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## ARTICLES

### **THE UNION SUBSTITUTION HYPOTHESIS REVISITED: DO JUDICIALLY CREATED EXCEPTIONS TO THE TERMINATION-AT-WILL DOCTRINE HURT UNIONS?**

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#### I. INTRODUCTION

Since 1987, the Executive Council of the AFL-CIO has undertaken a lobbying effort in favor of expanding current exceptions to the termination-at-will doctrine. Although attempts to modify the termination-at-will doctrine are hardly unique, it is important to note the proponent of this particular call for modification. The AFL-CIO, along with many international unions, has long maintained that the protection against unjust and arbitrary dismissal is an important advantage provided by unionization. Union supporters have often asserted the "union substitution hypothesis," i.e., that the furnishing of such protection by the legislatures or the courts would act as a substitute for union protection and would undermine support for the unions. In an era of declining union membership, the current AFL-CIO position seems, at least at first glance, remarkably untimely: Why would the unions affirmatively give up what they consider to be one of the essential advantages union membership continues to offer?

This Article examines some of the reasons why unions might indeed support such legislation and suggests that union support for exceptions to termination-at-will is not likely to negatively affect union growth. The Article begins with a consideration of several reasons commonly advanced for

the continuing decline in levels of unionization. Since union support for limitations on termination-at-will would appear most inconsistent with the union substitution hypothesis, this hypothesis will be discussed at some length. This section is followed by a brief discussion of the termination-at-will doctrine, and the exceptions thereto, including coverage by collective bargaining agreements. The Article then considers a statistical study done by the authors which seeks to assess the claim that the broadening of exceptions to termination-at-will has negatively affected union growth. In fact, the results of this study provide virtually no support for the proposition that the existence of exceptions to the termination-at-will doctrine has been a cause of the shrinkage in union membership. Moreover, the results of the authors' study also suggest that to the extent that exceptions to termination-at-will can lessen the effect of employer animus toward unions, by reducing the number of terminations based on perceptions of an employee's union sympathies, such exceptions might actually further union growth. The Article concludes with a discussion of why unions might favor limitations on the termination-at-will doctrine.

## II. THE DECLINE OF UNIONIZATION

Since 1953, the proportion of nonagricultural workers who are union members has declined from a peak of 32.5% to 16.8% in 1988.<sup>1</sup> The percentage of National Labor Relations Board ("NLRB") elections in which a union has been selected as a collective bargaining representative has also declined, from 71% in 1953 to 43% in 1983.<sup>2</sup> Several explanations have been advanced concerning the decline in union membership. These explanations include changes in the economic structure of the United States, union suppression, and union substitution by government.<sup>3</sup>

Proponents of the argument that union membership declines are due to structural changes in the economy cite two primary factors. The first factor is geographical in nature and the second represents a shift in industry.<sup>4</sup> Since 1961, there has been a movement of workers away from the heavily unionized Northeast and Midwest to the "Sunbelt" states of the South and

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1. Daily Lab. Rep. (BNA) at B-13 (Jan. 30, 1989); L. TROY & N. SHEFLIN, U.S. UNION SOURCEBOOK 3-5, 3-10 (1985).

2. 47 NLRB ANN. REP. Table 15B (1982); 18 NLRB ANN. REP. Table 13A (1953).

3. Fiorito & Maranto, *The Contemporary Decline of Union Strength*, 5 CONTEMP. POL'Y ISSUES 12, 13 (1987); *Beyond Unions: A Revolution in Employee Rights is in the Making*, BUS. WK. 73 (July 8, 1985) [hereinafter *Beyond Unions*].

4. Craver, *The Current and Future Status of Labor Organizations*, 36 LAB. L.J. 210, 211-13 (1985); Usery & Henne, *The American Labor Movement in the 1980s*, 7 EMPLOYEE REL. L.J. 251, 253 (1981).

the West.<sup>5</sup> From 1961 to 1984, the percentage of workers residing in metropolitan areas in the Northeast and Midwest declined from 35% to 26%, and from 33% to 26% respectively.<sup>6</sup> Meanwhile, there has been an increase from 19% to 28% in the South and from 14% to 20% in the West.<sup>7</sup> Because of historical anti-union sentiment and the existence of right-to-work legislation, labor unions have traditionally found the South and Southwest to be difficult areas in which to organize.<sup>8</sup>

The second factor cited in the discussion of structural changes in the economy is the shift away from manufacturing jobs to "massive growth in white-collar and service occupations, areas that unions have traditionally found difficult to organize."<sup>9</sup> Since 1960, it is estimated that the average number of workers involved in manufacturing has dropped from about 31% of the nonagricultural workforce to 19%.<sup>10</sup> As the percentage of manufacturing jobs has decreased, there has been a corresponding increase in service-type employment. Recent figures show this total to be nearly 75% of the nonagricultural workforce.<sup>11</sup>

Union suppression is also advanced as a significant reason for the decline in union membership.<sup>12</sup> Union suppression refers to both legal and illegal tactics taken by management to preserve their nonunion status.<sup>13</sup> Several studies have shown illegal activities by management to be a major factor in the decline of union organizing success.<sup>14</sup> One author referred to management actions as "a rapidly growing unlawful activity that seriously impairs the opportunity of work groups to make unfettered decisions about the costs and benefits of union representation."<sup>15</sup> In recent years, manage-

5. See, e.g., Craver, *supra* note 4; Usery & Henne, *supra* note 4; *The De-unionization of America*, THE ECONOMIST 71 (Oct. 29, 1983).

6. Doyle, *Area Wage Surveys Shed Light on Declines in Unionization*, MONTHLY LAB. REV. 13, 16 (Sept. 1985) (table 4).

7. *Id.*

8. Craver, *The Vitality of the American Labor Movement in the Twenty-first Century*, 1983 U. ILL. L. REV. 633, 637-38.

9. Usery & Henne, *supra* note 4, at 253.

10. *Id.*; see also 110 MONTHLY LAB. REV. 68 (March 1987); 84 MONTHLY LAB. REV. 302, 305 (March 1961).

11. 110 MONTHLY LAB. REV. 68 (March 1987).

12. See, e.g., *supra* note 3; R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? (1984); Betton, *The Three Faces of Unionism: Managerial Opposition to Labor Unions, An Empirical and Theoretical Analysis*, 37 LAB. L.J. 555 (1986); Cooke, *The Rising Toll of Discrimination Against Union Activities*, 24 INDUS. REL. 421 (1985); Lawler & West, *The Impact of Union Avoidance Strategy in Representation Elections*, 24 INDUS. REL. 406 (1985); Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

13. T. KOCHAN, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS 183 (1980).

14. See sources cited *supra* note 12.

15. Cooke, *supra* note 12, at 440.

ment has used more sophisticated techniques developed by professional behaviorists acting as "management consultants."<sup>16</sup> These consultants are hired to discourage unionizing, and they are apparently enjoying unprecedented demand for their services.<sup>17</sup> For many employers, the costs associated with these "union-busters" is, or appears to be, considerably less than the costs associated with employee unionization. Moreover, some employers view the choice to hire a management consultant as a purely economic decision, "without regard to moral or systemic considerations."<sup>18</sup> Over the past few years, these consultants have been very successful. Indeed, it has been argued that "[t]hese techniques have become so well developed that . . . almost no sophisticated employer who is willing to make the effort need find its work force unionized against its will."<sup>19</sup>

In addition to the use of consultants to stymie union growth, there has been a large increase over the past two decades in the number of unlawful employee discharges based on union support.

[I]n 1957, 922 section 8(a)(3) discharges were directed reinstated in NLRB proceedings, while by 1970 the number of such discriminatees had risen to 3779. Yet, by 1980, the number of such illegally terminated individuals exceeded 10,000. . . . [D]uring 1980, one out of every twenty employees who voted in favor of the union in . . . [NLRB] representation elections, presumably the primary union organizers, was unlawfully discharged.<sup>20</sup>

Of the discharged employees who were reinstated, only 40% accepted reinstatement, and 80% of those who did return left their jobs within two years of reinstatement.<sup>21</sup> The total number of unfair labor practice charges against employers, all Section 8(a) charges, increased 130%, and those alleging discrimination against employees for their union activity, Section 8(a)(3) charges, increased 81% between 1969 and 1982. This increase in charges filed has been accompanied by increasing remedies awarded by the NLRB. Reinstatement and backpay awards increased 72 and 300%, respectively, between 1969 and 1982.<sup>22</sup>

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16. Craver, *supra* note 8, at 647.

17. Gould, *The Decline (and Rise?) of Unions*, THE CENTER MAG. 25, 26 (March/April 1986).

18. Craver, *supra* note 4, at 213-14.

19. Usery & Henne, *supra* note 4, at 254. This comment may reflect a degree of overstatement since, arguably, if any employer could successfully resist unionization, there would be little incentive for any union to try to organize any employer.

20. Craver, *supra* note 4, at 214.

21. *Id.*

22. 48 NLRB ANN. REP. Table 4 (1983); 34 NLRB ANN. REP. Table 2 (1969).

