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INTRODUCTION[1]

In 1976 University of Pennsylvania law professor Clyde W. Summers wrote a law review article saying that it was time for a statute to protect employees from wrongful dismissal.[2] Ten years later many employers think a statute is a good idea to protect employers from wrongful dismissal suits.

The law has been reducing employer autonomy during the last half-century, and the trend is likely to continue. In the last decade, rapid development of common law wrongful dismissal theories reduced the residue of the "employment-at-will" doctrine nearly to the vanishing point. Wrongful dismissal is merely the most recent step in a progression that began with state and federal statutes obligating employers to pay minimum wages, to participate in collective bargaining, to refrain from sex, race, religious, age and handicapped discrimination, to provide safe and healthful workplaces, and to meet certain requirements if they elect to establish employee benefit plans.

Wrongful dismissal differs from the other enumerated restrictions on employer autonomy in that it is a common-law, rather than a statutory, restriction. Increasingly, legislatures are being asked to consider whether the law of dismissal should be codified. Legislative response to this request

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1. The issues explored in this paper are developed more fully in H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE (2d ed. 1987) [hereinafter EMPLOYEE DISMISSAL]. An early version of the Article was presented at the Third Annual Labor and Employment Law Institute, Univ. of Louisville, April 25, 1986.

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

can rationalize the law of employee dismissal, or it can fragment it further. Moreover, in framing their response, legislators will be asked to weigh conflicting societal interests with major implications for individual freedom and economic efficiency. The important policy question for employers, employee representatives, labor lawyers, and the legislatures is not whether employer dismissal authority should be restricted. Such restriction has been increasing for fifty years and it is unlikely to be reduced—although the wisdom of existing restrictions is likely to be debated. The important questions are: (1) how new restrictions should be integrated with old ones, and (2) whether it is feasible to strike the balance between individual liberties and economic interests on the one hand, and the societal need for efficient enterprise on the other, in a way that adequately provides for both.

So far, the dialogue about legislation has had too narrow a focus. Most of the contemporary state proposals would prohibit dismissals of employees except for just cause. Such legislation, if enacted, would represent a revolution in American private-sector employment law. Most federal proposals protect employees against dismissal for various specific reasons. At last count, federal law already prohibited dismissal for 20 specific reasons, with the prohibitions contained in as many separate statutes.[3] The time is ripe for integrating and rationalizing employee dismissal law.[4] The practicability of legislative reform always is determined by political reality. The purpose of this Article is to broaden the policy dialogue about the range of legislative options available in the wrongful dismissal area.

Most labor lawyers are familiar with the basic concepts embodied in the National Labor Relations Act, the discrimination statutes, the OSHA Act, and ERISA, but are less familiar with wrongful dismissal theories. An enormous literature has developed recently regarding wrongful dismissal common law developments and the extinction of the em-

3. *See* EMPLOYEE DISMISSAL, *supra* note 1, ch. 2.

4. *See* Perritt, *Employee Dismissals: An Opportunity for Legal Simplification*, 35 LAB. L.J. 407 (1984) (proposing single tribunal for adjudicating wrongful dismissal claims). *But see* Letter from Donald Dotson, Chairman, NLRB, to Representative Hoyer, *reprinted in* 104 Daily Lab. Rep. (BNA) at A-5, May 30, 1986 (opposing creation of super administrative agency to handle all employment disputes).

ployment-at-will rule.[5] It is appropriate to summarize the three basic wrongful dismissal doctrines that are reasonably well defined in the case law, and discussed in the literature. About 40 states have recognized one or more of three wrongful dismissal theories, sometimes referred to as exceptions to the employment-at-will rule.[6]

The first is the Public Policy Tort theory. It permits terminated employees to recover damages resulting from their terminations when they can show that a termination jeopardized realization of a public policy reflected in a state or federal constitution, statute, administrative regulation, or formal code of conduct for a profession. Early cases accepting this theory were *Nees v. Hocks*[7] and *Sheets v. Teddy's Frosted Foods, Inc.*[8]

The second is the Implied in Fact Contract theory, permitting a terminated employee to recover damages when he or she can prove breach of an implied in fact contract. Under this theory, employees are permitted to establish a contract right not to be terminated at will, based on informal employer promises of employment security, such as those made orally at the time of hire, or those contained in employee handbooks or personnel policies. The leading case recognizing this theory is *Toussaint v. Blue Cross and Blue Shield of Michigan.*[9]

The third is for breach of an Implied Covenant of Good Faith and Fair Dealing—a contract theory with tort aspects. It was one of the earliest exceptions to the employment-at-will rule, recognized in *Petermann v. Local 396, International Brotherhood of Teamsters*,[10] and embraced in *Monge v. Beebe Rubber Co.*,[11] and *Fortune v. National Cash Register Co.*[12] The Implied Covenant theory has declined in importance as courts have developed Public Policy and Implied in Fact Contract theories. The weaknesses of the Implied Covenant

5. *See* EMPLOYEE DISMISSAL, *supra* note 1, § 1.11, at 21 n.47 (listing law review articles).

6. *See id.* § 1.12, at 23–30.

7. 272 Or. 210, 536 P.2d 512 (1975).

8. 179 Conn. 471, 427 A.2d 385 (1980).

9. 408 Mich. 579, 292 N.W.2d 880 (1980).

10. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

11. 114 N.H. 130, 316 A.2d 549 (1974).

12. 373 Mass. 96, 364 N.E.2d 1251 (1977).

theory are that it leaves too much to the jury,[13] and that it potentially duplicates the Public Policy Tort concept.[14] Nevertheless, few courts have repudiated the theory entirely because it may permit relief in apparently deserving cases that do not fit the evolving requirements for Public Policy Tort or Implied in Fact Contract.

The courts have required plaintiffs seeking recovery on a Public Policy Tort theory to show how their terminations jeopardize clear public policies. Courts have been meticulous in requiring plaintiffs seeking recovery on Implied in Fact Contract grounds to plead and prove promise, detrimental reliance, and breach elements, although a tendency to relax the detrimental reliance requirement for breach of implied contract dismissal suits has surfaced.

This Article reviews the power and preferences of six salient interest groups, and suggests that the only type of wrongful dismissal legislation likely to receive appreciable political support in the near term is legislation enumerating reasons for which dismissal is *not* permitted. This Article suggests a statute encompassing basically the grounds for which recovery is permitted under the Public Policy Tort and Implied in Fact Contract common law theories, a limitation on damages recoverable, and plaintiffs' attorney fees. Significantly, the statute would encourage all legal claims related to a particular employment termination to be presented in a single proceeding. I discuss these matters more fully and include the draft federal and state statutes reflecting the considerations in my treatise, *Employee Dismissal Law and Practice*.[15]

I. THE POLITICS OF STATUTORY REFORM

The political alignment of six salient interest groups will determine the fate of any proposed wrongful discharge legislation. They are: employers, the defense bar, trade unions,

13. *See* Thompson v. Saint Regis Paper Co., 102 Wash. 2d 219, 227, 685 P.2d 1081, 1086 (1984) (adopting the Implied in Fact Contract theory and the Public Policy Tort theory, but refusing to adopt the Implied Covenant theory because its bad faith concept is "amorphous," and because it might be internally inconsistent with actual conduct or promises).

14. *See* Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 573, 335 N.W.2d 834, 840–41 (1983) (no breach of implied covenant unless clear public policy violated by discharge).

15. *See* EMPLOYEE DISMISSAL, *supra* note 1, ch. 9 & app. C.

the plaintiff bar, non-union employees, and academic lawyers.

Employers historically have opposed any legislative or judicial action that would restrict their employment practices or impose increased liability for adverse action against employees. Employers are well organized politically and influential in legislative assemblies. In the past employers opposed legislation expanding legal protections against wrongful discharge. But employers also historically have favored legislation as an alternative to common law liability when it seemed that legislation would permit greater predictability of outcome and limit the size of damage awards. The continued rapid growth in common law liability for wrongful discharge could shift the preference of this key group toward legislation of an appropriate form.

The defense bar generally opposes legislative measures that would increase exposure to liability by defendants. This predisposition would militate against support of wrongful discharge legislation by this group. But for the same reasons that employer preferences may shift—the burden of increased common law liability and the desire for predictability and order through statutory reform—the preferences of this group also may change in favor of comprehensive legislation.

