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THE FUTURE OF WRONGFUL DISMISSAL CLAIMS: WHERE DOES EMPLOYER SELF INTEREST LIE?

*Henry H. Perritt, Jr.**

I. INTRODUCTION

The most significant employment law development in the last quarter of the 20th century has been the erosion of the employment-at-will rule[1] and the recognition of a family of common law rights protecting individual employees against wrongful dismissal.[2] Under these wrongful dismissal doctrines, terminated employees may be able to recover damages when they can show that their terminations violated employer promises, jeopardized clear public policies, or, sometimes, when the terminations did not comport with good faith and fair dealing. The wrongful dismissal common law doctrines have substantially eroded the operation of the employment-at-will rule.

Nevertheless, the employment-at-will rule is not altogether dead. The law in no American jurisdiction requires private employers to demonstrate "just cause" for terminating an employee. The employment-at-will rule continues to provide a presumption, however circumscribed, that a dismissal is legal; it is up to the dismissed employee to rebut that presumption by showing violation of a common law wrongful dismissal doctrine or violation of a statute.

This article considers the current state of the common law of wrongful dismissal and suggests that the employer community would be well served by participating in the drafting and promotion of state wrongful dismissal statutes to codify and integrate the law of employee dismissal. Common law contract doctrines eventually will evolve to permit employees to recover substantial front pay awards on implied contract theories based on employer representations, and public policy tort doctrines logically may expand to protect a variety of rights modeled on constitutional free speech and substantive due process rights.

The author has followed the evolution of the employment-at-will rule and the common law of wrongful dismissal closely since the

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1. The employment-at-will rule can be summarized like this: An employer may dismiss an at-will employee for a good reason, a bad reason, or for no reason at all.

2. *See* Wandry v. Bull's Eye Credit Union, 129 Wis. 2d 37, 40 n.2, 384 N.W.2d 325, 326 n.2 (1986) (noting erosion of employment-at-will rule, citing author's treatise).

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early 1980s. The author wrote one of the first books on the subject and has monitored case developments closely in order to prepare twice-annual supplements to the book and its second edition.[3] Parts of this article are adapted from the book.

This article first reviews the three basic wrongful dismissal doctrines, emphasizing recent developments and likely trends for the further evolution of each. Then, the article surveys legislative developments, emphasizing the political calculus that will determine the fate of any statutory proposal. Finally, the article explains why employers would be better off participating in framing wrongful dismissal legislation than letting near-term legislative opportunities pass by until the common law has evolved further.

II. THE STATE OF WRONGFUL DISMISSAL LAW AND THE EMPLOYMENT-AT-WILL RULE

Three basic common law doctrines permit recovery of damages for wrongful dismissal despite the employment-at-will rule. The first permits a plaintiff to recover for breach of contract when the employer dismisses the employee in violation of promises of employment tenure made orally, or implied from a course of conduct or from employee policies or handbooks.[4] This *implied-in-fact contract theory* requires a plaintiff to plead and prove the following elements:

1. The employer made a promise of employment security.
2. The employee gave consideration for the promise, in the form of detrimental reliance by continuing employment or otherwise.
3. The employer breached the promise by dismissing the employee.
4. The employee suffered damages.

The second common law doctrine allows an employee to recover in tort when the dismissal offends some identifiable public policy.[5] This *public policy tort theory* requires the plaintiff to plead and prove the following elements:

1. That a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the *clarity* element).

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3. H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE (1984); H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE (2d ed. 1987 & Supp. 1 1989).

4. *See* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE §§ 4.1-4.28 (2d ed. 1987).

5. *See* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE §§ 5.1-5.33 (2d ed. 1987).

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2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the *jeopardy* element).
3. The plaintiff's dismissal was motivated by conduct related to the public policy (the *causation* element).
4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).

The third common law doctrine enables an employee to recover for breach of contract[6] when the employer has violated a "covenant of good faith and fair dealing," implied in all contracts as a matter of law.[7] Conceptually, the *covenant theory* requires that contract rights be exercised in a manner that does not violate the covenant. Thus, even though an employer has the right to terminate an at-will contract for any reason, good or bad, or for no reason at all, the employer also has a duty not to exercise this right in bad faith or unfairly.

Under the broadest view of this doctrine, a dismissed employee need only show:

1. An employment relationship existed.
2. The employment was terminated.
3. Some aspect of the termination was unfair or in bad faith.

Upon such a showing, a jury is entitled to decide, with only the most general instructions,[8] whether the termination was fair and in good faith.

The trend of wrongful dismissal cases demonstrates a strong convergence of judicial opinion on the elements of the implied-in-fact contract, a majority public policy tort rule more favorable to employees and a minority rule less favorable to employees. Substantial differences of opinion exist respecting the implied covenant of good faith and fair dealing.

A. Public Policy Tort

Two dimensions influence how favorable to employees a particular variant of the public policy tort doctrine is: (1) the respective roles of judge and jury, and (2) the flexibility of the substantive public policy analysis. Most favorable to the employee on judge and

6. Some courts treat breach of the implied covenant as a tort. *But see* Foley v. Interactive Data, 47 Cal. 3d 654, —, 765 P.2d 373, 395-96, 254 Cal. Rptr. 211, 233-34 (1989) (en banc) (covenant is essentially a contract theory).

7. *See* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE § 4.11 (2d ed. 1987).

8. *See* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE § 7.28 (2d ed. 1987) (example of implied covenant jury instructions).

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jury roles is *Cloutier v. Great Atlantic & Pacific Tea Co.*[9] In *Cloutier,* the court declined to restrict tort recovery to instances in which the dismissal contravened clear public policy pronouncements in statutes. Rather, the court decided it "best to allow the citizenry, through the institution of the American jury, to strike the appropriate balance in these difficult cases,"[10] in other words, to decide the clarity and jeopardy elements. Giving juries more flexibility benefits employees because juries notoriously are sympathetic to employees and hostile to employers.

Most favorable to employees on the substantive analytical framework is *Novosel v. Nationwide Insurance Co.,*[11] in which the United States Court of Appeals for the Third Circuit, applying Pennsylvania law, held that a public policy tort claim could be premised on private employer conduct that infringes rights recognized in the United States Constitution.[12] The Third Circuit held that an employee who was dismissed for refusing to participate in an employer-directed lobbying campaign had a legitimate claim upon which relief could be granted.[13] The court reasoned that the public policy tort concept as recognized in *Nees v. Hocks* included dismissals that chilled rights embodied in the federal and state constitutions.[14] *Novosel* benefits employees because it greatly expands the range of public policies on which public policy tort claims can be based.

At the opposite pole from *Novosel* are *Murphy v. American Home Products,*[15] and *Phung v. Waste Management, Inc.*[16] In *Murphy,* the New York Court of Appeals refused to recognize a tort of "abusive discharge."[17] The court reviewed the trend in other states toward tempering "what is perceived as the unfairness of the traditional rule by allowing a cause of action in tort to redress abusive discharges."[18]

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9. 121 N.H. 915, 436 A.2d 1140 (1981).

10. *Id.* at 924, 436 A.2d at 1145.

11. 721 F.2d 894 (3d Cir. 1983). *See* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE § 5.12 (2d ed. 1987) for analysis of public policy tort claims based on Constitutional policies.

12. *Id.* at 898-99. The *Novosel* case was settled after the district court, on remand, denied the employer's motion for summary judgment on all counts except plaintiff's punitive damage claim for breach of contract. Novosel v. Nationwide Mutual Ins. Co., 118 L.R.R.M. (BNA) 2779, 2782 (W.D. Pa. 1985). Interestingly, the employer argued that it dismissed Mr. Novosel for pro-union remarks made to non-management personnel, which might have raised additional public policy and preemption issues. *Id.* at 2780.

13. *Novosel,* 721 F.2d at 897.

14. *Id.* at 899.

15. 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

16. 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986).

17. 58 N.Y.2d at 297, 448 N.E.2d at 87, 461 N.Y.S.2d at 233.

18. *Id.* at 301, 448 N.E.2d at 89, 461 N.Y.S.2d at 235.

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It concluded that changes in the traditional rule should be left to legislatures.[19] In the court's view, the legislature was better equipped than the courts to consider the competing policy positions of various groups as to whom liability was appropriate.[20] *Phung* also appears to reject the public policy tort doctrine, suggesting that courts should defer to legislatures for modifications of the employment-at-will rule.[21] *Phung,* however, is not as broad as *Murphy.* In *Phung* the Ohio Supreme Court did not state that it would never recognize a public policy tort. Rather, the court noted that "[t]he allegations herein failed to state a violation of a sufficiently clear public policy to warrant creation of a cause of action in favor of Phung. No jurisdiction has allowed a cause of action to proceed based only on vaguely alleged violations of 'societal obligations.' "[22]

Few states have followed either the *Cloutier* view of the jury's role, or the *Novosel,*[23] the *Murphy* or *Phung* doctrinal extremes. The *Cloutier* view of the jury's role in public policy tort cases seems to be an aberration. Judges, not juries, decide what is public policy and what kind of jeopardy can occur if specific types of employee conduct are chilled by the threat of dismissal. The judge ought to decide the clarity and jeopardy elements, both of which involve relatively pure law and policy questions in the abstract.[24] The jury decides factual issues relating to causation and overriding justification. Most courts considering the matter since *Cloutier* have adopted the view that the judge decides what public policy is and what kind of conduct is necessary to realize the public policy. In performing their roles, judges can consider a variety of sources of public policy: well recognized common law concepts as well as specific statutory or administrative announcements. The jury decides only the actual questions of what

19. *Id.*

20. *Id.* at 302, 448 N.E.2d at 89-90, 461 N.Y.S.2d at 235-36.

21. 23 Ohio St. 3d at 103, 491 N.E.2d at 1117.

