central to constitutional interpretation. . . . Indeed, implicit in social contract theory is the view that the formation of formal societies and governments is prompted by a need, basic to all people, to preserve individual dignity and autonomy, both moral and physical.

Id.

10. Murphy, *supra* note 6, at 749.

11. Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 778 (1985). See also Hubbard, *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465 (1978).

On the whole, I would prefer (and I assume that most persons would prefer) to live

John Rawls, in his exposition of *A Theory of Justice*,¹² assumed that the individuals establishing social institutions are moral, rational people possessing a "coherent system of ends and a capacity for a sense of justice."¹³ They are equally moral and possess equal dignity. They want certain primary goods which specify their stan-

in a world characterized by these postulates—*i.e.*, a world which is inhabited by rational persons who recognize and respect the equal rights of each person to be autonomous and to pursue his own rational set of ends without society interfering with this pursuit solely to maximize the well being of others.

Hubbard, at 467.

12. J. RAWLS, *A THEORY OF JUSTICE*, (1971) [hereinafter RAWLS]. The publication of Professor Rawls' book produced an explosion of comment. For book reviews, see Campbell, Book Review, 1 DALHOUSIE L.J. 210 (1973); Cobb, Book Review, 22 J. CONTEMP. L. 151 (1973); Frankel, Book Review, 5 COLUM. HUM. RTS. L. REV. 547 (1973); Fried, Book Review, 85 HARV. L. REV. 1691 (1972); George, Book Review, 20 UCLA L. REV. 856 (1973); Rhein-stein, Book Review, 73 COLUM. L. REV. 1515 (1973); Rogers, Book Review, 35 OHIO ST. L.J. 78 (1974).

Some reviews undertook a detailed critical evaluation of Rawl's theory or its particular components. See Bentley, Book Review, 121 U. PA. L. REV. 1070 (1973); Brock, Book Review, 40 U. CHI. L. REV. 500 (1973); Feinberg, Book Review, 81 YALE L.J. 1004 (1972); Feldman, Book Review, 61 CALIF. L. REV. 1463 (1973); Hart, Book Review, 40 U. CHI. L. REV. 534 (1973); MacIntyre, Book Review, 52 B.U.L. REV. 330 (1972); McBride, 81 Yale L.J. 980 (1972); Merritt, Book Review, 26 VAND. L. REV. 665 (1973); Monroe, Book Review, 9 CAL. W.L. REV. 368 (1973); Scanlon, Book Review, 121 U. PA. L. REV. 1020 (1973); Simson, Book Review, 23 EMORY L.J. 473 (1974).

Publication of Professor Rawls' book generated (and continues to generate) articles, including this one, either analyzing his theory or applying it to discrete legal problems. See, e.g., Baker, *Sandel on Rawls*, 133 U. PA. L. REV. 895 (1985); Boynton, *The Season of Fiction is Over: A Study of the "Original Position" in John Rawls' A Theory of Justice*, 15 OSGOOD HALL L.J. 215 (1977); Coffee, *The Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of Sentencing Commission*, 66 GEO. L.J. 975 (1978); Donnelly, *A Theory of Justice, Judicial Methodology, and the Constitutionality of Capital Punishment: Rawls, Dworkin and a Theory of Criminal Responsibility*, 29 SYRACUSE L. REV. 1109 (1978); Flynn & Ruffinengo, *Distributive Justice: Some Institutional Implications of Rawl's Theory of Justice*, 1975 UTAH L. REV. 123 (1975); Gifford, *The Relevance of the Complexity of Social Arrangements to the Attainment of Rawlsian Justice*, 51 TUL. L. REV. 510 (1977); Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47 (1977); Grey, *Property and Need: The Welfare State and the Theories of Distributive Justice*, 28 STAN. L. REV. 877 (1976); Hermann, *The Fallacy of Legal Procedure as Predominant Over Substantive Justice: A Critique of "The Rule of Law" in John Rawls' A Theory of Justice*, 23 DEPAUL L. REV. 1408 (1974); Hubbard, *supra* note 11; Kaufman, *The Nature of Justice*, 19 WASHBURN L.J. 197 (1980); Lyons, *The Nature of the Contract Argument*, 59 CORNELL L. REV. 1064 (1974); McCormick, *Justice: An Un-original Position*, 3 DALHOUSIE L.J. 367 (1976); Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); O'Kelley, *Rawls, Justice, and the Income Tax*, 16 GA. L. REV. 1 (1981); Pazner, *Entitlement Principles and the Original Position: A Rawlsian Interpretation of Nozick's Approach to Distributive Justice*, 19 ARIZ. L. REV. 169 (1977); Richards, *supra* note 7-8; Samek, *Justice and Ideology: Another look at Rawls*, 59 CAN. B. REV. 787 (1981).

13. RAWLS, *supra* note 12 at 329.

dard of well-being and their expectations.¹⁴ For Rawls, the most important primary good is "self-respect and a sure confidence in the sense of one's own worth. . . ." ¹⁵

Self-respect has two aspects. The first is the individual's sense of personal value, "a secure conviction that his conception of his goal, his plan of life, is worth carrying out."¹⁶ The second is the individual's confidence in being able to carry out the intended life plan.¹⁷ The first aspect is further refined. The individual's feeling of personal worth is supported by a rational life plan, especially one requiring the interesting use of natural capacities or abilities. This is complemented by the individual's need to have others appreciate his or her person and performance.¹⁸

Rawls' theory recognizes that a sense of community is of decisive importance, that individuals must combine in a cooperative effort to better everyone's life. To be acceptable, the community formed must recognize and respect each individual's independence and equality. It must acknowledge that each individual has a natural right to equal concern and respect.¹⁹ This is not a matter of birth or personal characteristic. It is a right which inheres in individuals who can make plans and give justice.²⁰ Rawls' emphasis is on individuals

14. Scanlon, *Rawls' Theory of Justice*, 121 U. PA. L. REV. 1020, 1023 (1973). "Neutrally desirable goods whose allotment is directly dependent on social institutions are what Rawls calls primary social goods. He lists these as rights and liberties, powers and opportunities, income and wealth, and the bases of self respect." *Id.*

15. RAWLS, *supra* note 12, at 396. See also Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

The good of self-respect seems to play a dual role in the theory of justice as fairness. It is . . . one of the primary goods . . . with respect to which the difference principle demands that the bottom's prospects be maximized But there is another perspective in which confirmation and nurture of self-respect are the end and objective of all the principles of justice taken together. In this perspective, self-respect is the preeminent social good, superordinate even to rights and liberties Self-respect thus becomes central element in the justification of the whole theory.

Michelman, at 990.

16. RAWLS, *supra* note 12, at 440.

17. *Id.*

18. *Id.*

19. See Baker, *Essay: Sandel on Rawls*, 133 U. PA. L. REV. 895, 926 (1985).

Rawls' theory of justice provides the theoretical grounds for demanding . . . that the needed community be open and egalitarian The contribution of liberalism, as developed by Rawls, is the recognition that an acceptable community must respect the autonomy and equality of the individual. It must conform to principles of justice even as its richness goes beyond them. In other words, the needed community can and must respect both the universal and particular aspects of our conception of the person.

Id.

20. Dworkin, *The Original Position*, 40 U. CHI. L. REV. 500, 532 (1973).

and the relationships between individuals. His theory is founded on individual equality and erects a social framework for evaluating how these equal individuals interact.²¹

Rawls argues that public recognition of his principles of justice would increase support for the individual's self-respect which would, in turn, increase the efficiency of social cooperation.²² It is a blending of independence and interaction.²³ Each individual has the capability to form and carry out a life plan which is "fundamental to the concept of what it is to be a person and because all are equal in their possession of it, all persons are entitled to equal concern and respect, as persons."²⁴ This implicates the notion of reciprocity or, as Rawls puts it, "the natural duty of mutual respect."²⁵ This requires civil treatment between equal individuals and a willingness to explain why certain actions are taken toward one another.²⁶ The basic struc-

[J]ustice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice.

Id.

21. Baker, *supra* note 19, at 901.

Rawls views his task as finding principles that represent people as equals—clearly an emphasis on relationships between people—and attempts to find criteria for evaluating a framework of interaction that embodies this claim. Yet Rawls also emphasizes people as rational and autonomous agents concerned with advancing their individual interests. . . . [H]is approach is less a hypothesis about people's 'nature' than a hypothesis about how the social order ought to view them.

Id.

22. RAWLS, *supra* note 12, at 178.

23. Richards, *supra* note 7, at 1224. "To think of persons as possessing human rights is to commit oneself to two crucial normative assumptions: first, that persons have the capacity to be autonomous, and second, that persons are entitled, as persons, to equal concern and respect in exercising that capacity." *Id.*

In describing autonomy, Professor Richards said people "have a range of capacities that enables them to develop, to want to act on, and in fact to act on higher-order plans of action that take as their object the individual's life and the way it is lived. . . . [A]utonomy gives to persons the capacity to call their lives their own." *Id.* at 1225.

24. *Id.* at 1225. Professor Richards said autonomy and equality are the elements of human rights which, if attributed to individuals, leads us "to assess and criticize human institutions and relationships in terms of whether those institutions and relationships conform to principles of obligation and duty that guarantee to each person equal concern and respect in exercising autonomy, the effective capacity for final responsibility in establishing the integrity of their lives." *Id.*

25. RAWLS, *supra* note 12, at 179.

26. *Id.*

[A] desirable feature of a conception of justice is that it should publicly express men's respect for one another. In this way they insure a sense of their own value. . . . For by arranging inequalities for reciprocal advantage and by abstaining from the exploitation of the contingencies of nature and social circumstance within a framework of equal liberty, persons express their respect for one another in the

ture of a society adhering to the principles of justice reflects the members' "desire to treat one another not as means only but as ends in themselves."²⁷

Rawls speaks out strongly for a fundamental individual equality, especially as it pertains to the respect owed to individuals as moral persons.²⁸ This is defined by two elements. First is the initial principle of justice which affords each individual "an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."²⁹ The second element is certain natural duties including that of mutual respect.³⁰

This article focuses on the natural duty of mutual respect in private, non-collective bargaining employment associations. It is a duty flowing from employer to employee, and reciprocally, from employee to employer. Each must show the other the respect due individual moral beings.³¹

Mutual respect is as basic as treating others as you would want to be treated under similar circumstances. This is a central intuitive feature of morality, of a system of conduct based on principles of right and wrong.³² It is a system of standards.³³ The duty of mutual respect inheres in this concept of universally accepted standards of

very constitution of their society. In this way they insure their self-esteem as it is rational for them to do.

27. *Id.* See also Rosenfeld, *supra* note 11, at 777.

As a distinct ideology, individualism has been widely adopted only in modern western civilization. Its most salient feature is its postulation of the primacy of the individual over social goals. Whereas all nonindividualist political theories believe in the hierarchical nature of the social order and the conformity of every element to its place within society as a whole, individualism maintains that the purpose of social and political institutions is to serve the interests of the individual.

28. RAWLS, *supra* note 12, at 511.

29. *Id.* at 250.

30. *Id.* at 333-42. See also Dworkin, *supra* note 20, at 532.

31. Lyons, *The Nature of the Contract Argument*, 59 CORNELL L. REV. 1064, 1070-71 (1974). Rawls' conception of justice:

is supposed. . .to embody the notion of 'reciprocity' which corresponds closely to the notion of a 'fair exchange.' . . . But Rawls's principles go well beyond this intuitive notion of fairness, since the intuitive notion merely *allows* such fair exchanges and does not require them. Rawls' principles *require* them, in the name of justice.

Id. (footnotes omitted).

32. Richards, *Free Speech*, *supra* note 8, at 60.

33. One commentator distilled Rawls' analysis down to this:

Moral principles are those that perfectly rational men, irrespective of historical or personal age, in a hypothetical position of equal liberty and having all knowledge and reasonable belief except that of their specific personal situation, would agree to as the ultimate standards of conduct that are applicable at large.

Id.

conduct.³⁴ It defines the manner in which individuals should treat each other. It is demonstrated by an individual's willingness to assume the other's point of view in assessing situations. It is being willing to assume the perspective of the other's conception of the good. It is being willing to give reasons and explanations as to why acts affecting the other are being taken.³⁵

In developing his theory of justice, Rawls discussed three stages of moral development: authority, association and principle.³⁶ This article is concerned with the morality of association which is "derived through participation in cooperative activities and characterized by the cooperative virtues of justice and fairness, fidelity and trust, integrity and impartiality."³⁷ The fundamental psychological response of the parties to the association is reciprocity, the "tendency to answer in kind."³⁸

A Rawlsian society is a cooperative effort designed for everyone's mutual benefit. It is characterized by a tension between identity and divergence.³⁹ The identity makes a social life attainable; the divergence makes social institutions necessary.⁴⁰ The well being of everyone is dependent upon their cooperation.⁴¹ In an employment association, this is "the idea that economic institutions are reciprocal

34. See Merritt, *Justice as Fairness: A Commentary on Rawls's New Theory of Justice*, 26 VAND. L. REV. 665, 676 (1973).

Just as natural selection and the evolutionary process have shaped man's physical and mental characteristics, [certain] psychological tendencies have forced man to develop a sense of justice that permits him to operate within fair cooperative arrangements and stable social groups. Rawls' theory of justice as fairness is consonant with these psychological laws and the tendency of evolution because both are rooted in the principle of reciprocity, mutuality or partnership—the tendency to answer in kind and return what is given.

Id.

35. RAWLS, *supra* note 12, at 337-38.

36. *Id.* at 462-79. See Brock, *The Theory of Justice*, 40 U. CHI. L. REV. 486, 497 (1973). This author stated that Rawls:

distinguishes three stages of morality: a morality of authority based on love of the parents and a desire to follow the injunctions they lay down; a morality of association derived through participation in cooperative activities and characterized by the cooperative virtues of justice and fairness, fidelity and trust, integrity and impartiality; and a morality of principle developed from participating in and benefiting from just institutions and characterized by the principles of justice.

37. Brock, *supra* note 36, at 497.

38. "At each stage [of morality] the root psychological response is one of reciprocity, a tendency to answer in kind the love of the parents, the fair play of associates and the society regulated by a public conception of justice." *Id.*

39. RAWLS, *supra* note 12, at 4, 126. See also Beatty, *Industrial Democracy: A Liberal Law of Labour Relations*, 19 VAL. U.L. REV. 37, 45-46 (1984).

40. Oberdiek, Book Review, 47 N.Y.U. L. REV. 1012, 1017-18 (1972).

41. RAWLS, *supra* note 12, at 126-27.

arrangements for mutual advantage in which the parties cooperate on a footing of equality."⁴² This is not an equality of talent or position. It is the equality of independent, rational human beings fulfilling their natural duty of mutually respecting one another.⁴³ When individuals form an employment association, employees, who voluntarily restrict their liberty in order to benefit everyone, have a natural right to expect that others who benefit, such as employers, should similarly restrict their liberties.⁴⁴ This reciprocity influences the association's structure and increases social trust.⁴⁵

The morality of the employment association is given content by standards appropriate to the individual's role.⁴⁶ Common sense rules of morality are adjusted to fit to the individual's particular position.⁴⁷ They are imposed upon the individual by the approval or disapproval of co-workers and employers.⁴⁸ But, above all, everyone is viewed "as equals, as friends and associates joined together in a system of cooperation known to be for the advantage of all and governed by a common conception of justice."⁴⁹ Individuals do not pursue their desires alone because they cannot be obtained without some form of social cooperation.⁵⁰ There is a cost to the individual. Once

42. Scanlon, *supra* note 14, at 1063.

43. RAWLS, *supra* note 12, at 15, 103. See also MacCormick, *Justice: An Un-Original Position*, 3 DALHOUSIE L.J. 367, 371 (1976). Rawls' principles of justice "would be . . . definitive of a conception of justice worthy of the assent of all human beings as free and rational moral agents, and consistent with the mutual respect for each other's persons which is incumbent upon such beings." MacCormick, *supra*, at 371.

44. RAWLS, *supra* note 12, at 343. See also Rosenfeld, *supra* note 11, at 806; Rogers, *Book Review*, 35 OHIO ST. L.J. 78, 82 (1974).

The basic contractarian idea—which is the reciprocity of obligation—shines through this formulation. In many ways, this principle appeals to one's notion of procedural fairness. A person cannot legitimately claim a right or privilege unless he is willing to extend that right or privilege to all other members of society.

Rogers, *supra*, at 82.

45. Merritt, *supra* note 34, at 671-72.

An obligation . . . arises from what Rawls calls the 'principle of fairness' which provides that when a group of people join a cooperative venture . . . those who restrict their liberty in order to benefit all, may rightfully expect others who benefit from the venture similarly to restrict their freedom. . . . [O]bligations are based on the notion that an individual should not gain from the cooperative effort of others without contributing his fair share. This is a principle of reciprocity or mutual benefit. This principle of reciprocity influences a large part of the structure of cooperation and trust in society.

Id.

46. RAWLS, *supra* note 12, at 467.

47. *Id.*

48. *Id.*

49. *Id.* at 472.

50. *Id.* at 15, 103, 126-27.

cooperation is accepted, associational demands require the individual to forego any unrestrained attempt to attain a strictly personal vision of the good.⁵¹ The cost is not too dear because the individual knows that others, co-workers and employers, are similarly restrained and that the association will be to everyone's advantage.⁵²

A primary goal of the employment association must be the protection and enhancement of each individual's dignity and sense of worth. The parties in a moral employment association must be sensitive to and respectful of each individual's dignity. The internal structure of the association must reflect the members' abilities and desires and provide a firm foundation for each member's sense of worth.⁵³

A scheme of cooperation is necessary. Without it, no one could have a satisfactory life. However, the terms must be reasonable. The employment association must have a "fair . . . basis [on] which those better endowed, or more fortunate in their social position . . .