Ironically, the three groups who would benefit most from wrongful dismissal legislation are either too poorly organized to effect a change or are simply ambivalent toward such a change. Trade unions historically have favored legislation granting new rights to employees. Furthermore, the trade union movement is well organized and influential with legislators. The labor movement therefore might be expected to favor, and its support could be effective in behalf of, wrongful discharge legislation. Yet, organized labor also knows that statutory expansion of employee rights may dilute the incentive for employees to organize. It is well recognized that one of the benefits that union organizers can offer to employees is protection against arbitrary dismissal. Accordingly trade union groups have been ambivalent toward proposals for wrongful discharge statutes.

The plaintiff bar is ambivalent also. Plaintiff lawyers make their living by litigating, and by receiving portions of judgments or settlements large enough to compensate them

for work done on cases in which the plaintiff receives nothing—a form of cross-subsidy. This segment of the bar has favored expansion of common law wrongful dismissal doctrines, but that does not translate into support of legislation. Wrongful dismissal legislation would most likely include a cap on damages, thus limiting the opportunity for cross-subsidy of plaintiff litigation. But if legislation simplifies litigation or permits attorney fee awards, it could reduce the need for large potential damage awards to provide cross-subsidy. Also, if legislation broadens the substantive rights of dismissed employees, it could increase the probability of success for plaintiffs and their lawyers. Plaintiff lawyers may oppose or favor legislation, depending on its content.

Undoubtedly, non-union employees would benefit most from expanded protection against wrongful discharge. Such protection would enhance their economic security without imposing any identifiable costs directly on them. But this interest group is poorly organized and largely ignorant of the legal issues involved. Moreover, there is no "public interest" group that regularly speaks for non-union employees. Accordingly the non-union employee group will not be influential unless the subject of wrongful discharge gains prominence in election politics, so that the individual votes of members of this group are influenced by candidates' positions on the wrongful discharge issue. Wrongful discharge has not become such a prominent issue yet.

There is only one group which seems strongly to support wrongful dismissal legislation of the type most frequently discussed: academic lawyers. Law professors generally have favored legislative initiatives expanding legal protection for individual employees. This predisposition has been manifest with respect to wrongful discharge law. Indeed, the common law wrongful discharge concepts may be attributed in part to the academic legal literature.[16] Academic lawyers are influential because they provide technical assistance to legislators and because they link new proposals to well accepted legal doctrines, and thus improve the perceived legitimacy of proposals for legislative change. At present, there is no indication that this group will lessen its support of comprehensive wrongful discharge legislation.

16. *See id.* § 1.11.

The foregoing interest-group analysis suggests that the balance of political power would shift in favor of wrongful discharge legislation only if employers and the defense bar react against expanded common law liability for wrongful discharge, and if the plaintiff bar perceives that proposed legislation would enhance—or at least would not diminish—the economic feasibility of representing dismissed employees. If these groups decide that legislation is a desirable alternative to continued expansion of common law liability, they may become proponents of legislative action.

Clearly, the groups' needs and desires are at variance and, therefore, compromises must be made. Wrongful dismissal legislation is unlikely unless it satisfies the essential needs of the major groups. Fortunately, the content of legislation meeting the essential desires of the key groups also appears desirable from a policy perspective.

Employers seek order and predictability. To meet these needs, legislation attractive to employers would include:

1. Clear criteria to distinguish legitimate from prohibited dismissals;
2. A means to screen frivolous claims;
3. Protection against multiple claims;
4. A cap on damages;
5. Limited expansion of existing prohibitions (i.e., retention of the Employment-at-Will Rule to the extent possible); and
6. Deference to voluntarily adopted internal grievance mechanisms.

The preferences of the defense bar parallel those of employers.

Trade unions are likely to want:

1. Increased protection of employees;
2. Protection of incentives to unionize; and
3. Fewer fair representation claims against unions.

Non-union employees need:

1. Low cost claim assertion;
2. The closest thing possible to just cause protection;
3. Protection of private off-duty conduct and freedom of speech;
4. Maximum potential damages;
5. Speedy claim resolution; and
6. The opportunity to present claims in as many forums as possible and with maximum opportunity for review.

The plaintiff bar would like:

1. The potential for large damage awards;
2. The opportunity to present claims in as many forums as possible; and
3. Statutory award of attorneys fees.

Academic lawyers, for the most part, have supported legislation providing for:

1. Just cause protection;
2. Arbitration of claims of wrongful dismissal.

II. EXAMPLES OF PROMINENT LEGISLATIVE MODELS

Wrongful dismissal legislation can take two basic forms: it can forbid employment terminations except for cause, or it can forbid employment terminations for enumerated reasons. Most of the proposals for wrongful dismissal legislation are of the first form. Most existing employment dismissal statutes, such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the National Labor Relations Act, and the several federal "whistleblower" statutes[17] are of the second form. As early as 1981, a committee of the Bar Association of the City of New York recognized that wrongful dismissal legislation can take a variety of forms, on a spectrum ranging from broad just cause protection at one end to a simple codification of common law protections at the other.[18] Regrettably, this observation largely has been neglected in the wrongful-dismissal legislative discussion since then.

Examples of just cause legislation are plentiful. British labor law provides a comprehensive remedy for employees believing they have been subjected to "unfair dismissal."[19] Federal law in Canada has provided comprehensive reme-

17. *See id.* §§ 2.3–2.6, 2.28, 2.33.

18. Committee on Labor and Employment Law, *At-Will Employment and the Problem of Unjust Dismissal*, 36 REC. A.B. CITY OF N.Y. 170 (1981) [hereinafter *NYC Report*].

19. Employment Protection (Consolidation) Act (1978 ch. 44 §§ 54–80), 16 HALSBURY'S STATUTES 381, 434–73 (4th ed. 1986), *as amended by* Employment Act (1980 ch. 42), 16 HALSBURY'S STATUTES 639 (4th ed. 1986) *and* Employment Act (1982 ch. 46), 16 HALSBURY'S STATUTES 691 (4th ed. 1986).

dies for unjust dismissal since 1978,[20] and three provinces provide at least limited protection.[21]

In 1976, Professor Clyde Summers proposed enactment of just cause legislation at the state level in the United States,[22] channeling the adjudication of cases arising under the statute into the arbitration process.[23] A special committee of the State Bar of California endorsed, over employer dissent, a comprehensive legislative scheme establishing a just cause standard for dismissal, arbitration, and reinstatement with back pay as the primary remedy.[24] Other proposals have been similar.[25] The California,[26] Colorado,[27] Michigan,[28] New Jersey,[29] and Pennsylvania[30] legislatures have considered, but have not enacted, just cause legislation. The just cause bills all are basically similar to Summers' proposal. The American Bar Association Labor and Employment Section is collecting information on legislative alternatives.[31]

Professor Janice Bellace, writing in a 1983 symposium, proposed state enactment of just cause protection, with en-

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20. 1978 Act to Amend the Canada Labour Code, 26–27 ELIZ. II ch. 27, 1977-78 Can. Stat. 615–18, (adding Division V.7, § 61.5, to the Canada Lab. Code, 5 R.S.C., L–1, c.17 (2d Supp.), s.16).

21. Act Respecting Labour Standards, QUE. REV. STAT. ch. 45, § 124 (1979) (protecting employees with five or more years of service against dismissal without "good and sufficient cause"); Act to Provide for a Labour Standards Code, N.S. STAT. ch. 10, § 68, (1972) (requiring up to 8 weeks notice before dismissal); Employment Standards Act, ONT. REV. STAT. ch. 137, § 40 (1980) (same).

22. *See* Summers, *supra* note 2.

23. *Id.* at 521–22.

24. *See* Ad hoc Committee on Termination at Will and Wrongful Discharge Appointed by the Labor and Employment Law Section of The State Bar of California, *To Strike a New Balance* (Feb. 8, 1984)[hereinafter, Ad Hoc Committee].

25. *See* Mennemeier, *Protection from Unjust Discharges: An Arbitration Scheme*, 19 HARV. J. ON LEGIS. 49 (1982); Note, *Reforming At-Will Employment Law: A Model Statute*, 16 U. MICH. J.L. REF. 389 (1983).

26. Cal. Gen. Ass. Bill No. 3017 (1984), *cited in* Fenn & Whelan, *Job Security and the Role of Law: An Economic Analysis of Employment-At-Will*, 20 STAN. J. INT'L L. 353, 354 n.5 (1984).