22. *Id.* at 102, 491 N.E.2d at 1116-17. The membership of the *Phung* court was unusual. Justice Dahling, author of the majority opinion, was not a regular member of the Supreme Court. He replaced Justice Douglas, who wrote the *Phung* court of appeals decision finding a cause of action. *Id.* at 103, 491 N.E.2d at 1117. So when Justice Dahling is subtracted from the majority, and Justice Douglas added to the dissenters, one obtains a four-three majority in Phung, suggesting that the court might reach a different result in another public policy tort case, either because of different facts, or because of minor changes in the court's membership.

23. *See* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE § 5.12 (2d ed. 1987 & Supp. 1 1989) (characterizing authority supporting *Novosel* approach as "sparse").

24. H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE § 7.11 (2d ed. 1987); Mello v. Stop & Shop Co., 402 Mass. 555, — n.7, 524 N.E.2d 105, 108 n.7 (1988) (reversing judgment for employee and noting that jury does not define public policy; judge decides clarity element, then instructs jury on how to decide if causation element was present).

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conduct the employee engaged in and what the employer's motivation was.[25]

Many courts recognize that *Murphy* and *Phung* are too narrow. While legislatures may be more appropriate institutions than courts in making basic policy judgments, there is a long tradition of courts relying on public policy to control the evolution of the common law.[26]

1. Potential for Constitutionalizing Private Employment: *Novosel*

The *Novosel* doctrine has attracted few supporters, but it is an important model for possible future expansion of the public policy tort into a constitutionalization of private employment. Even when *Novosel* is read to encompass dismissals that offend public policy only in that they jeopardize the exercise of "free speech" rights, and even if free speech rights were limited, as they have been in the public sector to matters of public concern,[27] the expansion would be significant.

But free speech is not the only constitutionally recognized right. Due process is also constitutionally recognized. Part of substantive due process is the rationality idea: the idea that injury must be justified by some good cause. It is a relatively short logical step from *Novosel* to transform the public policy tort into a legally imposed just cause standard. Because of this potential, it is worth considering the *Novosel* analysis in greater depth.

The public policy tort concept logically extended applies to wrongful dismissal lawsuits in which the employment termination offends policies embodied in the United States Constitution or state constitutions. The precedent for such an application is mixed,

25. *See* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE §§ 7.10, 7.16 (2d ed. 1987).

26. *See* Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1205 (8th Cir. 1984) (court competent to decide public policy; legislature not only source of public policy); Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 378-79, 710 P.2d 1025, 1033-34 (1985) (en banc) (quoting Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1205 (8th Cir. 1984)) (court decisions, as well as statutes and constitutions are sources of public policy); Dabbs v. Cardiopulmonary Management Serv., 188 Cal. App. 3d 1437, 1443-45, 234 Cal. Rptr. 129, 133-34 (1987) (public policy need not be based on statutory right or on refusal to perform illegal act but may also be derived from decisional law; reversing trial court and finding public policy based tort remedies for therapist who refused to work under conditions that endanger patients). Professors Ronald Dworkin and Melvin Eisenberg are particularly articulate in explaining how judges must consider policy in deciding difficult cases. *See generally*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977); M. EISENBERG, THE NATURE OF THE COMMON LAW (1988) (fairness dictates consideration of public policy).

27. *See* Connick v. Myers, 461 U.S. 138, 146-47 (1983) (First Amendment protection does not extend to public employee expression related to private matters).

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largely because it generally is agreed that the Constitution does not protect persons against purely private conduct.[28] There is no logical reason, however, why the Bill of Rights[29] cannot be used as a foundation for public policy to permit tort recovery. Indeed its guarantee of a jury trial was used for this purpose in *Nees v. Hocks.*[30]

The first element of the analytical structure for a public policy tort, clarity of the policy, was met in *Novosel* because "the protection of an employee's freedom of political expression would appear to involve no less compelling a societal interest than the fulfillment of jury service or the filing of a workers' compensation claim."[31] The second element, jeopardy, was met because of the chilling effect that the threat of employment termination can have on expression.[32] On the record before the court of appeals, the employer had suggested no particular justification for the dismissal, permitting an inference that it was solely motivated by Novosel's political expression. It is not too difficult to apply this reasoning to other constitutionally recognized rights, including substantive due process.

28. United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 830 (1983) (violation of First Amendment rights cannot be shown under 42 U.S.C. § 1985(3) unless the state was involved in the deprivation); *see* Barr v. Kelso-Burnett Co., 106 Ill. 2d 520, 526, 478 N.E.2d 1354, 1357 (1985) (free-speech provisions of state and federal constitutions cannot support public policy tort because they reflect public policy only against governmental interference); Annotation, *Discharge From Private Employment on Ground of Political Views or Conduct,* 51 A.L.R.2d 742 (1957).

29. U.S. CONST. amends. I-X.

30. 272 Or. 210, 536 P.2d 512 (1975) (tort recovery permitted for discharge in retaliation for jury service). However, in Chin v. American Tel. & Tel. Co., 410 N.Y.S.2d 737, 741, 96 Misc. 2d 1070, 1075 (Sup. Ct. 1978), the court declined to find public policy support for a tort action based on first amendment interests. For early dicta that a tort remedy does exist for dismissals based on constitutionally protected acts, *see* Boniuk v. New York Medical College, 535 F. Supp. 1353, 1356 n.1, 1358 n.2 (S.D.N.Y. 1982) (only lower state courts have recognized the tort of abusive discharge; not appropriate for federal court to recognize it); Brink's Inc. v. City of New York, 533 F. Supp. 1123, 1125 (S.D.N.Y. 1982) (while wrongful discharge action not recongized for at will employees in New York, it is possible that it would be recognized if discharge violated public policy). It is not clear what vitality these New York cases have since the New York Court of Appeals has rejected the concept of a public policy tort in Murphy v. American Home Prods., 58 N.Y.2d 293, 301, 448 N.E.2d 86, 89, 461 N.Y.S.2d 232, 235 (1983). *Cf.* Gil v. Metal Serv. Corp., 412 So. 2d 706, 708, (La. App. 1982) (dicta that a "whistle-blower" might be constitutionally protected from dismissal under the free speech clause.)

31. Novosel v. Nationwide Ins. Co., 721 F.2d 894, 899 (3rd Cir. 1983).

32. *See id.* at 900 (threat of employment termination infringes "the individual rights of the employees and the ability of the lone political actor to be heard").

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2. Backlash Represented by *Bushko v. Miller Brewing Co.*, *Adler v. American Standard Corp.*, and *Gryzb v. Evans*

The majority rule regarding the public policy tort involves a flexible interest balancing approach basically similar to that outlined in the introduction. A considerably narrower approach also has emerged as a kind of minority rule. The narrower approach, less favorable to employees, denies recovery unless the employee can show that he was dismissed for exercising an explicit statutory right,[33] or for refusing to violate an explicit statutory prohibition.[34] The narrower approach involves less judicial activism and greater deference to the legislature. It declines to afford a theory of recovery to a dismissed employee unless the legislature explicitly has declared public policy in connection with the particular type of conduct engaged in by the employee.

Bushko v. Miller Brewing Co.[35] exemplifies the refusal-to-violate-positive-law formulation of the public policy tort. Mr. Bushko claimed he was fired because he told his employer a machine was in an unsafe condition and violated state law.[36] The majority reversed the intermediate court of appeals because it "incorrectly held that activity merely consistent with a public policy provides a basis for a wrongful discharge cause of action."[37] Bushko's counsel conceded at oral argument that "Bushko was not ordered by his employers . . . to do anything that violates the positive law of the State of Wisconsin,"[38] so the Supreme Court concluded he had no claim. The majority opinion strains to construe earlier Wisconsin public policy tort cases as adopting the refusal-to-violate formula, expressing a concern that, without narrow limitations, a Pandora's box would be opened, out of which due process or equal protection concepts would emerge to swallow the distinction between private and governmental employment.[39]

Three justices concurred, emphasizing that Mr. Bushko's evidence, but not his legal theory, was deficient.[40] The concurrence disagreed with the majority's characterization of Wisconsin case law, and with the majority's preoccupation with the refusal-to-violate

33. Buethe v. Britt Airlines, Inc., 787 F.2d 1194 (7th Cir. 1986).

34. *See* Adler v. American Standard Corp., 830 F.2d 1303 (4th Cir. 1987); Bushko v. Miller Brewing Co., 134 Wis. 2d 136, 141, 396 N.W.2d 167, 170 (1986).

35. 134 Wis. 2d at 136, 396 N.W.2d at 167.

36. *Id.* at 137-140, 396 N.W.2d at 168-69.

37. *Id.* at 141, 396 N.W.2d at 170.

38. *Id.* at 142, 396 N.W.2d at 170.

39. *Id.* at 146, 396 N.W.2d at 172. This possibility is addressed *infra* in this article in the text accompanying notes 141 to 143.

40. *Id.* at 147, 396 N.W.2d at 172 (Abrahamson, J., concurring).

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branch of the public policy tort concept. In many cases, as the *Bushko* concurrence pointed out, the dispute between employer and employee can be recharacterized as a refusal-to-violate rather than actions-consistent-with-public-policy.[41] Inherent in the state machine safety statute involved in *Bushko* was an employee's duty to report safety violations to an employer. By dismissing an employee for making such reports, the employer arguably was retaliating for the employee's refusal to violate his reporting duty.[42]

The concurrence embraced two "guidelines" for applying a public policy tort concept anchored in the idea that employer power to dismiss should not be used to undermine fundamental public policies. "Not only employees but also the public would suffer if the discharge power enhanced the ability of employers to violate public policy."[43] One suggested guideline was applicable when an employee was dismissed for refusing to violate a statutory or constitutional provision; the second was when an employee was dismissed for "actions consistent with a clear and compelling public policy embodied in a statute or constitution."[44]

In *Adler v. American Standard Corp.,* the court of appeals embraced a two-prong public policy tort formula similar to that advocated by the *Bushko* concurrence.[45] In *Adler,* the disagreement between the panel majority and the dissenter was whether Mr. Adler's insistence on reporting corporate bribes to higher employer authority satisfied either prong of the formula. The majority noted the traditional reluctance of legislatures "to impose affirmative obligations on citizens to report or prevent crimes," and concluded that Mr. Adler had no duty to report the corporate misconduct.[46] Following the refusal-to-violate or compliance-with-duty formulations strictly, the majority thought, was necessary to "tie abusive discharge claims down to a manageable and clear standard."[47] The dissent characterized Adler's conduct as a refusal to perform an illegal act: soliciting business through bribes,[48] illustrating the characterization point of the *Bushko* concurrence.