51. See Rosenfeld, *supra* note 11, at 790.

Because the fulfillment of one's fundamental desires often requires some form of social cooperation, being left alone to pursue one's self-interest would be unsatisfactory. . . . Once cooperation between individuals becomes necessary, however, the demands of social life may interfere with the individual's pursuit of his or her own vision of the good.

Id.

52. RAWLS, *supra* note 12, at 15, 343. See also MacCormick, *supra* note 43, at 383. MacCormick states:

Society being a collaborative enterprise capable of securing for all advantages which none could secure alone, division of functions and division of labour increases the capacity of a society to confer benefits on its members. . . . [T]he best equilibrium is when only such inequalities are permitted as are either intrinsic to the performance of a function . . . or essential as incentives . . . in circumstances in which the performance of those tasks at all, and their performance by the best qualified people, secures the greatest possible benefits to those who benefit least from the overall scheme.

53. See Beatty, *supra* note 39, at 56.

By ensuring that the principles which govern the local, private processes of making the law of employment . . . are themselves sensitive to and respectful of this equality of personhood. . . we could be confident that the resulting terms and conditions of employment, which define the details of economic security, would be equally protective of the autonomy of everyone.

Id.; See also Merritt, *supra* note 34, at 686; Rheinstein, Book Review, 73 COLUM. L. REV. 1515, 1520 (1973).

The well ordered society is the result of the sense of justice of the participants in the original position, and as society remains well ordered, its citizens will continuously cultivate their sense of justice. Each citizen's self-respect will then be maintained by both the public body and its individual members. The citizenry is considerate and friendly to each other, ready to come to each other's assistance and fair in their dealings. . . . In Rawls' well ordered society individual justice is the concomitant of the justice of the state.

Rheinstein, *supra*, at 1520.

could expect the willing cooperation of others when some workable scheme is a necessary condition of the welfare of all."⁵⁴ The employees in the association have voluntarily restricted their liberty by agreeing to work according to the employer's rules and objectives. However, they have a right to expect the employer who benefits from this to be similarly restricted. The employees have a right to expect the association to "be just, if not perfectly just, at least as just as it is reasonable to expect under the circumstances."⁵⁵

There can be no valid employment association without this. The parties must acknowledge and respect each other's worth and dignity.⁵⁶ They must treat each other in ways which can be explained and justified. They must recognize that each possesses "an inviolability founded on justice that even the welfare of society as a whole cannot override."⁵⁷

Over the last twenty years, the private, non-collective bargaining employment association has received much attention. The commentators and the courts have wrestled with the problem of protecting individual values in an increasingly complex and interdependent society. They seek to preserve individual liberty and dignity without disrupting the workings of employment associations which are neces-

54. RAWLS, *supra* note 12, at 15.

55. *Id.* at 343.

56. See West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 399 (1985). West states that:

Kafka's depictions of commercial, employment and sexual transactions illustrate a simple truth: the consensual bargain that underlies commerce, labor and sex may save those transactions from being theft, slavery or rape but it hardly accords them positive moral value. . . . The morality of any of these consensual transactions depends upon the value of the worlds they create which in turn depends in part upon the worth of the relationships they contain.

See also Saphire, *supra* note 9, at 118.

57. RAWLS, *supra* note 12, at 3. See also Flynn & Ruffinengo, *Distributive Justice: Some Institutional Implication of Rawls' A Theory of Justice*, 1975 UTAH L. REV. 123, 157 (1975). Flynn and Ruffinengo state:

We have lost a consensus on an ethic of distributive justice in our culture and, as a result, we risk sinking into a new form of feudalism where the rights and dignity of the individual are made subservient to monolithic institutions, a political or economic elite, or a mindless and onrushing technocracy. In grappling with the conundrum of preserving individualism in an ever more complex and interdependent society . . . we need a renewed consensus of justice—one which does not exalt efficiency, meritocracy or group utility as the primary end of social and economic justice. Rather, we need a consensus which guarantees just institutions capable of restricting inequalities to those inequalities for the reasonable benefit of all, while preserving individual liberty.

Id. See also McClintock, *Enterprise Labor and the Developing Law of Employee Job Rights*, 8 GONZ. L. REV. 40, 277 (1972); Beatty, *supra* note 39, at 37.

sary for everyone's greater benefit.

The private employment association, a distinct and important social relationship, calls for promotion and regulation, independence and guidance.⁵⁸ The courts have become increasingly involved in the regulation and guidance of the private employment association. The judiciary, perhaps, recognizes that an individual's freedom and dignity is threatened by dependence upon an employer possessing great powers.⁵⁹ They may agree that it offends individual dignity when employers "exercise what is thought to be a demeaning measure of control over significant portions of the lives of others."⁶⁰

The remainder of this article will describe how the rules governing private, non-collective bargaining employment associations developed and briefly analyze the legislative and judicial encroachments on that rule. It will then discuss the various interests involved—employer, employee, social. It will then propose a model for fair dealing in employment associations which responds to these interests.

II. THE GENESIS OF EMPLOYMENT AT WILL

The employment association became legally significant after the Civil War. The number of factories increased as did the number of non-land holding workers.⁶¹ In 1877, Horace Wood, "pushing his pen ahead of precedent" and speaking with the certainty of one who has no support, said the American presumption regarding employment associations is that they are at will.⁶² Absent a contrary agreement, either party could end the association at any time for any reason. Before Wood made his egregious slip of the pen,⁶³ the

58. See Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 336 (1974) [hereinafter Note, *Implied Contract Rights*].

59. See Blades, *supra* note 3, at 1404, 1407; Note, *Employment at Will: An Analysis and Critique of the Judicial Role*, 68 IOWA L. REV. 787, 791 (1983) [hereinafter Note, *Employment at Will*].

60. Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1022 (1984).

61. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 553-54 (2nd ed.)

62. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1083-85, 1097 (1984).

63. See Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118, 126 (1976). Feinman lists three major errors in Wood's statement:

First, the four American cases he cited in direct support of the rule were in fact far off the mark. Second, his scholarly disingenuity was extraordinary; he stated incorrectly that no American courts in recent years had approved the English rule, that the employment at will rule was inflexibly applied in the United States, and that the English rule was only for a yearly hiring, making no mention of notice. Third, in the

employment association was viewed as a status relationship.⁶⁴ Employment was for a set term. Both parties had continuing rights and obligations. There were legally established terms and expectations.⁶⁵

The emerging industrial system could not work efficiently in that legal atmosphere. The system needed (and needed to exploit) a large reservoir of workers. It did not need individual artisans. It relied on a production process which used unskilled, almost fungible, workers. Employees were just another input in the process. For efficiency's sake, it was important that they be hired and fired as production demanded.⁶⁶

Wood's Rule facilitated industrial development by aligning the law of employment associations with the dominant laissez-faire economic ideology and its legal analogy, freedom of contract. Employers gained a flexible control of the workplace through an almost unchallengeable right to hire, direct and fire employees. The employee's right was to resign and move on to better employment.⁶⁷

Individualism was in its primacy in legal and economic affairs.⁶⁸ The employment association became one of limited scope, uncertain duration and impersonal relations. The legal analysis of the association became formalistic and abstract.⁶⁹ The law increased employer

absence of valid legal support, Wood offered no policy grounds for the rule he proclaimed.

64. See Note, *Employment At Will*, *supra* note 59, at 789.

65. See Summers, *supra* note 62, at 1085.

66. See L. FRIEDMAN, *supra* note 61, at 553-58. Getman & Kohler, *The Common Law, Labor Law and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415, 1418 (1983). Getman and Kohler state:

The new rule's appearance, of course, was concomitant with the phenomenal growth of the large industrial organization which so affected and characterized this era. . . . [T]he new industrial organization was not dependent on the skilled artisan for its successful and continued existence. Mass production techniques increasingly made skills obsolete and workers fungible. Industry now depended upon the availability of a large pool of workers who could be hired and discharged according to the demand for production. The at-will doctrine more accurately mirrored and fit the needs and behavior of industry; hence, it quickly came to replace the prior common law rules governing the employment relationship.

Getman & Kohler, *supra*, at 1418. See Epstein, *Common Law, Labor Law and Reality: A Rejoinder to Professors Getman and Kohler*, 92 YALE L.J. 1435 (1983).

67. See Decker, *At-Will Employment: Abolition and Federal Statutory Regulation*, 61 U. DET. J. URB. L. 351, 353 (1984); Note, *The Employment-at-Will Rule: The Development of Exceptions and Pennsylvania's Response*, 21 DUQ. L. REV. 477, 480 (1983) [hereinafter Note, *The Employment-at-Will Rule*]; Note, *The Covenant of Good Faith and Fair Dealing: A Common Ground for the Tort of Wrongful Discharge from Employment*, 21 SANTA CLARA L. REV. 1111, 1118-19 (1981) [hereinafter Note, *The Covenant*].

68. See Feinman, *supra* note 63, at 124-25.

69. See Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41*, 62 MINN. L. REV. 265, 295 (1978); Getman & Kohler, *supra*

discretion, while reducing employer liability.⁷⁰ It was molded to a philosophy which was "unwilling to imply any restriction on an individual's freedom to act unless she had clearly indicated an intention to obligate herself."⁷¹

The courts' unquestioning acceptance and enthusiastic application of Wood's Rule reflected dominant social and economic assumptions. To promote economic growth, the employer needed an absolute discretion to manage.⁷² The courts appeared convinced that the expanding economy necessarily required that employees share a major portion of the risks.⁷³ The employer needed the ability to act quickly and without incurring a legal obligation. The employer, in reaction to economic trends, needed the ability to prune away unproductive or unwanted employees.⁷⁴ The employer dominated the workplace, supported by a philosophy that "workers should remain unorganized, that business should be free from control, that the health of enterprise was the way, the truth, the consummate social good."⁷⁵

Society was being transformed but it was looking backward. It was moving from a pre-industrial larval to an emergent capitalistic stage but its eyes and ideology were cast back to the frontier. There was an anarchistic distrust of laws and other social contracts which were often regarded as devices for handicapping the most able so as to confer undeserved opportunities and rewards on their inferiors.⁷⁶

note 66, at 1418; Feinman, *supra* note 63, at 118.

70. See Catler, *The Case Against Proposals to Eliminate the Employment-At-Will Rule*, 5 IND. REL. L.J. 471, 473 (1983); Note, *Implied Contract Rights*, *supra* note 58, at 343.

71. Catler, *supra* note 70, at 473.

72. See Minda, *The Common Law of Employment at Will in New York: The Paralysis of Nineteenth Century Doctrine*, 36 SYRACUSE L. REV. 939, 987 (1985).

Perhaps in the early nineteenth century it was 'inevitable' that employers would be given the absolute right to terminate employment relationships of indefinite duration. . . . In the nineteenth century, labor was, after all, treated as a commodity, and the wage contract was itself merely a purchase and sale like any other business transaction. . . . The nineteenth century image of the employment relationship was thus reflective of the development of modern monopoly capitalism, which emphasized the importance of consumption, competition and, above all, managerial control.

Id.

73. See Note, *The Covenant*, *supra* note 67, at 1124.

74. See Comment, *Employment At Will and the Law of Contracts*, 23 BUFFALO L. REV. 211, 240 (1973). [hereinafter cited as Comment, *Employment*]

75. See L. FRIEDMAN, *supra* note 61, at 554.

76. Gilbert, *Westering Man: The Life of Joseph Walker* 295 (1983). Gilbert states that the frontier:

was won by a small, easily identifiable, specifically endowed group. . . . As a class, they were bold, aggressive, competitive, pugnacious, impatient and acquisitive. Direct, physical, forceful and violent action was esteemed as an effective, manly response to challenges. Being confident about the innate superiority of their own kind,

The "Frontier Response" was that the country would remain powerful, prosperous and stable if the endowed, aggressive and violent were allowed to dominate.⁷⁷

America had an open economic frontier.⁷⁸ Land and jobs were available. Individuals were mobile; movement was expected, encouraged.⁷⁹ The country exalted the rugged individual: independent, daring, self-reliant.⁸⁰ Competition reflected the individual: the better succeeded, the strong survived, the industrious prospered. This was the ideology of economic individualism.⁸¹

Freedom of contract was an important legal adjunct to this.⁸² Wood's Rule revamped the obligations inhering in the employment association. It worked to abolish duties imposed by long-standing custom. It moved the analysis away from the status oriented, mutual obligation model. The creation and terms of any employment association were dependent upon the parties' free will. They were seen as equally free and capable of agreeing on the rights and obligations of their association. As free individuals, they had a fundamental right to act without interference or limitation.⁸³ Contract law became a main vehicle by which the process of abstraction was imposed on social reality.⁸⁴ The ideology of economic individualism required freedom of contract, believing that it would benefit both the parties

they were intrinsically racist, xenophobic and paternalistic.

77. *Id.*

78. See, e.g., Dodd, *From Maximum Wages to Minimum Wages: Six Centuries of Regulation of Employment Contracts*, 43 COLUM. L. REV. 643, 656 (1943); Bierman & Youngblood, *Employment-at-Will and the South Carolina Experiment*, 7 IND. REL. L.J. 28, 29 (1984).

79. See Heinsz, *The Assault on the Employment At Will Doctrine: Management Considerations*, 48 MO. L. REV. 855, 861-62 (1983).

80. See Krauskopf, *supra* note 3, at 189-90.

81. See DeGeorge, *The Right to Work: Law and Ideology*, 19 VAL. U. L. REV. 15, 22-23 (1984).

82. See generally E. FARNSWORTH, *CONTRACTS* §1.7 (1982); Note, *Protecting At Will Employees*, *supra* note 3, at 1824-28.

83. See Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 953 (1984); Rosenfeld, *supra* note 11, at 822; Note, *The Covenant*, *supra* note 67, at 1119.

84. Rosenfeld, *supra* note 11, at 836-37.

Classical contract law deals with abstract relationships and is blind to differences of subject matter and person. It is not concerned with who buys or who sells or what is bought or sold. It treats all commodities . . . interchangeably. The abstraction of classical contract law is not a mere contrivance. It is not a flight from reality, but rather makes social facts and social reality more abstract. Thus, abstraction is not merely a creation of the law, but a reflection of the very transformations produced by the free market economy. Indeed, in the last analysis, it is the market that requires people and commodities to become essentially interchangeable.

Id.

and society.⁸⁵

The employment association was seen as a bipartite relationship.⁸⁶ The only interests involved were those of the employer and employee. Wood's Rule erased the status-based, personal obligation model and replaced it with an individualistic, formalistic one.⁸⁷ Viewing the association as a transaction between discrete, equally free, equally able individuals fitted it comfortably within the contract notion of voluntary bargaining and agreement.⁸⁸ The association was impersonal, commitments were limited and notions of mutual responsibility and worker security were discarded.⁸⁹

Wood's Rule perhaps was adequate for a frontier, agrarian-type society. It may well have encouraged the development of an emergent industrial society. It may have accurately reflected the dominant economic and social ideology of the immediate post-Civil War society in which mobility was an asset.⁹⁰ However, depersonalizing the employment association and abstracting the parties, isolated the individual, severing his or her links to others in society. This created an association in which the individual's dignity was not honored, in which the individual was seen as just another industrial factor rather than as an independent being.⁹¹

By the end of the 19th century, it became increasingly evident, at least to state and federal legislators, that an abstract, individualis-

85. See MacCormack, *Important Aspects of the Common Law Basis of the Labor Decision and Steps Towards the Development of a National Labor Policy—Part I*, 31 B.U.L. REV. 139, 141-42 (1951).

86. See Note, *Protecting At Will Employees*, *supra* note 3, at 1824.

87. See Rosenfeld, *supra* note 11, at 812.

As market relationships become predominant, individuals are increasingly separated from their own organic status-oriented groups in order to become associated with strangers. This . . . is not a fraternal relation of concrete personalities, but the impersonal relationship of abstracted or disembodied egos linked externally on the basis of their reciprocity as beings who possess formal legal equality.

Id.; See also McClintock, *supra* note 57, at 72.

88. See Getman & Kohler, *supra* note 66, at 1419.

89. See Note, *Protecting At Will Employees*, *supra* note 3, at 1825.

90. Krauskopf, *supra* note 3, at 191. Krauskopf states:

An individual's employment relationship with any one employer was seldom of long-term economic significance. The cultural frontier mentality and the burgeoning variety of commercial enterprises led to an expectation of personal mobility and entrepreneurial instability. The widespread agrarian base of society allowed for much more seasonal and part-time employment. Most important . . . long-term economic security in the sense of provision for subsistence, food, shelter, medical care, disability protection and retirement or old-age 'insurance' was self-insured by the family institution, the basic personal protection unit of society . . . [C]lassical contract theory . . . fit the temper of those times.

91. See Rosenfeld, *supra* note 11, at 850-51.

tic, bipartite employment association model was not satisfactory. The “primitive conception of a country of yeoman, a federalism of smallholders, no longer suited reality.”⁹² Industry was growing. The numbers of urban industrial workers were growing. Fewer people were living on the land. Individualism was becoming mythical and interdependence was becoming real. This was “not the interdependence of small, face-to-face groups, but the interdependence of strangers—buyers who never saw their sellers; patients without close ties to their doctors; workers who did not know the boss’s name.”⁹³

This change in the employment association model seemed clear to everyone but the courts. The courts defended, like a British square, the ideology of economic individualism.⁹⁴ In 1905, the Supreme Court in *Lochner v. New York*⁹⁵ reviewed a New York statute limiting the hours which baking and confectionary employees could work. The employer challenged the statute’s constitutionality in the state trial court and lost; in the state appellate division and lost; in the state court of appeals and lost.