27. Colorado House Bill No. 1485 (1981), *cited in* Fenn & Whelan, *supra* note 26, at 354 n.5.

28. Michigan House Bill Nos. 4665 (1979) & 5892 (1982), *cited in* Fenn & Whelan, *supra* note 26, at 354 n.5.

29. New Jersey Gen. Ass. Bill No. 1832 (1980), *cited in* Fenn & Whelan, *supra* note 26, at 354 n.5.

30. Pa. House Bill No. 1742, (1981), *cited in* Fenn & Whelan, *supra* note 26, at 354 n.5.

31. *See Individual Rights and Responsibilities in the Work Place*, 1 LAB. LAW. 777, 783 (1985) (committee report discussing "Model Legislation Project").

forcement placed in existing unemployment compensation tribunals.[32] She argued that integration of wrongful dismissal protection with the existing unemployment compensation system would result in low cost, avoid additional government bureaucracy, and relieve the courts of a flood of new cases.[33] She explained that unemployment compensation referees are accustomed to deciding most of the same questions confronting labor arbitrators hearing dismissal cases because of the frequency with which employers allege misconduct as grounds for denying unemployment compensation.[34]

Professor Bellace would modify unemployment compensation procedure in one important respect. Under the existing system, a hearing before a referee usually is available only if compensation is denied by the local office.[35] After the right to be dismissed only for just cause is added to the unemployment compensation statute, she would grant a hearing in any case in which the employee claimed unfair dismissal as well as, or in lieu of, seeking benefits.[36]

She disfavored reinstatement as the standard remedy for unfair dismissal, fearing that non-union employees would be subject to harassment with no union to protect them.[37] Instead, she proposed a remedial scheme composed of a basic award, supplemented by a "compensatory award" in appropriate cases.[38]

Five states recently have enacted statutes generally modifying the employment-at-will rule, though stopping far short of prohibiting dismissals except for just cause.[39] Whistleblower statutes exist in California[40], Connecticut,[41]

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32. Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REF. 207 (1983).

33. *Id.* at 208, 232.

34. *Id.* at 236–37.

35. *Id.* at 235.

36. *Id.* at 239.

37. *Id.* at 241.

38. *Id.*

39. Many more states, of course, have statutes addressing discrimination and collective bargaining. *See* EMPLOYEE DISMISSAL, *supra* note 1 app. A (table of state statutes).

40. CAL. LAB. CODE § 1102.5 (West Supp. 1987).

41. CONN. GEN. STAT. ANN. § 31-51m (West 1987).

Maine,[42] Michigan,[43] and New York.[44] All of these statutes refer claims of violation to the regular common law courts rather than to a new system of arbitration. In addition, South Dakota only recently rewrote its longstanding employment term statute,[45] and Missouri has a statute requiring employers to disclose the reasons for termination.[46]

The most significant development at the state level has been the enactment by the Montana legislature of a "Wrongful Discharge From Employment Act."[47] The Montana statute authorizes damages actions for dismissals which violate public policy,[48] are not for good cause after employees complete probationary periods,[49] or which violate express written employer personnel policies.[50] Compensatory damages for lost wages and benefits for up to four years are available, but not any other form of damages unless the employee can establish actual fraud or actual malice by the employer.[51] The statute expressly preempts common law tort and implied contract claims,[52] and excludes employment terminations subject to state and federal whistleblower and discrimination statutes,[53] or covered by collective bargaining agreements.[54] Arbitration of claims arising under the statute is optional, but attorneys fee awards are provided for against the party declining to arbitrate.[55] The Montana statute is a peculiar combination of just cause and enumerated reasons legislation. It is not entirely clear why the specific

42. Whistleblowers' Protection Act (1983), ME. REV. STAT. ANN. tit. 26, §§ 831-40 (Supp. 1986).

43. MICH. COMP. LAWS ANN. § 15.362 (West 1981) (prohibition); *id.* § 15.363 (West Supp. 1987) (civil action for injunctive relief or damages).

44. N.Y. LAB. LAW § 740 (Consol. Supp. 1986).

45. S.D. CODIFIED LAWS ANN. § 60-1-3 (Supp. 1987) (The prior version, establishing a presumption that employment is to continue for a period of time defined by the pay interval, has been rewritten to state: "The length of time which an employer and employee adopt for the estimation of wages is relevant to a determination of the term of employment.").

46. MO. ANN. STAT. § 290.140 (Vernon Supp. 1986).

47. Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901—914 (1987) (effective July 1, 1987).

48. *Id.* § 39-2-904(1).

49. *Id.* § 39-2-904(2).

50. *Id.* § 39-2-904(3).

51. *Id.* § 39-2-905.

52. *Id.* § 39-2-913.

53. *Id.* § 39-2-912(1).

54. *Id.* § 39-2-912(2).

55. *Id.* § 39-2-914.

provisions relating to public policy dismissals or dismissals contravening employer personnel policies are included, given the broad prohibition against dismissals without just cause, unless the narrower prohibitions are intended to protect only probationary employees.

The prevalence of just cause/arbitration models tends to obscure the reality that other forms of wrongful dismissal legislation are feasible, and may attract more political support.

III. Content of Wrongful Dismissal Legislation

The choice between just cause legislation and enumerated-prohibitions legislation should be made explicitly, revisiting the same policy question addressed by the courts that have modified the Employment-at-Will rule: to what extent must the reason relied upon by an employer for terminating an employee bear a rational relationship to the employer's business needs? This is a substantive question. In addition, the choice between arbitration and judicial enforcement raises a procedural question: once acceptable reasons for dismissal have been prescribed, what machinery should be available to ascertain and evaluate the basis for dismissal in a manner likely to result in a reasonably accurate factual decision? For ease in exposition, the first aspect will be called "substantive fairness," and the second, "procedural fairness."

Before superimposing the political calculus, it is useful to develop, explicitly, the basic alternatives for substantive and procedural fairness.

A. *Substantive Fairness*

Choosing between a just cause approach and an enumerated-prohibitions approach to wrongful dismissal involves a balancing process, in which the needs of an employer to have broad discretion to make dismissal decisions are weighed against the harm to the employee adversely affected by the decision. The use of a balancing process implies that one should be able to identify the interests being weighed. Commonly the rights and needs thus drawn into the balance must be recognized as "legitimate" if the law is to take them into account. Defining the scope of

"legitimate" rights and needs accomplishes the hardest part of the substantive fairness analysis.

The analytical process involved is embraced by the prima facie tort concept, recognized in Section 870 of the Second Restatement of Torts.[56] The prima facie tort concept provides for the imposition of liability on one who intentionally, without justification, causes legal injury to another.[57] The Restatement drafters contemplated that a court would engage in a balancing process, in which the legal injury to the plaintiff would be weighed against the legitimate needs of the defendant attempting to "justify" her action.[58] In prima facie tort analysis, as in constitutional due process analysis, legitimacy enters into the equation on both plaintiff's and defendant's sides. If the plaintiff has been hurt in some way not recognized as legal injury, prima facie tort will afford him no damages and no injunction.[59] Once the plaintiff proves legal injury (and causation, of course), if the defendant cannot offer legally recognized justification, her conduct will subject her to liability.[60]

In prima facie tort analysis, the challenger of a decision cannot obtain scrutiny by legal institutions unless he can show impairment of an interest formally recognized by the

56. Another example is constitutional substantive due process analysis. In substantive due process analysis, the needs of the state are weighed against the rights of the individual claiming denial of due process. *See* Beller v. Middendorf, 632 F.2d 788, 807 (9th Cir. 1980); Major v. Hampton, 413 F. Supp. 66, 69 (E.D. La. 1976); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW ch. II (3d ed. 1986). The balancing process is not necessary unless the person claiming denial of due process can implicate rights recognized as appropriate for constitutional protection: (1) liberty interests, *see* Connick v. Myers, 461 U.S. 138 (1983); Loehr v. Ventura County Community College Dist., 743 F.2d 1310, 1317 (9th Cir. 1984) (failure to demonstrate property interest does not defeat properly asserted liberty interest claim); or (2) property interests, *see* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972). Once either of these rights is shown to be involved, the decision under scrutiny can be sustained only if a "legitimate" state interest in making the scrutinized decision can be shown. *Compare Connick*, 461 U.S. at 154 (decision justified) *with* Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969) (decision not justified). The analogy between the property or liberty interest in constitutional analysis and the individual right in substantive fairness analysis is obvious. Similarly, the legitimate state interest is analogous to the institutional need in substantive fairness analysis.

57. RESTATEMENT (SECOND) OF TORTS § 870 (1979).

58. *Id.* comment k.

59. *Id.* comment e.