A third reason often cited for the declining rate of unionization in the United States is based on a hypothesis that rights and protections that were previously provided to organized employees only under collective bargaining agreements are now provided at least in part to unorganized workers.<sup>23</sup> These rights and protections have been provided by judicial decisions and various legislative enactments. Referred to as the "union substitution hypothesis," this reason for union decline continues to be advanced in both scholarly<sup>24</sup> and business publications.<sup>25</sup> The labor movement has frequently shared this view. Samuel Gompers and the AFL opposed all social welfare schemes for adult men eligible to join unions.<sup>26</sup> This position reflected a philosophical preference for voluntarism and also a fear that such schemes would reduce employees' demands for union representation. As late as January 1932, AFL President Green called unemployment insurance a "union-wrecking measure."<sup>27</sup> Advocates of the union substitution hypothesis often point to Title VII of the Civil Rights Act,<sup>28</sup> the Occupational Safety and Health Act ("OSH Act"),<sup>29</sup> and exceptions to the termination-at-will doctrine as sources of protection that might substitute for union protection.<sup>30</sup>

Somewhat surprisingly, the union substitution hypothesis appears to have maintained its credibility in spite of several factors which would seem to mitigate the importance of any substitution effect. Notably, the growth or decline of unions does not clearly correlate with the passage of so-called substitute legislation, and the extent to which the legislation actually "substitutes" for the union is questionable. For instance, the late 1930s and early 1940s saw tremendous union growth;<sup>31</sup> Congress passed legislation creating minimum wage requirements<sup>32</sup> and Social Security.<sup>33</sup> Similarly, although the decline in union membership began in the mid 1950s,<sup>34</sup> legisla-

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23. Aaron, *Future Trends in Industrial Relations Law*, 23 INDUS. REL. 52, 55 (1984).

24. See, e.g., Neumann & Rissman, *Where Have All the Union Members Gone?*, 2 J. LAB. ECON. 175 (1984); Steiber, *Employment-at-Will: An Issue for the 1980s*, 36 INDUS. REL. RES. A. 1, 12 n.39 (1983).

25. See, e.g., *Beyond Unions*, *supra* note 3.

26. H. PELLING, *AMERICAN LABOR* 123 (1960) (The CIO, however, supported the passage of social welfare legislation.).

27. *Id.* at 152; Craver, *supra* note 8, at 658 n.184.

28. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982).

29. Occupational Safety and Health Act, Pub. L. No. 91-596, 84 Stat. 1590 (1970).

30. Smith, *Exceptions to the Employment-at-Will Doctrine*, 36 LAB. L.J. 875, 882-88 (1985).

31. L. TROY & N. SHEFLIN, *supra* note 1, at 3-10.

32. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1982).

33. Social Security Act, ch. 531, 49 Stat. 620 (1935).

34. Weiler, *supra* note 12, at 1772.

tion like the OSH Act<sup>35</sup> and Title VII,<sup>36</sup> which could also be viewed as union substitution legislation, was not passed until the mid to late 1960s.

Furthermore, the union substitution hypothesis, to the extent that it implies that various legal protections eliminate the need for unions or union protections, appears incorrect. The legal protections may reduce the additional amount of protection expected from the collective bargaining process, but they are unlikely to eliminate the same because legal protections are imperfect substitutes for union representation. In fact, the unions may be instrumental in achieving the goals of legislation. For example, the OSH Act purports to assure a certain degree of workplace safety.<sup>37</sup> The Labor Department is charged with the responsibility of enforcing the mandates of the OSH Act, which it does by conducting workplace inspections.<sup>38</sup> But one study suggests that only two percent of the total firms regulated by the OSH Act are inspected per year.<sup>39</sup> Some of those inspections occur because of workplace accidents or worker complaints.<sup>40</sup> Obviously, in 98% of the regulated firms the responsibility for compliance with OSH Act standards rests almost entirely with the employers. The degree to which employers meet their compliance responsibility can be greatly influenced by the unions. Indeed, although the unions do not generally bargain about specific occupational hazards, they do:

concentrate on negotiating agreements that permit enforcement of standards set by others, establishing procedures for resolving health-and-safety-related labor-management disputes, obtaining agreements governing work rules and wage rates that are in some way sensitive to the existence of job hazards, and establishing training programs to make their members more safety-conscious.<sup>41</sup>

Furthermore, the union, through its representative(s), is continually present in the workplace and can monitor the safety program and, if necessary, report any continuing violations to the Labor Department.<sup>42</sup> Essentially, the presence of the union can serve as a less formal enforcement mechanism of OSH Act standards. Again, the passage of the OSH Act has not really taken the place of a union because it is not an "either/or" situa-

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35. See *supra* note 29.

36. See *supra* note 28.

37. 29 U.S.C. § 651 (1982).

38. 29 U.S.C. § 657 (1982).

39. L. BACOW, BARGAINING FOR JOB SAFETY AND HEALTH 13 (1980) (citing Nichols & Zeckhauser, *Government Comes to the Workplace: An Assessment of OSHA*, 49 THE PUB. INTEREST 39 (1977)).

40. *Id.*

41. *Id.* at 86.

42. *Id.* at 57.

tion. Instead, the existence of unions may enhance the protections provided by the legal system; similarly, the legal protections may enhance the perceived importance of unions.

Moreover, although there are certain similarities between the OSH Act and the unions, there are obvious differences. Both the unions and the Occupational Safety and Health Administration ("OSHA") seek to improve the lives of workers by controlling or directing the conduct of management to varying degrees. The issues that the unions deal with, however, are considerably more varied than the concerns of the OSH Act. Furthermore, the rules that OSHA promulgates must necessarily apply to a wide range of industries. Unions, on the other hand, negotiate for specific workplace "rules" that are likely to be more industry and firm-specific, and more flexible than OSHA's regulations. Finally, the union's constant presence in the workplace provides a greater opportunity to enforce the rules and influence events that might affect the costs of compliance with such rules.<sup>43</sup>

In light of the contrary factual information about the effects of union substitution legislation, it is interesting that this theory continues to be advanced as a cause of union decline.<sup>44</sup> The union substitution hypothesis may be suggested when exceptions to termination-at-will are considered because, unlike the earlier social legislation, exceptions to termination-at-will can protect employees from unjust discharge. Thus, these exceptions may be seen as effectively substituting for what is often considered to be a basic or primary function of unions — protection against discharge without cause.<sup>45</sup> Indeed, in a 1984 study, Neumann and Rissman argued that their results supported a conclusion that union membership declined as a result of judicial exceptions to the termination-at-will doctrine.<sup>46</sup> It is especially noteworthy then that the AFL-CIO would advance legislation that could be seen as a substitute for the union and it is particularly timely to empirically test the effects of existing judicial exceptions to the termination-at-will doctrine.

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43. *Id.* at 56-57.

44. Of course, implicit in the union substitution hypothesis is the assumption that employees are actually aware of the substituting policies and such an assumption may be incorrect. A telephone survey in Nebraska, conducted before Nebraska had any recognized exceptions to the termination-at-will doctrine, found that few respondents (8 to 22%, depending on age) were even aware that an employer had a legal right to discharge an employee without cause. In other words, the respondents were not aware of the termination-at-will doctrine and would therefore not fully appreciate union protection from the same. See Forbes & Jones, *A Comparative, Attitudinal, and Analytical Study of Dismissal of At-Will Employees Without Cause*, 37 LAB. L.J. 157, 165 (1986).

45. Block, Mahoney & Corbitt, *The Impact of Employment-at-Will Judicial Decisions on the Outcomes of NLRB Representation Elections*, 38 INDUS. REL. RES. A. 268 (1986).

46. Neumann & Rissman, *supra* note 24.



### III. THE TERMINATION-AT-WILL DOCTRINE

The doctrine of termination-at-will emerged in America in 1877, when a treatise writer stated:

With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . [Otherwise] it is an indefinite hiring and is determinable at the will of either party . . . .<sup>47</sup>

The rule of termination-at-will was quickly adopted by American jurists and by the beginning of the 20th century it had become the prevailing law governing the right to discharge. According to judicial interpretation, the termination-at-will doctrine presumed that all employment contracts, absent an explicit provision to the contrary, were for an indefinite length of time and could therefore be terminated by either party at any time and without any notice.<sup>48</sup>

The newly developed American rule concerning termination of employment embodied the dominant belief in freedom of contract. Under a freedom of contract theory, parties freely entering into a contract were free to fix the terms of that contract, including the terms and conditions of employment. The legal system would function to enforce such contracts but would not, generally speaking, determine the terms and conditions thereof. This theory of freedom of contract was thought to result in the most efficient allocation of property and resources; the allocation would inure to the general benefit of society. Further, freedom of contract allowed individuals to determine their own needs and interests and to control their own lives. Finally, freedom of contract limited the involvement of the judicial system to interpretation of contract terms, rather than substantive determination of the agreement.<sup>49</sup>

Although the termination-at-will doctrine remains the general rule, a number of exceptions to this rule have been created during the last 100 years. These exceptions have included constitutional protections for public sector employees, statutory exceptions, and most recently, a host of judicially-created exceptions.

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47. 2 H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 136, at 283 (1886). Wood's first edition was published in 1877.

48. Essentially, this reflects the doctrine of mutuality. See A. CORBIN, CORBIN ON CONTRACTS § 152 (1950 & Supp. 1984); see also *Adair v. United States*, 208 U.S. 161, 174-75 (1908).

49. F. KESSLER & M. SHARP, CONTRACTS: CASES AND MATERIALS 4-5 (1953).

### A. Constitutional Protection

For public sector employees, constitutional guarantees provide some protection against unjust dismissal. Notably, the first amendment guarantees of freedom of speech, association, and belief support a limit on employer discharge.<sup>50</sup> Unlike employees in the private sector, government employees are protected, at least to some degree, in their right to speak out on matters that may be contrary to the government employer's policies.<sup>51</sup>

Public sector employees are also afforded procedural protection by the provisions of the fifth and fourteenth amendments' guarantees of due process.<sup>52</sup> Although not entitled to a full adjudicatory hearing, public sector employees must receive notice and an opportunity to be heard before they can be discharged.<sup>53</sup> The constitutional protections have been generally insured by statutory enactments such as the Civil Service Reform Act.<sup>54</sup>

### B. Statutory Protection

There are several types of federal and state statutes that limit termination-at-will by precluding discharge based on various factors. For instance, many state and local governments have enacted legislation that prohibits discrimination in any aspect of employment, including termination on the basis of race, sex, national origin, age or creed.<sup>55</sup> In 1964, Congress provided similar protection on the federal level in Title VII of the Civil Rights Act.<sup>56</sup>

In addition to Title VII and similar state statutes, there are many other types of statutory protections against unjust dismissal. For example, statutes protect employees against retaliation for filing a claim under the Fair Labor Standards Act ("FLSA")<sup>57</sup> and the OSH Act.<sup>58</sup> Similarly, the Safe Drinking Water Act<sup>59</sup> protects workers who report employer violations. The Consumer Credit Protection Act prohibits the discharge of employees

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50. U.S. CONST. amend. I.