The employer, however, won in the United States Supreme Court. The majority found that the statute interfered with the parties’ right to contract for the sale of labor, a right which “is part of the liberty of the individual protected by” the Constitution, the liberty being “the right to purchase or to sell labor.”⁹⁶ Putting the question as “which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract,”⁹⁷ the Court refused to uphold the legislation as a valid labor law⁹⁸ or a valid health law.⁹⁹

92. L. FRIEDMAN, *supra* note 61, at 657.

93. See L. FRIEDMAN, *supra* note 61, at 657.

94. See Note, *Protecting At Will Employees*, *supra* note 3, at 1826 discussing opinions representing “the high water mark of the Court’s insistence on laissez-faire principles in the labor area, despite a growing concern by legislatures at the time that freedom of contract was a cruel illusion because of the extreme differences in bargaining power between employers and employees.” *Id.* at 1826.

95. 198 U.S. 45 (1905). See Balkin, *Ideology and Counter-Ideology From Lochner to Garcia*, 54 UMKC L. REV. 175 (1986).

96. 198 U.S. at 53.

97. *Id.* at 57.

98. *Id.*

There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State.

With some alarm, the Court noted the increase of legislative “interference . . . with the ordinary trades and occupations of the people.”¹⁰⁰ The Court felt that many laws “while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives.”¹⁰¹ The Court saw the legislature’s real motive as “simply to regulate the hours of labor between the master and his employee’s (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employee’s.”¹⁰² This was an unconstitutional interference with “the freedom of master and employee to contract with each other in relation to their employment.”¹⁰³

Three years later, the Court in *Adair v. U.S.*¹⁰⁴ determined whether Congress could “make it a criminal offense . . . for an agent or officer of an [employer], having full authority in the premises from the [employer], to discharge an employee from service sim-

99. *Id.* at 61. The *Lochner* Court also refused to uphold the legislation as a valid health law describing it as:

an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual.

100. *Id.* at 63. See Balkin, *supra* note 95, at 182. Balkin describes “the individualist ideological basis of *Lochner* jurisprudence” as viewing the employment association this way:

“The relations between employer and employee are their own business and nobody else’s, and for the government to alter these relations based upon the effects that a private contract had on third parties would be to deny the local and autonomous character of contracts. Contracts, and especially employment contracts, were private, local relations between parties which would not be interfered with regardless of the effects that they had on others. . . . This attitude is consistent with individualist philosophy, which denies the responsibility of actors for the effects that their actions have on others in society.

101. *Lochner*, 198 U.S. at 64.

102. *Id.*

103. *Id.* Justice Harlan, joined by Justices White and Day, dissented. Assuming that “liberty of contract is subject to such regulation as the State may reasonably prescribe for the common good and the well-being of society,” they did not consider the legislation to “be, beyond question, plainly and palpably in excess of legislative power.” *Id.* at 68. Justice Holmes also dissented stating that the case was “decided upon on economic theory which a large part of the country does not entertain” (*Id.* at 75) and that “the word liberty . . . is perverted when it is held to prevent the natural outcome of a dominant opinion” which does not “infringe fundamental principles as they have been understood by the traditions of our people and our law.” *Id.* at 76.

104. 208 U.S. 161 (1908). See Hogler, *Employment At Will and Scientific Management: The Ideology of Workplace Control*, 3 HOFSTRA LAB. L.J. 27, 39-46 (1985).

ply because of his membership in a labor organization?"¹⁰⁵ The lower court said yes; the Supreme Court said no.

The Court considered Congress' action "an invasion of the personal liberty, as well as the right of property" protected by the fifth amendment.¹⁰⁶ This included the rights "to make contracts for the purchase of the labor of others and equally . . . for the sale of one's own labor."¹⁰⁷ The agent had a liberty and property right "to serve his employer as best he could," a right "to prescribe the terms upon which the [employee's] services . . . would be accepted and it was the [employee's] right . . . to become or not, as he chose, an employee . . . upon the terms offered."¹⁰⁸

Congress had no right "to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another."¹⁰⁹ The employee had the right "to sell his labor upon such terms as he deems proper" and to "quit the service of the employer, for whatever reason."¹¹⁰ The employer had the right "to prescribe the conditions upon which he will accept such labor" and "for whatever reason, to dispense with the services of such employee."¹¹¹

A similar state legislative scheme was struck down in *Coppage v. Kansas*.¹¹² As the majority read it, the statute made it criminal for an employer "to merely prescribe, as a condition upon which one may secure certain employment . . . (the employment being terminable at will) that the employee" agree not to join or remain a member of a union.¹¹³ The employee was "subject to no incapacity or

105. 208 U.S. at 171.

106. *Id.* at 172.

107. *Id.*

108. *Id.* at 172-73.

109. *Id.* at 174. Justice Harlan who wrote the majority opinion in *Adair* attempted to reconcile his dissent in *Lochner*: "Although there was a difference of opinion in that case . . . as to certain propositions, there was no disagreement as to the general proposition that there is a liberty of contract which cannot be unreasonably interfered with by legislation." *Id.*

110. 208 U.S. at 174-75.

111. *Id.* Justice McKenna, who dissented, disliked the majority's abstract approach and felt Congress had acted properly "not in speculation of uncertain provisions of evils but in experience of evils." *Id.* at 185. Justice Holmes also dissented thinking "that the right to make contracts at will that has been derived from the word liberty. . . has been stretched to its extreme by the decisions." *Id.* at 191.

112. 236 U.S. 1 (1914). See Lesnick, *The Consciousness of Work and the Values of American Labor Law*, 32 BUFFALO L. REV. 833, 843-47 (1983); Balkin, *supra* note 95, at 180-81.

113. 236 U.S. at 9.

disability, but on the contrary free to exercise a voluntary choice.”¹¹⁴ The result was ordained. If congressional interference with the employment association was unconstitutional, so must the state’s.

Precedent provided a quick answer, yet the Court undertook a thirteen-page justification. The right to contract for employment “is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority . . . have no other honest way to begin to acquire property save by working for money.”¹¹⁵ The Court acknowledged “the inequalities of fortune,” the natural occurrence that “parties negotiating about a contract are not equally unhampered by [the] circumstances.”¹¹⁶ But the Court felt it “self-evident that, unless all things are held in common, some persons must have more property than others.”¹¹⁷ It was simply “the nature of things” that upholding freedom of contract and the right of private property required “recognizing as legitimate those inequalities of fortune that are the necessary result” of their exercise.¹¹⁸

The Court’s opinions put it far out of step with reality. Legislatures had experienced the evils which the emerging industrial society generated. True, for a brief period in the 19th century, there was a combination of economic, social and legal philosophies which promoted an atmosphere in which the formation and performance of the employment association was immunized from legislative or judicial encroachment.¹¹⁹ The atmosphere began to change when society became aware of the consequences. It became apparent “that a system in which everybody is invited to do his own thing, at whatever cost to

114. *Id.*

115. *Id.* at 14.

116. *Id.* at 17.

117. *Id.*

118. *Id.* Justice Holmes in his dissent called for the overruling of *Lochner* and *Adair* and said that under then current conditions “a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him.” *Id.* at 26-27. For Justice Holmes, if such a belief “whether right or wrong, may be held by a reasonable man . . . it may be enforced by law . . . to establish the equality of position between the parties in which liberty of contract begins.” *Id.* at 27.

Justice Day, joined by Justice Hughes, said it certainly could:

be no substantial objection to the exercise of the police power that the legislature has taken into consideration the necessities, the comparative ability, and the relative situation of the contracting parties. While all stand equal before the law, and are alike entitled to its protection, it ought not to be a reasonable objection that one motive which impelled the enactment was to protect those who might otherwise be unable to protect themselves.

Id. at 42.

119. See generally Dodd, *supra* note 78; Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining*, 50 HARV. L. REV. 1071 (1937).

his neighbor, must work ultimately to the benefit of the rich and powerful, who are in a position to look after themselves. . . ."¹²⁰ The 19th century ideology upheld by the courts assumed a "narrow scope of social duty" which, like the frontier mentality, said "no man is his brother's keeper; the race is to the swift; let the devil take the hindmost."¹²¹

The courts approved these abstracting, depersonalizing theories which produced a system of industrial oppression where workers were not credited with having any right to dignity or respectful treatment.¹²² They were regarded as factors, not moral beings.¹²³

The employer and judicial attitude that employment was at will was behind the times. No longer was the individual employee's industry, capability and judgment a guarantee that he or she could provide for self and family. The country had moved from a self-sufficient, agrarian, frontier society to a dependent, industrial, urban one. For the economically weaker employee, freedom of contract was real

120. G. GILMORE, *THE DEATH OF CONTRACT* 95 (1974).

121. *Id.* See also Balkin, *supra* note 95, at 177 n.7. Balkin states:

It is characteristic of an ideology that it is both partially a true reflection of the world and a distortion or falsification of it. For example, in the *Lochner* era the Court saw the freedom of persons to engage in economic transactions as an essential aspect of liberty. This ideological assertion did reflect a truth about human nature; human dignity does require that, to some extent, people have freedom to choose their own goals, freedom to choose how they will use their own property, and freedom to choose how they will earn a living. At the same time, the Court's exaltation of liberty of contract concealed the economic coercion that may result in a regime of free contract where parties have vastly different amounts of economic resources and bargaining power.

Id.

122. Magruder, *supra* note 119, at 1076. See also L. FRIEDMAN, *supra* note 61, at 554. Professor Friedman described the employees' situation in hellish terms:

These workers in industry were poor; work and life were hard. . . . Conditions in many factories and mines were appalling. Employers hired and fired at will; there was little or no job security and the worker was trapped in a web of company rules. The business cycle added special miseries, social services were weak; sickness, broken bones or a downturn in business added new threats to the worker's security.

L. FRIEDMAN, *supra*, at 554.

123. Magruder, *supra* note 119, at 1072-73. In 1894, a congressional committee described one employer's attitude toward the employment association:

The company does not recognize that labor organizations have any place or necessity in Pullman, where the company fixes wages and rents, and refuses to treat with labor organizations. The laborer can work or quit on the terms offered; that is the limit of his rights. To join a labor organization in order to secure the protection against wrongs, real or imaginary, is overstepping the limit and arouses hostility. This position secures all the advantage of the concentration of capital, ability, power and control for the company in its labor dealings and deprives the employees of any such advantage or protection as a labor union might afford.

Id.

only in law, not in fact. Wood's Rule, which was "prompted by the economic realities of an industrializing society,"¹²⁴ had to be reevaluated in light of the economic realities of an industrialized society.

The legislative incursions, which the courts so regarded with horror, represented evolving notions of social fairness and decency. The employment association was seen as a tripartite one: employer, employee and social.¹²⁵ To the courts, social intervention was "an iconoclastic and dangerous invasion of traditional and fundamental liberties."¹²⁶ But history showed otherwise. The court created "liberties" were neither traditional nor fundamental. A swing toward social intervention in employment associations began before the 19th century ended. The ascendancy of economic individualism and freedom of contract occurred during "a relatively short interval between two periods of regimentation."¹²⁷ Freedom of contract masked the true nature of the employment association and made the existing inequalities appear legitimate. It resulted in domination and exploitation, thus requiring social intervention.¹²⁸

Perhaps the courts found it impossible to imagine that the economic frontier was closed and that the perspectives and responses perhaps once valid, were no longer.¹²⁹ The country had transformed—from self-reliance to reliance, from independence to interdependence, from abundant to limited opportunities, from property-owning to job-holding, from personal to impersonal employment

124. Murg & Scharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?* 23 B.C.L. REV. 329, 335 (1982).

125. See, e.g., Note, *Contracts: Termination of Employment At Will—Public Policy May Modify Employer's Right to Discharge*, 14 RUTGERS L. REV. 624, 625 (1960) (the employer's interest in running his business as he sees fit, the interest of the employee in maintaining his employment and the interest of the public at large in maintaining a morally sound societal structure, must all be balanced together).

126. Dodd, *supra* note 78, at 643.

127. *Id.*

128. See Rosenfeld, *supra* note 11, at 814.

[W]here background fairness is lacking and previously shielded individuals must now become subject to another's force to survive, contract can be used not only to conceal relationships essentially based on force but also to provide those relationships with an aura of apparent legitimacy. . . . When contract promotes individual autonomy without allowing exploitation and domination, it would be granted an extensive role. When there is a great danger of exploitation and domination, however, the contractarian would have to substantially limit contract's role.

Id. See also Klare, *supra* note 69, at 307.

129. See Peck, *supra* note 3, at 25; Note, *Non-Statutory Causes of Action for an Employer's Termination of an "At Will" Employment Relationship: A Possible Solution to the Economic Imbalance in the Employer-Employee Relationship*, 24 N.Y.L. SCH. L. REV. 743, 768 (1979) [hereinafter Note, *Non-Statutory Causes*].

associations.¹³⁰

Mobility had decreased; specialization and technological advances restricted movement.¹³¹ Self employment opportunities were limited.¹³² Employees became attached to their jobs by seniority, pension benefits, insurance programs and age.¹³³ They became bound by "the psychological comfort inherent in ordered relationships."¹³⁴ They developed expectations, a reliance on the security promoted by doing a job well.¹³⁵ They began to see the employment association as a relationship, not a discrete, impersonal commodity transfer.¹³⁶ They developed a sense that in such a vital, important social associa-

130. See Gilbert, *supra* note 76, at 294-95. The author wrote that:

we have fantasized so greatly about our frontier past that we sometimes appear to have difficulty accepting the fact that we have not been a frontier people for more than a century and cannot and should not behave as if we were. With the frontier's disappearance, no evidence or logic makes it reasonable to assume that responses which were valid then still are. Furthermore, this ideology evokes not a real but a largely invented past. . . . The acceptance of this ideological frontier and the mythic response to it as realities constitute a pervasive and dangerous derangement.

This analysis applies to the employment association. See DeGeorge, *supra* note 81, at 23. DeGeorge, in discussing the ideology of individualism, wrote that it:

had its basis in reality. . . . [T]he general belief was that opportunities were available for the industrious, those willing to take a chance, seek their own fortune and if necessary tame the wilderness. The right to work . . . became an issue only when labour supply exceeded demand; and only with the development of large industry, which carried with it the growth of a working force dependent on others for jobs. But the frontier had disappeared; there are no longer abundant opportunities for the self-reliant; and although industriousness is still deserving of reward, the equation of poverty with laziness is clearly not justified.

131. See Note, *Employment at Will*, *supra* note 59, at 791-92.

132. See Blades, *supra* note 3, at 1413; Note, *The Covenant*, *supra* note 67, at 1112-13.

133. See Note, *Implied Contract Rights*, *supra* note 58, at 338; Note, *Wrongful Termination of Employees at Will: The California Trend*, 78 NW. U.L. REV. 259, 264-65 (1983) [hereinafter cited as Note, *Wrongful Termination*]

134. Note, *Implied Contract Rights*, *supra* note 58, at 339. See also Glendon & Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C.L. REV. 457, 478-79 (1979).

135. See, e.g., McClintock, *supra* note 57, at 55-56, 58.

136. See Minda, *supra* note 72, at 960. Minda states:

[t]here is, however, reason to believe that the employment at will relationship is not like a price auction where buyers and sellers engage in discrete transactions. Rather . . . it is 'relational' in the sense that the parties have important interests, expectations and motivations structured by their unique relationship. These interests are created independent of contract defined promises and are thus non-transactional in character.

Id. See also Lesnick, *supra* note 112, at 854-55. Lesnick states:

[a]n alternative consciousness starts from the ontological reality that work is an expression of a basic human need. . . . Work is more than the sale of a saleable portion of oneself in return for self-sufficiency; it is an expression of one's energy, one's capacity and desire to be useful, one's responsibility and connection to fellow humans.

tion, they had a right to be dealt with in a dignified, respectful manner.¹³⁷

These expectations rested in part on the substantial legislative incursions into the employment association. These represented a judgment that associational attributes and attitudes were matters of public concern. The legislation expressed notions of fairness, notions which became part of social and legal consciousness.¹³⁸ Many states enacted laws even during the hey day of economic individualism which were aimed at reducing the inequalities of fortune and mitigating the evils of an unregulated industrial system.¹³⁹ The rule Wood spun out of nothing, was treated as gospel by the courts. However, the rule was "a fairly short-lived anomaly rather than a long standing and tested method of ordering."¹⁴⁰ The legislation reflected a willingness to reject the dominate ideology, assert that freedom of contract was not inviolable and acknowledge the social aspect of the employment association.¹⁴¹

The employer's absolute power to determine who would be employed for how long and under what conditions began to erode.¹⁴² Wood's Rule and the law which grew out of it were discredited by legislation which repudiated 19th century values and perspectives.¹⁴³ Society would intervene in the employment association to equalize disparities and redress injustices:

The last seventy-five years have witnessed significant regulation of the marketplace in order to protect individual workers from the

137. See Catler, *supra* note 70, at 485-87.

138. See Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201, 228 (1985); Rohwer, *Terminable-At-Will Employment: New Theories for Job Security*, 15 PAC. L.J. 759, 761 (1984).

139. The courts were too busy constructing "a powerful fortress of socioeconomic rights which under the slogan 'freedom of contract' resulted in protecting the haves against the have-nots." Murphy, *supra* note 6, at 740-41. See also Dodd, *supra* note 78, at 666. Dodd states that there is:

[n]o doubt there was on the Supreme bench more honest devotion to an individualistic theory of natural law and more genuine belief in laissez-faire as a sort of natural law of economics and less conscious class bias than some critics of these decisions have been inclined to admit. Nevertheless, many of the justices were quite obviously aware of the advantages which liberty of contract gives to the economically stronger party and accepted those advantages with a complacency which would have been impossible for men who had a sympathetic understanding of the wage-earner's situation."