41. *Id.* at 155 n.6, 396 N.W.2d at 176 n.6 (Abrahamson, J., concurring).

42. *Id.* (Abrahamson, J., concurring).

43. *Id.* at 151, 396 N.W.2d at 174 (Abrahamson, J., concurring).

44. *Id.* at 149, 396 N.W.2d at 173 (Abrahamson, J., concurring).

45. 830 F.2d 1303, 1306-07 (4th Cir. 1987) (quoting Maryland cases as embracing theory covering either dismissals for refusal to act unlawfully or dismissals for attempt to perform duty).

46. *Id.* at 1307.

47. *Id.*

48. *Id.* at 1308.

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The second branch of the *Adler* formula permits recovery only when the employee is dismissed for insisting on performing a duty, while the second branch of the *Bushko* concurrence formula would permit recovery when an employee is dismissed for "actions consistent with . . . public policy . . . ."[49] Conceptually, many employee actions could be consistent with public policy without falling within a positive duty imposed on the employee.

The Kentucky Supreme Court, in *Gryzb v. Evans,* similarly concluded that recovery is permitted only when rights specifically granted to employees are violated, declining to recognize a public policy tort based on constitutional rights.[50] It held, however, that a claim based on the public policy contained in anti-discrimination statutes was not cognizable because of the availability of administrative remedies.[51]

For ease of exposition it is useful to call the *Bushko* majority test and the first prong of the *Adler* test the "refusal-to-violate" requirement; the second prong of the *Adler* test the "compliance-with-duty" requirement; and the second prong of the *Bushko* concurrence formula the "actions-consistent" test.

Refusing to violate an explicit statutory prohibition and exercising an explicit statutory right are two sides of the same coin, with an important difference. In both circumstances, an employee is engaging in conduct that the legislature has decided is socially desirable: conduct clothed with a right and conduct promoted by a prohibition against acting otherwise. The difference is that a prohibition reflects stronger policy. When the legislature prohibits conduct, it intends to leave those regulated no choice; they must comply with the prohibition or face sanction. When the legislature creates a right, it affords a greater range of choice; the person possessing the right has the legal power either to exercise it or not. Arguably, the policy reflected by creation of a right is weaker.

There is, however, another consideration. Rights have correlative duties. Usually, when the legislature creates a right possessed by employees, qua employees, the correlative duty is imposed on their employers. When the legislature creates a prohibition applicable to employees, the prohibition is a duty imposed on the employees. The correlative right is possessed by someone else, frequently the public at large. Another way to look at the underlying interest analysis is to view the public policy tort as a means of enforcing duties

49. *Compare id.* at 1307 *with Bushko,* 134 Wis. 2d at 149, 396 N.W.2d at 173.
50. 700 S.W.2d 399 (Ky. 1985).
51. *Id.* at 401.

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rather than a means of protecting rights. Under this view, it is easier to conclude that an employer should be liable for violating a duty to the employee than to be liable for coercing someone else to violate his or her duty to the public. Under this view the public policy tort is applicable only when an employee is dismissed for exercising an explicit statutory right and not when an employee is dismissed for refusing to violate a statutory prohibition. This explains the Seventh Circuit approach,[52] but it does not fully explain the *Bushko* approach.

3. An Appropriate Middle Ground

The public policy tort can become an amorphous source of just cause litigation, unless standards exist for principled decision-making, especially at the summary judgment and pleadings stages. But the refusal-to-violate and compliance-with-duty requirements do not represent appropriate standards. They are not faithful to the underlying concept of the public policy tort, and they do not eliminate the ability of a litigant or judge to manipulate results by artful characterization. The potential for alternative characterizations of employment dismissal disputes so as to meet the refusal-to-violate and compliance-with-duty requirements is adequately illustrated by the *Bushko* concurrence and the *Adler* dissent.

A brief review of the landmark public policy tort cases exposes the lack of harmony between the "refusal-to-violate" and "compliance-with-duty" tests and the underlying concept of the public policy tort. In some of the landmark cases, to be sure, the result is predicted by these two tests. In *Petermann v. International Brotherhood of Teamsters,* the employee was fired for refusing to perjure himself, a clear refusal-to-violate case.[53] Cases in which an employee is dismissed for refusing to dispose of hazardous wastes improperly or for refusing to operate unsafe or overweight vehicles similarly would satisfy the refusal-to-violate test. But other seminal cases do not satisfy the tests. In *Palmateer v. International Harvester Co.,* the plaintiff had no duty to report criminal violations, so he satisfied neither the refusal-to-violate nor the compliance-with-duty tests.[54] Employees dismissed for filing workers' compensation claims satisfy neither the refusal-to-violate nor the compliance-with-duty tests.

52. *See* Buethe v. Britt Airlines, Inc. 787 F.2d 1194 (7th Cir. 1986) (Posner, J.) (Indiana public policy tort doctrine provides cause of action for whistle-blowers only when statute creates right to "blow a particular whistle"—presumably to report particular type of violation to particular agency).

53. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

54. 85 Ill. 3d 124, 421 N.E.2d 876 (1981).

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The plaintiff in *Sheets v. Teddy's Frosted Foods, Inc.*, in reporting product labeling violations, satisfied neither test. Indeed, no whistle blower case would satisfy the tests, in the absence of a statute—unlikely to be enacted—that imposes an obligation to blow the whistle.[55]

Judge Posner's alternative test, permitting recovery only for dismissals motivated by employee exercise of a statutory right,[56] may explain the workers' compensation cases, but it does not predict the results in a large number of other cases in which the interests jeopardized by the dismissal belong not to the employee, but to the public. A much better way to make public policy tort analysis principled than the *Bushko* and *Adler* formulations is to use the three steps identified in the introduction to this article and advocated elsewhere by the author:[57] (1) requiring clarity of public policy; (2) identifying jeopardy to realization of the policy if the employer escapes liability; and, (3) requiring the employee to demonstrate a causal link between the policy-promoting conduct and the dismissal.

The jeopardy analysis can be subdivided. The first jeopardy step is to decide what kind of conduct is necessary to further the public policy.[58] A class of conduct thus identified can be considered analogous to the "protected conduct" concept under Section 7 of the National Labor Relations Act[59] and other statutes protecting employees in engaging in defined conduct.[60] The second substep under the jeopardy analysis is to decide if the employee's actual conduct fell within the protected conduct. The third substep is to decide if the threat of dismissal is likely in the future to discourage the employees from engaging in similar conduct. The answer to the third question almost always will be "yes."

Bushko and *Adler* follow the clarity and causation steps, so the disagreement between the author of this article and the authors of the *Bushko* and *Adler* majority opinions must relate to the jeopardy analysis. The important point to accept is that many dismissals can jeopardize clear public policies without involving refusals-to-violate or compliance-with-duty. Whistle blowing in cases where violations of law or employer conduct jeopardizing public safety and health are

55. 179 Conn. 471, 427 A.2d 385 (1980).

56. *See Buethe*, 787 F.2d at 1194.

57. *See* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE § 5.1 (2d ed. 1987).

58. *See* Guy v. Travenol Laboratories, Inc., 812 F.2d 911, 916 (4th Cir. 1987) (comprehensive enforcement scheme of Federal Food, Drug and Cosmetic Act makes it unnecessary to recognize public policy tort to further policy of Act).

59. 29 U.S.C. § 157 (1970).

60. *See* 29 U.S.C. § 215 (a)(3) (1982) (FLSA retaliation);*id* at § 1140 (ERISA retaliation).

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likely to go undetected without employee whistle-blowing are clear examples; rarely are employees obligated to turn their employers in to enforcement agencies. Nearly the entire universe of external public policy tort cases fails to satisfy the refusal-to-violate or compliance-with-duty tests; yet it is reasonable that some fundamental aspects of employees' private lives should be protected from employer coercion lest fundamental policies enshrined in constitutional and tort doctrines be jeopardized.

The Nebraska Supreme Court found these ideas persuasive when it adopted a reading of the public policy tort that permitted recovery for good faith reports by employees of employer violations of criminal statutes to the criminal authorities. It considered and rejected the line of cases limiting the public policy tort to instances in which the employee was dismissed for refusing to commit a crime.[61] The Kansas Supreme Court similarly extended public policy tort protection to employees fired for reporting serious employer violations of state or federal rules or statutes to employer officials or to governmental agencies. The Kansas Supreme Court rejected an argument that public policy tort recovery should be limited to circumstances in which an employee is dismissed in contravention of a right specifically granted to employees, reasoning that the public interest requires the voluntary disclosure of employer wrongdoing.[62] Similarly, the Illinois intermediate appellate court reasoned that employee reports of nursing home violations to nursing home personnel promote public policy just as much as reports to enforcement agencies.[63]

Indeed, another approach to limiting the public policy tort proceeds from essentially opposite principles from *Gryzb, Bushko,* and *Adler:* from the idea that it is the public who is to be protected by the theory, not persons within the workplace. In *Foley v. Interactive Data Corp.*,[64] the California Supreme Court held that a public policy tort requires that the policy concerns implicated by the employer-employee controversy implicate some policy related to the general

61. *See* Schriner v. Meginnis Ford Co., 228 Neb. 85, 93, 421 N.W.2d 755, 759 (1988) (affirming summary judgment for employer because employee lacked sufficient basis for good faith belief employer was violating state odometer statute when he reported employer to state attorney general's office).

62. Palmer v. Brown, 242 Kan. 893, 897, 752 P.2d 685, 688 (1988) (recognizing public policy tort claim for employee dismissed for reporting medicare fraud).