51. See *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

52. U.S. CONST. amends. V and XIV, § 1.

53. See H. KAPLAN, *THE LAW OF CIVIL SERVICE* 225 (1958); Comment, *Substantive Due Process: The Extent of Public Employees' Protection from Arbitrary Dismissal*, 122 W. VA. L. REV. 16 (1974).

54. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978).

55. See Bonfield, *The Substance of American Fair Employment Practices Legislation I: Employers*, 61 NW. U.L. REV. 907 *passim* (1967).

56. 42 U.S.C. § 2000e (1982).

57. 29 U.S.C. § 215(a)(3) (1986).

58. 29 U.S.C. § 660(c) (1982).

59. Safe Drinking Water Act, 42 U.S.C. §§ 300 j-q(i)(10) (1982).

based on the grounds that their wages are being garnished for a single indebtedness.<sup>60</sup>

Furthermore, several states have laws prohibiting the discharge of an employee for refusal to take a lie detector test.<sup>61</sup> Some states prohibit discharge based on an employee's jury service or indication of a willingness to serve on a jury panel.<sup>62</sup> At least thirty-five municipalities have passed ordinances that prohibit discrimination against employees because of their sexual preference.<sup>63</sup> Five states have passed legislation or amended existing legislation to protect employees from employer retaliation for the employee reporting a violation of a law or participation in an enforcement proceeding.<sup>64</sup> Under Michigan's Whistleblower's Protection Act, an employer may not discharge, threaten, or otherwise discriminate against an employee in matters of salary, benefits, privileges, or location of employment based on the employee's perceived status as a whistleblower.<sup>65</sup>

To date there is considerable variance among the states concerning statutory provisions for exceptions to termination-at-will; however, some consideration is currently being given to minimizing that variance. On July 15, 1988, the National Conference of Commissioners on Uniform State Laws

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60. 15 U.S.C. § 1674(a)-(b) (1982).

61. CONN. GEN. STAT. ANN. § 31-51G (West 1987); HAW. REV. STAT. § 378-26.5 (1985); IDAHO CODE § 44-903 (1977); MD. ANN. CODE art. 100, § 95 (1985); MICH. COMP. LAWS ANN. §§ 37.201-37.208 (West 1985); N.J. STAT. ANN. § 2C:40A-1 (West 1987); OR. REV. STAT. § 659.225 (1987); PA. CONS. STAT. ANN. § 7321 (Purdon 1983); R.I. GEN. LAW §§ 28-6.1-1 to -6.1-3 (1986); WASH. REV. CODE ANN. §§ 49.44.120, 49.44.130 (West Supp. 1989).

62. See, e.g., IDAHO CODE § 2-218 (1979); MICH. COMP. LAWS ANN. § 600.1348 (West 1981); N.D. CENT. CODE § 27.09.1-17 (1985).

63. J. STIEBER & J. BLACKBURN, PROTECTING UNORGANIZED EMPLOYEES AGAINST UNJUST DISCHARGE 26 (1983).

64. See, e.g., CAL. LAB. CODE § 1102.5 (West Supp. 1989) (protecting both public and private employees when making a disclosure to government or law enforcement agency); CONN. GEN. STAT. ANN. § 4-61dd(a) (West 1979) (applying to public employees only); LA. REV. STAT. ANN. § 30:2027 (West 1989) (protecting both private and public employees when reporting environmental violations); LA. REV. STAT. ANN. § 42:1169 (West Supp. 1989) (applying to public employees only); MD. ANN. CODE art. 64, § 12(G) (1988) (applying to public employees only).

65. Whistleblowers' Protection Act, Act 469, 1980, March 31, 1981 (codified at MICH. COMP. LAWS ANN. §§ 15.361-15.369 (West 1981)). Other laws which protect against unjust dismissal do so on the basis of the nature of the employee to be protected. For instance, honorably discharged military veterans are, upon discharge from the service, entitled to return to the same jobs which they held before they entered the service. These veterans may not, except for cause, be discharged from the jobs to which they return for a period of one year. Veteran's Preference Act of 1944 and Vietnam Era Veteran's Readjustment Assistance Act of 1974, 38 U.S.C. §§ 2021-2026 (1982). "Cause" has been defined by courts to encompass "such cause as a fair-minded person may act upon . . . ." Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 497 (1976) (citing *Keserich v. Carnegie-Illinois Steel Corp.*, 163 F.2d 889, 890 (7th Cir. 1947)).

released a draft of the Employment Termination Act.<sup>66</sup> In its tentative form, this Act recognizes three exceptions currently recognized by some state legislatures and various state courts. This uniform law would prohibit a termination that (1) contradicts clearly expressed public policy; (2) is based upon the employee reporting certain facts that he or she was legally bound to report or is based upon the employee's failure to report facts that would harm other employees or the general public; or (3) violates the employer's own policies (implied contract) or is not based on good faith.<sup>67</sup> This Act appears to be an attempt to create consistency with respect to the treatment of the termination-at-will issue and enables both employers and employees to anticipate what would constitute exceptions to the rule. The reporter's comments suggest that no decision has been made about the extent to which employees covered by collective bargaining agreements will be affected by this Act.<sup>68</sup> The reporter's notations suggest that there is some sentiment among the commissioners to include unionized employees only under the public policy exception.<sup>69</sup> Apparently, there is also some consideration to include a provision that creates a presumption that any employee covered by this Act, who has been employed for more than one year, could not be fired without "just cause."<sup>70</sup>

### C. Unions and Termination-at-Will

One of the first statutes to offer the employee some protection against arbitrary action by the employer was the National Labor Relations Act of 1935 ("NLRA").<sup>71</sup> The NLRA, in Section 8(a)(3), forbids the discharge of an employee based upon the employee's union activity.<sup>72</sup> Employees

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66. *Draft of Employment Termination Act Prepared for Discussion by Drafting Committee of Nat'l Conf. of Comm'rs on Uniform State Laws*, [July] Daily Lab. Rep. (BNA) No. 161, at D-1 (Aug. 19, 1988).

67. *Id.* at D-1 and D-2.

68. *Id.* at D-2.

69. *Id.*

70. *Id.*

71. National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982).

72. Section 8(a) states:

It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organizations: *Provided*, that nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when

wrongfully discharged may, under the provisions of the NLRA, be reinstated. Since such actions are enforced through the NLRB, employees normally bear no cost in prosecuting their claims.<sup>73</sup> Notably, however, the protection provided by the NLRA is limited to discharge based on an employee's participation in union activity and does not limit the employer's freedom to terminate employees for other reasons.<sup>74</sup>

In addition to the protection against unlawful discharge for union activity, the NLRA provided the legal impetus for the development and growth of collective bargaining. Although individual employees may possess relatively little bargaining power with employers, groups of individuals acting in concert, as through labor unions, are able to effect a substantially greater bargaining advantage. The inequality in bargaining power contributed to the rise of labor unions which, as one of their major tenets, fought to limit the powers of employers to terminate the employment relationship on an at-will basis.<sup>75</sup> Relying on the Taft-Hartley Act, private sector unions used collective bargaining agreements to limit the employer's ability to terminate only to those cases where "just cause" was present. The protection of employees from unjust discharge continues to be one of the major advantages of union membership: Approximately 90% of all collective bargaining agreements include language which prohibits dismissal "without cause" or "without just cause" and even where such language is not explicitly stated, arbitrators tend to imply such a condition.<sup>76</sup>

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made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, that no employer shall justify any discrimination against any employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . .

29 U.S.C. § 158.

73. In one year the NLRB ordered reinstatement for 5407 terminated workers and back pay wages totaling \$5.9 million to be paid to 6758 workers. See Summers, *supra* note 65, at 492 (citing 38 NLRB ANN. REP. 13-14 (1973)).

74. Zimmerman & Howard-Martin, *The National Labor Relations Act and Employment-at-Will: The Federal Preemption Doctrine Revisited*, 37 LAB. L.J., 223, 233-34 (1986).

75. R. ALLEN & T. KEAVENY, CONTEMPORARY LABOR RELATIONS 158-59 (1983).

76. Summers, *Protecting All Employees Against Unjust Dismissal*, HARV. BUS. REV. 132, 136, (Jan.-Feb. 1980); Zimmerman & Howard-Martin, *supra* note 74, at 227.