Dodd, *supra*, at 666.

140. Getman & Kohler, *supra* note 66, at 1427. See also Dodd, *supra* note 78, at 644.

141. See Dodd, *supra* note 78, at 668.

142. See Harrison, *The "New" Terminable-At-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327 (1984); Epstein, *supra* note 83.

143. See Minda, *supra* note 72, at 989.

power of employers. The principle goals of this legislation have been first, to promote unionization as a countervailing force against employer power and control; second, to establish a minimum level of economic entitlement for workers; third, to combat discrimination against specific groups in hiring and dismissals; fourth, to protect employee health and safety; and fifth, to guarantee a minimum level of security for retirement and for the survivors of wage earners.¹⁴⁴

This legislative activity evinces the social interest in the employment association. It increases job security, cushions certain dislocations and limits the areas open to employer autocracy.¹⁴⁵

However, legislation only limited the areas open to employer autocracy; it did not eliminate the areas. Although the issues and the balancing of interests seem well-suited to legislative action, there has been little direct activity toward protecting the employee in a private, non-collective bargaining employment association from unprincipled terminations. True, employees cannot be terminated for exercising certain protected rights or for certain non-merit factors such as sex, race or age. But this merely limits the range of employer activity. There remains unregulated conduct which does not seem compatible with the standards of a developed society.¹⁴⁶

Legislative activity has outlined standards to be applied in the employment arena. The social interests and policies expressed in legislation have influenced both the expectations of employees and the courts. The legislation indicates how employees can reasonably expect to be treated in an employment association. It establishes and protects society's interest in stability and productivity. It redresses certain unconscionable activity. It limits the employer's unreasonable, excessive or abusive use of superior associational power and advantage. All together, the legislation creates expectations and standards by which courts can evaluate otherwise unregulated employment associations.

144. Note, *Protecting At Will Employees*, *supra* note 3, at 1827. See also Alleyne, *Vengeance Discharges*, 5 GA. L. REV. 479 (1971); St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI.[-]KENT L. REV. 631, 655 (1985). St. Antoine states: the major development affecting the whole labor field during the past two or three decades has been the increasing resort to direct government regulation of the substantive terms of the employment relationship. The matters covered range from civil rights to physical safety to economic security.

145. See Greenbaum, *supra* note 3, at 76-77; Summers, *supra* note 3, at 491.

146. See Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REF. 207 (1983); Stieber & Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REF. 319 (1983); Blades, *supra* note 3, at 1433-34; Beatty, *supra* note 39, at 60, 66; Comment, *Employment*, *supra* note 74, at 231.

Courts have discovered, as the legislatures did, that the 19th century concept of freedom of contract was a "world of fantasy . . . a regime" which was "merely another system, more elaborate and more highly organized for the exercise of economic pressure."¹⁴⁷ By abstracting the individual, divorcing him or her from social ties, and making all individuals theoretically free, equal and able, 19th century ideology exposed workers "to relations based on superior force, untempered by fraternal bonds of kinship."¹⁴⁸ By imagining that either party in an employment association was equally free to agree or refuse to agree, the true nature of the association was hidden. It painted over "the naked expression of the employer's substantially greater powers."¹⁴⁹ It generated "oppressive and morally defective results."¹⁵⁰

Courts recognize that employees may be unable to safeguard their own interests. They recognize the potential for employer oppression.¹⁵¹ Courts have begun to require that the association be basically fair. They have started to intercede and redress inequitable effects and adjust the imbalance of bargaining power and now openly evaluate the social and economic realities of the private, non-collective bargaining employment association. The freedom of contract theory no longer insulates the association from an evaluation weighing its fundamental fairness, the behavior it entails and its consistency with social policies.¹⁵²

Courts have adopted a flexible attitude in evaluating employment associations. They are not constrained by a rigid 19th century orthodoxy. They recognize that employees have less bargaining power than employers, that the traditional rule can result in outrageous, socially unacceptable employer behavior, that the employee's

147. Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 TUL. L. REV. 345 (1937), quoted in Klare, *supra* note 69, at n.98.

148. Rosenfeld, *supra* note 11, at 813.

149. *Id.*

150. Klare, *supra* note 69, at 297. Professor Klare says this occurred for two reasons: First, the wage-bargain is inherently an unequal exchange, because the value produced by the employee and appropriated by the capitalist, must ordinarily be greater than the value received back in wages. Second, the wage contract is more than a legal relationship. It establishes an entire system of social relations in the workplace whereby the employer is entitled to control the worker's actions and choices during the major portion of his waking hours. Thus, labor contractualism functions as the institutional basis of domination in the workplace.

151. See, e.g., Summers, *supra* note 62, at 1108 ("Most employees are unable to protect their own interests, particularly when they must bargain individually with the employer").

152. See Note, *Protecting At Will Employees*, *supra* note 3, at 1826; Note, *The Covenant*, *supra* note 67, at 1111.

and society's interests in a stable, fair relationship may outweigh the employer's managerial interests.¹⁵³ They recognize that employees have valid relational expectancies,¹⁵⁴ and that they cannot be merely neutral arbiters and enforcers. They must now evaluate which agreements are fair and which are not.¹⁵⁵

In analyzing employment associations, courts deal with expectations. This is not limited to the employer's or employee's expectation of reasonable treatment but also society's expectation.¹⁵⁶ They view the association as tripartite with public as well as private interests.¹⁵⁷ As one commentator put it, if "the demise of substantive due process and the rapacious concepts of strict contractual freedom and laissez-faire teach anything, it is that the conduct of private affairs may

153. See Note, *Protecting At Will Employees*, *supra* note 3, at 1824; Comment, *Employment*, *supra* note 74, at 239-40; Comment, *Employment At Will: When Must An Employer Have Good Cause For Discharging an Employee?*, 48 MO. L. REV. 113, 116 (1983) [hereinafter Comment, *Employment at Will*].

154. Note, *The Covenant*, *supra* note 67, at n.1145. This author describes these interests in terms of importance:

Whether these interests are termed 'employee equities,' 'valuable rights,' or 'new property,' their basic importance to the modern employee cannot be denied. . . . In the context of good faith analysis these relational expectancies fall within those interests the court seeks to define as the 'reasonable expectations' that the law creates on behalf of a weaker party who has no opportunity to serve his interests through effective bargaining. The most basic expectation—that the employer will not abuse the power of termination by using it for reasons unrelated to the legitimate conduct of the enterprise—will be present in every case. . . . Other expectancies concerning retirement, pension, disability, contingent payments, and limitations on re-employability arising from job longevity, skill specialization, damage to reputation, induced geographical immobility and financial and psychological interests in job security will of course vary from case to case.

Id. See also Harrison, *supra* note 142, at 346.

155. See Rosenfeld, *supra* note 11, at 899. Rosenfeld states:

Justification of the continued adherence to the contractarian paradigm in a sociopolitical setting in which contracts of adhesion and labor contracts are predominant requires the development of an institutional framework capable of making these types of contracts fair. . . . [T]his institutional framework will have to supply the means to curb the unrestrained pursuit of individual self interest. . . . [T]he new framework cannot merely remain neutral and limited to the guarantee of the enforcement of agreements exclusively defined by the individual parties to them. Indeed, with the loss of inherent background fairness, the new institutional framework will have to determine, at least to some extent, which contractual arrangements are fair and which are unfair.

156. See Harrison, *supra* note 142, at 347: In speaking of tort remedies, Professor Harrison wrote that "the expectations involved are not those that were implicit in the individual contract but, rather, are societal expectations about what is reasonable behavior. No less than in contract cases, the courts are enforcing what individuals have come to expect in terms of their treatment by others." See also Note, *Defining Public Policy Torts in At-Will Dismissals* 34 STAN. L. REV. 153 (1981) [hereinafter Note, *Defining Public Policy Torts*] (courts have applied a tort analysis based on the employer's violation of what were held to be public duties).

157. See, e.g., Krauskopf, *supra* note 3, at 232-33.

well have a wide impact of general concern to all."¹⁵⁸

The courts have encountered many problems in attempting to ameliorate the effects of what is perceived to be an outmoded, illogical, oppressive ideology without invalidating those employer prerogatives necessary to an efficient economy. This has produced "a bewildering array," "a smorgasbord,"¹⁵⁹ a "hodge-podge of different holdings based on a hodge-podge of different theories."¹⁶⁰ Whether dealing in contract or tort, the courts have difficulty in precisely defining what the theory is and how it should be applied. The definitions are unclear, uncertain, and inconsistently applied. Sometimes this inconsistency appears even within a single jurisdiction.¹⁶¹ While courts may desire to undo or modify a theory inconsistent with modern ideas of a proper employment association, they are by tradition reluctant to create or impose new or different duties or rights which may vary an existing relationship or legislative announcement.¹⁶² The protection being offered may be more limited than what is needed.¹⁶³

There are substantial costs involved in subjecting every employment dispute to legal process. Employees may not be able to afford it.¹⁶⁴ Courts may find themselves burdened by an increasing caseload

158. Note, *The Covenant*, *supra* note 67, at 1139. The author continued:

The statute books are replete with laws predicated on policy statements recognizing the public impact of private conduct within the employment relationship. Thus, it is not entirely accurate to say that an employee's concern in maintaining his livelihood is, in the largest sense, 'merely private'. Nor is it true that our system of law condones the infliction of injury without justification simply because it occurs within such a questionably 'private' relationship.

Id. (footnotes omitted). See also Note, *Protecting Employees*, *supra* note 3, at 1950-51 and Harrison, *supra* note 142, at 349.

159. Comment, *Employment At Will*, *supra* note 153, at 134-35.

160. Bierman & Youngblood, *supra* note 78, at 32.

161. *Id.* See also Note, *Employment-At-Will in the Eighth Circuit—The Rules, the Exception and the Confusion* 18 CREIGHTON L. REV. 1137 (1985) [hereinafter Note, *Employment-At-Will*] (the vagueness of the standard used to determine employer liability has given the courts discretion in determining employer liability.); Note, *Limiting the Right to Terminate At Will—Have the Courts Forgotten the Employer?* 35 VAND. L. REV. 201, 226 (1982) [hereinafter Note, *Limiting the Right*] (uncertainty has arisen because of the absence of clearly defined public policy standard. . . ."); Bellace, *supra* note 146, at 232; Comment, *Employment*, *supra* note 74, at 216 ("the contract of employment . . . depends upon a number of factors which are . . . inconsistently and ambiguously applied by the courts.").

162. See DeGiuseppe, *The Recognition of Public Policy Exceptions to the Employment-At-Will Rule: A Legislative Function?*, 11 FORDHAM URB. L.J. 721, 767-74 (1983); Comment, *Employment At Will*, *supra* note 153, at 135; Note, *Defining Public Policy Torts*, *supra* note 156, at 170-71; Note, *The Covenant*, *supra* note 67, at 1141.

163. See Summers, *supra* note 62, at 1107-08; Note, *Protecting Employees*, *supra* note 3, at 1932, 1937; Note, *The Covenant*, *supra* note 67, at 1141.

164. See, e.g., Bierman & Youngblood, *supra* note 78, at 32 ("Litigation is often very

eating up valuable judicial time and in turn postponing the ultimate resolution of the particular dispute.¹⁶⁵ Employment disputes should be quickly resolved without the hostility generated by litigation.¹⁶⁶

There is the real possibility that adjudicating employment disputes produces unprincipled, unpredictable results.¹⁶⁷ Judges and juries may be unduly sympathetic to individual employees.¹⁶⁸ They may impose their own subjective standards on individual cases without properly considering the long term effect on employer/employee relations or the employer's legitimate need to plan and predict.¹⁶⁹ Unclear, subjective standards encourage litigation, including that which is vexatious.¹⁷⁰

costly and time consuming. The average employee . . . simply cannot afford to challenge an employer decision in court"). See Bellace, *supra* note 146, at 232; DeFranco, *Modification of the Employee At Will Doctrine—Balancing Judicial Development of the Common Law with the Legislative Prerogative to Define Public Policy*, 30 ST. LOUIS U.L.J. 65, 82 (1985).

165. See Summers, *supra* note 62, at 1108; DeFranco, *supra* note 164, at 82-83; Bellace, *supra* note 146, at 232; Decker, *supra* note 67, at 362. Not everyone agrees with this analysis, see Note, *Protecting At Will Employees*, *supra* note 3, at 1842.

One objection is that judicial innovation . . . will lead to a flood of litigation that will crush already overburdened dockets. Yet it is not clear that this will result from increased judicial scrutiny of discharges. First, expanded liability may deter future abusive or retaliatory discharges. . . . Second the development of clear standards. . . will encourage out-of-court settlement of the claims that do arise. In any event, fear of a small increase in litigation is hardly a valid reason for denying relief to wrongfully discharged employees.

Note, *Protecting At Will Employees*, *supra*, at 1842.

166. See, e.g., Mennemeier, *Protection from Unjust Discharges: An Arbitration Scheme*, 19 HARV. J. ON LEGIS. 49, 67 (1982); Comment, *Wrongful Discharge: Court-Annexed Arbitration as a Means of Providing Relief*, 21 WILLAMETTE L.J. 569 (1985); Bierman & Youngblood, *supra* note 78, at 32-33.

167. See Comment, *Employment*, *supra* note 153, at 119; Bellace, *supra* note 146, at 232; Note, *Limiting The Right*, *supra* note 161, at 228-29; Harrison, *supra* note 142, at 352.

168. See DeFranco, *supra* note 164, at 82; Comment, "Good Cause": California's New "Exception" to the At-Will Employment Doctrine, 23 SANTA CLARA L. REV. 263, 288 (1983) [hereinafter Comment, "Good Cause"]; Note, *Employment At Will*, *supra* note 59, at 802; Note, *The Employment At Will Rule*, *supra* note 67, at 488.

169. See, e.g., Note, *Defining Public Policy Torts*, *supra* note 156, at 170-72. This author states that:

broad inquiry into the employer's business acumen is itself difficult to justify. Courts are ill-suited to review the wisdom of complex business judgments. The efficiency with which a business operates depends upon its production costs, of which labor costs and productivity are major elements. . . . [D]eteriorating moral, psychological, and workplace standards contribute to increased labor costs and decreased worker productivity. Judicial remarks concerning the wisdom of competing alternatives and the manner in which the employer might better have evaluated them are unlikely to prove a source of guidance for future managers.

Id.; See also Note, *Employment At Will*, *supra* note 59, at 802-04 (the uncertainty of the case by case determination of the public policy standard courts use to determine employer liability discourage the employer from making any changes in personnel).

170. See DeFranco, *supra* note 164, at 82; Comment, "Good Cause", *supra* note 168, at

These litigation related difficulties support the argument that it really is a legislative duty to assess the modern employment association, balance the factors and decide what changes, if any, need to be made.¹⁷¹ Employment associations are, after all, extensively regulated by legislation from hiring through firing. The courts may not have the expertise or resources to accumulate information and properly evaluate the various interests.¹⁷² The evaluation, however, should be a broad range one rather than a narrow, case by case one.¹⁷³ The following three sections discuss the associational interests involved—employer, employee, social.

III. THE EMPLOYER'S ASSOCIATIONAL INTERESTS

The employment association is an inherently risky venture for the employer and the employee. There are doubts and dangers attendant on deciding who to hire and who to work for. There are no guarantees on how the relationship will proceed. Will the employee be diligent and loyal or indolent and untrustworthy? Will the employer be fair and honest or grasping and disingenuous? Will the association be compatible or hostile? Will the anticipated rewards and satisfactions be real or not?¹⁷⁴

287-88; Note, *Limiting the Right*, *supra* note 161, at 228; Note, *Protecting At Will Employees*, *supra* note 3, at 1842.

171. See Summers, *supra* note 62, at 1108-09; Decker, *supra* note 67, at 360-61. Compare Summers and Decker with Rohwer, *supra* note 138, at 780-81 (it is tempting to seek legislative answers but wiser to obtain a common law remedy).

172. See DeFranco, *supra* note 164, at 83 (“[N]either courts nor juries have expertise in deciding employment related disputes.”); Catler, *supra* note 70, at 516 (“The competence of the courts is severely limited in the discharge area.”); Decker, *supra* note 67, at 362 (“Courts are neither equipped to handle the additional caseload nor sufficiently experienced in the area of employee terminations.”).

173. Courts in employment association cases may run into problems similar to those described in Givelber, *The Right to Minimal Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 52-53 (1982) [hereinafter cited as Givelbar, *The Right*]:

[D]espite claims that they serve as ‘society’s conscience’, courts may have no particular wisdom with respect to what is socially intolerable. . . . First, there may be no community sentiment with respect to a vast number of issues, and whatever sentiment there is may be deeply divided with respect to other issues. It would indeed be surprising to learn that . . . employers and employees agreed about the employer’s freedom of action to terminate ‘at will’ an employee. Second, there are situations in which it literally does not matter what dominant community sentiment may be—courts are not polling agencies, they are expositors of social policy.

Id. See also Comment, *Intentional Infliction of Emotional Distress in the Employment at Will Setting: Limiting the Employers Manner of Discharge*, 60 IND. L.J. 365 (1985) [hereinafter Comment, *Intentional Infliction*] (The use of the intentional infliction tort has been proposed in employment association dealings.).