60. *Id.* comment e.

law. The defender can be successful only if she shows that the decision was supported by interests formally recognized by the law. The history of employment law in the United States has been the history of adding legally recognized employee interests. Once a new category of interests is recognized, these interests are weighed against legitimate employer interests—either in a statutory formula or in individual cases. The courts and legislatures have expanded recognized employee interests in the following ways:

First, when the reason for the termination is based on a racial, religious, gender, or age characteristic, or when it is based on certain conduct, the legislature has said that the termination is at least prima facie illegal, and has afforded remedies to employees terminated for these reasons, unless the employer can offer overriding justification.[61]

Second, when the reason for the termination arises from conduct[62] within constitutional guarantees against governmental interference with free speech, association, privacy, and religion, the termination is prima facie illegal.[63] A governmental employer must offer legally adequate justification to escape liability.

Third, when the reason for the termination is conduct that is protected by "public policy," the discharge is a tort, unless the employer can offer justification.[64]

Fourth, when the employer has promised that she will terminate only for certain reasons, or only after following certain procedures, the employee's expectations created thereby will be protected by enforcing the employer's promise in a common law breach of contract suit,[65] or, if the em-

61. Statutory prohibitions against characteristic-based discharges are considered in EMPLOYEE DISMISSAL, *supra* note 1, §§ 2.2–2.14. Statutory prohibitions against conduct-based discharges are considered *id.* §§ 2.15–2.24.

62. With few exceptions, *see* Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (recognizing Public Policy Tort for private-sector employee, based on first amendment), the conduct restricted by the Constitution is conduct of the state or its instrumentalities.

63. These "liberty" interests are considered in EMPLOYEE DISMISSAL, *supra* note 1, § 6.11. Use of the term "prima facie" indicates that the employer can assert sufficiently compelling state interests to justify the invasion of liberty interests. Assessing the justification is at the heart of substantive due process analysis. *See id.* § 6.13.

64. The Public Policy Tort concept is considered *id.* at ch. 5. The controversy over how public policy should be decided is considered *id.* §§ 1.15, 7.11.

65. Contract theories are considered *id.* ch. 4.

ployer is the government, in an action under the constitutional guarantee against governmental deprivation of property without "due process."[66]

Formulating a standard for substantive fairness in wrongful discharge legislation requires consideration of all of the recognized interests enumerated above.[67] Reinforcing these employee interests are societal interests in favor of certain types of conduct by employees.[68]

Arrayed against these interests are employer and societal interests favoring effective management of organizations. These interests require that employees not be shielded from the consequences of their poor performance or misconduct and that supervisors not be deterred from exercising their managerial responsibilities by the inconvenience of litigating employees' claims.[69] An employer should be allowed to justify removing an employee in pursuit of these interests when such interests outweigh the adverse effect on legitimate employee interests. "Free enterprise" (the preference for regulating economic relations by market forces instead of by law) is a societal value on the employer's side. The free enterprise value militates against legal regulation of discharge decisions regardless of whether an employer can justify a particular discharge. This is the way I explain the interest-balancing to my first-year torts students:

> An employment dismissal case can be represented by the scales of justice, on which various weights representing interests are placed. If the scales tilt toward the employer, the employer wins; if the scales tilt toward the employee, the employee wins. The scales of justice in a dismissal case start out with a "weight" on the employer's side of the scales: the employment-at-will rule, opposing a "weight" always on the employee's side of the scales: representing the employee's interest in job security. If

66. Due process protection of property rights rooted in such promises of employment tenure is considered *id.* § 6.10.

67. A major weakness in most of the proposals found in the law review literature is that they address only one, or a few, of the types of substantive fairness. *See, e.g.*, Peirce, Mann & Roberts, *Employee Termination at Will: A Principled Approach*, 28 VILL. L. REV. 1, 46 (1982) (definition of "just cause" primarily by reference to "whistleblowing").

68. These interests are recognized by the Public Policy Tort. *See* EMPLOYEE DISMISSAL, *supra* note 1, ch. 5. They include interests in the jury system, in the workers compensation system, and in safe products.

69. *See* Note, *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201 (1982).

> no further weights are placed on the scales, our society has decided that the employment-at-will rule is "heavier" than the employee's economic interest, and the employer wins. But other weights may go on the employee's side in a particular case: non-discrimination rights granted by statute, "public policy", or implied employer promises of job security. Similarly, specific justification for dismissal is another weight that goes on the employer's side.

In balancing the competing interests involved in workplace governance, a workable substantive fairness standard should draw upon the experience of the common law courts and the expressions of the legislature.

Possible substantive fairness standards range from the simple to the more complex. The simpler proposals unfortunately tilt the balance of interests against the employer and present problems of administration. Such an imbalance detracts from the likelihood that employers would support wrongful discharge legislation which encompasses a simple substantive fairness standard.

1. Prohibiting Dismissals Without Just Cause

A simple substantive fairness standard would be a requirement of "cause" for dismissal in all cases.[70] This is the approach taken or suggested by most of the unfair dismissal schemes adopted in other countries and proposed for adoption at the state level in the United States.[71] Such a substantive standard burdens the employer to articulate the interests justifying the dismissal. Imposing such a standard would have the effect of making private employment like public employment, in that employees would enjoy something resembling civil service tenure.

2. Prohibiting Bad Faith Dismissals

Another simple possibility is a requirement that employer dismissal actions be accomplished in "good faith."[72]

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70. This corresponds to the "maximalist" approach discussed in the New York City bar report. *NYC Report*, *supra* note 18, at 189.

71. *See* EMPLOYEE DISMISSAL, *supra* note 1, §§ 9.5–9.16.

72. In Wadeson v. American Family Mut. Ins. Co., 343 N.W.2d 367 (N.D. 1984), for example, the court approved a jury instruction on good faith, but rejected the unsuccessful plaintiff's argument that the covenant requires the employer to discharge only for good cause. *Id.* at 370. The court interpreted earlier covenant of good faith cases as stopping short of requiring good cause for discharge. *Id.* *See* Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 569–74, 335

This presumably is a less burdensome standard for employers than a "for cause" requirement; the employer's action would be allowed to stand based on the subjective motivation for the employer's decision, rather than on application of an external substantive standard.

A "good faith" standard, however, gives broad discretion to the reviewer of employer decisions, resulting in considerable unpredictability, and, possibly, bias against the employer.[73]

3. Disadvantages of Broad, Simple Prohibitions

A weakness with any simple substantive fairness standard articulated in general terms such as "cause" or "good faith" is that it authorizes individual decisionmakers outside the workplace to make basic value tradeoffs that perhaps should be made by the employer.[74]

Adopting a broad, general substantive fairness standard almost certainly would result in less predictability in employment relations and reduced acceptability of the system.[75] A just cause standard would represent a revolutionary change in private sector employment relations. Even if this were desired by the poorly organized non-union employee group and the plaintiff bar, it materially would restrict employer flexibility in enterprise management. Such an initiative is not feasible politically[76] because of the strong employer opposition that would be aroused, and because of a public perception that civil service employees who are protected against discharge without cause enjoy too much job security.

N.W.2d 834, 838–41 (Wis. 1983) (discussing alternative standards). This corresponds to the "intermediate" approach discussed by the New York City bar report. *NYC Report*, *supra* note 18, at 190.

73. *See* Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081, 1086 (1984) (adopting the Implied in Fact Contract theory and the Public Policy Tort theory, but refusing to adopt the Implied Covenant theory because its bad faith concept is "amorphous," and because it might be internally inconsistent with actual conduct or promises).

74. Professor Unger has noted this problem with broad standards. *See* R. UNGER, LAW IN MODERN SOCIETY 193–94, 197 (1976).

75. *See Brockmeyer*, 113 Wis. 2d at 569, 335 N.W.2d at 838 (problems with a good faith requirement).

76. The broad English protection against unfair dismissal emerged from a complete overhaul of English labor law in 1971. *See* EMPLOYEE DISMISSAL *supra* note 1, § 9.11. The unfair dismissal program was a pro-employee piece; most of the rest of the legislation was perceived as pro-employer.

4. Prohibiting Discharges for Specified Reasons

In addition to the disadvantages of the broad, simple prohibitions, there are clear advantages to a substantive fairness standard that builds on existing, specific statutory and common law restrictions on employment terminations by enumerating the reasons for which dismissal is *not* permitted. This approach to substantive fairness would incorporate into one wrongful discharge doctrine the various standards contained in the Constitution and federal statutes, and articulated in common law cases. While this would result in a more complex set of rules, it would be consistent with an attempt to rationalize, rather than to revolutionize, the law of wrongful discharge.[77] The order and predictability stemming from this consolidation could reduce employer opposition.