### D. Judicial Exceptions

Several theories have been used by the courts to carve out exceptions to the termination-at-will doctrine: implied contract, tort action, and implied covenant of good faith.<sup>77</sup> Under the implied contract theory, a court relies on the construction of the conversation between the parties, for example in an interview, or in written words, including employee handbooks. Under this theory, a court may find that, on the basis of the evidence presented, there was an implied promise that there would be no discharge without just cause. For example, in a Michigan case, *Toussaint v. Blue Cross & Blue Shield of Michigan*,<sup>78</sup> involving a preemployment query, plaintiff was told that he would not be discharged as long as he did his job. In its decision, the Michigan court stated:

An employer who establishes no personnel policies instills no reasonable expectations of performance. Employers can make known to their employees that personnel policies are subject to unilateral changes by the employer. Employees would then have no legitimate expectation that any particular policy will continue to remain in

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77. For a further discussion of the judicial exceptions to the termination-at-will doctrine, see L. LARSON & P. BOROWSKY, *UNJUST DISMISSAL* (1989); Abrams & Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594; Bastress, *A Synthesis and a Proposal for Reform of the Employment At-Will Doctrine*, 90 W. VA. L. REV. 319 (1988); Baxter & Wohl, *A Special Update: Wrongful Termination Tort Claims*, 11 EMPLOYEE REL. L.J. 124 (1985); Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will*, 17 AM. BUS. L.J. 467 (1980); Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Blumrosen, *Strangers No More: All Workers Are Entitled to 'Just Cause' Protection Under Title VII*, 2 INDUS. REL. L.J. 519 (1978); Gillette, *The Implied Covenant of Good Faith and Fair Dealing: Are Employers the Insurers of the Eighties?*, 11 EMPLOYEE REL. L.J. 438 (1985); Hermann & Sor, *Property Rights in One's Job: The Case for Limiting Employment-at-Will*, 24 ARIZ. L. REV. 763 (1982); Jenkins, *Federal Legislative Exceptions to the At-Will Doctrine: Proposed Statutory Protection for Discharges Violative of Public Policy*, 47 ALB. L. REV. 466 (1983); Krauskopf, *Employment Discharge: Survey and Critique of the Modern Employment At Will Rule*, 51 U. MO.-KAN. CITY L. REV. 189 (1983); Lansing & Pegnetter, *Fair Dismissal Procedures for Non-Union Employees*, 20 AM. BUS. L.J. 75 (1982); Mallor, *Discriminatory Discharge and the Emerging Common Law of Wrongful Discharge*, 28 ARIZ. L. REV. 651 (1986); Marrinan, *Employment-At-Will: Pandora's Box May Have an Attractive Cover*, 7 HAMLINE L. REV. 155 (1984); Mennemeier, *Protection From Unjust Discharges: An Arbitration Scheme*, 19 HARV. J. ON LEGIS. 49 (1982); Murg & Scharman, *Employment At Will: Do The Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329 (1982); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Peirce, Mann & Roberts, *Employee Termination at Will: A Principled Approach*, 28 VILL. L. REV. 1 (1982); Platt, *Rethinking the Right of Employers to Terminate At-Will Employees*, 15 J. MARSHALL L. REV. 633 (1982); Steiber & Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 J. OF L. REF. 319, 333-34 (1983); Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082 (1984); Summers, *supra* note 65.

78. 408 Mich. 579, 292 N.W.2d 880 (1980).

force. Employees could, however, legitimately expect that policies in force at any given time will be uniformly applied to all. If there is in effect a policy to dismiss for cause only, the employer may not depart from that policy at whim simply because he was under no obligation to institute the policy in the first place. Having announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force, the employer may not treat its promises as illusory.<sup>79</sup>

Much of the tort theory relies on a wrongful or retaliatory discharge concept, in which courts often cite to some public policy that would be undermined by allowing termination. The public policy argument suggests that there are circumstances under which the employer's motive for discharging an employee harms or interferes with an important interest of the community and therefore justifies awarding compensation to the employee.<sup>80</sup> The principle factors that courts utilize in assessing public policy are formal expressions and manifestations of public policy in the mandates, norms, and guidelines declared in federal and state constitutions, statutes, judicial decisions, and the variety of other avenues by which the official decisions and actions of organized society are registered.<sup>81</sup> Under the public policy exception, individuals who are discharged for a reason in opposition to public policy, such as serving on a jury<sup>82</sup> or filing a worker's compensation claim,<sup>83</sup> can obtain relief from the courts.<sup>84</sup>

Finally, a few courts have found that a termination of employment represents a breach of an implied covenant of good faith in the employment contract. Utilizing this theory, courts have held that termination of em-

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79. *Id.* at 619, 292 N.W.2d at 894-95.

80. The first case to establish the public policy exception was the California case, *Petermann v. International Bhd. of Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), which held that public policy was violated when the plaintiff employee was discharged by his employer for refusing to give perjured testimony before a committee of the legislature.

81. *Id.* See generally Note, *Guidelines for a Public Policy Exception to the Employment at Will Rule: The Wrongful Discharge Tort*, 13 CONN. L. REV. 617 (1981).

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

83. *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984).

84. See, e.g., *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980) (employee discharged for refusing to engage in illegal price fixing); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (employee discharged for insisting employer comply with state labeling regulations); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (employee discharged for giving police information to be used against a fellow employee); *Delaney v. Taco Time Int'l*, 297 Or. 10, 681 P.2d 114 (1984) (employee discharged for refusing to sign a false and arguably tortious statement concerning the behavior of a former employee).

ployment must occur absent bad faith or malice.<sup>85</sup> In *Cleary v. American Airlines, Inc.*,<sup>86</sup> the California Court of Appeals wrote that “[t]here is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.”<sup>87</sup> Similarly, the New Hampshire Supreme Court held that “a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good and constitutes a breach of the employment contract.”<sup>88</sup>

#### IV. THE EFFECT OF JUDICIAL EXCEPTIONS TO THE TERMINATION-AT-WILL DOCTRINE ON UNIONS

As the courts and legislatures continue to erode the termination-at-will doctrine by expanding the number and scope of exceptions thereto, the effects of this change on organized labor remain unclear. Neumann and Rissman argued that by making third party (i.e., judicial) review of personnel decisions available to nonunion employees, the implied contract exception “seems to strike at the heart of the services provided by unions.”<sup>89</sup> But in fact, the breadth of protection against unjust discharge differs substantially between that provided by unionization and by the courts. Exceptions to the termination-at-will doctrine tend to be very narrow and have, to date, been extended primarily to professional and managerial (i.e., typically nonunion) employees. The cost of protection against discrimination or unjust discharge in the union sector consists of union dues; protection through the courts means that employees must retain an attorney. In addition, enforcement through grievance-arbitration in the union sector is, at least on the average, more expeditious than filing suit. Remedies also differ in potentially important ways, with courts often awarding monetary damages in lieu of reinstatement with backpay.

Arguably, although legal protections are likely to be imperfect substitutes for union protections, employees may *view* them as adequate substitutes. They may, for example, over-estimate the level of legal protection available to nonunion workers. Alternatively, employees may believe that

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85. *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974), *modified*, *Howard v. Dorr Woolen Co.*, 120 N.H. 295, 414 A.2d 1273 (1980).

86. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

87. *Id.* at 453, 168 Cal. Rptr. at 728 (citing *Comunal v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 658, 328 P.2d 198, 200 (1958) (emphasis added by *Cleary* court)).

88. *Monge*, 114 N.H. at 133, 316 A.2d at 551 (citing *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973)).

89. Neumann & Rissman, *supra* note 24, at 188.



the additional protections unions provide do not outweigh the cost of union dues.<sup>90</sup>

Whether employees believe that judicial exceptions to the termination-at-will doctrine adequately substitute for union protections is an empirical question. In their study, Neumann and Rissman found that union membership was significantly lower and declined faster in the states in which the judiciary had recognized implied contract exceptions to the termination-at-will doctrine.<sup>91</sup> They interpret this result as supporting the union substitution hypothesis. Because of the potentially important implications of such a finding and the existence of several shortcomings in the Neumann and Rissman study, our study seeks to correct those problems and re-estimate the impact of several exceptions to the termination-at-will doctrine on the primary source of union growth.

Again, the central premise of the union substitution hypothesis is that the provision of legal protections to nonunion employees reduces employee demand for union representation. To test whether termination-at-will exceptions exert such a substitution effect requires estimating the effect of these exceptions on a measure which captures employee demand for union representation. Neumann and Rissman tested this hypothesis by estimating the effect of termination-at-will restrictions on total union membership.<sup>92</sup> This is a serious limitation because a leading study of the causes of union membership decline concluded that economic factors have been the largest single cause of the decline in total union membership; the primary economic factor being slower employment growth in previously organized plants.<sup>93</sup> Employment decline in previously organized workplaces is entirely unrelated to employee demand for union services. Similarly, there is no precise relationship between employment growth in previously organized workplaces and union membership, due to the tied sale of employment and membership in union shops, and the existence of "free-riders" in right-to-work states.<sup>94</sup>

To remedy this limitation of the Neumann and Rissman study, we estimate the effect of termination-at-will restrictions on the primary source of new union members in the private sector: The number of employees for whom representation rights are won via NLRB certification elections in

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90. Forbes & Jones, *supra* note 44.

91. Neumann & Rissman, *supra* note 24.

92. *Id.*

93. Dickens & Leonard, *Accounting for the Decline in Union Membership, 1950-1980*, 38 INDUS. & LAB. REL. REV. 323 (1985).

94. Farber & Saks, *Why Workers Want Unions: The Role of Relative Wages and Job Characteristics*, 88 J. POL. ECON. 349-50 (1980).

percent of nonunion employment ("UNIONFLOW"). UNIONFLOW omits changes in union membership due to employment change in previously organized workplaces, because such change is unrelated to employee demand for union services. Employee demand is a major determinant of UNIONFLOW, as it is based on majority vote in elections to determine whether employees favor union representation at their workplace.<sup>95</sup>

We also estimate the effect of the termination-at-will exceptions on the number of employees for whom representation rights are sought, in percent of nonunion employment ("ORGEFF"). Unions must continually organize workers in order to replace members lost through employment declines in previously organized workplaces. As indicated by the data in Table 1, on the next page, dramatic declines in union organizing effort (column 3) have also contributed to the decline in total union membership.