174. See Epstein, *supra* note 83, at 955, 961.

Even the strongest critics of Wood's Rule acknowledge that the employer has an important, legitimate interest in making independent evaluations and decisions about the enterprise including the work force.¹⁷⁵ They admit that abolishing the rule could result in a flood of claims, real or fictitious, which would disrupt business. Wood's Rule has persisted in part because it does provide employers with the control necessary to run a business.¹⁷⁶ While the rule has been eroded,

the employer's basic right to control a work force is still widely recognized, as it should be. Intelligent decisions must be made about the size and performance of the work force. Individual workers must be trained, guided, and disciplined. Indeed, the public has an interest in a well-run work force. Whatever course of action is developed for wrongful discharge will to some degree place a chill upon the employer's traditional right to control the work force.¹⁷⁷

At its core the employment association remains a personal, consensual relationship. Compatibility can be as highly valued as ability. Every employer, no matter how large, functions by individuals—employees, supervisors, managers, owners. The association requires an agreement: to employ and to be employed. When consent disappears on either side of the relationship, it cannot function effectively. Neither party should then be compelled to continue the relationship.¹⁷⁸

Doing away with Wood's Rule would increase employer costs not only in production efficiency but also in complying with newly imposed requirements.¹⁷⁹ The employer's costs increase when an inefficient or incompatible employee is retained out of fear that litigation will result from termination.¹⁸⁰ The employer may refrain

175. See, e.g., Blades, *supra* note 3, at 1427-28. Blades notes that the most cogent argument against giving every employee recourse to the courts in cases of abusive dismissal: that the danger of fictitious claims threatens interference with the normal exercise of the employer's right of discharge" and acknowledges that: "the employer's prerogative to make independent, good faith judgments about employees is important in our free enterprise system."

176. Note, *The Covenant*, *supra* note 67, at 1158.

177. Miller & Estes, *Recent Judicial Limitation on the Right to Discharge: A California Trilogy*, 16 U.C.D. L. REV. 65, 73-74 (1982) (footnotes omitted).

178. See, e.g., DeFranco, *supra* note 164, at 70; Power, *A Defense of the Employment At Will Rule*, 27 ST. LOUIS U.L.J. 881, 888 (1983); Comment, "Good Cause", *supra* note 168, at 284 (arguing that "the employer's personal liberty to decide whom he shall employ, to whom he will trust the running of his business, and the right to expend his property (money) as he sees fit are rights which are protected under the Due Process Clause of the United States Constitution.").

179. See DeFranco, *supra* note 164, at 78.

180. See Note, *Limiting the Right*, *supra* note 161, at 229-30.

from critically evaluating employees or acting on that evaluation. Retaining such employees lowers overall production efficiency. Having them in the work force may affect the motivation and efficiency of other employees. Morale may go down when productive, qualified, compatible employees see unproductive, less qualified, incompatible employees retained.¹⁸¹ In an employment association, the bad apple theory may be valid.

An employer needs to monitor employee performance and react quickly to that which is disruptive or inadequate. It is more efficient and less costly to do so unilaterally. This permits effective monitoring of employee performance with a minimum of disruption and cost. The employer can respond quickly and flexibly to make the adjustments required by business or personnel demands.¹⁸² It can be a sensible, individual response to the variety of circumstances in an employment association.¹⁸³ Perhaps in a free enterprise system "the private sector should implement such procedures in the manner that it determines to be the most efficient, not the manner that the courts or a twelve person jury deem to be the most efficient."¹⁸⁴

These employer interests have received judicial acknowledgement. When the constitutionality of the National Labor Relations Act was challenged in *NLRB v. Jones & Laughlin*,¹⁸⁵ the Court upheld the employees' "fundamental right" to organize and select representatives to deal with the employer.¹⁸⁶ However, in response to

181. See Note, *Ensuring Good Faith in Dismissals*, 63 TEX. L. REV. 285, 297 (1984) [hereinafter Note, *Ensuring Good Faith*]; DeFranco, *supra* note 164, at 78; Power, *supra* note 178, at 894.

182. See Epstein, *supra* note 83, at 965; Note, *Protecting At Will Employees*, *supra* note 3, at 1835.

183. Epstein, *supra* note 83, at 982. The author believes [n]o system of regulation can hope to match the benefits that the contract at will affords in employment relations. The flexibility afforded . . . permits the ceaseless marginal adjustments that are necessary in any ongoing productive activity conducted . . . in conditions of technological and business change. . . . All too often the case for a wrongful discharge doctrine rests upon the identification of possible employer abuses, as if they were all that mattered. But the proper goal is to find the set of comprehensive arrangements that will minimize the frequency and severity of abuses by employers and employees alike.

184. DeFranco, *supra* note 164, at 79. See also Note, *Employment at Will*, *supra* note 59, at note 88 ("The time and expense required to litigate unjust dismissal suits will tap the employer's resources. . . .").

185. 301 U.S. 1 (1937). For a critical analysis see Klare, *supra* note 69, at 298-300.

186. 301 U.S. at 33. The Court explained that labor organizations were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ

the dissent's *Adair/Coppage* argument that the employer was being "deprived of power to manage his own property by freely selecting those to whom his manufacturing operations are to be entrusted,"¹⁸⁷ the majority said those cases were not applicable.¹⁸⁸

The friction between the employer, seeking unquestioned control over the work place and the employee seeking control in the work place, resurfaced in *Board of Regents v. Roth*.¹⁸⁹ In this case the plaintiff taught at a state college under a one year contract which was not renewed. Using liberty and property arguments, plaintiff claimed he was entitled to be told why the action had been taken. Acknowledging that plaintiff's "re-employment prospects were of major concern to him—concern that we surely cannot say was insignificant"¹⁹⁰ the majority held that he was not entitled to a statement of reasons and a hearing. All that happened was that plaintiff "was not rehired for one year at one university."¹⁹¹ It would stretch "the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another."¹⁹² While plaintiff "surely had an abstract concern in being rehired," he was unable to establish "a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment."¹⁹³

The plaintiff in *Arnett v. Kennedy*¹⁹⁴ was a non-probationary federal employee fired for making what his superiors thought were defamatory statements. The applicable statute permitted terminations "only for such cause as will promote the efficiency of the [civil] service."¹⁹⁵ The statute and regulations provided an administrative

and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.

NLRB v. Friedman—Harry Marks Clothing Co., 301 U.S. 58, 103 (1937) (McReynolds, J., dissenting).

187. NLRB v. Friedman—Harry Marks Clothing Co., 301 U.S. at 103.

188. NLRB v. Jones & Laughlin, 301 U.S. at 45-46.

The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion.

189. 408 U.S. 564 (1972).

190. *Id.* at 570.

191. *Id.* at 575.

192. *Id.*

193. *Id.* at 578 (emphasis in original).

194. 416 U.S. 134 (1974).

195. 5 U.S.C. § 7501(a) (West 1980).

procedure for termination. Plaintiff claimed the standard and the procedures did not comport with due process and infringed his constitutional rights.

Justice Rehnquist, joined by the Chief Justice and Justice Stewart, noted that "in the absence of statutory limitation, the governmental employer has had virtually uncontrolled latitude in decisions as to hiring and firing."¹⁹⁶ Although the legislation accorded "a measure of statutory job security" its focus was "on the procedural mechanism for enforcing the substantive right."¹⁹⁷ Thus, "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of [plaintiff] must take the bitter with the sweet."¹⁹⁸

The plurality said the statutory standard for discharge was neither vague nor overbroad. The Civil Service Commission had "indicated that what might be said to be longstanding principles of employer-employee relationships like those developed in the private sector, should be followed in interpreting the language."¹⁹⁹ This application of private sector law would not authorize a federal employee's discharge for protected speech.²⁰⁰ The objective "is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the . . . employer in promoting the efficiency of the public services it performs through its employees."²⁰¹

Justices Powell and Blackmun concurred in the conclusion but used different reasoning. They did not agree that the statute could limit the procedural protections for an employee's property rights. While "the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate proce-

196. *Arnett*, 416 U.S. at 152.

197. *Id.*

198. *Id.* at 153-54.

199. *Id.* at 160.

200. *Id.* at 162.

The Act proscribes only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes no greater controls on the behavior of federal employees than are necessary for the protection of the Government as an employer. Indeed the Act is not directed at speech as such, but at employee behavior, including speech, which is detrimental to the efficiency of the employing agency.

201. *Id.* at 161 (quoting from *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)).

dural safeguards."²⁰² In other words, the bitter did not necessarily go with the sweet.

Justice Powell determined the appropriate safeguards by balancing "the Government's interest in expeditious removal of an unsatisfactory employee . . . against the interest of the affected employee in continued public employment."²⁰³ He came down strongly on the employer side of the balance.²⁰⁴ Requiring interim measures such as suspensions with pay pending a hearing would impose not only a financial burden but "would undoubtedly inhibit warranted discharges and weaken significantly the deterrent effect of immediate removal."²⁰⁵

Justice White also disagreed with the plurality's "bitter with the sweet" analysis. Once the government has defined a property right "the Constitution defines due process."²⁰⁶ He found the legislation's procedures constitutionally adequate but, like Justice Powell, noted the cost "of keeping a person on the scene who might injure the public interest through poor service or might create an uproar at the workplace."²⁰⁷ His solution was suspension with pay pending the hearing.

Justices Marshall, Douglas and Brennan dissented. They believed "a tenured Government employee must be afforded an evidentiary hearing prior to a dismissal for cause."²⁰⁸ They also considered the legislation "unconstitutionally vague and overbroad as a regulation of employees' speech."²⁰⁹ The Government's argument that a post-termination evidentiary hearing made "the functioning of the

202. *Id.* at 167 (footnote omitted).

203. *Id.* at 167-68.

204. *Id.* at 168 (footnote omitted).

In the present case, the Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony and ultimately impair the efficiency of an office or agency . . . [T]he Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial.

205. *Id.* at 169 n.4.

206. *Id.* at 185.

207. *Id.* at 194.

208. *Id.* at 206.

209. *Id.*

agency more efficient" was "entirely unconvincing."²¹⁰ If the employee disrupted the discipline and efficiency of the office, he "could be put on administrative leave or temporarily assigned to a less sensitive position pending this hearing."²¹¹

The policeman plaintiff in *Bishop v. Wood*²¹² was terminated without a hearing and without a statement of reasons. He was later told that he was fired for failing to follow orders, poor attendance at training, causing low morale and unsuitable conduct. He claimed a property interest in his job through a personnel ordinance. He also claimed the explanation was false and deprived him of a liberty interest.

To determine if plaintiff had a property interest, the Court referred to state law which it read to say that "an enforceable expectation of continued public employment . . . can exist only if the employer by statute or contract has actually granted some form of guarantee."²¹³ While acknowledging that the ordinance "on its face . . . may fairly be read as conferring such a guarantee,"²¹⁴ the Court adopted the district court's reading that "the City Manager's determination of the adequacy of the grounds for discharge is not subject to judicial review; the employee is merely given certain procedures which [were not] violated in this case."²¹⁵ Now the bitter did go with the sweet.

In assessing plaintiff's liberty claim, the Court assumed the discharge was a mistake and based on incorrect information. However, the Court said plaintiff, like the teacher in *Roth*, remained free to seek another job. The liberty interest was not implicated by "the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge."²¹⁶ The Court concluded:

The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.²¹⁷

210. *Id.* at 223-24.

211. *Id.* at 225.

212. 426 U.S. 341 (1976).

213. *Id.* at 345.

214. *Id.*

215. *Id.* at 347.

216. *Id.* at 348.

217. *Id.* at 349-50 (footnote omitted).

A contrary conclusion “would enable every discharged employee to assert a constitutional claim merely by alleging that his former supervisor made a mistake.”²¹⁸

The Court again addressed the “employee comment/employer efficiency” balance in *Connick v. Myers*²¹⁹ where the employee, an assistant district attorney, was fired for refusing to accept a transfer and for distributing a questionnaire concerning internal office matters. The Court undertook its analysis with “the common sense realization that government offices could not function if every employment decision became a constitutional matter.”²²⁰

The threshold question was whether the questionnaire could “fairly [be] characterized as constituting speech on a matter of public concern.”²²¹ If not, “government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”²²² Like *Arnett*, even if the firing was unfair, mistaken or unreasonable “ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review.”²²³ If the employee speaks “not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.”²²⁴

Except for one item, the employee’s questionnaire focused not on office performance but on accumulating “ammunition for another round of controversy with her superiors.”²²⁵ The questions reflected her “dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre.”²²⁶ Although public officials “as a matter of good judgment . . . should be receptive to constructive criticism . . . the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal of-

218. *Id.* at 349.

219. 461 U.S. 138 (1983).

220. *Id.* at 143 (footnote omitted).

221. *Id.* at 146.

222. *Id.*

223. *Id.*

224. *Id.* at 147.

225. *Id.* at 148.

226. *Id.* (footnote omitted).

office affairs."²²⁷

To a limited extent, the questionnaire did touch upon matters of public concern. This was not sufficient to require the employer to "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."²²⁸ The Court gave "a wide degree of deference to the employer's judgment" when, as here, "close working relationships are essential to fulfilling public responsibilities."²²⁹ The employer does not have to wait until "the disruption of the office and the destruction of working relationships is manifest."²³⁰ The employee acted not "out of purely academic interest," but "threatened the authority of the employer to run the office."²³¹ As in *Arnett*, the Court refused "to constitutionalize" the employee's personal grievance about the course of her employment association.²³²

IV. THE EMPLOYEE'S ASSOCIATIONAL INTERESTS

An employment association is a blend of elements—economic, political, social and personal.²³³ For most individuals, employment is a central focus of their lives; it is the most valuable possession they have.²³⁴ Employment is an economic resource and security; it is a means to provide for self and family.²³⁵ It figures prominently in an

227. *Id.* at 149.

228. *Id.* at 154.

229. *Id.* at 151-52.

230. *Id.* at 152.

231. *Id.* at 153.

232. *Id.* at 154.

233. Wirtz, *On Teaching Labour Law*, in *THE PARK CITY PAPERS* 3 (1985)

234. See Summers, *supra* note 3, at 532. Summers states:

It should need no argument in our time to demonstrate that all employees should be protected from arbitrary and unjust dismissal. . . . For most employees, their job is the most valuable thing they possess; it is not a figure of speech but a statement of economic and social reality to say that employees have property rights in their jobs. Such valuable interests have a compelling claim to legal protection.

Id.; see also Bayles, *Introduction: Labour, Law and Society*, 19 VAL. U.L. REV. 1 (1984); Note, *Employment at Will*, *supra* note 59, at 792; Comment, *Job Security for the At-Will Employee: Contractual Right of Discharge for Cause*, 57 CHI.[-]KENT L. REV. 697 (1981); Comment, *Termination of the At-Will Employee: The General Rule and the Wisconsin Rule*, 65 MARQ. L. REV. 637, 640-41 (1982).

235. See Krauskopf, *supra* note 3, at 196. Krauskopf states:

The century, from 1880 to 1980, has seen the transformation of employment by another—a job for wages—from a sporadic opportunity to the principal form of wealth for the masses of people. . . . [A] job with a particular employer became, for most people, their chief source of economic security and, for many, the only economic resource they had.

The author noted "the essential value of a job to the individual." *Id.* See also McClintock, *supra* note 57, at 69-70; DeGeorge, *supra* note 81, at 17.

individual's life plan. It is an expression of identity. It helps to exert and develop abilities.²³⁶ But, above all, "what men want is meaningful work in free association with others, these associations regulating their relations to one another within a framework of just basic institutions."²³⁷

Individuals devote a major portion of their lives to work, both physically and psychologically. Their lives are shaped by their relationship to work, to co-workers and to employers.²³⁸ Individuals have an economic, a social, a psychological dependence on employment. This makes the individual employee vulnerable to the employer's

highly concentrated economic power The most potent weapon in the employer arsenal for the exertion of undue pressure on employees is the absolute power of dismissal. In essence, an employee's ability to derive a livelihood—frequently his most valued possession—is subject to the absolute discretion of his employer.²³⁹

An individual losing a job loses income, spends time, energy and money finding new employment, endures emotional distress and social stigma, suffers confusion and frustration, receives a blow to self respect.²⁴⁰

The employment association has a strong psychological component for the employee,²⁴¹ especially in their sense of self-esteem.²⁴²

236. See Beatty, *supra* note 39, at 47.

Certainly, the labour relationship is central in the life plans of virtually every member of any contemporary industrial society. . . . In the institutions in which we exercise our labour, we take care of and give expression to the most basic aspects of our humanity. . . . [I]t is in our labour relationships that we act out our most basic instincts to exert and develop our natural capacities. By our labour . . . we give direct expression to our identities as we conceive of them. We demonstrate who we are and what we think is a worthwhile application of our talents. . . . Employment has become for the industrial society what commons land was to its feudal predecessor. It is the social institution through which we pursue virtually every ambition we have to be productive.

Id. See also Schwartz, *Towards a Jurisprudence of Labour Law: Methodological Preliminaries*, 19 VAL. U.L. REV. 71, 74 (1984).

237. RAWLS, *supra* note 12, at 290.

238. See Sunstein, *Rights, Minimal Terms and Solidarity: A Comment*, 51 U. CHI. L. REV. 1041, 1049-50 (1984); Bayles, *supra* note 234, at 2.

239. Note, *Non-Statutory Causes*, *supra* note 129, at 743-44.

240. See Blades, *supra* note 3, at 1413 and Note, *supra* note 3, at 1833-34.

241. See Mauk, *supra* note 138, at 204-05; Note, *The Covenant* *supra* note 67, at 1146-47; Miller & Estes, *supra* note 177, at 69.