63. Shores v. Senior Manor Nursing Center, Inc., 164 Ill. App. 3d 503, 509, 518 N.E.2d 471, 475 (1988) (reversing dismissal of complaint and finding employment termination for reporting nursing home violations to nursing home supervisory personnel covered by public policy tort).

64. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988).

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public's interest rather than management of the particular enterprise.[65]

4. Implications of *Lingle v. Norge Division*

There is a strong trend toward rejecting public policy tort claims based on policies in statutes that provide administrative remedies. The reasoning is central to the jeopardy analysis. If administrative channels exist for enforcing the public policy or for protecting employees against dismissal and retaliation for public policy-serving conduct, the public policy will not be jeopardized in the absence of a public policy tort remedy. This idea is not applied strongly to preclude public policy tort recovery for dismissals also covered by anti-discrimination statutes, but anti-discrimination statutes have especially strong cumulative and supplementary remedial policies.[66]

In contrast, one would have thought that employees covered by "collectively bargained just cause protection" present the paradigmatic case in which the jeopardy analysis militates against the availability of public policy tort relief. Nevertheless, the Supreme Court of the United States has decided that public policy tort claims by employees protected by collectively bargained just cause and arbitration provisions are not preempted by Section 301 of the Labor Management Relations Act, and a growing number of state supreme courts have decided that collective bargaining employees may maintain parallel public policy tort actions.

In *Lingle v. Norge Division,*[67] the Supreme Court of the United States held that a public policy tort claim for worker's compensation retaliation was not preempted by Section 301 of the LMRA,[68] although the employee plaintiff arbitrated her claim of dismissal without just cause and won reinstatement. The unanimous Court reasoned that the tort claim was independent of the collective bargaining agreement, and therefore could be decided without interpreting the collective agreement. Thus the state claim was not "inextricably intertwined" with contract questions that could be

65. *Id.*, 765 P.2d at 379, 254 Cal. Rptr. at 217. (". . . whether the discharge is against public policy and affects a duty which inures to the benefit of the public at large rather than to a particular employer or employee."). *See also* Mello v. Stop & Shop Co., 402 Mass. 555, 560-61, 524 N.E.2d 105, 108 (1988) (dismissal for complaining about purely internal false claims and false reports does not implicate public policy).

66. *See, e.g.*, Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974).

67. 108 S. Ct. 1877 (1988).

68. 29 U.S.C. § 185 (1970).

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presented to the arbitrator—the test articulated by the Court in *Allis-Chalmers Corp. v. Lueck.*[69]

The *Lingle* decision does not resolve the question of what preclusive effect an arbitration might be entitled to receive.[70] Nor does it decide how, as a matter of substantive state law, the availability of collectively bargained just cause protection ought to affect the jeopardy component of public policy tort analysis.

The Kansas Supreme Court, overruling earlier Kansas Supreme Court precedent,[71] held in *Coleman v. Safeway Stores, Inc.*,[72] that an employee covered by collectively bargained just cause and arbitration provisions nevertheless was entitled to assert public policy tort claims. The court reasoned that the arbitration remedy was not aimed at protecting the individual rights and public interests implicated in the public policy tort concept, and that the majoritarian principles of collective bargaining were inappropriate mechanisms to waive rights embodied in the tort law. The court also utilized *Alexander v. Gardner-Denver Co.* to characterize arbitration as a potentially inferior procedural system for hearing public policy tort claims.[73]

Maryland's highest court also has decided that public policy tort claims are available to employees covered by collective bargaining agreements.[74] These cases are just the most recent in a trend that began with the Illinois Supreme Court in *Midgett v. Sackett-Chicago, Inc.*[75]

B. Implied-in-Fact Contract

As the introduction noted, virtually all states have accepted the proposition that the employment-at-will presumption can be overcome by proof of an informal contract to dismiss only for certain reasons or only through certain procedures. There is growing acceptance of the proposition that consideration for an informal employer promise can be found in the employee's continuing to work

69. 471 U.S. 202 (1985).

70. *See* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE § 7.31 (2d ed. 1987).

71. The precedent overruled explicitly included Armstrong v. Goldblatt Tool Co., 242 Kan. 164, 169-70, 747 P.2d 119, 123-24 (1987), decided only three months earlier.

72. 242 Kan. 804, 813-15, 752 P.2d 645, 651-52 (1988) (reversing summary judgment for employer).

73. 415 U.S. 36 (1974).

74. Ewing v. Koppers Co., 312 Md. 45, 50-51, 537 A.2d 1173, 1175 (1988) (public policy tort claim for retaliatory discharge for filing worker's compensation claim is available to employee covered by collective agreement, but preempted by 29 U.S.C. § 185 where arbitrator already had decided that just cause existed). *See* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE § 5.20 (2d ed. 1987) for other cases.

75. 105 Ill. 2d 143, 473 N.E.2d 1280 (1984).

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and performing normal duties after knowing of the employer's promise. This section reviews the consideration analysis, explains that disclaimers generally have been given effect, explores the front pay issue, and notes that some of the implied-in-fact contract ideas developed in the context of wrongful dismissal cases are being extended to support employee claims for other terms of employment such as particular pay rates, or promotions.

1. Continuing Employment as Consideration for an Employer's Promise of Employment Security

Nearly all states allow consideration for an informal employer promise of employment security to be shown by proof of conduct above and beyond performing the ordinary job duties, such as quitting another job or turning down alternative job offers. If such "special consideration" is established, the promise of employment security is enforced even in the most conservative states.[76] In a growing number of states, continuation of employment after knowing of a promise of employment security is consideration for the employer's promise. The rationale is that the continued performance of service is a detriment suffered by the employee which was bargained for by the employer. Even when the "bargained-for" aspect cannot be met, the employer's promise can be enforced under the promissory estoppel doctrine, contained in Section 90 of the Restatement (Second) of Contracts, if the employee's conduct in reliance on the promise was reasonable, and reasonably should have been expected by the employer.[77]

The idea of the "bargained-for-exchange" is important to grasp before analysis of the consideration requirement[78] in wrongful dis-

76. *See* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE §§ 1.12, 4.15 (2d ed. 1987).

77. *See* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE § 4.14 (2d ed. 1987).

78. Part of the idea of offer and acceptance or "meeting of the minds" in contract theory is to require that a promise be supported by some sort of validation device before the law enforces it. The most common validation device is *consideration:* something given in return for a promise. This may be a return promise or it may be conduct. *See* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE § 4.13 (2d ed. 1987) for analysis of the difference between bilateral (promise given in return for a promise) and unilateral (conduct given in return for a promise) contracts. It may be any benefit or detriment that is given in exchange for a promise. There must be a promise, or finding consideration is of no avail to the plaintiff. *See* Walker v. Modern Realty of Mo., Inc., 675 F.2d 1002, 1004 (8th Cir. 1982) (recognizing promissory estoppel theory, but denying recovery because no promise of continued employment). The benefit may be a promise to pay a sum of money or may be the performance of an act, for example repairing an automobile. The detriment can be forbearance to do anything that one has a legal right to do, for example refraining from using tobacco. The motive for the consideration requirement, as for alternative validation devices, is essentially evidentiary. If a party

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missal actions makes sense. Intuitively, the bargained-for idea is an easy idea when two parties sit down at a table and say to each other, "If I give you this what will you give to me in return?" and eventually reach a deal. For example, if there is a specific agreement evidencing a meeting of the minds between employer and employee regarding compliance with personnel policies, there is little need for other manifestations of assent.[79] It is a harder idea to grasp when one party makes a promise without saying anything explicit to the other about what is expected in return, and then the other engages in some sort of conduct in reliance on the promise. Yet, that is precisely the circumstance found in most implied-in-fact contract cases involving wrongful dismissal allegations.

When one party makes a promise and the other party responds with conduct, a unilateral contract may have arisen. In the unilateral contract context, the bargained-for question is the following: did the party making the promise make it *for the purpose of inducing* a certain kind of conduct. If such a purpose was present, one says the reliance was "bargained for."[80]

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has given something in return for a promise it is more likely that both parties meant for the promise to be enforced. *See* Darlington v. General Electric, 350 Pa. Super. 183, 203, 504 A.2d 306, 311, 316 (1986) (analysis of role of consideration in evidencing party intent to be bound; quoting this author's treatise on order of proof in implied contract case). When something has been given in return for a promise, it also seems fairer to enforce the promise. *See* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE § 4.12 (2d ed. 1987) (discussing the history of the consideration requirement).

79. *See* Lukoski v. Sandia Indian Management Co., 106 N.M. 664, —, 748 P.2d 507, 509-510 (1988) (affirming judgment for employee based on handbook distributed after employment began with signed receipt by employee). Another good example is the Pennsylvania case of Robertson v. Atlantic Richfield Petrol. Prod. Co., 371 Pa. Super. 49, 537 A.2d 814 (1987) (affirming jury verdict of $200,000 for employee), where employee and employer had an explicit conversation about the employee's concern that accepting a new assignment for which he was underqualified might jeopardize his employment. The employer agreed to reassign him if the new assignment did not work out. It was reasonable for the jury to infer an explicit bargain giving rise to employment security in these circumstances. *Id.* at —, 537 A.2d at 818-19.

80. If, for example, I am concerned that my employees may defect to another employer who pays higher salaries and offers more secure employment, I may make a general commitment to the work force that no one will be laid off. In such circumstances, it is reasonable to infer that my promise was made for the purpose of inducing employees to refuse offers to go to the competitor and to remain in my employ. In contrast, I might make the same commitment to the work force and one employee might rely on it by passing up a scholarship for postgraduate education. In this circumstance, it would not be reasonable to infer that I made the general commitment to induce the refusal of the scholarship. In the first hypothetical the bargained for conduct was the refusal of other job offers. In the second hypothetical the conduct of passing up the scholarship would not be bargained for.