A second limitation of the Neumann and Rissman study concerns their definition and categorization of the judicial decisions regarding termination-at-will. They relied exclusively on a secondary source, the Bureau of National Affairs ("BNA"), in order to determine the states in which exceptions to the termination-at-will doctrine had been recognized. Perhaps as a consequence of this reliance, they coded several states as having exceptions which, according to our reading of the actual cases, do not belong in this category. Moreover, the BNA categorization of implied contract cases was overly general for the purpose of testing the government substitution hypothesis.

The coding scheme developed in this Article, for judicially recognized exceptions to the termination-at-will doctrine, attempts to reflect the complexity and nuances of the various judicial decisions.<sup>96</sup> Cases were first cat-

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95. Nonetheless, the NLRB data is subject to some limitations. It omits the flow into the union sector via the Railway Labor Act ("RLA") and public sector bargaining laws. However, the RLA is a relatively minor source of union growth. Public sector union growth appears to be subject to very different dynamics than the private sector, and public employees have greater nonunion protections than private sector employees via Civil Service laws. Thus, the latter omission may be advantageous for our purpose. NLRB data also ignores the reduction of the flow of successfully organized workers due to the high rate (25%) of failure to negotiate first contracts. See Cooke, *The Failure to Negotiate First Contracts: Determinants and Policy Implications*, 38 *INDUS. & LAB. REL. REV.* 163 (1985). While a potentially important source of union decline, failed contract negotiations operate independently of employee demand for union representation by definition, since they change the union status of workers who have expressed a desire for representation. Our estimates relate to causes of union decline which operate on employee demand, and are not meant to be strictly comparable to those which focus on net changes in total union membership.

96. Because union election data are not available from the NLRB Annual Reports after 1983, the authors did not use cases decided after 1982. The authors lagged the termination-at-will variables one year to allow knowledge of the judicially-created exceptions to filter down to the public

TABLE 1

<u>Year</u>	<u>Number of Elections Held</u>	<u>Number of Employees for Whom Rep. Sought</u>	<u>Number of Employees for Whom Rep. Won</u>	<u>Election Win Rate (Percent)</u>	<u>Average Unit Size</u>
1969	7,748	577,408	292,526	54.3	74.5
1970	7,820	589,252	308,167	55.2	75.3
1971	8,170	573,946	269,068	53.0	70.2
1972	8,675	571,694	286,436	53.5	65.9
1973	9,091	519,286	224,121	50.9	57.1
1974	8,631	524,894	194,115	49.7	60.8
1975	8,387	553,546	209,876	48.0	66.0
1976	8,491	465,586	167,172	48.0	54.8
1977	9,292	553,740	198,018	45.8	59.6
1978	8,093	461,335	171,752	45.8	57.0
1979	7,905	562,069	202,311	44.8	71.1
1980	8,049	509,971	190,408	45.6	63.3
1981	7,391	439,085	162,399	42.8	59.4
1982	5,041	293,095	100,325	39.9	58.1
1983	4,361	206,120	90,340	42.9	47.3

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egorized as falling under the implied contract, tort or implied covenant of good faith exception.<sup>97</sup>

and therefore potentially affect their decisions about union membership. A number of state courts did recognize exceptions to the termination-at-will doctrine for the first time after 1982.

97. The cases categorized under implied contract are: *Forman v. BRI Corp.*, 532 F. Supp. 49 (E.D. Pa. 1982); *Wagner v. Sperry Univac*, 458 F. Supp. 505 (E.D. Pa. 1978); *Foley v. Community Oil Co., Inc.*, 64 F.R.D. 561 (D. N.H. 1974); *Scott v. Lane*, 409 So. 2d 791 (Ala. 1982); *Rabago-Alvarez v. Dart Indus.*, 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 (1976); *Magnan v. Anaconda Indus.*, 37 Conn. Supp. 38, 429 A.2d 429 (1980); *McClure v. Leasco Computer, Inc.*, 134 Ga. App. 871, 216 S.E.2d 689 (1975); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); *Carter v. Kaskaskia Community Action Agency*, 24 Ill. App. 3d 1056, 322 N.E.2d 574 (1974); *Johnston v. Farmers Alliance Mut. Ins. Co.*, 218 Kan. 543, 545 P.2d 312 (1976); *Terrio v. Millinocket Community Hosp.*, 379 A.2d 135 (Me. 1977); *Garrity v. Valley View Nursing Home, Inc.*, 10 Mass. App. Ct. 822, 406 N.E.2d 423 (1980); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Sinnett v. Hie Food Prods., Inc.*, 185 Neb. 221, 174 N.W.2d 720 (1970); *Forrester v. Parker*, 93 N.M. 781, 606 P.2d 191 (1980); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441 (1982); *Sabin v. Willamette-Western Corp.*, 276 Or. 1083, 557 P.2d 1344 (1976); *School Comm. of Providence v. Board of Regents for Educ.*, 112 R.I. 288, 308 A.2d 788 (1973); *Sea-Land Serv., Inc. v. O'Neal*, 224 Va. 343, 297 S.E.2d 647 (1982); *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 568 P.2d 764 (1977).

The cases categorized under tort are: *Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057 (5th Cir. 1981); *Larson v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977);

The cases were further classified either as narrow, broad, limited or not termination. The narrowest definition of an exception to the termination-at-will doctrine used only those cases in which an exception was explicitly recognized by the state's highest court and the case concerned the termination of an employee's job.<sup>98</sup> These cases reflect decisions that clearly recognize an exception to the termination-at-will doctrine and set precedent in the state.

The next definition (broad) for all exceptions was extended to include cases that were decided by an intermediate state appellate court or a federal

M.B.M. Co. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); *Petermann v. International Bhd. of Teamsters, Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 590 P.2d 513 (1978); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); *Beavers v. Johnson*, 112 Ga. App. 677, 145 S.E.2d 776 (1965); *Parnar v. American Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982); *Jackson v. Minidoka Irrigation Dist.*, 98 Idaho 330, 563 P.2d 54 (1977); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Johnston v. Farmers Alliance Mut. Ins. Co.*, 218 Kan. 543, 545 P.2d 312 (1976); *Pari-Mutual Clerks' Union of Ky., Local 541 v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977); *Adler v. American Standard Corp.*, 291 Md. 31, 432 A.2d 464 (1981); *Agis v. Howard Johnson Co.*, 371 Mass. 140, 355 N.E.2d 315 (1976); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Keneally v. Orgain*, 186 Mont. 1, 606 P.2d 127 (1980); *Cloutier v. Great Atlantic & Pacific Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974); *Branham v. Miller Elec. Co.*, 237 S.C. 540, 118 S.E.2d 167 (1961); *Sea-Land*, 224 Va. 343, 297 S.E.2d 647.

The cases categorized under implied covenant of good faith are: *Mitford v. LaSala*, 666 P.2d 1000 (Ark. 1983); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); *Magnan v. Anaconda Indus.*, 193 Conn. 558, 479 A.2d 781 (1984); *Fortune*, 373 Mass. 96, 364 N.E.2d 1251; *Gates v. Life of Mont. Ins. Co.*, 196 Mont. 178, 638 P.2d 1063 (1982); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Hall v. Farmers Ins. Exch.*, 713 P.2d 1027 (Ok. 1985).

98. The implied contract cases in this category are: *Magnan*, 193 Conn. 558, 479 A.2d 781; *Jackson*, 98 Idaho 330, 563 P.2d 54; *Terrio*, 379 A.2d 135 (Me. 1977); *Toussaint*, 408 Mich. 579, 292 N.W.2d 880; *Forrester*, 93 N.M. 781, 606 P.2d 191; *Weiner*, 57 N.Y.2d 458, 443 N.E.2d 441; *Sabin*, 276 Or. 1083, 557 P.2d 1344.

The tort cases in this category are: *Tameny*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839; *Sheets*, 179 Conn. 471, 427 A.2d 385; *Parnar*, 65 Haw. 370, 652 P.2d 625; *Kelsay*, 74 Ill. 2d 172, 384 N.E.2d 353; *Frampton*, 260 Ind. 249, 297 N.E.2d 425; *Pari-Mutual Clerks' Union*, 551 S.W.2d 801; *Agis*, 371 Mass. 140, 355 N.E.2d 315; *Cloutier*, 121 N.H. 915, 436 A.2d 1140; *Nees*, 272 Or. 210, 536 P.2d 512; *Sea-Land*, 224 Va. 343, 297 S.E.2d 647; *Harless v. First Nat'l Bank in Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978).

The implied covenant of good faith cases in this category are: *Cleary*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722; *Magnan*, 193 Conn. 558, 479 A.2d 781; *Gates*, 196 Mont. 178, 638 P.2d 1063; *Monge*, 114 N.H. 130, 316 A.2d 549.

court, or where a court which indicated its willingness to find an exception in the future, but declined to do so in the instant case.<sup>99</sup>

The third definition (limited) included cases in which an exception was recognized, but in a limited fashion.<sup>100</sup> For example, in some cases the court conditioned its finding of an implied contract upon the existence of a stated or clear duration of employment and in others insisted upon a showing of detrimental reliance.<sup>101</sup>

The final and broadest definition (not termination) included employment cases in which the court recognized an implied contract, but the injury was not the termination of employment per se, but rather, for example, failure to pay a bonus.<sup>102</sup> These cases were coded separately because they did not directly deal with, address, nor give a remedy specifically for termination-at-will based on the facts or the relief sought. An example of a case in this category is one in which a court recognized an implied contract promising a bonus, but declined to extend the implied contract to create an exception to the policy of termination-at-will.<sup>103</sup>

Judicially recognized exceptions to the termination-at-will doctrine can reduce employee demand for union representation by persuading nonunion employees that these decisions provide sufficient protection from unjust discharge without union representation. To test whether these decisions have actually had this effect, it is necessary to determine which judicial decisions employees are aware of and which decisions are assumed to provide sufficient protection.