242. Note, *Implied Contract Rights*, *supra* note 58, at 339.

Empirical studies indicate that discharge from employment affects the self-esteem of employees no less severely than it affects their economic well being. Work serves not only a useful economic purpose but plays a crucial role in the individual's psychological identity and sense of order. The growing recognition of the centrality of

Employment must be reckoned among the most important of the "conventional necessities," those things which almost everyone has and which society thinks is degrading to do without. No one is "immune from serious loss of self respect at the involuntary deprivation of" such a conventional necessity.²⁴³

Most individuals develop certain expectations about their employment. They are bound to it, economically and psychologically. They need it to live and to provide meaning and form to their lives.²⁴⁴ They come to believe that doing their job well will insure continued employment.²⁴⁵ They expect safe working conditions, fair pay for what they do and treatment as individual beings, not mere units of production. They have a "security of expectation" the disappointment of which can be disastrous on both economic and emotional levels.²⁴⁶

work in a person's life together with an awareness of the severe economic consequences resulting from arbitrary treatment in the employment relationship, supports [the] assertion that employer control over the job means that the substance of life is in another man's hands.

Id. See Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 887 n.31 (1976) where the author quotes Holmes, commenting on the doctrine of adverse possession:

Sir Henry Maine has made it fashionable to connect the archaic notion of property with prescription. But the connection is further back than the first recorded history. It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of men.

Id. citing Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 477 (1897).

243. See Grey, *supra* note 242, at 898-99.

244. See Krauskopf, *supra* note 3, at 197; Note, *Challenging the Employment At Will Doctrine Through Modern Contract Theory*, 16 U. MICH. J. L. REF. 449, 451, 455-56 (1983) [hereinafter Note, *Challenging*].

245. See Note, *Challenging*, *supra* note 244, at 449: The "belief is often engendered by promises of job security and deferred benefits that employers use to recruit and maintain a cooperative work force. Consequently, arbitrary discharge creates severe financial and emotional hardships for employees who have relied on express or implied assurances of job security."

246. Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1025, 1027 (1974).

For, make no mistake about it, security of expectations is not just a rich man's value. It can be even more important to a poor person or a person of moderate means. . . . [I]f I have only one or two humble expectations—a pension, seniority in my job, the promise of a small legacy, an assurance of child support payments or a low-rent, long-term lease on my apartment—disappointment of that expectation can be disastrous.

Id. See also Note, *Challenging*, *supra* note 244, at 451; Schreiber, *Wrongful Termination of At Will Employees*, 68 MASS. L. REV. 22, 26 (1983).

The psychological distress of discharged workers also may be a compelling force to those seeking redress. Studies show that self-esteem is directly linked to job security

There are social factors which attend the employment association. There is a social value in being employed; a social stigma in being unemployed.²⁴⁷ The employment association is a basic social relationship.²⁴⁸ It confers status, defines social roles, and it affects personal relationships.²⁴⁹ It "shapes both [society's] non-work institutions and the social relations and abilities and inclinations its members can form."²⁵⁰

As a major social institution, the employment association should be stable and should clearly express individual obligations and expectancies.²⁵¹ But, despite the legislative and judicial incursions on Wood's Rule, there remains an unacceptable imbalance in the employment association. Employers retain the power to act "in a manner that is not consistent with the standards of a civilized society," and which "does not accord human dignity the value it deserves and usually receives in American law."²⁵² The employment association

and may be severely affected in those who feel they are being arbitrarily treated in the employment relationship. The psychological and economic significance of losing a job is not to be minimized.

Schreiber, *supra*, at 26 (footnote omitted).

247. DeGeorge, *supra* note 81, at 18. DeGeorge states:

To be a human being is a matter not only of a certain biological type but also of belonging to human society. A full, able-bodied, competent member of society has a role and plays a role in it. . . . Work is the typical way by which human adults assert their independence and are able to assume their full share of responsibility in a community. Work involves the assumption of one's place in the community. . . . One's self-respect as well as the respect of others is closely linked with what one does, how a person expresses himself through his actions, and the extent to which one assumes the full burden of and responsibility for one's life and one's part in the social whole. A person who is not allowed to work is not allowed to take a rightful place in society as a contributing, mature, responsible adult.

Id. See also Note, *Employment At Will*, *supra* note 59, at 792.

248. See Note, *Defining Public Policy Torts*, *supra* note 156, at 168-9.

249. See Bayles, *supra* note 234, at 2. See also McClintock, *supra* note 57, at 66: Jobs have socially recognitional value because jobs confer status. Status of the person, his or her social identity, creates an expectation or claim of right. . . . The worker employee invests more than just time, energy, and skill. He or she invests *himself* or *herself*, his or her *person*—emotion and personality. There arises a dependence of person and job, and dependence means identity. Soon 'the job' becomes 'his or her job.'

Id. at 64-65. See also Note, *The Covenant*, *supra* note 67, at 1113:

In contrast to the employee's dependence on the employment relation, the employer is relatively unconcerned with the identity of the person with whom he shares the relation. . . . [T]he employer's relative disinterest works a profound harm to employees by operation of the rule that an employment contract for an indefinite period may be terminated at any time at the will of either party.

250. Schwartz, *supra* note 236, at 92. See also RAWLS, *supra* note 12, at 502-03; Scanlon, *supra* note 14, at 1037.

251. See Comment, *Employment At Will*, *supra* note 153, at 134.

252. Peck, *supra* note 3, at 49. See also McClintock, *supra* note 57, at 76; Minda, *supra*

has both a light and a dark side. It can strengthen individual autonomy, increase self-respect and provide opportunities for engaging in essential human activity. It can also make individuals dependent on a capricious, untrustworthy system, one which deprives them of dignity and self respect.²⁵³

For the individual, the value of employment and the cost of its loss are great. Justice Marshall, dissenting in *Board of Regents v. Roth*, said "employment is one of the greatest, if not the greatest, benefits that governments offer in modern day life."²⁵⁴ When something as valuable as the opportunity to work is at stake, the governmental employer should be required to demonstrate that its employment actions, hiring through firing, "are fair and equitable."²⁵⁵

Justice Marshall, joined by Justices Douglas and Brennan in his dissent, expanded on these thoughts in *Arnett v. Kennedy*. In arguing for a pretermination evidentiary hearing, he noted that an employee waiting for a post-termination hearing is hampered in finding interim employment by "the stigma that attends a dismissal for cause."²⁵⁶ Justice Marshall catalogued other costs including the employee's inability to provide for personal needs.²⁵⁷ These costs apply equally to the private employee.

To his colleagues who argued that the welfare system provides a sufficient cushion, Justice Marshall said that reflected "a gross insen-

note 72, at 965.

253. See West, *supra* note 56, at 401.

Hierarchical relationships can strengthen our autonomy and leave us better off if they help us grow, develop talents, improve our mental health, our physical health, our store of knowledge, or our wisdom. They weaken us and leave us worse off if they render us dependent on an unreliable or untrustworthy source of information, if they divest us of the power to engage in essential human activities, or if they deprive us of self-respect or the ability to make independent moral judgments.

Id.

254. 408 U.S. at 589.

255. *Id.*

256. 416 U.S. 134, 219 (1974).

257. Justice Marshall stated that:

Many workers . . . will suffer severe and painful economic dislocations from even a temporary loss of wages. Few public employees earn more than enough to pay their expenses from month to month. . . . Like many of us, they may be required to meet substantial fixed costs on a regular basis and lack substantial savings to meet those expenses while not receiving a salary. The loss of income for even a few weeks may well impair their ability to provide the essentials of life—to buy food, meet mortgage or rent payments, or procure medical services [Plaintiff] was . . . driven to the brink of financial ruin while he waited. He had to borrow money to support his family, his debts went unpaid, his family lost the protection of his health insurance and, finally, he was forced to apply for public assistance.

Id. at 220-21.

sitivity to the plight of these employees."²⁵⁸ The individual may be required to exhaust savings and convert assets. He or she may have to give up their home and personal possessions and deplete other sources of support.²⁵⁹

In *Cleveland Board of Education v. Loudermill*,²⁶⁰ the Court was asked to determine "what pretermination process must be accorded a public employee who can be discharged only for cause."²⁶¹ In striking the proper balance, the first item put into the pan was the employee's significant interest in remaining employed. The second was the "obvious value" of giving the employee a chance to tell his or her side of the story.²⁶² The employer's interest in immediate termination did not outweigh these employee interests.

Justice Marshall concurred in the judgment, repeating earlier concerns about the devastating disruption that loss of employment entails, "the attendant and often traumatic disruptions to [the employee's] personal and economic life."²⁶³ After reciting the economic consequences, Justice Marshall said that of equal concern was "the personal trauma experienced during the long months in which the employee awaits decision, during which he suffers doubt, humiliation and the loss of an opportunity to perform work, will never be recompensed, and indeed probably could not be with dollars alone."²⁶⁴ He refused to close his eyes "to the economic situation of great numbers of public employees, and to the potentially traumatic effect of a wrongful discharge on a working person."²⁶⁵

V. SOCIETY'S ASSOCIATIONAL INTERESTS

The employment association has three sides: employer, employee, social. We must be concerned with the justice of the scheme

258. *Id.* at 221.

259. *Id.*

Moreover, rightly or wrongly, many people consider welfare degrading and would decline public assistance even when eligible The substitution of a meager welfare grant for a regular paycheck may bring with it painful and immediate personal as well as financial dislocations. A child's education may be interrupted, a family's home lost, a person's relationship with his friends and even his family may be irrevocably affected. The costs of being forced, even temporarily, onto the welfare rolls because of a wrongful discharge from tenured Government employment cannot be so easily discounted.

260. ___ U.S. ___, 105 S.Ct. 1487 (1985).

261. *Id.* at ___, 105 S.Ct. at 1489.

262. *Id.* at ___, 105 S.Ct. at 1494.

263. *Id.* at ___, 105 S.Ct. at 1497.

264. *Id.* at ___, 105 S.Ct. at 1498.

265. *Id.*

of private, non-collective bargaining employment association "or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation."²⁶⁶ These major institutions, among which must be counted the employment association, define everyone's entitlements and obligations, and influence their futures by shaping what they can expect to be and how well they can hope to do.²⁶⁷ The justice of an employment association depends on the assignment of rights and duties, the availability of economic opportunities and the existing social conditions.

Wood's Rule did not address these interests. It created an abstract, bipartite relationship. Social impact and social justice simply were not factors. In our present state of development, the rule is neither necessary for nor appropriate to an efficient, orderly, just association.²⁶⁸ To the extent that it is still applicable, Wood's Rule "far exceeds its social utility and shifts to the employee the burden of unproductive and unwarranted employer discretion at the expense of important employee interests that deserve protection."²⁶⁹

There are social costs attending such job insecurity. Society has an economic and moral interest which grows out of

employment's interdependence with a stable economy and worker productivity. The ethos of work is important to workers in the United States. Job insecurity may lead to deteriorating moral and psychological standards in the work force. Moreover, actual job displacement may result in political, financial and social alienation of workers, all of which contribute to underproductivity and other social and economic problems.²⁷⁰

There is a substantial overlap between public and private interests. Employment association activity affects not only the involved parties but all other employees, in and out of the immediate workplace. Unjust actions or even their possibility adversely affect society's interest

266. RAWLS, *supra* note 12, at 7.

267. *Id.*

268. *See* Summers, *supra* note 3, at 520.

[N]o one can seriously contend that this out-moded rule is either necessary or appropriate to the efficient and orderly functioning of our society. . . . [P]rotection [against unjust dismissal] has earned acceptance as an essential element of tolerable and humane employment relation and it expresses an increasing recognition that employees have valuable rights in their jobs that society ought to protect against arbitrary action.

Id.

269. Note, *The Covenant*, *supra* note 67, at 1115.

270. Note, *Defining Public Policy Torts*, *supra* note 156, at 168.

in productivity, stability and fairness.²⁷¹ Wood's Rule, even in a vestigial state, leads to distributive injustices and threats to individual dignity which are incompatible with proper notions of the modern employment association.²⁷²

There are arguments for exercising caution in modifying or eliminating Wood's Rule. One economic analysis began by asking if allocating the right to discharge (or the right not to be discharged) may have "resulted in its frequent possession by the party—the employer—who values it least."²⁷³ If so, it may be economically efficient to restructure the rule. Looking at the parties' reasonable behavioral expectations, if "the precluded discharges are viewed by most employers as outside their anticipated behavior, the new costs associated with labor as a factor of production will be minimal."²⁷⁴ But if employers perceive that "the scope of managerial prerogatives" has been reduced, "a new cost . . . is introduced into the labor market."²⁷⁵ A consequence is that "labor is less attractive as a production input and employers have an incentive to substitute other factors of production" which could lead to lower wages and reduced employment.²⁷⁶ Other consequences could be a reduction in current employee benefits, an undue impact on small employers, a deterrence to relocation, and an undesirable complication of the employment association.²⁷⁷

Others have argued that Wood's Rule works to the employee's benefit albeit "in a backhanded way."²⁷⁸ Although being fired is an "unpleasant experience," if the employee "then finds more suitable employment, his situation is permanently improved."²⁷⁹ Even if the new job is disliked, the employee's "increased knowledge of his skills and tolerance that comes with accumulating experience makes it more likely that he will eventually move to more suitable employment."²⁸⁰ Other employees will benefit because eliminating unfit or

271. See Note, *Protecting Employees*, *supra* note 3, at 1948; Note, *Protecting At Will Employees*, *supra* note 3, at 1834-35.

272. See Murphy, *supra* note 6, at 746; Flynn & Ruffinengo, *supra* note 57, at 154.

273. Harrison, *supra* note 142, at 330-31.

274. *Id.* at 348 (footnote omitted).

275. *Id.*

276. *Id.* at 359.

277. See Epstein, *supra* note 83, at 953; Decker, *supra* note 67, at 352; Note, *Wrongful Termination*, *supra* note 133, at 282-83; Note, *Limiting the Right*, *supra* note 161, at 230-31.

278. Power, *supra* note 178, at 892.

279. *Id.*

280. *Id.* See DeFranco, *supra* note 164, at 74. DeFranco states:

The nonunion employee who is discharged for reasons he believes are unjust can simply obtain a new job. . . . Unlike the employee who has lost a leg, the employee

incompatible workers increases business efficiency which increases profits leading to capital investment which create more jobs.²⁸¹

It is possible that the current situation is best and that it works to the advantage of the employer, the employee and society.²⁸² In his defense of at will employment associations, Professor Epstein said they are to be welcomed "not because they are perfect but because in many contexts they respond to the manifold perils of employment contracts better than any rivals that courts or legislatures can devise."²⁸³ He identified five reasons why this is so.

First it permits both sides to monitor behavior. The employer can fire, the employee can quit "whenever the net value of the employment contract turns negative."²⁸⁴ This permits "small adjustments *in both directions* in ongoing contractual arrangements with a minimum of bother and confusion."²⁸⁵

Second, there is an "asymmetry of reputational losses" in such arrangements.²⁸⁶ An employer may be free to act for no reason or a bad reason but he or she will suffer for it among the employees, particularly the best ones, who "will take fresh stock of their own prospects, for they can no longer be certain that their faithful per-

who has lost a job can often replace the lost job with equal or better alternative employment. . . . The most attractive aspect of this remedy is that the employee may find his new supervisors and co-workers more pleasant and easier to deal with than the former ones, and thus improve his quality of life.

Id.; see also Catler, *supra* note 70, at 509 stating that "our labor relations system relies on the individual worker to select the type of job that best suits her needs and desires."

281. See Power, *supra* note 178, at 894.

282. See, e.g., Power, *supra* note 178; Catler, *supra* note 70; Note, *Limiting the Right*, *supra* note 161; Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labour Legislation*, 92 YALE L.J. 1357 (1983); Comment, *The Development of Exceptions to At-Will Employment: A Review of the Case Law From Management's Perspective* 51 U. CIN. L. REV. 616 (1982).

283. Epstein, *supra* note 83, at 952. Professor Epstein's goal was to show that the contract at will:

is adopted not because it allows the employer to exploit the employee, but rather because over a very broad range of circumstances it works to the mutual benefit of both parties, where the benefits are measured, as ever, at the time of the contract's formation and not at the time of dispute." He examined the contract "in light of the three dominant standards that have emerged as the test of the soundness of any legal doctrine: intrinsic fairness, effects upon utility or wealth, and distributional consequences.

He concluded that "the first two tests point strongly to the maintenance of the at-will rule, while the third, if it offers any guidance at all, points in the same direction." *Id.* at 953. See also Rosen, *Commentary: In Defense of the contract at Will*, 51 U. CHI. L. REV. 983 (1984).

284. Epstein, *supra* note 83, at 966.

285. *Id.* at 967.

286. *Id.*

formance will ensure their security and advancement."²⁸⁷ If the employer acts for a good reason and dismisses an undesirable employee, those remaining will benefit "for this ordinarily acts as an implicit increase in wages to [those] who are no longer burdened with uncooperative or obtuse co-workers."²⁸⁸

Third, an at will association permits risk diversification over time in that the employee "is not locked into an unfortunate contract if he finds better opportunities elsewhere or if he detects some weakness in the internal structure of the firm."²⁸⁹ The association allows both parties "to take a wait and see attitude to their relationship so that new and more accurate choices can be made on the strength of improved information."²⁹⁰

Fourth, an at will association is inexpensive to administer. It avoids the expense of litigation—pre-trial, trial and post-trial. It avoids second guessing by judges and jury who may not have the ability "to divine motive and purpose from the evidence that is presented to them."²⁹¹ It avoids the cost of inhibiting the employer's conduct of the business.²⁹²

Finally, the employer who fires pays "an implicit price" in no longer being able to compel the employee's services.²⁹³ The employer "must find, select and train a replacement worker who may not turn out to be better than the first employee."²⁹⁴ Professor Epstein believes "there are strong reasons for each side to avoid squeezing the last drop out of their relationship" since that could "lead to a sever-

287. *Id.* at 968. See also Summers, *supra* note 62, at 1108. Summers states an employer's express declaration:

that there is no job security and that the employer reserves the right to be wholly insensitive, unfair and arbitrary is not cost-free. Employees so forewarned may take the job only as a last resort, stay as short a time as possible, and favor the employer with low morale and low productivity.