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Even when conduct is not bargained for in this sense, it nevertheless may have legal effect as a validation device,[81] under the promissory estoppel idea embraced in Section 90 of the Restatement (Second) of Contracts. Promissory estoppel does not contemplate that the conduct be bargained for, only that it should have been anticipated by a reasonable promisor and that the conduct itself be a reasonable response to the promise.

The special consideration requirement for employment security promises provided a means of insisting upon obvious validation for unusual types of employment promises.[82] Because most employers did not make promises of employment security, or did not intend to be bound by such promises, in order for an allegation of such a promise to be taken seriously, an especially credible validation device was required. The most obvious such device was special consideration: paying money, or doing something out of the ordinary beyond merely undertaking or continuing the employment relationship. Some courts misunderstood this special consideration requirement and transformed it into a substantive rule. Until relatively recently, most states accepting the implied-in-fact contract theory required a showing of special consideration in the form of quitting another job or turning down job offers to validate an employer promise of job security. Several recent cases, however, clearly say that the employer's promise can be validated merely by continuing employment.

In *Woolley v. Hoffman-La Roche, Inc.*,[83] the New Jersey Supreme Court concluded that consideration to support a handbook promise to dismiss only for cause was inherent in the nature of the handbook, which apparently was intended to discourage unionization.[84] The court held that reliance by employees in general should be presumed, and need not be shown in individual cases.[85] The *Woolley* analysis is unexceptional in one respect and unusual in another. The unexceptional part of *Woolley* is acceptance of the premise that a bargained-for exchange in the unilateral contract context can be

81. *See* RESTATEMENT (SECOND) OF CONTRACTS § 18 (1979) (manifestation of mutual assent); *id.* § 19 (conduct as manifestation of assent); *id.* § 24 (offer defined). *See also,* A. CORBIN, CORBIN ON CONTRACTS § 13 (1963) (describing a promise as an "expression of intention" that need not be expressed with words); *id.* § 34 (rejecting idea that for a contract to be enforceable, the parties must have intended to affect their legal relations).

82. *See* Albert v. Davenport Osteopathic Hosp., 385 N.W.2d 237, 238-39 (Iowa 1986) (at-will presumption can be overcome by additional consideration such as quitting another job, but in this case employee did not give additional consideration so contract was terminable-at-will).

83. 99 N.J. 284, 491 A.2d 1257 (1985).

84. *Id.* at 302, 491 A.2d at 1267.

85. *Id.* at 307, 491 A.2d at 1270.

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shown by a general promise of employment security in an employee handbook on one side, and mere continuation of employment on the other. The unusual part is dispensing with the need to show knowledge of the promise (because the terms in the policy manual applied to employees who had not received it). As explained earlier, the most likely motive for an employer to make a promise of employment security to the work force in general is that the promise will encourage employees to continue their employment. Thus the bargained-for-exchange idea for this kind of reliance on the promise is logical.

Other courts before *Woolley* found continuation of employment sufficient to satisfy the bargained-for detriment requirement. *Pine River State Bank v. Mettille*[86] involved an employee handbook distributed to the plaintiff employee after he was on the job.[87] The Supreme Court of Minnesota held that the employee, by continuing his employment thereafter, furnished consideration sufficient to support the handbook promises of employment tenure.[88]

Woolley has crystallized the distinction between special consideration and merely continuing employment. The courts in other states, including California,[89] Connecticut,[90] Idaho,[91] Iowa,[92] Massachusetts,[93] Minnesota,[94] Nebraska,[95] New Hampshire,[96] Virginia,[97] and

86. 333 N.W.2d 622 (Minn. 1983).

87. *Id.* at 624.

88. *Id.* at 629.

89. *See* Foley v. Interactive Data Corp., 47 Cal. 3d 654, —, 765 P.2d 373, 384, 254 Cal. Rptr. 211, 222 (1988) (ordinary rules of contract interpretation permit proof of implied terms; no basis for requiring special consideration).

90. *See* Coelho v. Posi-Seal Int'l, Inc., 208 Conn. 106, 118-19, 544 A.2d 170, 176 (1988) (promise of employment security becomes enforceable as soon as employee enters employment; no reliance beyond performance of regular services legally required as consideration).

91. *See* Watson v. Idaho Falls Consol. Hosp., Inc., 111 Idaho 44, 48, 720 P.2d 632, 636 (1986) (employee handbook creates binding unilateral contract) (quoting Woolley v. Hoffman-LaRoche, 99 N.J. 284, 491 A.2d 1257 (1985)).

92. *See* Cannon v. National By-Products, Inc., 422 N.W.2d 638, 641 (Iowa 1988) (rejecting requirement for special consideration to support promise to dismiss only for good cause or to support post-employment incorporation of personnel policies).

93. *See* Jackson v. Action for Boston Community Dev., 403 Mass. 8, 14, 525 N.E.2d 411, 415 (1988) ("remaining with an employer after, or commencing employment upon, receiving an employee manual can . . . supply the necessary consideration to incorporate the manual's terms into employment contract").

94. *See* Brookshaw v. South St. Paul Feed, Inc., 381 N.W.2d 33, 36 (Minn. Ct. App. 1986) (employee accepts an offer of a disciplinary procedure contained in a handbook by remaining on the job despite disclaimer printed in handbook); Hunt v. IBM Mid Am. Employees Fed. Credit Union, 384 N.W.2d 853, 856-58 (Minn. 1986) (distinguishing special consideration case from implied contract case like *Pine River State Bank*, 333 N.W.2d 622 (Minn. 1983)) (implying nothing more than performance of services is necessary when promise was sufficiently specific) (reversing denial of summary

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West Virginia[98] have followed the *Woolley* conclusion that mere continuation of employment is sufficient to support a promise. Courts have been less enthusiastic about that aspect of *Woolley* suggesting that the employee need not even know about the employer's promise.[99]

2. The Proper Role of the Consideration Requirement

Because of the function of consideration as a validation device for promises, there is theoretical justification for linking the consideration requirement to the clarity of the promise. If the promise of employment security is relatively specific, there is less reason to insist on special consideration, and continuation of employment should serve to validate the promise. Conversely, if the promise is ambiguous, it may be appropriate to insist on special consideration such as quitting another job or giving up a specific job offer. The Connecticut Supreme Court, reviewing recent cases from other jurisdictions, has explained that the proper role of special consideration is evidentiary: to strengthen an inference that the parties intended for promises of employment security to be enforceable.[100]

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judgment for employer because handbook promise too vague to constitute enforceable covenant of good faith and fair dealing).

95. Stratton v. Chevrolet Motor Div., Gen. Motors Corp., 229 Neb. 771, 775-77, 428 N.W.2d 910, 913-14 (1988) (employee can "accept" written or oral limitations on at-will termination right by continuing employment after knowing of them; no knowledge and no breach in instant case).

96. *See* Panto v. Moore Business Forms, Inc., 130 N.H. 730, 735-38, 547 A.2d 260, 264-66 (1988) (adopting general principle that employee accepts employer offer by continuing normal work; characterizing *Woolley*, 99 N.J. 284, 491 A.2d 1257 (1985), as relaxing traditional contract principles; applying traditional unilateral contract principles in layoff compensation case).

97. *See* Thompson v. American Motor Inns, Inc., 623 F. Supp. 409, 414-15 (W.D. Va. 1985) (consideration for handbook promises supplied by continued work after reading handbook; citing *Woolley*, 99 N.J. 284, 491 A.2d 1257 (1985) with approval).

98. *See* Cook v. Heck's Inc., 342 S.E.2d 453, 458-59 (W. Va. 1986) (handbook statements regarding employment security can be offers of unilateral contract, accepted by employee continuing to work, citing *Woolley*, 99 N.J. 284, 491 A.2d 1257 (1985)).

99. *See* Sabetay v. Sterling Drug, Inc., 114 A.D.2d 6, 9-10, 497 N.Y.S.2d 655, 657 (N.Y. App. Div. 1986) (lack of knowledge of handbook precludes implied contract claim because both "inducement" and reliance must be shown), *aff'd*, 69 N.Y.2d 329, 506 N.E.2d 209 (1987).

100. Coelho v. Posi-Seal Int'l, Inc., 208 Conn. 106, 118, 544 A.2d 170, 176 (1988) (affirming judgment on jury verdict for employee). *See also* Scott v. Extracorporeal, Inc., 376 Pa. Super. 90, —, 545 A.2d 334, 338-40 (1988) (role of special consideration is essentially evidentiary, strengthening inference that parties intended employment security; but general promises do not necessarily go to jury even when special consideration present).

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3. Disclaimers are Effective

Disclaimers are one way employers attempt to preclude promises of employment security being enforceable. Disclaimers are express statements, usually in employment applications or in employee handbooks, that put employees on notice that general statements or conduct suggesting a commitment of employment security should not be relied upon by the employees. Most courts would agree with the federal court in *Novosel v. Sears, Roebuck & Co.*,[101] that an employment application expressly reserving the employer's right to terminate with or without cause, and precluding informal agreements to the contrary, negates any possibility of an implied agreement to dismiss only on certain grounds.[102] Written or oral assurances of continued employment, however, may vitiate the effect of a disclaimer. Also, it may be a jury question whether informal assurances of employment security override a letter from the employer expressly reserving the right to terminate at any time.[103] In *Ohanian v. Avis Rent a Car System, Inc.*,[104] the court affirmed a jury finding that a written disclaimer executed after an oral promise of employment security was made did not constitute a contract. Obviously the content and timing of both the promise and the disclaimer are important.[105]

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101. 495 F. Supp. 344 (E.D. Mich. 1980).

102. *See id.* at 346. *See also* Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 230-31, 685 P.2d 1081, 1088 (1984) (employers can avoid enforceability of handbooks by stating conspicuously that they are not intended to be enforceable); Cutter v. Lincoln Nat'l Life Ins. Co., 794 F.2d 352, 355-56 (8th Cir. 1986) (affirming j.n.o.v. for employer under South Dakota law; written employment agreement provided for termination with or without cause).