99. The implied contract cases in this category are: *Forman*, 532 F. Supp. 49; *Scholtes v. Signal Delivery Serv., Inc.*, 548 F. Supp. 487 (W.D. Ark. 1982); *Rabago-Alvarez*, 55 Cal. App. 3d 91, 127 Cal. Rptr. 222; *McClure*, 134 Ga. App. 871, 216 S.E.2d 689; *Carter*, 24 Ill. App. 3d 1056, 322 N.E.2d 574; *Johnston*, 218 Kan. 543, 545 P.2d 312; *Garrity*, 10 Mass. App. Ct. 822, 406 N.E.2d 423; *Hedrick v. Center for Comprehensive Alcoholism Treatment*, 7 Ohio App. 3d 211, 454 N.E.2d 1343 (1982); *School Comm. of Providence*, 112 R.I. 288, 308 A.2d 788.

The tort cases in this category are: *Smith*, 653 F.2d 1057; *Larson*, 117 Ariz. 507, 573 P.2d 907; *M.B.M. Co.*, 268 Ark. 269, 596 S.W.2d 681; *Petermann*, 174 Cal. App. 2d 184, 344 P.2d 25; *Lampe*, 41 Colo. App. 465, 590 P.2d 513; *Beavers*, 112 Ga. App. 677, 145 S.E.2d 776; *Jackson*, 98 Idaho 330, 563 P.2d 54; *Johnston*, 218 Kan. 543, 545 P.2d 312; *Adler*, 291 Md. 31, 432 A.2d 464; *Sventko*, 69 Mich. App. 644, 245 N.W.2d 151; *Keneally*, 186 Mont. 1, 606 P.2d 127; *Pierce*, 84 N.J. 58, 417 A.2d 505; *Geary*, 456 Pa. 171, 319 A.2d 174; *Branham*, 237 S.C. 540, 118 S.E.2d 167.

100. Five cases of implied contract fit this category: *Foley v. Community Oil Co.*, 64 F.R.D. 561 (D. N.H. 1974); *Scott v. Lane*, 409 So. 2d 791 (Ala. 1982); *Fortune*, 373 Mass. 96, 364 N.E.2d 1251; *Sea-Land*, 224 Va. 343, 297 S.E.2d 647; *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 568 P.2d 764 (1977).

101. See, e.g., *Sea-Land*, 224 Va. 343, 297 S.E.2d 647.

102. Two cases of implied contract fit this category: *Wagner v. Sperry Univac*, 458 F. Supp. 505 (E.D. Pa. 1978); *Sinnett v. Hie Food Prod., Inc.*, 185 Neb. 221, 174 N.W.2d 720 (1970).

103. *Sinnett*, 185 Neb. 221, 174 N.W.2d 720.

Of course, it is not possible to know with any degree of certainty whether or not employees are aware of any particular court decisions. At the state level, the focus is on cases decided at the appellate levels, in part because only state supreme court decisions absolutely set precedent in all states and, as a general rule, only state appellate decisions are published. Clearly, the media does not limit reporting to appellate decisions. It is possible that the lay public would be aware of trial court decisions and may not be aware that such decisions can be appealed. Certainly, the public may not follow a case to find out if the initial decision is affirmed on appeal. Moreover, although we have taken care to code decisions based on the level and type of court that rendered the decision, and the breadth of the exception that was created, it is unlikely that the lay public would make such sophisticated distinctions. Since we cannot determine, a priori, which decisions influence employee perceptions, we empirically test the effect of all the alternative definitions of termination-at-will restrictions. This procedure allows us to determine whether our conclusions are sensitive to the definition used. The more robust the results are to differences in definition, the greater the confidence we can place in these results.

#### A. *The Model*

The primary data source for this study is the *Annual Reports of the NLRB*. Two dependent variables are used: the number of employees for whom union representation rights are won, in percent of nonunion employment ("UNIONFLOW"); and the number of employees for whom representation rights are sought by unions, in percent of nonunion employment ("ORGEFF").<sup>104</sup>

As noted earlier in this Article, scholars have suggested several causes for the declining level of unionization. In addition to union substitution by government, these causes include employer suppression, structural changes in the economy, ideology, and values. Since these causes coincided with increasing judicial restrictions on termination-at-will, their effects must also be controlled.

The employer suppression hypothesis asserts that increasing legal and illegal employer resistance to union organizing has been a major cause of union decline. To test this hypothesis, the number of unfair labor practice

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104. Although intuitively it is most appropriate to gauge union organizing efforts relative to nonunion employment, this method can be criticized for creating a definitional relationship between the dependent variable and one of the independent variables, namely union membership. When the model is re-estimated using organizing effort relative to total employment, the union membership coefficient is no longer statistically significant. All other estimated coefficients and the  $R^2$  are invariant with respect to which dependent variable is used.

charges filed against employers in each state, in each year, are included in the analysis, in addition to the percentage of employees eligible to vote in elections ("8ACHARGE"). 8ACHARGE represents the increased cost to employees engaging in union activity as well as increasing levels of employer suppression of unions.

The structural change hypothesis maintains that union decline is the result of the shrinkage of the "unionizable" (i.e., manufacturing, blue collar) sector relative to service and white collar employment. The percentage of a state's total employment accounted for by manufacturing industries ("%MFG") is included as an indicator of economic structure.

Another hypothesized source of union decline concerns ideology and values. Lipset argues that declining public opinion toward unions has been a major cause of union decline.<sup>105</sup> There are three ways in which attitudes toward unions can influence union growth or decline. Anti-union attitudes will directly influence organizing success by reducing the proportion of workers desiring union representation. These attitudes will also affect union growth indirectly through their effect on public policy. Finally, by reducing the probability that unions will win elections, anti-union attitudes reduce the payoff to unions of attempting to organize and thus the amount of organizing in which they will invest. In the absence of a means of capturing attitude differences and changes, omitted variables bias and simultaneity bias are likely to occur. Thus, it is imperative that these problems be resolved. One way to control the effect on the analysis of changing public attitudes toward unions is to include appropriate national opinion poll data. Thus, in one model specification, we include a variable indicating the difference between the percentage of respondents who have "a great deal" or "quite a lot" of confidence in unions and the percentage of respondents who have the same level of confidence in "big business."

If changing public attitudes toward unions caused a reduction in union growth and power, the increased protection of individual employees through court decisions may be a response to, rather than a cause of, union decline. Failure to control for this possibility will create simultaneity bias. Several commentators have predicted that continuing union decline will lead to increased government regulation of the employment relationship.<sup>106</sup> In the context of the present study, it is at least possible that judges may have been more inclined to recognize exceptions to the termination-at-will doctrine to provide alternative means of protection against unjust dismissal

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105. LIPSET, *Labor Unions in the Public Mind*, in UNIONS IN TRANSITION 287-322 (S. Lipset ed. 1986).

106. See, e.g., Aaron, *supra* note 23.

as a result of declining union strength. Although we do not ascribe to this view, we will test for its existence. The time-series dimension of the data is exploited to test for the direction of causality. Since court decisions cannot have an effect before they exist, the direction of causation of union decline is tested by using leading indicators of these decisions. Thus, included in the model are the variables  $CONTRACT^{t-5}$ ,  $TORT^{t-5}$ , and  $GOODFAITH^{t-5}$ , which equal one beginning five years before these court cases were decided. A negative and significant coefficient on any of these variables would be consistent with the proposition that declining unionization precipitated these court decisions.

Omitted variables bias will also occur if state-to-state differences in attitudes toward unions and/or union political power affect union growth. Since pooled cross-section time series data are used, and attitudes are expected to differ systematically across states, the structure of the data can be exploited to reduce this source of bias. In order to control for cross-state attitude differences that do not vary over time, unobserved state-specific effects can be incorporated by estimating a fixed-effects model. Therefore, forty-nine state dummy variables are included in the estimating equations.

Several variables are included in the model as additional controls in all analyses. The state's annual average unemployment rate captures the availability of alternative employment opportunities, and thus the potential cost of job loss due to employer suppression or successful unionization. The state's real average manufacturing wage is included to control for income level. The level of union strength in the state is measured by the percentage of the state's employees who are union members. Membership is expected to reflect both union political power in the state and employee perceptions of union strength and efficacy. Finally, year dummy variables are included to control for year-specific effects.

The dependent variables,  $UNIONFLOW$  and  $ORGEFF$ , refer to fiscal years, while many of the independent variables refer to calendar years. The independent variables are lagged up to nine months by entering the prior calendar year's values for the current fiscal year. In other words, union organizing effort in fiscal 1983 is estimated as a function of 1982 calendar year values. The court decision variables are also lagged one year. This reflects the assumption that the lay public's awareness of the existence of these common law developments, and thus any influence they might have, occurs with a lag.

### *B. Results*

The estimates reported in columns (1) and (3) in Table 2 utilize the narrowest definition of judicially recognized exceptions to the termination-



TABLE 2

REGRESSION ESTIMATES<sup>a</sup> OF THE EFFECT OF JUDICIALLY RECOGNIZED EXCEPTIONS TO THE TERMINATION-AT-WILL DOCTRINE ON THE FLOW OF WORKERS INTO THE UNION SECTOR ("UNIONFLOW") AND UNION ORGANIZING EFFORT ("ORGEFF"), 1969-1983

	1	2	3	4
	UNIONFLOW	UNIONFLOW	ORGEFF	ORGEFF
CONTRACT <sup>b</sup>	.15 (.13)	.05 (.09)	-.04 (.07)	-.04 (.05)
TORT <sup>b</sup>	.29* (.11)	.25** (.09)	.21* (.06)	.16** (.05)
GOODFAITH <sup>b</sup>	-.09 (.19)	-.06 (.18)	-.02 (.11)	.03 (.10)
8ACHARGE	-.07** (.01)	-.07** (.01)	-.08** (.00)	-.08** (.00)
% MFG	-.01 (.01)	-.01 (.01)	-.01 (.01)	.01 (.01)
Other control variables: unemployment rate, real wage, union membership, year dummies, state dummies.				
R <sup>2</sup>	.67	.67	.81	.81
N	690	690	690	690

<sup>a</sup> Standard errors in parentheses.