288. Epstein, *supra* note 83, at 968.

289. *Id.* at 969.

290. *Id.*

291. *Id.* at 971.

292. Professor Epstein wrote:

of the deleterious effects of increased regulation upon expected hiring patterns of employers. Where an employer might have been more willing to take risky employees under an at-will rule, he will now be less willing to do so under the for-cause rule because any subsequent demotion or dismissal will be an open invitation to a lawsuit by an aggrieved employee. Furthermore, in most at-will situations the dismissed employee is replaced by another, so it is hard to see how employees *as a class* benefit from a rule that can only hamper general mobility in labor markets.

Id. at 972 (emphasis in original). See also DeFranco, *supra* note 164, at 78-79; Comment, *Employment*, *supra* note 153, at 135; Note, *Protecting Employees*, *supra* note 3, at 1829-30.

293. Epstein, *supra* note 83, at 973.

294. *Id.* at 974.

ance of the relationship and then to a loss" of the economic surplus created by their ongoing relationship.²⁹⁵

Although this argument may be analytically tight insofar as it considers the employment association in an abstract, bipartite, impersonal manner, any system which permits unexplained, oppressive behavior against an individual seems fundamentally flawed.²⁹⁶ Such behavior threatens "pervasive, destructive injury to inherent dignitary values," values which it should be the law's greatest objective to recognize, protect and promote.²⁹⁷

VI. FAIR DEALING IN EMPLOYMENT ASSOCIATIONS

A basic principle of the employment association must be that the immediate parties—employer and employee—are entitled to fair and just treatment and that individual dignity must be respected and enhanced.²⁹⁸ The employer must retain the freedom to act in response to business needs and conditions but in a way compatible with notions of fairness and in a way which reflects "a keener awareness of and greater respect for the individuality of the employee."²⁹⁹

295. *Id.* at 975.

296. *See* Summers, *supra* note 3, at 532. *Compare* Summers with Catler, *supra* note 70, at 471-72.

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

Catler, at 471-72.

297. Saphire, *supra* note 9, at 147. *See also* Hermann, *supra* note 12, at 1432; Murphy, *supra* note 6, at 724; Flynn & Ruffinengo, *supra* note 57, at 156.

298. *See* St. Antoine, *supra* note 144, at 645-46. In discussing critical legal theorists he wrote:

they have made one contribution that has put us much in their debt. They have helped refocus attention on the individual employee and his or her total well being as the criterion for testing the quality of our labor legislation. . . . The goal of just, sound labor law has to be the fullest autonomy of the individual working person.

Id. By this latter phrase, St. Antoine meant that "the worker must be given the widest scope to develop his own skills and to have a voice in the structuring of his job and the governance of the enterprise, consistent with the legitimate needs of fellow employees, the employer, and the larger public." *Id.* at 646 (footnote omitted). *See also* Heinsz, *supra* note 79, at 892 and Comment, *Employment*, *supra* note 74, at 241.

299. Blades, *supra* note 3, at 1414. Earlier, Professor Blades wrote that the law must confront the situation "[w]hether for the sake of providing specific justice for the afflicted individual, deterring a practice which poses an increasingly serious threat to personal freedom generally, or instilling into employers a general consciousness of and respect for the individual-

To the argument that this intrudes on the employer's formerly unchecked authority, it may be said that "the freedom of business is and has always been legitimately circumscribed by the rights of individuals in society."³⁰⁰ This can, and has, been done without harm to commerce. The legislative and judicial activity has accomplished an expropriation, a withdrawal of total employer autonomy.³⁰¹ That autonomy gave way to a "more fundamental and deeper concern for the equality that holds between individuals in their liberty, their freedom, to organize their lives as they best see fit."³⁰² What is proposed does not seek to foreclose legitimate employer activity but only asks that the employer, when acting "do so upon conditions and in accordance with procedures, that ensure respect for individual dignity."³⁰³

It was true sixty years ago and remains so today that:

primary to all questions and fundamental to the security of our industrial system there must be a thorough understanding of the dependence of the American workman upon the structure of industry, the advantage which the industry has from that dependence . . . and the obligation which it owes the workingman in return for

ity of the employee. . . . *Id.* at 1410. See also Summers, *supra* note 62, at 1106; St. Antoine, *supra* note 144, at 657 describing "the overreaching goal of a decent working environment, one that will be conducive to both human dignity and efficient operations."

300. DeGeorge, *supra* note 81, at 34. See also St. Antoine, *supra* note 144, at 656. St. Antoine states:

Acceptance of a wrongful discharge action will limit employer flexibility and may add to the cost of doing business. Frivolous claims are inevitable. . . . [S]ome courts will flounder without guidelines to mark the boundaries of public policy. Emotional juries may be persuaded to award massive and excessive damages. It can also be argued that . . . the vast majority of employers treat their employees fairly. On balance, I think the equities tip in favor of the individual employee. Recognizing a wrongful discharge action will impose some additional burdens on business; failing to recognize it will perpetuate the economic and psychological devastation visited annually on some 100,000—150,000 nonunion, nonprobationary employees who are fired without just cause.

St. Antoine, at 656 (footnote omitted).

301. See Peck, *supra* note 3, at 38; Fried, *supra* note 60, at 1028; Note, *The Covenant*, *supra* note 67, at 1127-28.

302. Beatty, *supra* note 39, at 68.

303. Saphire, *supra* note 9, at 151. See also Givelber, *The Right*, *supra* note 173, at 57, the proposal heeds his warning that:

incivility is so pervasive in our society that it is inappropriate for the law to attempt to provide a remedy for it in every instance. The effort would tax available judicial resources as well as open the door to false claims. It would provide a judicial forum to the adjudication of private feuds. Public adjudication of common irritations and arguments would dignify most disputes far beyond their social importance (and, perhaps, retard their resolution through normal social processes).

Id. (footnote omitted).

that advantage. . . . There must be a legal weighting of the opportunities which industry affords the workman and the obligations which he owes to industry whenever he elects to take advantage of these opportunities.³⁰⁴

Total equality may be impossible or unwise but what inequalities remain should not violate the employee's reasonable expectations of just treatment.³⁰⁵

There has been a significant evolution in society's view of the employment association. The view has gone from "simple rugged individualism to complex interdependence and institutional protection of individuality."³⁰⁶ The development seeks "to prevent people, who must interact with one another in order to realize their humanity and improve their common conditions, from oppressing or destroying one another."³⁰⁷

Whatever validity Wood's Rule had in the latter 19th century, it offers the wrong prescription for modern employment associations.³⁰⁸ Labor is no longer a mere commodity; the employment association is more than a sale and purchase transaction. It involves interests and expectations not dependent on some fictional contract but arising from the parties' behavior and relationship. It involves personal and social relationships.³⁰⁹ The association arises in a society which has come to expect that it "should be conducted in good faith and in an atmosphere of fairness."³¹⁰ The association is ongoing, carrying with it past, present and future rights and responsibilities. The

304. Quigg, *Function of the Law in Relation to Disputes Between Employers and Employees*, 9 A.B.A. J. 795, 799 (1923). See also Note, *Contracts-Interpretation of Agreements for "Permanent" Employment*, 15 N.C.L. REV. 276, 279 (1937):

The majority rule. . . enables the employer to keep the employee when labor is scarce because the employee believes he has the security of lasting employment. Then the employer can nevertheless discharge him when labor becomes cheap and abundant. In many cases, the employee's expectation of employment so long as he is able to perform seems reasonable.

Id.; see also Note, *Employment Contracts of Unspecified Duration*, 42 COLUM. L. REV. 107, 122-23 (1942).

305. See Laube, *The Defaulting Employee-Britton v. Turner Reviewed*, 83 U. PA. L. REV. 825, 847-9 (1935). See also Lansing & Pegretter, *Fair Dismissal Procedures for Non-Union Employees*, 20 AM. BUS. L.J. 75 (1982).

306. Krauskopf, *supra* note 3, at 193.

307. *Id.*

308. See generally Jones, *supra* note 246, at 1031 (law must be kept up to date, and responsive to social change).

309. See Minda, *supra* note 72, at 984-85, 989; Comment, "Good Cause," *supra* note 168, at 286-87.

310. Mauk, *supra* note 138, at 245.

association should respect and enhance individual dignity.³¹¹

The avalanche of scholarly and judicial criticism of Wood's Rule has painted it as unworkable, immoral, socially unacceptable and ripe for repeal or revision.³¹² The quandary is accommodating the employee's legitimate claim for respectful, dignified treatment with the employer's equally legitimate need for discretionary authority. This is an accommodation of "proprietary liberty with an adequate notion of human moral equality."³¹³

An employer is entitled to run the business without unnecessary or ill-advised attempts to replace his or her judgment with that of a judge or jury. Any assessment of the employment association must consider the "employer's business interests in maintaining the control, efficiency and productivity of the business."³¹⁴ The employee's right to dignified, respectful treatment must not preempt the employer's equally strong right to manage the enterprise. The goal is fair dealing in employment associations based on the employer's and employee's equal right to respect and dignity but which does not upset the cooperation necessary for success.³¹⁵ The goal is a standard to be used for appraising "the way in which social institutions distribute to individuals the benefit and burdens of their shared social existence."³¹⁶

The employment association is a social institution. It requires a

311. See Summers, *supra* note 62, at 1100; Rohwer, *supra* note 138, at 781; Blades, *supra* note 3, at 1416.

312. See Jones, *supra* note 246, at 1025.

When one has established, sufficiently and forcefully, that an existing rule of law is immoral, administratively unworkable or socially disadvantageous, he has done more than score a critical point; he has made it more likely than not that the . . . rule will be abolished, sooner or later, by legislative repeal or judicial overruling or emasculatation. . . . [T]he durability of a legal principle, its reliability as a source of guidance for the future, is determined far more by the principle's social utility, or lack of it, than by its verbal elegance or formal consistency with other legal precepts.

Id.

313. Rosenfeld, *supra* note 11, at 795. See also Note, *Defining Public Policy Torts*, *supra* note 156, at 170 ("Courts continue to struggle with the question of how to accommodate the public's interest in job security and the employer's need for discretionary dismissal of workers in these cases").

314. Note, *Implied Contract Rights*, *supra* note 58, at 336. See also Note, *Employment at Will*, *supra* note 59, at 808-09 (statutorily defined public policy standard recognizes the employer's management rights and seeks only to protect employees from being fired for protected conduct).

315. See Blades, *supra* note 3, at 1406; Note, *The Employment-at-Will Rule*, *supra* note 67, at 510; Note, *The Covenant*, *supra* note 67, at 1143.

316. Frankel, Book Review, *A Theory of Justice*, 5 COLUM. HUM. RTS. L. REV. 547, 550 (1973). See also Scanlon, *supra* note 14, at 1034.

framework which encourages social cooperation without submerging the individual's dignity and right to be treated with respect. The employment association requires cooperation based on consent and respect for individual dignity.³¹⁷ For Rawls, justice as fairness "applies to the basic structure of society" including the employment association for how "men work together now to satisfy their present desires affects the desires they will have later on, the kinds of persons they will be."³¹⁸ There is an unavoidable, perhaps even desirable, dependence on others. However, the individual's degree of attachment is affected by the perception of how others care.³¹⁹ There is a basic concept of reciprocity, of responding in kind.³²⁰

317. See Beatty, *supra* note 39, at 38-39; Hermann, *supra* note 12, at 1435; Richards, *Unnatural Acts*, *supra* note 8, at 1306.

318. RAWLS, *supra* note 12, at 259. He continued: "Since economic arrangements have these effects, and indeed must do so, the choice of these institutions involves some view of human good and of the design of institutions to realize it. The choice must, therefore, be made on moral and political as well as on economic grounds." *Id.* at 259-60.

See Brock, *supra* note 36, at 488. Brock states:

The fundamental idea of Rawls' theory is a simple and powerful one—the principles of justice are those principles that free and equal rational persons would agree on for regulating their common association . . . The function of the conception of justice chosen is . . . to assign fundamental rights and duties and benefits and burdens within a society, to determine a proper balance between competing claims to the advantages of social life. A well-ordered society is one governed by a public conception of justice.

Id.; see also Scanlon, *supra* note 14, at 1026. Scanlon states:

Through the adoption of his two principles as a public conception of justice, Rawls argues, the members of a society express their respect for one another as moral persons . . . [A] well ordered society founded on these principles is a community in a strong sense, a social union in which each person may pursue his own good within a form of association which is itself a good for all [T]he force of Rawls' theory depends . . . [in part] on the coherent view of social cooperation which the theory as a whole provides.

319. RAWLS, *supra* note 12, at 529.

320. *Id.* at 494. Professor Rawls, wrote:

a rational person is not indifferent to things that significantly affect his good; and supposing that he develops some attitude toward them, he acquire either a new attachment or a new aversion. If we answered love with hate, or came to dislike those who acted fairly toward us, or were averse to activities that furthered our good, a community would soon dissolve A capacity for a sense of justice built up by responses in kind would appear to be a condition of human sociability. . . .

Id. at 495. See Rosenfeld, *supra* note 11, at 790-91. Rosenfeld calls for:

[a] new paradigm, one that provides an institutional framework for systematic cooperation among individuals, is needed. The principal problem . . . is finding an institutional framework that can facilitate the achievement of the requisite degree of social cooperation while at the same time preserve each individual's right to pursue his or her conception of the good. The contractarian paradigm envisions society as relying on reciprocity, limited and well defined cooperation based on consent and justice as fairness. Its principal institutional device is contract, which is capable of operating both at the macropolitical level and at the micropolitical level as social

A Rawlsian social institution is not static. His conception of justice requires changes to reflect those changes that also occur in social conditions. There is nothing sacred about the existing order even if it was once correct.³²¹ In the well ordered society, institutions change but "remain just, or approximately so, as adjustments are made in view of new social circumstances."³²² In employment associations, as in other social institutions, those who benefit from the cooperation of others are expected to also do their fair share. Those who restrict their liberty to "yield advantages for all . . . have a right to a similar acquiescence on the part of those who have benefited from their submission."³²³

The employment association must be geared to respecting the autonomy and dignity of the parties. Rawls presupposes that in such relationships, justice is a virtue, individuals are inviolable and that certain rights and liberties are uncontestable.³²⁴ Our society has passed through its 19th century growing pains. It has achieved a certain level of economic well-being, where individuals become more concerned with individual liberty and dignity and less with merely surviving.³²⁵ Inequalities may remain but not the type which degrade, demean, debase or destroy an individual's dignity.³²⁶ Those which remain will support, not undercut, individual dignity.³²⁷

The proposal which follows acknowledges the employment association's importance to the individuals involved. It assumes that Wood's Rule, in its pure form, does not protect individual dignity. It requires that an employer, before dissolving an employment associa-

contract and legal contract respectively.

321. RAWLS, *supra* note 12, at 307. See also Flynn and Ruffinengo, *supra* note 57, at 123 where the authors state that the United States has benefited from factors "which have created a situation of relative well being and just distribution in comparison to other nations. Nevertheless, the need for change and revitalization of some traditional American ideals is becoming increasingly apparent." They saw "indications of a culture seeking to implement a renewed and refined standard of justice in its institutions." *Id.* They concluded that "the application of [Rawls'] theory to the reality of modern America could be achieved with a minimal disruption of existing institutions and in a manner consistent with the cultural evolution of American social values." *Id.* at 146. They believed "Rawls has presented the best alternative for implementing a new sense of justice in a manner consistent with the values of our society, compatible with political realities, and within the framework of most of our existing institutions." *Id.* See also Rheinstein, *supra* note 53, at 1519.

322. RAWLS, *supra* note 12, at 457-58.

323. *Id.* at 112.

324. See Monroe, *Toward a Higher Order of Justice: Reflections on a Theory* (Book Review), 9 CAL. W. L. REV. 368, 369 (1973).

325. See RAWLS, *supra* note 12, at 542-43. See also Hubbard, *supra* note 11, at 468-70.

326. See Scanlon, *supra* note 14, at 988 n. 74.

327. See Baker, *supra* note 19, at 910, 924.

tion, notify the affected employee and provide the employee an opportunity to discuss the decision with an authoritative figure. Employees may not reasonably expect permanent job security. They may reasonably expect dignified treatment affording "at least minimal opportunity for the sort of personal participation, revelation and explanation necessary to protect individual dignity."³²⁸ The parties are bound "to minimal levels of civility in their dealings and disagreements."³²⁹

Justice Marshall in *Board of Regents v. Roth*, discussed public employment, and argued that an employer "may only act fairly and reasonably."³³⁰ He considered "procedural due process [to be] our fundamental guarantee of fairness, our protection against arbitrary, capricious and unreasonable government action."³³¹ To the argument that this imposed an undue burden he gave "[t]he short answer . . . that it is not burdensome to give reasons when reasons exist."³³² It could "scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected" especially since summary procedures would be used that "would provide fair and adequate information."³³³ "At least renders arbitrary action more difficult" and "will surely eliminate some of the arbitrariness that results, not from malice, but from innocent error."³³⁴

The Court outlined minimum due process procedures in *Goss v. Lopez*³³⁵ where high school students had been temporarily suspended for up to ten days without a hearing. State law gave students a legitimate claim of entitlement to public education which the state could not "withdraw on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred."³³⁶

The minimum to be afforded was "*some* kind of notice and . . . *some* kind of hearing."³³⁷ The goal was "to avoid unfair or mistaken

328. Saphire, *supra* note 9, at 149. See also Minda, *supra* note 72, at 958; Peck, *supra* note 3, at 4. "[T]he very important and constitutionally protected interest in continued employment cannot be destroyed without observance of procedural due process guarantees and . . . discharge without cause constitutes a deprivation of equal protection of the law to the unorganized employees of private employers." *Id.*

329. Givelber, *supra* note 173, at 68.

330. *Board of Regents v. Roth*, 408 U.S. 564, 588 (1972) (Marshall, J., dissenting).