The first step in developing such a standard is to identify those types of employee interests that are entitled to legal protection under existing law. Each of these interests should be incorporated in the new substantive fairness standard. The interests of employees to be free from discrimination based on race, religion, gender, age, handicap, and sexual orientation should be recognized. These interests presently are protected by statute and it is unlikely that any credible opposition to including them in a comprehensive wrongful discharge doctrine could be mounted. Interests of employees to be free from discrimination based on specified conduct also are recognized to some extent by statutory law, and should be protected in conjunction with protections afforded presently under Public Policy Tort concepts.[78]

The expectations of employees, generally protected under common law contract principles,[79] in having employers live up to promises made to them also should be recognized. Recognition of these contract principles does not greatly demand that external reviewers of termination deci-

77. This approach is similar in many respects to the "minimalist" approach discussed by the New York City Bar Committee. *See NYC Report*, *supra* note 18, at 191.

78. The statutory conduct-based protection is discussed in EMPLOYEE DISMISSAL, *supra* note 1, §§ 2.11–2.19. Conceptually, it is hard to distinguish from the conduct-based protection afforded by the Public Policy Tort doctrines discussed *id.* ch. 5.

79. *See generally id.*, ch. 4.

sions strike difficult balances among competing interests; the employer herself has struck the balance when she made the promise of employment tenure. If the employers wish to change the way the balance is struck, they can forbear to make the promise.[80]

Inclusion of these protections in a new substantive fairness standard would not tilt the balance of interests appreciably against employers. On the contrary, codification would reduce uncertainty and permit responsible employers to design better employee policies and thus, from a political standpoint, would attract employer support.

Incorporation of two other, overlapping, categories of existing common law protection presents more difficult questions of balance. These categories relate to off-duty conduct and to rights protected by the Constitution against governmental interference as "liberty" interests.

Including termination for off-duty conduct in an enumerated-prohibitions statute has two virtues: It would not jeopardize legitimate employer interests,[81] though it undeniably diminishes employer power, and it would protect certain interests recognized by the Constitution without eviscerating the state-action barrier to full constitutional scrutiny of private employer decisions. Off-duty conduct protection, widely afforded by labor arbitrators,[82] shields employee interests in privacy and personal freedom from employer coercion unrelated to the employer's economic interests. Unless the employer can sustain the burden of demonstrating a nexus with its business needs, she should not be able to escape liability for terminating employees on account of political views expressed outside the workplace, marital status, or sexual orientation. Affording protection to off-duty conduct is not the same thing as imposing a just cause

80. The right of the employer to define the terms of employment is emphasized in the *Pine River State Bank v. Mettille* jury instruction, *quoted in* EMPLOYEE DISMISSAL, *supra* note 1, § 7.28, at 438.

81. *See* Slohoda v. United Parcel Service, Inc., 193 N.J. Super. 586, 590, 475 A.2d 618, 622 (N.J. Super. Ct. App. Div. 1984) (reversing summary judgment for employer and holding that inquiry by an employer into extra-marital sexual activities can give rise to tort liability if the employee was discharged for that reason); Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985) (reversing dismissal of plaintiff's claim and holding that nurse dismissed for refusing to "moon" on off-duty rafting trip could recover on Public Policy Tort theory).

82. *See* EMPLOYEE DISMISSAL, *supra* note 1, § 3.8.

requirement. Adding off-duty conduct to the enumerated reasons for which dismissal is not permitted leaves the burden of proof on the employee to demonstrate that he was fired for off-duty conduct. A just cause protection burdens the employer to articulate the reason for the dismissal and to demonstrate that the reason amounted to just cause.[83]

These substantive fairness rules might be expressed in a statute like this:

> A discharge of an employee shall be wrongful if one or more of the following was a determining factor in the discharge:
> (i) The employee's age, sex, race, religion, national origin, handicap, or sexual orientation;
> (ii) The employee's exercise of rights of political expression, religious activities, association, or privacy guaranteed under the United States Constitution against governmental interference;
> (iii) The employee's performance of an act or refusal to perform an act, the performance or refusal being in furtherance of public policy, as expressed in statute, administrative regulation, or formal statements of professional ethics applicable to the employee;
> (iv) Off-duty conduct of the employee bearing no reasonable relationship to the employee's job performance.
>
> Or, discharge of an employee shall be wrongful if the discharge occurred in violation of an employer's express or implied promise that the employer would dismiss the employee only for certain reasons or only after following certain procedures.

None of the suggested enumerated rights would be absolute; employers would be able to escape liability for infringing the rights when they could show legitimate business reasons for doing so.[84] This is not a revolutionary proposal;

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83. Off-duty private conduct and employee free-speech are constitutional "liberty" interests protected against infringement by public employers. Exercise of constitutional rights by public employees is protected both because adverse employment action by a public employer is "state action" potentially triggering due process protections, and because many public employees have a statutory right to be dismissed only for "cause." *See* EMPLOYEE DISMISSAL, *supra* note 1, ch. 6. These interests historically were not protected against infringement by private sector employers. *But see* Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (Public Policy Tort claim can be pleaded under Pennsylvania law for discharge interfering with first amendment political expression rights).

84. Such justification occurs in applying substantive due process scrutiny to public employer decisions and when an employer is allowed to justify class-based discrimination on BFOQ or business-necessity grounds recognized in the discrimination statutes. A BFOQ is a "Bona Fide Occupational Qualification" defense to

virtually all of these grounds for dismissal would give rise to statutory or common law liability under present law. The political motivation for this approach to substantive fairness is the need to attract support from employers and the defense bar; the needs of the plaintiff bar are addressed primarily through the selections made regarding procedural fairness.

B. *Procedural Fairness*

Whether a wrongful dismissal statute should send claims to arbitration, to an administrative agency, or directly to the regular courts raises procedural fairness questions. The issue of procedural fairness in private employment termination decisions primarily involves striking a balance between deferring to decisions made by the employer through its own procedures and retrying the termination decision in an external forum.

Procedural fairness is a relative, rather than an absolute, concept. At a minimum, it requires some external check on the decision procedures utilized by employers, as a counterweight to natural employer interests potentially antagonistic to employee interests. Procedural fairness can be ensured by a review of procedures used by the employer or it can involve a *de novo* decision by an external tribunal. Determining the appropriate level of procedural fairness, like determining the appropriate approach to substantive fairness, requires a balancing of values.[85]

1. Selection of Forum

A new statute could direct wrongful discharge disputes to any one of three forums: the regular courts, an existing or new administrative agency, or alternative dispute resolution tribunals, such as arbitration. As noted earlier, most of the wrongful dismissal statutes involve an arbitration forum. Most of the statutes actually enacted involve a judicial forum.

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a prima facie case of sex, religious or age discrimination, recognized by § 703(e) of Title VII, 42 U.S.C. § 2000e-2(e) (1982), and by § 623(f) of the Age Discrimination in Employment Act, 29 U.S.C. § 623(f) (Supp. III 1985).

85. Acceptance of this proposition is reflected in the balancing approach to procedural due process adopted by the Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

The serious burden on regular courts by the existing volume of civil litigation militates against sending additional wrongful dismissal claims directly to court.[86] A search for civil litigation alternatives enjoys wide support within the legal community and elsewhere. Legislative action perceived as increasing burdens on the courts would contravene the movement to reduce the burden. Wrongful discharge legislation designed to attract maximum support should avoid this and should, if feasible, be perceived as reducing the existing burden. Similar reasons militate against sending wrongful dismissal claims to administrative forums, the approach traditionally elected in twentieth century labor legislation.[87] Administrative regulation has been subjected to increasing criticism since 1970, and "regulatory reform" has been high on the priorities of the last two Presidents of the United States.[88] Wrongful discharge legislation should be designed so as not to contravene this political movement.

The arbitration alternative is attractive because it avoids the problems inherent in judicial and administrative alternatives. In addition, arbitration already is in wide use to protect against wrongful discharge in the union and government sectors of the economy and has proven to be generally successful in protecting the legitimate rights of both employers and employees. Also, presumably the economic barriers to arbitral resolution are lower for the dismissed employee than the barriers to judicial litigation. A California study has estimated that plaintiff legal fees for wrongful dismissal cases that go to trial average $7500–$8000 per case.[89] A typical labor arbitration case probably costs about $1,000. It is not surprising that many of the concrete proposals for wrongful discharge legislation,

86. *See* Perritt, *And the Whole Earth Was of One Language: A Broad View of Dispute Resolution*, 29 VILL. L. REV. 1221 (1984).