<sup>b</sup> Estimates in columns 1 and 3 are based on the narrowest definition of termination-at-will exceptions. Columns 2 and 4 are based on the broadest definition.

\*\* Significant at .01 level.

\* Significant at .05 level.

at-will doctrine. That is, these variables reflect decisions of the state's highest court, that clearly recognized an exception, and involved termination. The estimates in columns (2) and (4) utilize the broadest definition of judicial exceptions, the "not termination" definition. The estimates in columns (1) and (2) of Table 2 report the determinants of the flow of workers into the union sector; columns (3) and (4) report those for union organizing effort. All models reported in Table 2 include controls for unobserved state-specific effects, but do not include the variable capturing public opinion poll data on attitudes toward unions.

The union substitution hypothesis implies that judicially recognized exceptions to the termination-at-will doctrine reduce non-union employees' demands for union representation, i.e., negative coefficients of these variables would support the union substitution hypothesis. The estimates reported in Table 2 provide no support for this hypothesis. Indeed, with all other factors being equal, recognition of the tort of wrongful discharge sig-

nificantly increases both the flow of workers into the union sector and union organizing effort. The signs and significance of the termination-at-will coefficients are very robust as compared to alternative definitions of these exceptions. The results obtained when using the intermediate definitions (not reported) are virtually identical to those which are reported. These results suggest that protections of nonunion employees may encourage unions to organize the unorganized and encourage individuals to vote for union representation. This might occur if recognition of the tort of wrongful discharge is viewed as providing some protection from the consequences of employer retaliation during union organizing campaigns.

Alternative interpretations of these results are also possible. For example, the failure to find a negative effect of any exceptions of the termination-at-will doctrine may reflect a tendency of unions to organize only where the effect of termination-at-will exceptions is weakest. Without specific hypotheses identifying which employee groups are least affected by these decisions, it is not possible to directly test for this possibility. Nonetheless, the results do not support the union substitution hypothesis, via judicial exceptions to termination-at-will.

It is important to control for increasing management resistance to unionization, since it increases the cost to employees of advocating unionization and is expected to be serially correlated with the expanding protections of nonunion employees. As expected, illegal employer resistance, as measured by employer unfair labor practices, significantly reduces both the flow of workers into the union sector and union organizing effort.

In another specification, we included a variable reflecting public attitudes toward unions. Use of this variable necessitates a restriction on the time period examined: Only odd years beginning in 1973 are used. These results are not reported, but are available from the authors on request. Controlling directly for changing public attitudes toward unions does not alter our conclusion that judicial restrictions on the termination-at-will doctrine have not contributed to union decline. Similarly, our test for simultaneity between union decline and recognition of exceptions to the termination-at-will doctrine, via leading indicators of these decisions, suggests that these judicial exceptions did not occur as a consequence, or follow after, union decline in the state. These results are also not reported, but are available on request.

There are several reasons why our results differ from those of Neumann and Rissman.<sup>107</sup> First, and most importantly, our dependent variables dif-

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107. Neumann & Rissman, *supra* note 24.

fer; that is, the quantity which we try to explain statistically differs. We estimate the effects of termination-at-will restrictions on two quantities: the number of employees for whom representation rights were sought by unions (organizing effort), and the flow of workers into the union sector via NLRB elections. In contrast, Neumann and Rissman estimate the effect of termination-at-will restrictions on the total change in union membership. As discussed above, union membership is affected by many things which have nothing to do with changes in employee desires for union representation, for example, shifts in employment from manufacturing to nonmanufacturing, and employment declines within heavily unionized industries. Since it is very difficult to adequately control for these other sources of union decline, and because the emergence of termination-at-will restrictions may have coincided with these other causes of union decline, we believe it is preferable to limit our focus to changes in union membership that reflect changes in employee desires for union representation, such as data on representation elections.

Second, unlike Neumann and Rissman, we directly control for the increase in illegal employer resistance to union organizing. Since this resistance has been increasing at the same time that the judiciary has been recognizing exceptions to the termination-at-will doctrine, failure to control for employer resistance may have caused the judicial exception variables to pick up the effect of increasing employer resistance. We also controlled for state-specific effects, unlike Neumann and Rissman. Again, omission of these variables may have caused the judicial exception variables to pick up their effects.

Finally, although in examining the actual court cases we took great care to determine in which states the judiciary has recognized termination-at-will exceptions, and the scope of these exceptions, the definition did not matter empirically. Regardless of the definition utilized, our results and conclusions were unaffected.

In sum, the results of this study provide no support for the hypothesis that increased governmental protection of individual employees, provided by judicially-recognized exceptions to the termination-at-will doctrine, has reduced employee demand for union representation. On the contrary, our results suggest that recognition of the tort of wrongful discharge is associated with greater union organizing efforts and an increased flow of new workers into the union sector.

## V. UNION SUPPORT FOR TERMINATION-AT-WILL EXCEPTIONS

The AFL-CIO now urges the enactment of both federal and state limits on the rule of termination-at-will.<sup>108</sup> Although the unions have not actively campaigned against exceptions to the doctrine, this statement marked the first time that the unions have indicated an intent to actively lobby for such exceptions.<sup>109</sup>

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108. AFL-CIO Executive Council Statement on *The Employment-At-Will Doctrine* [hereinafter AFL-CIO Statement], delivered at the annual meeting of the Executive Council in Bal Harbour, Fla. on February 20, 1987.

109. Stieber, *supra* note 24, at 12 n.40; Stieber, *Recent Developments in Employment-at-Will*, 36 LAB. L.J. 557, 558, 562 (1985) [hereinafter *Recent Developments*].

Following the introductory section, the AFL-CIO argues for an unjust discharge law, which, at a minimum, includes the following five elements:

*A prohibition on discharges without cause.* It is not enough to codify the exceptions to the employment-at-will doctrine that have been judicially developed. What is required, rather, is adoption of the rule that workers may be discharged only *for cause* and not otherwise.

*Financing to assure that discharged employees will be able to enforce their statutory rights.* Legal rules are of no consequence if they cannot be enforced, and individuals who have lost their jobs cannot be expected to divert their scarce resources from sustaining themselves and their families to retaining attorneys to litigate their discharge cases. An unjust discharge law must therefore provide either for a government administrative enforcement system or for an alternative means of compensation of private representatives.

*Prompt review of discharge decisions by an independent tribunal.* Most workers cannot afford to be without their livelihood for a sustained period of time. Consequently, if a worker can be fired and required to engage in protracted litigation to secure review of the discharge, workers will, in practice, continue to serve at their employer's pleasure. An unjust discharge law therefore must establish adjudicative procedures that result in decisions within a short time after a challenge to a discharge is filed.

*Mandatory reinstatement for any employee who is found to have been discharged wrongfully.* Most workers value their job not merely for the income it produces but also for the opportunities for advancement and for the job security — and the other personal and social benefits — derived only from steady employment. To make a wrongfully discharged employee whole, therefore, requires that the employee be reinstated to the job from which he was wrongfully fired. Although it is questionable whether reinstatement can work in practice in an unorganized setting, nonetheless, a law that does not offer reinstatement to wrongfully discharged workers cannot even begin to free workers from the capricious power of their employers.

*Full compensation for losses sustained as the result of a wrongful discharge.* In many instances, a worker who is fired suffers not only the loss of wages but also a host of consequential injuries flowing from the loss of his/her livelihood. An innocent employee who has been wrongfully discharged should not be left to bear those losses; rather, the wrongdoing employer should be held responsible for these injuries.

AFL-CIO statement, *supra* note 108, at 3-4. The AFL-CIO Statement begins with the following discussion:

The general acceptance in the United States of the concept that employers are entitled to dismiss employees at any time, without any notice, for any reason whatsoever puts some 60 million non-union workers at risk. It is estimated that of these, roughly 150,000 workers are unjustly discharged each year. And, the "employment-at-will" doctrine adversely

Certainly there are a number of reasons why the AFL-CIO might favor more formalized and expanded termination-at-will exceptions, particularly

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affects all who are potentially subject to their employer's unbridled caprice by denying these workers their natural right to be treated fairly and with respect. No other industrial society continues to grant employers this feudal power that is totally inconsistent with our concepts of individual dignity and worth.

Over the past several years, the courts in a number of states have made limited inroads on the "employment-at-will" doctrine. Many courts have held that where an employee is discharged for engaging in conduct the law seeks to protect or foster, the discharge violates public policy and constitutes a tort. A handful of courts also have concluded that where an employer, in personnel manuals or like documents, sets forth a policy governing discharges, the employer is bound to adhere to his self-proclaimed policy as part of his contract with his employees.

These belated judicial developments, while of course welcome, do not correct the essential conflicts between the "employment-at-will" doctrine and the legitimate concerns of workers.

The "public policy" exception to the at-will rule, by its terms, is of very limited scope and hence, even in theory, of benefit only to a small number of discharged employees. The "contract" exception is one that employers easily circumvent by redrafting their personnel manuals so as not to make any binding commitments.

The judicial exceptions to the at-will doctrine suffer as well from serious practical limitations. Proving a violation in any event is a difficult task, especially under the public policy exception which requires the plaintiff to show that the employer was motivated by an improper purpose. Most workers who have lost their jobs do not have the resources to retain counsel; consequently, only those with a strong likelihood of recovering substantial moneys — most often formerly high-paid executives — have been able to secure the resources to fight a case through the judicial system. Lastly, the sole remedy the courts have provided an unjustly discharged employee is money damages, and not reinstatement to the job from which the worker has been wrongfully removed.