331. *Id.* at 589.

332. *Id.* at 591.

333. *Id.*

334. *Id.*

335. 419 U.S. 565 (1975).

336. *Id.* at 574.

337. *Id.* at 579.

exclusion from the educational process with all of its unfortunate consequences.”³³⁸ School officials acting in good faith “frequently act on the reports and advice of others and the controlling facts and the nature of the conduct under challenge are often disputed.”³³⁹ Acknowledging the size and complexity of modern school systems, and the frequent need for immediate effective discipline, the Court nonetheless felt:

it would be a strange disciplinary system . . . if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done. “[F]airness can rarely be obtained by secret, one sided determination of facts decisive of rights” “Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.”³⁴⁰

Due process required certain “rudimentary precautions” against unfair, mistaken, arbitrary action: the individual must “be given oral or written notice of the charges against him and, if he desires them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.”³⁴¹ The notice and the hearing can occur together. Moreover, an individual may be immediately removed if his or her presence “poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process.”³⁴² In that case, “the necessary notice and rudimentary hearing should follow as soon as practicable.”³⁴³ These requirements “are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.”³⁴⁴

The Court applied these due process principles to the public employment association in *Cleveland Board of Education v. Loudermill* highlighting the employee’s significant interest in keeping his or her job and “the severity of depriving a person of the means of livelihood.”³⁴⁵ The Court also identified the “obvious value” of providing

338. *Id.*

339. *Id.* at 580.

340. *Id.* (quoting *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 170, 171-72 (1950) (footnote omitted) (Frankfurter, J., concurring)).

341. *Id.* at 581.

342. *Id.* at 582.

343. *Id.* at 582-83.

344. *Id.* at 583.

345. — U.S. — at —, 105 S.Ct. 1487, 1494 (1985).

the employee "some opportunity . . . to present his side of the case" which would clarify factual mistakes and disputes and the appropriateness or necessity of the discipline.³⁴⁶

The employer's "interest in the immediate termination does not outweigh these interests."³⁴⁷ Giving the employee a choice to respond presents neither a significant administrative burden nor an unacceptable delay. Although the employees were entitled to a post-termination administrative hearing, the Court considered a pretermination hearing necessary as "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."³⁴⁸ Like a student, the employee "is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."³⁴⁹

One commentator, attempting to specify due process values, defined them in terms of the impact of governmental action "upon the dignity of those individuals whom it adversely affects."³⁵⁰ Individual dignity provided the focus for this attempt "to apply moral values, such as fairness, to our perception of the persons, institutions, and forces confronting us."³⁵¹ This sense of dignity "springs not from the outcomes of governmental decisions and conduct, but from the interaction between individuals and their government."³⁵² There are values in this which are not related to outcomes and "which, when observed, tend to bolster the affected individual's sense of integrity, self-respect and autonomy."³⁵³

The focus was on how things are done and not on outcome.³⁵⁴ The proposed model sought to "ensure that the method of interaction

346. *Id.*

347. *Id.* at —, 105 S.Ct. at 1495.

348. *Id.*

349. *Id.*

350. Saphire, *supra* note 9, at 117.

351. *Id.* at 118.

352. *Id.* at 120-21.

353. *Id.* at 121 n. 40. Professor Saphire refers to these as inherent dignitary values, a "novel term" which he admits bends "the normal confines of language to encompass new thoughts." *Id.* at 146-47. He later wrote of the "value of individuality—of respect for personal integrity and identity—that forms the core of inherent dignity. To ignore or deny its existence, or discard its importance in the procedural due process equation, is to invite a regime hostile to the role of the individual under the rule of law." *Id.* at 193.

354. *Id.* at 123-24. Professor Saphire suggests "that even when outcomes of decisions are viewed as unfair or unjust, the decisions may be accepted as legitimate if the processes through which they are reached respond to basic principles of self-respect and autonomy." *Id.* at 124.

itself is fair in terms of what are perceived as minimum standards of political accountability—of modes of interaction which express a collective judgment that human beings are important in their own right, and that they must be treated with understanding, respect, and even compassion.”³⁵⁵ The goal was “revelation, explanation, and participation.”³⁵⁶ The basic elements were the individual’s right to personally participate and respond to governmental deprivatory decisions.

The right to personally participate required an opportunity to meet with a responsible official and be told of the “nature of the decision taken or to be taken, the time frame in which it is expected to be implemented, and the factual and legal justification upon which it rests or would rest.”³⁵⁷ This insured that “the individual does in fact understand the nature, reasoning, and probable impact of the action.”³⁵⁸ This opportunity was “the best assurance that the individual will understand what is about to happen to her and why, and is the essential prerequisite for satisfaction of the innate need to be treated as a responsible and independent human entity.”³⁵⁹

The first phase of this model is explanatory; the second is responsive. The individual was given an opportunity “to register concern, dissatisfaction, and even frustration and despair.”³⁶⁰ It was the “best method to promote the feeling that, notwithstanding the substantive result, one has been treated humanely and with dignity by one’s government.”³⁶¹ The individual could dispute the factual basis for the action. Even if the facts were agreed upon, the individual could dispute the application of the legal standards. Even if the action was legally justified and based on accurate facts, the individual could appeal to the authority’s discretion to forgo such action.³⁶² At the very least, the opportunity to respond provided a vent for hostile-

355. *Id.* at 159. In an accompanying footnote, Saphire writes:

Compassion and courtesy may ultimately be no more helpful in particularizing human dignity than other terms often used. But I believe these concepts may offer a fresh and relevant dimension to the inquiry. And although compassion may subsume courtesy, both concepts embrace ideas of sensitivity, concern, and fraternity. Indeed, at least one function of the due process methodology suggested in this Article might be to assure that, at the very least, government will treat its citizens with compassion and courtesy, especially when it acts to deprive them of something they regard with value.

Id. at 159 n. 214.

356. *Id.* at 162.

357. *Id.* at 163.

358. *Id.*

359. *Id.* at 152.

360. *Id.* at 165.

361. *Id.*

362. *Id.* at 152 n.178.

ity and frustration.

This model excluded many of the trappings normally found in adversary hearings. There was not an extensive notice period nor an extensive time for discussion. There was no need for trained personnel, written records, witnesses or attorneys.³⁶³ What was required was an interaction which "has fundamental and independent significance to the individual, regardless of substantive outcomes, in that it forces the government's decisionmakers to confront those adversely affected by its policies, and to treat them as individual human beings."³⁶⁴

The applicability of this model or the *Goss/Loudermill* analysis to the private employment association is apparent.³⁶⁵ The rule that now governs the private employment association is not compatible with modern notions of fairness.³⁶⁶ We expect and should demand that individuals be treated with respect and dignity. We should "require a basic level of fair procedure and decency in dealings between people who occupy unequal bargaining positions and are bound (or apparently bound) by voluntary agreements."³⁶⁷

The most extreme disruption of the employment association is discharge. Yet, unlike the temporary suspension of high school students, there is no requirement that the employee be given a reason or an opportunity to discuss or contest the action. There are no procedures insuring "that all circumstances surrounding termination are known and that all factors are honestly evaluated."³⁶⁸ That is no guaranteed opportunity for the employee to present his or her ver-

363. *Id.* at 173-74.

364. *Id.* at 166. Professor Saphire felt that "even in those situations in which the government acts arbitrarily . . . the individual retains the right to be informed, in the most direct manner, that her government *does* act arbitrarily as well as the right to react to such treatment." *Id.* See also *Id.* at 183-84.

365. See, Peck, *supra* note 3, at 46-49; Comment, *Patronage, Arbitrary Discharge and Public Policy: Redefining the Balance of Interests in Employment*, 14 J. MAR. L. REV. 785 (1981); Hermann & Sor, *Property Rights in One's Job: The Case for Limiting Employment-At-Will*, 24 ARIZ. L. REV. 763 (1982).

366. See, e.g., McClintock, *supra* note 57, at 76. Beatty, *supra* note 39, at 55 ("a right to procedural fairness in the institutions in which these (occupational, economic) conditions of liberty and individual autonomy were defined.").

367. Givelber, *supra* note 173, at 63.

368. Heinsz, *supra* note 79, at 888. The author, noting that discharges often "are initiated by lower level supervisors and often are accompanied by improper motives or discrimination" recommends that a termination procedure "should include an unbiased review by a designated official." *Id.* The reviewer must be someone "who can effectively recommend either sustaining or overturning the discipline." *Id.* at 889. Also, giving the affected employee "a forum to appeal firing decisions" will insure "fairness when the serious step of discharge is taken; employees have a full opportunity to present the other side." *Id.*

sion of the circumstances.³⁶⁹ The informational or personal biases which may inform these actions have no way of being exposed.³⁷⁰ Except for those which enlightened employers impose on themselves, there are no mechanisms for protecting the employee's "sense of dignity and self determination."³⁷¹

Employers should not fear such rudimentary procedures.³⁷² The *Goss/Loudermill* model does not require much. There is only a need for adequate information and some opportunity to respond. There is no significant intrusion on the employer's management responsibilities. Employees can still be fired. All that is required is that they be told why and be permitted to respond. Requiring a participatory review procedure "is likely to result not only in a fairer dismissal process but also in a sense of dignity and self determination for employees that could significantly enhance productivity and quality of worklife. . .[and] would be an important step toward fostering coop-

369. See Gifford, *The Relevance of Complexity of Social Arrangements to the Attainment of Rawlsian Justice*, 51 TUL. L. REV. 510, 531-3, 540 (1977).

370. See Saphire, *supra* note 9, at 119-20. Saphire states:

[e]ven when absolute deprivation is not effected, basic notions of dignity might require that deprivatory action be premised upon the existence of facts or conditions that are generally believed to necessitate such action. . . . Such assurance is basic to human dignity because it tends to prevent arbitrary, callous or perhaps preventable mistakes or omissions, toleration of which would reflect a view that the individual is unimportant and that what really counts are values born out of expediency, convenience and ease of administration

Id.

371. Note, *Ensuring Good Faith*, *supra* note 181, at 286-87. This author states: [a]rbitrary and bad faith dismissals often result from individual managers' unchecked authority to dismiss employees. . . . [R]equiring dismissal review procedures in which nonmanagerial employees take part would produce a certain synergy: employees would gain not only protection against arbitrary dismissal but also a sense of dignity and self-determination that likely would increase productivity.

See also *Id.* at 308.

372. See, e.g., Power, *supra* note 178, at 895.

Whatever the rule as to termination, enlightened personnel management involves careful selection of employees and the building of employee loyalty through, among other ways, fair treatment. . . . Employees of the enlightened employer have a confidence founded in experience that they will not be fired without a reason, and this is arguably sufficient to reap whatever benefits there are both the employee and the employer from the employee's feeling of job security. Capricious bad faith firings, which injure employee morale and increase employee turnover are as much against the interest of the employers as of employees.

Id.

See also Minda, *supra* note 72, at 943 n.15. The general hostility of employer groups to unjust dismissal protection is also somewhat puzzling. Job security can foster employee identification with the goals of the enterprise and can serve to foster employee morale and productivity. Indeed, a growing number of corporations have recognized the wisdom of institutionalizing fair employment procedures, including company grievance procedures, as a means of improving employee productivity, efficiency and morale. *Id.*

eration in the workplace."³⁷³

Although there have been imaginative and energetic proposals to legislate such protections, it seems clear that reform must come from the state courts.³⁷⁴ If the premise of this article is sound—that all individuals have a fundamental right to be treated with equal dignity and respect—then most state constitutions provide a basis for requiring such treatment. This article argues, as the Montana Constitution declares, that “[t]he dignity of the human being is inviolable.”³⁷⁵ In any form of social cooperation, including the employment association, all parties “are equal and entitled to equal rights”³⁷⁶

373. Note, *Ensuring Good Faith*, *supra* note 181, at 310. See also Note, *Employment at Will*, *supra* note 59, at 800; Comment, *Intentional Infliction*, *supra* note 173, at 368-89: These in-house procedures are likely to expose a high percentage of unjust discharges at a time when they can be rectified by the employer . . . [T]he expense of administering such procedures and the potential for unfounded claims by disgruntled employees . . . are not an unreasonable burden, given the importance of job security to the average employee Furthermore, the costs of these procedures and of wrongful discharge liability will certainly be passed on to the consumer in many instances, thereby apportioning the risks of the individual employee throughout the entire economy.

374. See Decker, *At-Will Employment in Pennsylvania—A Proposal For its Abolition and Statutory Regulation*, 87 DICK L. REV. 477 (1984); Stieber & Murray, *supra* note 146; Bellace, *supra* note 146; Decker, *supra* note 67; Summers, *supra* note 3; Jenkins, *Federal Legislative Exception to the At-Will Doctrine: Proposed Statutory Protection for Discharges Violative of Public Policy*, 47 ALB. L. REV. 466 (1983).

See also Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 996-97 (1985) where he listed certain “institutional factors” which work to discourage legislative repeal of common law principles:

First, legislative procedures commonly are structured so that a substantial consensus is necessary to overturn an established rule. Legislatures are presented with a greater number of problems than they can possibly solve. Mild dissatisfaction with a common-law rule, however widespread, is not likely to be sufficient to clear the hurdles set up by bicameralism, the committee system, and other vagaries of parliamentary procedure. Instead, the legislature is likely to act only if some politically active group is *strongly* committed to the advocacy of that action.

375. MONT. CONST. art. II, § 4.

376. ALASKA CONST. art. I, § 1. See also ALA. CONST. art. I, § 1; ARK. CONST. art. 2, § 3; CAL. CONST. art. 1, § 1; CONN. CONST. art. I, § 1; FLA. CONST. art. 1, § 2; HAWAII CONST. art. 1, § 2; IDAHO CONST. art. I, § 1, 2; ILL. CONST. art. 1, § 1; IND. CONST. art. 1, § 1; IOWA CONST. art. I, § 1; KAN. Bill of Rights, § 1; KY. Bill of Rights, § 3; ME. CONST. art. I, § 1; MASS. CONST. pt. 1, art. I; MO. CONST. art. 1, § 2; NEB. CONST. art. I, § 1; N.H. CONST. art. I, 2; N.J. CONST. art. I, § 1; N.M. CONST. art. II, § 4; N.C. CONST. art. I, § 1; N.D. CONST. art. I, § 12; OHIO CONST. art. I, § 1; OKLA. CONST. art. 2, § 7; OR. CONST. art. I, § 1; S.D. CONST. art. VI, § 1; TEX. CONST. art. 1, § 3; UTAH CONST. art. 1, § 1; VT. CONST. ch. 1, art. 1; VA. CONST. art. 1, § 1; W. VA. CONST. art. 3, § 1; WIS. CONST. art. 1, § 1; WYO. CONST. art. 1, § 2.

Other states have “unenumerated rights” clauses which “provide that the enumeration of rights in the constitution should not be construed to impair, diminish or dispare other rights ‘retained by’ the people.” Note, *Unenumerated Rights Clauses in State Constitutions*, 63 TEX. L. REV. 1321, 1323-24 (1985). State courts “have invoked these provisions to protect a wide spectrum of individual rights.” *Id.* at 1325. See COLO. CONST. art II, § 28; GA. CONST. art I § 25; LA. CONST. art. I, § 24; MD. Bill of Rights art. 45; MICH. CONST. art I, § 23; MINN.

among which I count the right to be treated with dignity and respect. The imbalance in the distribution of rights between employers and employees needs to be redressed. State courts can impose constitutional norms on private actors.³⁷⁷ At a minimum in employment associations, they should require that the parties act toward each other in a manner which will respect and enhance their individual worth and dignity.³⁷⁸ Dignity is not negotiable; respectful treatment is the essence of equality. All of us as individual moral beings, are entitled to dignified, respectful treatment.

CONST. art. I, § 16; MISS. CONST. art III, § 32; R.I. CONST. art I, § 23; WASH. CONST. art. I, § 30.

377. See generally the symposium on state constitutional law in 63 TEX. L. REV. 959-1338 (1985). In particular see Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1277 (1985); "The possibility of imposing constitutional norms on private actors is potentially one of the most far-reaching changes in constitutional law to be worked by the state civil rights movement." However, the author believes legislation

is preferable to judicial action in this area [of enforcing state constitutional norms]

. . . . First, by defining elements, defenses, and immunities . . . a statutory scheme can foreshorten years of trial-and-error rule making in the appellate courts

Second . . . persons and organizations . . . deserve such guidance as will permit them to conform their conduct to constitutional expectations. . . . Third, the legislative process obviously permits greater participation by parties likely to be directly affected, perhaps resulting in more sensible and workable rules. Fourth, the legislative process performs a unique educative function that can never be duplicated by the world of judicial review

Id. at 1284.

378. See Collins, Foreword, *Reliance on State Constitutions—Beyond the New Federalism*, 8 U. PUGET SOUND L. REV. vi, xxv-xxvi (1984).

By examining the purpose and potential of the law set forth in the state constitution, we stand to make it more sensible to those who govern and are governed. In the process, it is to be hoped that we can revive that brand of federalism that comports with those 'fundamental principles . . . essential to the security of individual rights and the perpetuity of free government.'

Id. (quoting WASH. CONST. art. I, § 32).