87. Most of the statutes discussed in chapter 2 of EMPLOYEE DISMISSAL, *supra* note 1, provide for disputes to be referred, at least initially, to an administrative agency.

88. President Carter promulgated Executive Order No. 12,044 to improve the quality of administrative regulation. 3 C.F.R. 152 (1978) (revoked by Exec. Order 12,291 (1981)). President Reagan promulgated Executive Order Nos. 12,291 and 12,498 for the same purpose. 3 C.F.R. 127 (1981), *reprinted in* 5 U.S.C. § 601, and 50 F.R. 1036, *reprinted in* 5 U.S.C. § 601, at 92–93 (Supp. III 1985).

89. *See* Ad hoc Committee, *supra* note 24, at 8.

and the methods actually adopted in Britain and Canada, utilize some form of arbitration.

Arbitration has a number of disadvantages, however. The civil courts already exist, and referring claims under a new wrongful dismissal statute to the courts has the virtue of avoiding the establishment of a new institution. Moreover, the constitutions of all but one state afford the right to a jury trial for common law claims. Serious constitutional issues may be raised by a statute that apparently leaves intact common law tort and contract claims for wrongful dismissal[90] and purports to require that they be heard in a non-judicial forum.

Also, statutory arbitration suffers from disadvantages not present with collectively bargained arbitration. Individual claimants, unlike unions, are largely ignorant as to the qualifications and biases of potential arbitrators. Of course, it is possible that the plaintiff bar would develop knowledge about potential arbitrators commensurate with that exercised by unions on behalf of grievants.

The transfer of decisionmaking authority away from employers is probably greater if arbitration is selected as the forum for reviewing termination decisions. If common law judges review dismissals, the appellate process can correct major excursions from rules of decision that reflect competing societal values accurately. Even then the price will be high in terms both of the time required and of the resulting uncertainty, before basic standards of conduct stabilize. If arbitrators make the tradeoffs, the resulting transfer of authority over employment decisions is potentially greater because most labor arbitration decisions are insulated from meaningful judicial review on the merits of individual cases. This may not be a problem in the collective bargaining context, where union and management negotiators can change or make more definitive the basic document that arbitrators are interpreting. But in the statutory wrongful discharge

90. The constitutional problem might be avoided if a new statute expressly extinguishes the common law claims and substitutes a new statutory claim. The Montana statute avoids the constitutional problems in two mutually reinforcing ways. It extinguishes common law claims for dismissals covered by the statute. MONT. CODE ANN. § 39-2-913 (1987). It also makes arbitration optional, while imposing the economic burden of attorneys fees on a party who refuses arbitration and loses. *Id.* § 39-2-914(4).

setting, the discretion of an arbitrator to give his own interpretation to a statutory term such as "cause" or "good faith" is troublesome. This is because it is difficult to provide a convenient means of controlling the arbitrator's exercise of discretion in specific cases without vitiating the advantages of arbitration.

Regardless of the forum selected, an arbitrator or court could exercise more or less deference in reviewing employer decisions: ranging from a strictly appellate role to authority to decide the termination question *de novo*.

2. Deference to Employer Procedures

Voluntarism decentralizes decisionmaking, thereby reducing the load on central political institutions. It permits experimentation, provides opportunities for employers and employees to participate directly in making decisions that affect them and usually results in procedures and substantive norms tailored to the needs and priorities of a particular enterprise and its employees.[91] A wrongful dismissal statute that promotes voluntarism is more likely to be favored by the employers because it allows them to design dispute resolution procedures that accommodate the needs of a particular workplace.

Voluntarism can be promoted by ensuring that legal institutions pay substantial deference to procedures adopted by employers for deciding discharge controversies voluntarily. Two polar alternatives can be identified. The first alternative, least intrusive into employer prerogatives, but also the least protective of fairness, would be to permit employers to make discharge decisions, immune from any external review, so long as they follow *some* formal process which embodies the rudiments of procedural fairness (e.g., notice, an unbiased decisionmaker, and an opportunity for the employee to tell his side of the story to that decisionmaker).[92]

91. *See* Dunlop, *The Limits of Legal Compulsion*, 27 LAB. L.J. 67, 73 (1976).

92. This is similar to the minimum due process required for student suspensions in Goss v. Lopez, 419 U.S. 565, 581 (1975) (notice of charges, explanation of evidence against student, and an opportunity to present student's side of story). In Judge Friendly's list of ingredients of procedural due process, this would include only the first three rights: (1) an unbiased tribunal, (2) notice, and (3) an opportunity to present reasons why the proposed actions should not be taken. *See* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279–95 (1975). The Oregon Supreme Court essentially has embraced this approach in Simpson v.

The other alternative would be more intrusive, but also would enhance substantially the protection afforded to employees. It would involve a trial *de novo* of the fairness of the discharge decision by a jury in a regular court of law, following the usual rules of evidence.[93]

An intermediate approach to procedural fairness can be borrowed from administrative law.[94] Under this approach the employer would be allowed to adopt procedures meeting generic requirements of procedural fairness.[95] Employer decisions reached under such procedures[96] would be

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Western Graphics Corp., 293 Or. 96, 100, 643 P.2d 1276, 1278–79 (1982), though it is not clear that it would impose *any* procedural requirements, as opposed to deferring to the employer regardless of the procedure followed. An alternative, adopted by the Montana Supreme Court in Gates v. Life of Montana Ins. Co., 196 Mont. 178, 184–85, 638 P.2d 1063 (1982), would permit employers to define the procedures for decisionmaking, but let the jury decide whether they followed them.

93. Essentially, this is the approach adopted by the Michigan Supreme Court in Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 621–23, 292 N.W.2d 880, 896–97 (1980) (jury decides facts, and whether facts amount to cause). The Montana statute requires employees to exhaust any available employer procedures before suing for wrongful dismissal, but does not address what effect decisions reached in such procedures would have in subsequent litigation. MONT. CODE ANN. § 39-2-911(2) (1987). Even if a jury is to decide the termination question *de novo*, presumptions and burdens of proof can materially affect the relative weight given to employer and employee interests. *Cf.* Grey, *Procedural Fairness and Substantive Rights*, in DUE PROCESS: NOMOS XVIII 182, 185 (J. Pennock & J. Chapman eds. 1977). Presumptions and burdens of proof are discussed in EMPLOYEE DISMISSAL, *supra* note 1, ch.7.

94. The administrative law analogy is imperfect. Judicial review of administrative agency decisions proceeds from constitutional due process and legislative delegation doctrines, and is intended to enforce compliance with the agency's statutory mandate. External review of private employer decisions would be premised instead on public principles derived through the common law or expressed in statutes.

95. The Administrative Procedure Act ("APA"), imposes detailed procedural requirements for adjudication, *see* 5 U.S.C. §§ 556–57 (1982), but the courts allow agencies some discretion respecting compliance with these requirements. *See* Richardson v. Perales, 402 U.S. 389, 409–10 (1971); American Trucking Ass'n v. United States, 627 F.2d 1313, 1321 (D.C. Cir. 1980) (agencies have broad discretion to fashion own procedures); Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 313 (1978) (noting flexibility provided by present APA adjudication requirements). Much more flexibility is permitted under procedural due process constitutional requirements. *See* Schweiker v. McClure, 456 U.S. 188 (1982) (agency adjudicatory functions can be delegated to private hearing officer pursuant to statute without violating due process); Mathews v. Eldridge, 424 U.S. 319, 349 (1976); *Richardson* 402 U.S. at 400–401 (addressing informal adjudication by the Social Security Administration).

96. Whether the employer followed the procedure imposed on him externally or by his own hand is of course a separate question. *See* Gates v. Life of Montana

accepted unless they were arbitrary and capricious,[97] or made in "bad faith."[98]

Such an approach should be built into proposed legislation. If an employer affords no procedures to protect employee rights, then an external tribunal should decide the merits of a wrongful discharge claim. However, if the employer does have formal procedures within which the grounds for discharge are adjudicated, then the external tribunal should confine itself to an appellate role, ensuring that those procedures were followed. Decisions reached by the employer in compliance with those procedures should be final and binding, unless there is a substantive fairness problem. Substantive issues need not be reached until it is determined that employer procedures were followed.