103. Schipani v. Ford Motor Co., 102 Mich. App. 606, 302 N.W.2d 307 (Ct. App. 1981) (affirming denial of motion for summary judgment with respect to breach of implied contract). The agreement said, "I understand that my employment is not for any definite term, and may be terminated at any time, without advance notice by either myself or Ford Motor Company . . . ." *Id.* at 610, 302 N.W.2d at 309. *But see* Longley v. Blue Cross & Blue Shield, 136 Mich. App. 336, 339-41, 356 N.W.2d 20, 21-22 (Ct. App. 1984) (plaintiff's deposition testimony that she read and believed statement that employer could dismiss with or without cause precluded trial on implied contract theory); Reid v. Sears, Roebuck & Co., 790 F.2d 453, 461 (6th Cir. 1986) (giving effect, under Michigan law, to disclaimer in employment application); Ringwelkski v. Sears, Roebuck & Co., 636 F. Supp. 519, 520 (E.D. Mich. 1985) (giving effect to disclaimer in employment application); Ledl v. Quik Pik Food Stores, Inc., 133 Mich. App. 583, 586-88, 349 N.W.2d 529, 531-32 (Ct. App. 1984) (agreement acknowledging unenforceability of employer's promises of employment security made seven years earlier precluded recovery for termination based on breach of implied promise). *See also* Stiver v. Texas Instruments, Inc., 750 S.W.2d 843, 846 (Tex. Ct. App. 1988) (giving effect to disclaimer limiting authority to modify express at-will provision to officer of employer).

104. 779 F.2d 101, 108 (2d Cir. 1985).

105. *See* Murray v. Kaiser Aluminum & Chem. Corp., 591 F. Supp. 1550, 1553-54 (S.D. W. Va. 1984) (written contract providing for continued employment as long as

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4. Extension to Other Terms of Employment

In a growing number of cases, employees have recovered damages for termination of disability benefits or for other changes in employment terms not involving dismissal.[106] *Woolley* has been used to validate employee benefit promises.[107] The Montana Supreme Court has held, however, that the implied covenant theory is unavailable to enforce employer promises of promotions and raises. It is available only to contest employment terminations.[108]

5. Front Pay

Compensation in the form of money damages for disappointed expectations is the usual remedy for breach of contract.[109] Expectation damages are measured by the financial position the plaintiff would have occupied had the contract been performed fully.[110] Expectation damages in a wrongful dismissal case require the fact finder to project how long the employee would have been employed but for the employer's breach. This is an inherently speculative undertaking.[111]

"mutually agreeable" permitted unilateral termination by employer for any reason), *aff'd*, 767 F.2d 912 (4th Cir. 1985).

106. DeFosse v. Cherry Elec. Prod. Corp., 156 Ill. App. 3d 1030, 1031-32, 510 N.E.2d 145, 145 (App. Ct. 1987) (ordering j.n.o.v. on claim for breach of handbook promise to pay disability benefits; employee testified he read provisions and that they influenced his decision to take job); *see generally* Boynton v. TRW, Inc., 858 F.2d 1178, 1183 (6th Cir. 1988) (reviewing cases applying implied-in-fact theory to employer decisions not involving employment termination; reversing judgment finding employee failed to state a claim based on his layoff); Panto v. Moore Business Forms, Inc., 130 N.H. 730, 731, 547 A.2d 260, 261-62 (1988) (on certification from federal court, holding that employee could enforce layoff compensation promise on unilateral contract theory, consideration provided from mere continuation of employment). Bower v. AT&T Technologies, Inc., 852 F.2d 361, 366 (8th Cir. 1988) (reversing district court for refusing to enforce detailed promises of reemployment; implied contract analysis permitted employees a trial on their claim of reemployment rights after a layoff).

107. *See* Grigoletti v. Ortho Pharmaceutical Corp., 226 N.J. Super. 518, 545 A.2d 185 (1988) (benefits promise an offer of a unilateral contract; consideration is employee reliance, which is to be presumed; discussing *Woolley*, 99 N.J. 284, 491 A.2d 1257 (1985).

108. Frigon v. Morrison-Maierle, Inc., 760 P.2d 57, 60 (Mont. 1988) (affirming summary judgment for employer).

109. J. MURRAY, MURRAY ON CONTRACTS § 221 (2nd rev. ed. 1974).

110. *Id. Reliance* damages are available as an alternative in some cases. *See* J. MURRAY, MURRAY ON CONTRACTS § 223 (2nd rev. ed. 1974); RESTATEMENT (SECOND) OF CONTRACTS § 90 comments a-f (1979).

111. *Compare* Washington Welfare Ass'n, Inc. v. Wheeler, 496 A.2d 613, 617 (D.C. Cir. 1985) ($26,000 jury award for future earnings under contract terminable only for just cause allowed to stand) *with* Gram v. Liberty Mutual Ins. Co., 391 Mass. 333, 334-35, 461 N.E.2d 796, 798 (1984) (reversing $325,000 judgment for dismissed employee on grounds that proper measure is not same as earnings for lifetime employment).

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The uncertainty problem when a plaintiff avoids the employment-at-will rule by establishing an implied-in-fact contract of employment security is not uncertainty with respect to earnings, but uncertainty with respect to the duration of the contract. This source of uncertainty is unique to informal contracts for indefinite employment; when breach of an express contract for a definite term is involved, the duration of the contract is clear.

The tension between the expectation damage principle and the uncertainty proviso is illustrated by two recent implied contract cases: *Ohanian v. Avis Rent a Car System, Inc.*,[112] and *Sepanske v. Bendix Corp.*[113] In *Ohanian,* the Second Circuit, applying New York law, affirmed a jury award of $304,393 to an Avis regional vice-president, based on breach of a contract for lifetime employment. The contract arose from negotiations over a transfer in which an employer representative said, "unless he screwed up badly, there is no way he was going to get fired . . . he would never get hurt here in this company." When the plaintiff was fired, his annual salary was $68,400. The jury found that the present value of the plaintiff's lost wages was $245,409. The Second Circuit approved instructing the jury that it was to compute the amount plaintiff would have received until the natural end of the plaintiff's contract, subtracting from this amount anything Ohanian would receive from other employment. *Ohanian,* therefore, is a paradigmatic illustration of the expectation-damages principle in an implied-in-fact contract case.

The uncertainty issue was involved directly in *Sepanske.* The plaintiff had been promised employment in an equivalent job after he returned from a leave of absence. The jury found that the job offered on his return was not equivalent. The appellate court reversed an award of $75,206 in damages. It held that the plaintiff was entitled to an award of only nominal damages for breach of the employment contract:

> Plaintiff's expectation under the contract was to be restored to his old job or to an at-will position which was equivalent to or better than his [old] position . . . but he had no actionable expectation that any such restoration would be permanent. The position was still at will—one which the employer was free to alter or terminate without consequence . . . . The jury's damage assessment in such a situation amounts to pure speculation. There is no tangible basis upon which damages may be assessed where plaintiff's expectation was for an at-will posi-

112. 779 F.2d 101, 109-10 (2d Cir. 1985).

113. 147 Mich. App. 819, 826-27, 384 N.W.2d 54, 58 (1985).

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> tion which could have been changed or from which he could have been terminated without consequence.[114]

The difference between *Sepanske* and *Ohanian* is the difference between assessing damages for termination of an at-will employment contract and assessing damages for breach of a conditional promise of employment security. In *Sepanske,* the jury was in the position of estimating when Sepanske's employer might wish to exercise its unilateral right to terminate Sepanske. That was too speculative an undertaking to pass muster. In *Ohanian* the jury was in the position of estimating the likelihood—or the timing—that Ohanian might "screw up," permitting the employer to terminate the employment. That was not too speculative an undertaking.

The point is not that there is a special rule for computing damages for breach of an implied-in-fact contract of employment, as compared with breach of a contract for a definite term; on the contrary, the rule is the same. But most implied-in-fact contracts are based on rather general assurances of employment until a contingency occurs—frequently the existence of "just cause" for termination, or the completion of certain procedures. Evaluating the probability of the contingency occurring and its timing is inherently more uncertain than determining when a certain number of years or months will elapse.

Some courts deny front pay.[115] In *Brockmeyer v. Dun & Bradstreet,*[116] the court concluded that reinstatement and backpay were the most appropriate remedies for wrongful dismissal in violation of a public policy.[117] There is a trend, however, in implied contract cases, like statutory employment discrimination cases, to award front pay.[118]

C. Implied Covenant of Good Faith and Fair Dealing

The implied covenant doctrine enjoyed brief popularity and was used by the earliest courts that relaxed the employment-at-will rule. But as the more traditional and circumscribed implied-in-fact contract and public policy tort doctrines were developed, the implied covenant doctrine declined in importance. The early implied cove-

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114. *Id.* at 829, 384 N.W.2d at 59.

115. *See* Sterling Drug, Inc. v. Oxford, 294 Ark. 239, 251-52, 743 S.W.2d 380, 386-87 (1988) (reviewing cases; rejecting front pay as too speculative).

116. 113 Wis. 2d 561, 575, 335 N.W.2d 834, 841 (1983).

117. *Id.* at 573, 335 N.W.2d at 840-41.

118. *See* Ritchie v. Michigan Consol. Gas Co., 163 Mich. App. 358, 374, 413 N.W.2d 796, 803-04 (1987) (approving front pay in implied contract case); H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE § 4.28 (2d ed. 1987 & Supp. 1 1989).

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nant cases, *Petermann v. Brotherhood of Teamsters,*[119] and *Monge v. Beebe Rubber Co.,*[120] suggested no real limits to the scope of the implied covenant of good faith and fair dealing. Juries apparently were to be allowed to decide for themselves what constituted good faith and to decide if the employer's actions met the standard thus derived by them.[121] Under this approach, the implied covenant doctrine would give employees very broad protection.