Experience demonstrates that the surest way for workers to protect their jobs is through self-organization and collective bargaining. One of the great accomplishments of the American labor movement has been the negotiation of contract provisions that prohibit discharges without just cause and that provide grievance-arbitration procedures through which that job security is made real. Under these agreements, the union provides the discharged employee with representation in challenging the discharge and, if the individual prevails on his challenge, he or she will be reinstated to his or her job in a workplace where the union stands ready to assure that on reinstatement the individual is fairly treated.

Studies show that in this context, reinstated employees are normally able to pick up where they left off and are not likely to be picked out for retaliation for exercising their rights. In contrast, in an unorganized workplace, even if the employees do enjoy certain legal rights, they ordinarily do not have the wherewithal to enforce their rights. Moreover, if an individual worker seeks to do so, he or she will have no protection from employer reprisal. It is not surprising, therefore, that studies have found that employees who obtain reinstatement to a non-union plant through order of the National Labor Relations Board either elect not to return to their jobs or, if they do, leave their jobs within a year.

It is in good measure for these reasons that assisting unorganized employees to organize and to secure contractual protections from unjust discharges remains the labor movement's first priority. At the same time, the AFL-CIO remains committed to its long-term program of providing a base of support for the collective bargaining process through legislation that seeks to assure every working American the basic labor standards that are the hallmark of a decent society. There can be no doubt that protection against arbitrary

if the union substitution hypothesis is invalid. The AFL-CIO itself advances a number of reasons why it is lobbying for exceptions to the termination-at-will doctrine. According to the statement of the Executive Council, its primary motivation is to advance the interests of labor generally.<sup>110</sup> Helping labor generally has always been articulated by the unions as a major priority. In light of the growing number of unorganized workers, it seems obvious that a desire to protect labor must extend beyond the provision of union protections.<sup>111</sup>

In addition to any philosophical commitment that such an effort might represent, the AFL-CIO stance should serve to provide a more positive image of the unions. In recent years there has been some evidence that many Americans do not have particularly positive feelings about unions.<sup>112</sup> Whether these negative views result from detrimental media coverage or some other factors, they certainly will not positively affect union growth.<sup>113</sup>

The type of legislation that the AFL-CIO is supporting affects unorganized workers in a number of ways that current exceptions to the termination-at-will doctrine, particularly judicial exceptions, do not. For instance, most cases that involved an exception to termination-at-will concerned the dismissal of a white collar employee.<sup>114</sup> This finding is not especially surprising. Bringing a lawsuit is a relatively expensive proposition and white

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employer action qualifies as a basic labor standard. Thus, as state legislatures and the United States Congress begin to consider proposals to modify the employment-at-will doctrine, our policy is to support measures that safeguard workers against discharges without cause.

Most of the legislative proposals that have been put forward reflect a lowest common denominator approach which disserves the interest of workers. These proposals seem to proceed on the basis that the precondition to modifying the employment-at-will doctrine is the approval of the employer community as a whole. To secure that approval, it is suggested that a set of limited employee rights and even more limited remedies enforceable through an arbitration-type procedure that a discharged employee may invoke at his own cost should be substituted for the current court law (which at least in some cases produces large damage awards). The proposals are not worthy of organized labor's support.

*Id.* at 1-3.

110. See AFL-CIO Statement, *supra* note 109.

111. See *supra* notes 1-11 and accompanying text.

112. See Bilik, *Corrupt, Crusty or Neither? The Poll-ish View of American Unions*, 30 LAB. L.J. 323, 324-26 (1979); Lipset, *supra* note 104.

113. For consideration of potential media effects on the image of unions, see, e.g., LIEBLING, *THE PRESS 157-73* (1964); Gould, *supra* note 17, at 32; Hoyt, *Downtime for Labor*, 22 COLUM. JOURN. REV. 36-40 (1984); Hoyt, *Is the Labor Press Doing Its Job?*, 22 COLUM. JOURN. REV. 34-36 (1983).

114. Steiber, *supra* note 24, at 7-8. Whether or not the NLRA preempts the possibility of employees covered by collective bargaining agreements bringing discharge suits in court continues to be an issue. See, e.g., Brooks, *Preemption of Federal Labor Law by the Employment-at-Will Doctrine*, 38 LAB. L.J. 335 (1987).

collar workers are better able to afford to bring a suit. Likewise, with the possibility of a large award, attorneys are more likely to be favorably inclined to bring a suit on a contingency basis. While passage of the legislation suggested by the AFL-CIO would not necessarily reduce the cost of bringing suit,<sup>115</sup> it might increase the possibility of class action suits (for instance in reduction-in-force cases) thereby increasing the potential for a monetary award sufficient to support a contingency fee basis case.<sup>116</sup> Alternatively, the AFL-CIO proposes that legislation could include some means of defraying all or part of the costs of such litigation.<sup>117</sup> Presumably, the unions could assume some of the costs, but this is unlikely. Some type of court-appointed lawyer scheme might be arranged which, in effect, would pass the cost of litigation to the government and, ultimately the taxpayers. Finally, the AFL-CIO might propose that unsuccessful defendant-employers would pay all costs associated with the lawsuit.

Presumably, legislation would also make bringing a suit easier. While legislation would not negate the need to examine the facts surrounding any particular discharge situation, it might decrease litigation time and expense by providing for alternative dispute resolution mechanisms such as arbitration.<sup>118</sup> Legislation may prove beneficial for employees involved in an organizing campaign, but not yet organized, since it is likely to provide a somewhat more generous time frame for bringing an action than current NLRB policies.<sup>119</sup> Certainly, the possibility of monetary damages would broaden the scope of remedies available for union employees, since currently, redress from arbitrators and the NLRB does not extend to monetary awards.<sup>120</sup>

In an earlier section of this Article, the authors discussed three of the reasons most commonly advanced for the decline of union membership: (1) structural changes in the economy, (2) union or government substitution, and (3) employer animus.<sup>121</sup> Obviously, there is little that the unions can do to directly influence structural changes in the economy. They can, of course, change their organizing tactics to reflect the change in type of industry and they can concentrate organizing efforts in the growing industrial

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115. If, as the AFL-CIO proposes, *supra* notes 108 and 109, unjust discharge cases were settled or decided by some administrative means, the costs of such an action might be less than a court case.

116. Smith, *supra* note 30, at 889.

117. See AFL-CIO Statement, *supra* note 108.

118. *Id.*

119. Zimmerman & Howard-Martin, *supra* note 74, at 234.

120. Smith, *supra* note 30, at 876-79.

121. See *supra* notes 1-46 and accompanying text.

areas of the South and West. Indeed, a number of authors call on the unions to revise their organizing tactics to take these structural changes into account.<sup>122</sup> Although the unions have and will continue to heed such advice, history suggests that these areas have been traditionally difficult to organize, although union win rates in NLRB elections are currently higher in some service-type industries than in manufacturing.<sup>123</sup>

In any event, changes in organizing efforts alone may not be sufficient to stabilize union membership figures, let alone to reverse the decline in growth. To the extent that employer animus towards the unions is resulting in continuing and perhaps increasing union suppression, union leaders will need to find ways to minimize this suppression, if not the animus, in order for any organizing efforts to be successful. Under the current laws, employers may be able to fire employees who have, or who the employer suspects have, union sympathies if the employees are neither actively involved in a formal organizing campaign nor deemed to be working as part of a "concerted activity" in favor of union representation.<sup>124</sup> If, under the AFL-CIO proposal, remedies for unjust discharge are expanded to include reinstatement as well as monetary award, workers who may have been discharged based on real or perceived union sympathies, or who were not viewed as part of a "concerted activity," can be reinstated and may be able to positively effect union organizing, particularly if reinstatement occurs prior to the union election.<sup>125</sup>

## VI. CONCLUSION

Until the downward trend in union membership is at least halted, if not reversed, union supporters will continue to attempt to identify both the causes of the decline and ways to encourage union representation. This Article has focused on one factor that has been advanced as a reason for membership decline: the advent of judicially-created exceptions to the termination-at-will doctrine. Proponents of this argument suggest that as courts expanded the reasons for which employees either could not be law-

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122. See, e.g., Craver, *supra* note 4, at 215; Gould, *supra* note 17; Usery & Henne, *supra* note 4, at 257.

123. Craver, *supra* note 8.

124. Zimmerman & Howard-Martin, *supra* note 74, at 232. For a comparison of discharge rates of union and non-union employers see *Recent Developments*, *supra* note 109, at 559. Furthermore, according to Weiler, *supra* note 12, at 1781, "the current odds are about one in twenty that a union supporter will be fired for exercising rights supposedly guaranteed by federal law . . . ." *Id.*

125. The need for timely reinstatement is suggested by the AFL-CIO proposal. It calls for "prompt review of discharge decisions," as well as mandatory reinstatement. See AFL-CIO Statement, *supra* note 108; see also Weiler, *supra* note 12, at 1792-93.



fully terminated or could be granted remedies for such firings, the importance of the just cause provisions in collective bargaining agreements would be undermined. Hence, the argument continues, the perceived need for union representation would be diminished and membership would decline.

This Article, and the authors' study discussed herein, have attempted to refute this argument. The results of our study do not indicate that judicially-created exceptions to the termination-at-will doctrine negatively affect union membership. While it is not equally clear that exceptions will foster union growth, it is at least plausible that if such exceptions serve to preclude terminations based on union sympathies, union growth might well be enhanced. If the unions cannot eliminate or substantially decrease employer animus, protection of union supporters from termination based on that support may provide some measure of optimism for the unions' cloudy future.