Such an approach will provide incentives for employers to continue to adopt their own disciplinary procedures and may reduce employer resistance to new wrongful dismissal legislation. Any other approach would create a disincentive for the continuation or adoption of such procedures because the employer always would face the threat of relitigation of questions already decided in its own internal procedures. Precedent for a deferential approach to procedural fairness includes arbitral review of discharges in the railroad industry[99] and court review of public employee discharges under the civil service laws.[100]

Ins. Co., 196 Mont. 178, 638 P.2d 1063, 1067 (1982) (jury should decide whether employer followed his own policies).

97. One of the difficulties with the administrative model is that it tends toward imposition of greater procedural obligations, over time, on the decisionmaker. For example a requirement that a factual decision be supported by "substantial evidence," *see* Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951), implies that a "record" must be generated which, in turn, implies certain procedural requirements. *See* Camp v. Pitts, 411 U.S. 138 (1973). See generally Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35 (2d Cir.), *aff'd sub. nom.* Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977), for Judge Friendly's discussion of the standards for judicial review of administrative agency action.

98. *See* Gates v. Life of Montana Ins. Co., 196 Mont. 178, 638 P.2d 1063, 1067 (1982) (covenant of good faith violated by failure to follow procedures).

99. *See* McDonald v. Penn Cent. Transp. Co., 337 F. Supp. 803, 805–06 (D. Mass. 1972). A general review of the functioning of the National Railroad Adjustment Board is found in Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567 (1937). For a general discussion of the arbitrator's role as an appellate reviewer or *de novo* decisionmaker, see O. FAIRWEATHER, PRACTICE AND PROCEDURE IN ARBITRATION 244–50 (2d ed. 1983).

100. *See* EMPLOYEE DISMISSAL, *supra* note 1, §§ 6.3–6.6.

Despite the desirability of deferring to certain employer decisions, however, a number of difficulties arise. One obvious difficulty is deciding what standards the employer-established procedure must meet in order to be entitled to deference. Whether procedural fairness existed in the employer's forum cannot be determined by an external decisionmaker without scrutinizing what the employer did and what the employee was allowed to say in his defense. It is difficult for an external decisionmaker to ensure procedural fairness without having before it a record of the employer's proceedings or else retrying the case on the merits. But requiring employers to make transcripts or otherwise to create a "record" formalizes employer procedures, creating economic and other disincentives for adoption of such procedures.

A deferential procedural fairness standard can confront this problem in two steps. First, it can confine the statutory tribunal to the question of whether the employer procedures were fair before proceeding to address the substantive fairness question. In this first stage, evidence could be offered as to procedures actually followed by the employer. In the hypothetical case offered, the statutory tribunal could hear testimony and decide whether the employee was given a meaningful opportunity to present her version of the facts to the president of the employing enterprise. Second, if the employee alleges that the reason given by the employer was pretextual, the statutory tribunal can proceed to hear evidence on the merits. This compromise is far from perfect, but it represents a reasonable attempt to defer to employer procedures without rendering the opportunity for external review entirely illusory.

At the very least, a new statute should ensure the finality of final and binding arbitration agreed to in individual cases or in a class of cases. In those states adopting the Uniform Arbitration Act,[101] or similar statutes, little more will be necessary than a savings clause preserving the effect of such statutes. In other states, specific language should be included.[102]

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101. *See id.* § 3.22, at 153 n.51.

102. Section 11(c) of the proposed state statute, and section 11(d) of the proposed federal statute accomplish this. *See id.* app. C (for the proposed statutes).

3. Treatment of Collectively Bargained Arbitration

Employees with a right to be discharged only for cause and to litigate the fairness of terminations within collectively bargained procedures should not gain the right to relitigate such claims in a new external forum.[103] Exclusions of statutory coverage for employees covered by collective agreements should be provided. This approach, which appears in the British statute and in the Pennsylvania and Michigan bills, has been suggested by Professor Summers.[104]

There are signs, however, that some unions are willing to support wrongful dismissal legislation only if the legislation gives the union an opportunity to submit a dismissal claim either to collectively bargained arbitration or to submit it under a new statutory procedure. The rationale for this position is that submitting an individual employee to a forum not controlled by the union probably would lessen the number of subsequent fair representation claims against the union.

One of the difficulties with this proposal is that union control over the arbitration process reduces individual employee discretion to press her claim as far as possible,[105] since the standard of review of collectively bargained decisions is so deferential that it makes review highly impracticable.

4. Preclusion, Exhaustion, and Election of Remedies

One major shortcoming of present employment law is that employers are subjected to multiple litigation in various forums over adverse employment actions. If a particular employee enjoys statutory protection, she may be able to arbitrate a grievance over her discharge, file a charge with the NLRB, file a complaint with the EEOC alleging sex, race, and age discrimination, and file a suit alleging wrongful dis-

103. Courts hearing common law claims for wrongful dismissal can require that the claims be litigated in collectively bargained arbitration, as a matter of common law. *See* Burkhart v. Mobil Oil Corp., 143 Vt. 123, 127, 463 A.2d 226, 229 (1983) (reversing judgment for plaintiff who failed to use arbitration to contest dismissal).

104. EMPLOYEE DISMISSAL, *supra* note 1, § 9.14.

105. *See* McDonald v. City of W. Branch, 466 U.S. 284, 291 n.10 (1984) (noting union control over arbitration as one reason why an adverse arbitration award should not preclude access to the courts).

charge.[106] In *Olguin v. Inspiration Consolidated Copper Co.*,[107] the employee filed a state public policy tort action for wrongful dismissal after having her administrative claims dismissed under the Mine Safety and Health Act and the National Labor Relations Act. She also filed a grievance under the collective agreement, which the union refused to take to arbitration.[108] Also, it is not unusual for the legitimacy of an employee's termination to be litigated before an unemployment compensation tribunal as well as in a claim of wrongful dismissal.[109]

All these separate claims may go to a hearing. Enactment of comprehensive protection against wrongful discharge obviates the need for these separate procedures and also creates the opportunity to build political support in the employer community for wrongful discharge legislation by simplifying the machinery for deciding disputes.

Any wrongful discharge statute should force all legal claims related to a discharge into a single proceeding, and should preclude relitigation of the discharge in any other forum.[110] Of course this objective is difficult to meet entirely through state legislation. Federal preemption would guarantee employees access to federal forums despite establishment of new state remedies.[111]

State legislation could, however, preclude access to the state forum by an employee electing to pursue federal fo-

106. *See* Belknap, Inc. v. Hale, 463 U.S. 491, 512 (1983) (potentially conflicting unfair labor practice proceeding and state lawsuit by discharged striker replacements permitted); W. R. Grace & Co. v. International Union of United Rubber Workers Local 759, 461 U.S. 757, 772 (1983) (conflicting arbitration award and Title VII decree allowed to stand); Johnson v. Railway Express Agency Inc., 421 U.S. 454 (1975) (Title VII and 42 U.S.C. § 1981 remedies available for same discrimination claim); Alexander v. Gardner-Denver Co., 415 U.S. 36 59–60 (1974) (both collectively bargained arbitration and Title VII available for same claim); NLRB v. Plasterers' Local 79, 404 U.S. 116, 136 (1971) (unfair labor practice and arbitration potentially available for same claim).

107. 740 F.2d 1468 (9th Cir. 1984).

108. *Id.* at 1470–71.

109. *See* EMPLOYEE DISMISSAL, *supra* note 1, § 7.35.