Courts willing to relax the employment-at-will rule began to raise doubts about the implied covenant theory in the early 1980s. The New York Court of Appeals disfavored implying a promise in a breach of contract action that was inconsistent with the manifest intent of the parties, in *Murphy v. American Home Products Corp.*[122] The Wisconsin Supreme Court recognized the implied covenant doctrine, but limited it greatly in *Brockmeyer v. Dun & Bradstreet.*[123] The *Brockmeyer* court concluded that implied covenant recovery should be limited to dismissals "contrary to a fundamental and well-defined public policy as evidenced by existing law."[124] In effect, it used the implied covenant theory to limit damages available under the public policy tort theory.[125]

Now, California, Massachusetts, and Montana are the only states that rely heavily on the implied covenant as the primary wrongful dismissal doctrine. Two impose important limitations on its use.[126] Quite recently, the California Supreme Court, in *Foley v. Interactive Data Corp.* held that tort damages are not recoverable in implied covenant cases.[127] The Montana courts have been aggressive in using the implied covenant doctrine to impose something close to a just cause requirement. In Montana an employer has the burden of showing a "fair and honest reason" for a dismissal in order to es-

119. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

120. 114 N.H. 130, 316 A.2d 549 (1974).

121. *Petermann,* 174 Cal. App. 2d at 189, 344 P.2d at 28; *Monge,* 114 N.H. at 133-34, 316 A.2d at 552.

122. 58 N.Y.2d 293, 304-05, 448 N.E.2d 86, 91, 461 N.Y.S.2d 232, 237-388 (1982) (accepting implied-in-fact contract theory, but rejecting implied covenant and public policy tort).

123. 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

124. *Id.* at 573, 335 N.W.2d at 840.

125. *See also* Melnick v. State Farm Mutual Auto. Ins. Co., 106 N.M. 726, —, 749 P.2d 1105, 1111 (1988) (rejecting implied covenant as theory applicable to employment terminable at-will—at least where no "improper motivation" shown).

126. For a discussion of the limitations placed on the implied covenant, see *supra* notes 105-07 and accompanying text.

127. 47 Cal. 3d 654, 698 n.39, 765 P.2d 373, 400 n.39, 254 Cal. Rptr. 211, 238 n.39 (1988) (implied covenant does not, without more, impose duty to dismiss only for good cause).

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cape liability under the covenant.[128] Otherwise the implied covenant theory is hedged about with various restrictions.

III. THE FUTURE

Most of the major changes in employment law in this century, except for wrongful dismissal, have been made through state or federal legislation. Accordingly, it is natural for employers and advocates for employee interests to consider legislative alternatives to the continued evolution of common law. Indeed, part of the genesis of the common law revolution in wrongful dismissal was a 1976 law review article proposing a wrongful dismissal statute because of pessimism about the capacity of the common law to effect needed changes in the employment-at-will doctrine.[129] Interest in legislation is either increased or diminished by the likelihood, reviewed in the preceding sections, that the common law will continue to evolve to offer employees more chances of recovering substantial damages in defined classes of cases.

A. Basic Alternatives

The author has explained elsewhere that there are two basic approaches to defining wrongful dismissal in a statute: prohibiting dismissals except for just cause, and enumerating the reasons for which dismissal is not permitted.[130] The latter approach is less revolutionary and essentially codifies common law doctrines.

In addition, and perhaps of greater significance, two approaches to employee dismissal law integration are conceivable. The first approach simply would add a new statutory prohibition to existing statutory and common law rights and duties affecting employment terminations. The second approach would integrate a new, more comprehensive protection against wrongful dismissal with existing legal regimes, supplanting existing statutes and forums to a substantial degree. Most statutory additions to employment law have been cumulative: they simply define a new employee right, such as the right not to be dismissed for reporting false claims to the federal government, and leave intact existing rights, such as the right not to

128. *See* Stark v. Circle K Corp., 751 P.2d 162, 167 (Mont. 1988) (affirming $270,000 jury verdict for employee who refused to sign probationary notice the accuracy of which he contested).

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

130. *See* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE § 9.20-9.24 (2d ed. 1987); Perritt, *Wrongful Dismissal Legislation,* 35 UCLA L. REV. 65 (1987); Perritt, *Employee Dismissals: An Opportunity for Legal Simplification,* 35 LAB. L.J. 407 (1984).

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be dismissed because of race, sex, religion or national origin, the right not to be dismissed for filing an OSHA complaint, the right not to be dismissed for engaging in collective bargaining, and so on. The more integrated approach would recognize that the more general the statutory protection the less the need for separate grants of narrow rights. If, for example, a statute grants the right not to be dismissed without good cause, it logically encompasses the rights identified in the previous sentence and other similar rights. There is some conflict between an enumerated prohibitions approach and the most complete integration. If a new statute covers only terminations for the enumerated prohibited reasons, it is difficult to support preemption of rights and remedies associated with reasons not enumerated in the statute. Accordingly, across the board preemption and integration is much easier with a just cause statute than with an enumerated prohibition statute.

The major risk to the employer community is that rigid opposition to any form of legislation, resulting in nonparticipation in drafting efforts, will result in just cause legislation which is not integrated with the common law or other statutory rights. An independent risk is that legislation actually may be preferable to employer interests than continued evolution of the common law. If this is so, employers ought to take the initiative to promote the enactment of wrongful dismissal statutes.

The following sections review the outlines of major legislative proposals, including the only state statute enacted that addresses wrongful dismissal in a broad way. Then it assesses the political climate for wrongful dismissal legislation and concludes with a summary of the arguments why the employer community should get involved and should favor wrongful dismissal legislation providing an integration of the fragmented set of common law and statutory employee protections.

B. Legislative Proposals

The most significant development at the state level has been the enactment by the Montana legislature of a "Wrongful Discharge From Employment Act."[131] The statute follows the suggestions made by the author of this article for an enumerated prohibitions approach.[132]

131. MONT. CODE ANN. §§ 39-2-901 to 39-2-914 (1989) (enacted 1987).

132. *Compare id.* (Montana statute encompassing wrongful discharge) *with* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE app. C (2d ed. 1987) (draft statutes for wrongful discharge).

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The Montana statute authorizes damages actions for dismissals which are in retaliation for an employee's refusal to violate public policy,[133] are not for good cause after employees complete probationary periods,[134] or which violate express written employer personnel policies.[135] Compensatory damages for lost wages and benefits for up to four years are available, but no other form of damages are available unless the employee can establish actual fraud or actual malice by the employer.[136] The statute expressly preempts common law tort and implied contract claims,[137] and excludes employment terminations that are subject to state and federal whistleblower and discrimination statutes,[138] or are covered by collective bargaining agreements.[139] Arbitration of claims arising under the statute is optional, but attorney's fee awards are provided for against the party declining to arbitrate.[140]

The Montana statute is a peculiar combination of just cause and enumerated reasons legislation. It is not entirely clear why the specific 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.

A trial court in Montana held the Montana statute unconstitutional, essentially on equal protection grounds, although the court's opinion does not provide much analytical support for its conclusion. The Supreme Court of Montana reversed.[141]

The possibilities for wrongful dismissal legislation have been focused by an initiative of the Commissioners on Uniform State Laws to develop a model state statute. Early drafts of the statute reflect an approach similar in many ways to the Montana statute and to this author's proposals. The draft statute enumerates reasons for which employees may not be dismissed including also, as an option, a provision restricting dismissals to just cause. Claims of violation of the statute must be presented to an administrative agency for a preliminary probable cause determination. If probable cause is found, mediation and arbitration may ensue. The draft statute provides for

133. MONT. CODE ANN. § 39-2-904(1).
134. *Id.* § 39-2-904(2).
135. *Id.* § 39-2-904(3).
136. *Id.* § 39-2-905(1).
137. *Id.* § 39-2-913.
138. *Id.* § 39-2-912(1).
139. *Id.* § 39-2-912(2).
140. *Id.* § 39-2-914.
141. Meech v. Hillhaven West, Inc., 776 P.2d 488 (Mont. 1989).

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limited judicial review of arbitral determinations. It also preempts common law causes of action pertaining to dismissal. Employees must elect between making claims under the statute or making claims under other federal or state statutes for a single termination. The draft statute limits damages and provides for attorney's fee awards to the prevailing party. The plaintiff bar actively opposes the damages limitation and the preclusion of common law theories.

An intriguing idea that deserves more detailed development is the one advanced by University of Pennsylvania Professor Janice Bellace for integrating wrongful dismissal protection with the existing unemployment compensation system. This would avoid the need for erecting a new set of institutions, would avoid to some extent constitutional challenges to the appropriateness of the dispute resolution forum (although unemployment compensation does not reduce or supplant any common law right) and permit an intuitively appealing integration of remedies.

The legal attack on the Montana statute also illustrates one of the most difficult legal issues in drafting an appropriate statute. This legal issue constrains the policy choices that can be made and alters the political debate because of the possibility that some approaches advanced for policy reasons would be unconstitutional.

The problem is that limitations on damages, channeling wrongful dismissal controversies into alternative dispute resolution forms like arbitration, and integrating wrongful dismissal protections by abolishing common law rights of action all arguably infringe the right to a civil jury trial, preserved by the Seventh Amendment to the United States Constitution and similar provisions of all but two state constitutions.[142] The state constitutional protections are more important to the wrongful dismissal legislative debate than the Seventh Amendment protection. The Seventh Amendment has not been incorporated into the Fourteenth Amendment due process clause and therefore only affects federal court decision-making over cases presenting federal questions or involving diversity jurisdiction.

There is little doubt about the capacity of a legislature to change the common law. Otherwise there would be little function for legislatures. So, to the extent that a legislature considering wrongful dismissal legislation explicitly extinguishes a common law right, there should not be a constitutional jury trial problem. The right to jury trial in a civil case depends upon there being a civil case.[143]

142. *See* James, *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963).
143. *See id.*

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Some courts, however, have used equal protection analysis to conclude in nonemployment law areas that when the legislature takes away a common law right it must substitute some reasonable alternative.[144] Such an analytical framework, of course, puts a court in the position of judging whether the alternative provided is "reasonable." These concerns constrain mainly the authority of a legislature to integrate new wrongful dismissal protection with existing common law and statutory rights.