110. Section 11 of the proposed state and federal statutes accomplishes this. *See id.* app. C.

111. Federal preemption is discussed in EMPLOYEE DISMISSAL, *supra* note 1, §§ 2.27–2.34; *see also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974) (arbitration award not entitled to preclusive effect in Title VII discrimination litigation).

rums.[112] In this situation, the employee would still have access to multiple forums, but it is unlikely that an employee would choose to litigate several narrow federal causes of action to the exclusion of the broad state causes of action for Implied in Fact Contract and Public Policy Tort. Thus, protection against multiple claims is established indirectly by abolishing the two causes of action at common law, including them in a comprehensive state statute, and disallowing actions under this statute where the employee chooses the federal forum. If the employee presents a claim to the new state tribunal, loses and then proceeds to a federal forum, the federal forum might apply judgment or issue preclusion principles, though preclusion would be uncertain.[113]

A number of problems arise in connection with defining the appropriate relationship between new wrongful dismissal tribunals and administrative agencies already established to hear issues related to a wrongful dismissal claim. The problem is evident currently when an employee brings a common law Public Policy Tort claim premised on employer violation of health or safety regulations. Health or safety regulations commonly are enforced by administrative agencies. If the agency decides that a health or safety violation did not occur, what effect should the decision have on the wrongful dismissal case? One can argue that, since the agency did not decide the retaliatory dismissal question, the administrative decision should have no effect. Conversely, one can argue that the public policy basis for the wrongful dismissal claim evaporates when the responsible agency has found that there was nothing wrong with the employer's

112. MONT. CODE ANN. § 39-2-912 (1987).

113. *Compare* Buckhalter v. Pepsi-Cola General Bottlers, Inc., 768 F.2d 842, 853 (7th Cir. 1985) (dismissal of state discrimination claim by administrative agency precluded relitigation under 42 U.S.C. § 1981), *vacated on other grounds*, 106 S. Ct. 3328 (1986) *and* Gorin v. Osborne, 756 F.2d 834, 836 (11th Cir. 1985) (§ 1983 claim barred by res judicata effect of state court decision affirming state personnel board on "any evidence" to support decision) *with* Bottini v. Sadore Management Corp., 764 F.2d 116, 120 (2d Cir. 1985) (state administrative proceedings do not bar subsequent federal court action under Title VII) *and* Heath v. John Morrell & Co., 768 F.2d 245, 248 (8th Cir. 1985) (reversing district court for giving res judicata effect to unemployment compensation board decision in Title VII and § 1981 case; state board had no jurisdiction over discrimination law issues) *and* Griffen v. Big Spring Independent School District, 706 F.2d 645, 655 (5th Cir. 1983) (denying res judicata or collateral estoppel effect to state administrative appeals board determination because of gross irregularity of procedure, though procedure before hearing officer was adequate).

conduct. The soundest view is that the issue is not whether the employee was *correct* in her complaints; rather the issue should be whether the employee's right to complain *in good faith* without fear of retaliation promotes public policy. Accordingly, a finding of a serious violation by the responsible administrative agency would be persuasive evidence that the employee's concern was in good faith. A finding of no violation might support an argument that the employee's complaint was frivolous.

When the responsible agency has not yet addressed the employer's compliance with law, exhaustion of remedies principles should precluded a decision on the wrongful dismissal claim prior to the agency having an opportunity to interpret its own statute or regulation.[114]

5. Burdens of Proof

Under a just cause statute, the practical burden of proof (at least the burden of producing evidence) rests with the employer to show that the reason for dismissing an employee was justified. Under a "bad faith" statute, the burden would rest with the employee to make the initial showing that the employer dismissed him in bad faith. Under an enumerated-prohibitions statute, the employee would be burdened with establishing that one of the enumerated reasons motivated the termination. The employer then can defend successfully by offering legitimate business reasons for the discharge. The ultimate burden of persuasion should rest with the employee.[115] This order of proof comports well with what presently is required under federal statutes.[116]

6. Judicial Review

If the new wrongful dismissal tribunal is not judicial in character, a wrongful dismissal statute must address the appropriate standards of judicial review. The term "arbitration" leads most labor lawyers to assume a very deferential standard of review, similar to that applied under section 301 of the National Labor Relations Act. But, the plaintiff bar,

114. *See* EMPLOYEE DISMISSAL, *supra* note 1, § 7.34.

115. *See id.* ch. 7 (discussing burdens of proof in statutory and common law dismissal cases, including jury instructions).

116. *See id.* §§ 7.3–7.9.

unorganized employees, and employers may be unwilling to trust a new form of arbitration to this extent.

Practicable alternatives are hard to formulate, however. Affording a *de novo* judicial trial after arbitration negates much of the benefit of including a nonjudicial tribunal in the statute. On the other hand, the experience of court annexed arbitration programs which are reviewable *de novo*, suggest that perhaps the availability of a nonbinding decision, combined with threshold costs for access to the judicial forum, may result in a large proportion of cases stopping at the arbitral step.

If one takes an intermediate approach, and wishes to have an "arbitrary and capricious" standard of review, or a "substantial evidence in the records" standard of review, one then must force the initial tribunal to create a record, or at least to write opinions. Many of the benefits of arbitration result from requiring neither records nor opinions.

7. Remedies

Deciding upon the remedies to be afforded under a comprehensive wrongful dismissal doctrine presents three difficult questions: (1) whether reinstatement should be allowed; (2) whether "front pay"—pay for lost earnings in the future, as opposed to back pay—should be allowed; and (3) whether statutory attorney fees should be granted.

Reinstatement is almost universally available in labor arbitration and under existing statutes protecting individual employees, such as Title VII and the Age Discrimination in Employment Act. If reinstatement is permitted, there is less reason to provide for front pay. This represents a compromise between the common law contract rule, which permits "expectation damages" when a breach of contract has been shown,[117] and the tort[118] and statutory rules, which generally would permit only back pay.

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117. See *id.* § 4.28 for a discussion of contract damages principles.

118. Tort damages can include amounts for post-trial pecuniary loss. *See* RESTATEMENT (SECOND) OF TORTS § 910 (1979). Comment (d) to § 924, however, could be construed to bar recovery for future earnings, unless the dismissal has impaired the plaintiff's capacity to seek and find work. Tort damage principles are discussed generally in EMPLOYEE DISMISSAL, *supra* note 1, §§ 9.32–9.33. The cases discussed in that section can be read to permit "front pay" as an element of damages.

On the other hand, if remedies are circumscribed too far, strong opposition can be expected from the plaintiff bar. Statutory attorney fees would benefit the plaintiff bar. A reasonable compromise might be to cap damages, as desired by employers, permitting front pay in cases where reinstatement is not desired or appropriate, but not permitting punitive damages or compensation for mental distress, and providing an award of attorney fees to successful claimants.

IV. INTEGRATION OF WRONGFUL DISMISSAL AND UNEMPLOYMENT COMPENSATION SYSTEMS

One possibility for statutory wrongful dismissal protection is to integrate the machinery for adjudicating wrongful dismissal complaints with the existing unemployment compensation system.[119] The British unfair dismissal system is a model for such integration. The British industrial tribunals award "redundancy pay" (unemployment compensation) and decide claims of unfair dismissal as well. The advantages of such integration are the following:

1. The unemployment compensation system already exists in every state, and has an administrative mechanism for deciding individual cases involving termination of employment.[120]
2. Unemployment compensation tribunals already must decide certain factual issues that may be outcome determinative in claims of wrongful dismissal.[121]
3. The unemployment compensation system affords limited monetary relief to dismissed employees.

It would be necessary in any event to address how this type of relief should be integrated with new remedies under a wrongful dismissal statute. Integration of a comprehensive wrongful dismissal scheme with unemployment compensation would be relatively simple. The unemployment compensation statute could be amended to provide a schedule of payments, ranging from present compensation for no-fault termination to higher levels of monetary compensation

119. Such integration was suggested by Professor Bellace. *See supra* text accompanying notes 32–38.

120. EMPLOYEE DISMISSAL, *supra* note 1, §§ 2.36–2.37 describes the unemployment compensation system.

121. *See id.* § 7.35 (explaining relationship between findings of misconduct in claims for unemployment compensation and factual issues in wrongful dismissal cases).

or reinstatement for employees dismissed in violation of the new rights granted by the wrongful dismissal statute. Integration of wrongful dismissal with unemployment compensation would be equally feasible, regardless of whether a legislation elects a just cause approach or an enumerated prohibitions approach.

CONCLUSION

Wrongful dismissal legislation addressing particular prohibited reasons for dismissal is plentiful. The major policy question is whether statutory and common law in this important area should be rationalized, or whether it should be fragmented further. This Article has suggested that political reality militates in favor of an enumerated prohibitions approach, following the pattern of existing legislation, rather than a simple just cause approach. This Article also suggests that careful attention should be paid to forum selection.

A relatively unsophisticated analysis[122] of arbitration cases and caseload under existing federal statutes suggests that the number of cases filed annually under the proposed statutes could range from 30,000 to 103,000.

Rather than burdening the courts with this volume of new litigation, it is desirable to explore nonjudicial dispute resolution alternatives, at least as an initial step. While arbitration is a tempting alternative, difficulties with the constitutional right to jury trial and the absence of clear institutional memory on the employee's side regarding particular arbitrators may argue for integrating wrongful dismissal adjudication with the existing unemployment compensation tribunals.

122. *See id.* § 9.34, at 367–370.