There are other difficulties. Most commentators have thought that some form of arbitration would be a desirable way to adjudicate wrongful dismissal claims. But forcing wrongful dismissal claims into an arbitration process centrally confronts the jury trial right. If a legislature expressly extinguishes all of the common law wrongful dismissal rights and then substitutes a new statutory right that must be presented to an arbitrator, it theoretically avoids the constitutional jury trial guarantee but invites a court to decide whether the new legislatively substituted mechanism is "reasonable."

In addition, arbitration has some shortcomings as a dispute resolution process in this context. Most commentators have concluded too quickly that the success of collectively bargained arbitration recommends it for use in the wrongful dismissal area. But the legal and practical environment in which arbitration would function is different between collective bargaining and individual wrongful dismissal claims. In the collective bargaining environment, the union and the employer exercise continuing control over the arbitration process. They pick the arbitrators and develop institutional memories of arbitrator performance. If the arbitrator makes decisions they do not like, they can easily change the language of the collective bargaining agreement which the arbitrator must apply. These controls are absent when arbitration is used as a means of deciding individual wrongful dismissal claims. A wrongful dismissal arbitrator is interpreting the law, not a collective bargaining agreement.

Accordingly, the need for some controls over arbitrator decisionmaking suggests that a more intrusive form of judicial review would be appropriate, and perhaps constitutionally required, for wrongful dismissal arbitration. Yet a more intrusive kind of judicial review mitigates many of the advantages of arbitration as a dispute resolution process. For instance, judicial review is meaningful only if

144. *See* Kluger v. White, 281 So.2d 1 (Fla. 1973) (invalidating auto insurance reform); Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (invalidating medical malpractice reform); Keyes v. Humana Hosp. Alaska, Inc., 750 P.2d 343 (Alaska 1988) (rejecting jury trial, substantive due process, and separation of powers attack on malpractice screening panel).

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there is some kind of record to review. Yet requiring arbitrators to create records makes the process more expensive and more formal. In this context, creating a record means not only making a transcript of the evidence and testimony, but also requiring that the arbitrator issue a written opinion logically justifying his decision.

In addition, the likelihood of constitutional challenges to a legislative overhaul means not only the jury trial guarantee but also separation of power concepts would be brought to bear. Although state courts apply separation of powers concepts differently in detail, the basic ideas articulated by the United States Supreme Court under the United States Constitution are reasonable rules of thumb. These concepts say that it violates separation of powers for a legislature to force private common law rights to be adjudicated finally by an institution that is not a court, thus reinforcing the jury trial guarantee. It is permissible, however, for the legislature to create new rights and to provide for their adjudication by institutions lacking some attributes of a court. Under the "public right" or congressionally created "private right" doctrine, a legislature could create a new right not to be dismissed wrongfully and set up arbitration-like tribunals to adjudicate claims. Nevertheless, the adequacy of the adjudicatory mechanism thus set up would be subject to scrutiny under equal protection, separation of powers, and procedural due process concepts.

The foregoing discussion does not support an inference that the only constitutional wrongful dismissal statute is one that simply adds to the universe of employee rights and provides for litigation in the regular common law courts. It is possible and constitutional to draft a wrongful dismissal statute that integrates employee rights and provides for their adjudication in an appropriate administrative or arbitrary tribunal. The point is that drafters of statutes must be careful to understand the constitutional risks of particular approaches and to draft language carefully to avoid the difficulties.

C. Political Factors

I have reviewed the basic political calculus of wrongful dismissal legislative reform elsewhere.[145] Four changes are occurring that shift this calculus.

First, organized labor has endorsed in principle the concept of comprehensive legislative protection against dismissal without just cause. In a statement adopted by the AFL-CIO Executive Council in 1987, organized labor strongly rejected the alternative of enumer-

145. *See* Perritt, *Wrongful Dismissal Legislation*, 35 UCLA L. REV. 65, 68-72 (1987).

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ated prohibitions legislation.[146] Second, the plaintiff bar, at least in some states, has become sufficiently satisfied with common law wrongful dismissal developments and is beginning to resist the idea of wrongful dismissal legislation that limits in any major way common law theories or damages recoverable under those theories. Third, congressional activism is limiting further the reasons for which employees may be terminated. Within the last few years, Congress has enacted legislation requiring notification before facilities are closed,[147] granting private rights of action for dismissals associated with polygraph examinations[148] and granting a private right of action for dismissals in retaliation for reporting false claims under government contracts.[149] All of these new rights can be asserted in court.

Fourth, the academic community is beginning to perceive the problems associated with fragmentation. Clyde W. Summers, Professor of Law at the University of Pennsylvania and arguably the original stimulus for common law modification of the employment-at-will rule, has written recently about the fragmentation in labor law.[150] Professor Summers observes that the purpose of labor law always has been to redress an imbalance in bargaining power between employee and employer. Collective bargaining was the original policy instrument chosen to meet this goal, but collective bargaining largely has been abandoned as the policy instrument of choice because of its limited coverage. Although collective bargaining has a number of theoretical advantages, including flexibility to meet localized concerns, capacity to create adjudicatory institutions to enforce rights, and reduction of the need for detailed government intervention, it is not likely to return as the dominant regulatory approach. Rather, the policy emphasis has shifted fundamentally toward programs such as OSHA and ERISA that define individual employee rights and provide governmental institutional mechanisms to enforce them. Common law wrongful dismissal is a further example of this trend.

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146. The AFL-CIO Executive Council issued a "*Statement on the Employment-at-Will Doctrine*" on February 20, 1987, generally expressing support for broad just-cause legislation, and criticizing proposals for enumerated prohibitions statutes. *See generally* Gould, *Job Security in the United States: Some Reflections on Unfair Dismissal and Plant Closure Legislation from a Comparative Perspective*, 67 NEB. L. REV. 28, 41 n.73 (1988) (labor unions may relize various benefits from wrongful discharge statute).

147. 29 U.S.C. §§ 2101-2102 (1982 & Supp. 1989).

148. 29 U.S.C. § 2005 (1982 & Supp. 1989).

149. 31 U.S.C. § 3730(h) (1982 & Supp. V 1987).

150. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7 (1988).

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Professor Summers believes that the major challenge for the new century is integrating forums and rights so that neither employees nor employers face the necessity of litigating the same employment decision many different times and in many different forums under many different legal theories.[151] He fears, however, that solutions to the fragmentation problems inevitably will be piecemeal and incomplete.[152] He urges that a rough consensus could be arrived at, using minimum effort, regarding the appropriate remedies and measures of damages so that they will not vary according to the form of the action or the chosen forum.[153] Further, he urges "reduc[ing] multiple litigation by requiring that all of the rights growing out of the same transaction be adjudicated in the same forum and that the judgment be collateral estoppel on those rights."[154] He observes that statutes can be drafted with more careful attention to preemption problems.[155] These all are important and sound ideas.

Professor Summers also encourages more attention to effective remedies, recognizing that, "[m]ost workers do not have the price of admission to the legal system. They cannot afford a lawyer, and the claims are too small to produce a viable contingent fee."[156] Explaining why attorney's fee awards, and double damages do not provide sufficient incentives for adequate legal representation, he observes that, "[f]ew neutral observers would characterize the NLRB, EEOC, OSHA, or the Department of Labor as effective guardians of employee rights."[157] He also notes that large punitive and emotional distress damage awards in public policy tort cases really represent only a lottery with a few big winners and many losers. He urges that the industrial democracy premise underlying the policy preference for collective bargaining is still valid and that we should search for new ways to fulfill it.[158]

The California Supreme Court's decision in *Foley* apparently is perceived by many plaintiff lawyers as sharply curtailing the opportunities for wrongful dismissal plaintiffs and their counsel. Regardless of whether this is an accurate characterization of *Foley,* the perception may cause the plaintiff bar to view wrongful dismissal

151. *Id.* at 24-25.
152. *Id.*
153. *Id.* at 24.
154. *Id.*
155. *Id.* at 25.
156. *Id.*
157. *Id.*
158. *Id.* at 27.

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legislation (similar to that being developed by the commissioners on state laws) more favorably.

My original calculus suggested that wrongful dismissal legislation might be feasible if it contained the following elements: (1) grant of attorney's fees (for plaintiff lawyers); (2) enumerated reasons for which dismissal is not permitted, essentially codifying the three major common law theories (for employers); and, (3) limiting damages to back pay with the possibility of double back pay or triple back pay liquidated damages provision in some cases (as a compromise between employer and plaintiff lawyers). The trends, however, make enactment of such legislation increasingly unlikely as time passes. The addition of more prohibited motive statutes narrows the gap somewhat conceptually between just cause protection and enumerated prohibitions protection. Satisfaction by the plaintiff bar with the status quo removes a potential ally in any movement for legislative reform. Additionally, the labor movement has taken sides between the two basic types of wrongful dismissal legislation.

D. Employer Interests

The right kind of wrongful dismissal legislation is in the economic interest in the employer community. The employer community, however, risks being excluded from the process of developing and implementing wrongful dismissal legislation unless it recognizes its economic interests more clearly and becomes more active in promoting legislative reform. The essential danger remains that just cause legislation will be enacted on top of existing piecemeal protections with no provisions which might be desired by employers, or alternatively that the common law will evolve in a way so favorable to employees that the political opportunity for reform legislation will be lost entirely.

Serious employer involvement in exploring the options for wrongful dismissal legislation need not be limited to the proposal emerging from the Uniform State Law Commissioners' effort, nor to the enumerated prohibitions approach. A third alternative with a number of attractive features would be to integrate wrongful dismissal protection with the existing unemployment compensation system. Such integration could eliminate the need for developing new forums and processes and also would match conceptually with some kind of standard, and limited, liquidated damages for wrongful dismissal. Employers ought to help rationalize employment law instead of letting other interests superimpose yet another program restricting employer autonomy.

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