OHIO STATE LAW JOURNAL
Volume 40, Number 1, 1979

Unjust Discharges From Employment: A Necessary Change in the Law

CORNELIUS J. PECK*

> The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on *Politics*, "A man has a right to be employed, to be trusted, to be loved, to be revered." It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man.[1]

At times one is tempted, despite the hazards, to make predictions concerning the law of the future. The prediction made in this article is one of the safest that can be made. Indeed, it may be wrong to characterize what is said here as a prediction. So strong are the forces for the change that it may be only the details of an inevitable development that remain undisclosed. The prediction is that American courts will abandon the principle that, absent some consideration other than the services to be performed, a contract of employment for an indefinite term is to be considered a contract terminable at will by either party, with the consequence that an employer may discharge an employee for any cause, no cause, or even a bad cause.[2] Instead, courts will require that employers

---

* Professor of Law, University of Washington School of Law.

1. Barsky v. Board of Regents of the Univ. of the State of N.Y., 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

2. RESTATEMENT (SECOND) OF AGENCY § 442 (1958) states the rule to be: "Unless otherwise agreed, mutual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening events." Comment b gives emphasis to the employment at will nature of the relationship by stating that a contract of employment for a salary proportionate to units of time "does not, of itself, indicate that the parties have agreed that the employment is to continue for the stated unit of time."

9 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1017, at 129-30 (3d ed. W. Jaeger 1967) (footnotes omitted) states:

> Where the contract is not for a fixed term, and is, therefore, terminable at will, though such notice as the nature of the contract made reasonable might be necessary, there seems no general principle analogous to that in the law of tenancies at will requiring notice of a certain length of time.

Corbin's discussion of the term of service of employment contracts refers to a disagreement over whether there is an American rule and an English rule, and takes the position that "[t]he question is one of factual interpretation, and very frequently . . . a jury question." 3 A. CORBIN, CONTRACTS § 684, at 224 (1960).

The Restatement of Contracts contains no provision relating specifically to contracts of employment at will, but the treatment accorded usage would lead to a conclusion that contracts of

have just cause for terminating the employment relationship. A further consequence will be that courts will also require proof of just cause for any serious disciplinary action by employers.

More than a decade ago a powerful argument was made by Professor Blades for the development of a tort remedy to protect employees from abusive exercise of power by employers.[3] Somewhat earlier, Professor Blumrosen had demonstrated that the treatment given contracts of employment by American courts had its origins in the erroneous statements of the author of a nineteenth-century treatise.[4] A highly respected attorney, with experience in government and private practice and as counsel for a major union, later gave her persuasive arguments for recognition of employee rights to job protection for the unorganized.[5] She found support for her position in standards adopted by the International Labour Office (ILO) that require "valid reason" for termination of employment at the initiative of an employer.[6] Those standards were adopted after a study that extended over several years and reviewed employment practices of member nations.[7] More recently, Professor Clyde Summers has presented for consideration his thoughtful proposal that all employees be given protection against unjust discipline by a statute providing for arbitration of discharge and discipline cases, using the general procedures and standards as well as the corps of arbitrators developed by the process of collective bargaining.[8] As will be seen, some judges have given attentive and even hospitable consideration to arguments that employers should not have an unlimited right to terminate

---

employment for an indefinite term are terminable at will. RESTATEMENT OF CONTRACTS § 246, Illustration 8 (1932). *See id.* § 32, Illustration 1.

For numerous cases in which the conclusion reached was that the contract of employment was terminable at will, and therefore without cause, see Annot., 62 A.L.R. 3d 271 (1975).

3. Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

4. Blumrosen, *Employer Discipline: U. S. Report*, 18 RUTGERS L. REV. 428, 432-33 (1964). *See* Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 340-47 (1974). The erroneous statement appeared in H. WOOD, MASTER AND SERVANT § 134 (1877). Professor Blumrosen has continued to argue against the principle that makes employment terminable at will and for job protection for employees. *See* Blumrosen, *Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTGERS L. REV. 268, 270-71 (1969). *See also* Blumrosen, *Common Law Limitations on Employer Anti-Union Conduct: Protection of Employee Interest in Union Activity by Tort Law*, 54 NW. U.L. REV. 1, 18-19 (1959).

5. Weygand, *Present Status of Individual Employee Rights*, in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-SECOND ANNUAL CONFERENCE ON LABOR 171 (T. Christensen & A. Christensen eds. 1970).

6. INTERNATIONAL LABOUR ORGANISATION, CONVENTIONS AND RECOMMENDATIONS 1919-1966, at 1060-61 (1966). The text of the recommendations may be found in *Extracts from the International Labor Office Report*, 18 RUTGERS L. REV. 446, 449-55 (1964).

7. INTERNATIONAL LABOUR CONFERENCE, 46TH SESS., REPORT VII(1) ON TERMINATION OF EMPLOYMENT (DISMISSAL AND LAY-OFF) (1961-62) [hereinafter cited as INTERNATIONAL LABOUR CONFERENCE, REPORT VII(1)].

8. Summers, *Individual Protection Against Unjust Dismissal: Time For A Statute*, 62 VA. L. REV. 481 (1976) [hereinafter cited as Summers, *Individual Protection*]. *See* Summers, *Arbitration of Unjust Dismissal: A Preliminary Proposal* in THE FUTURE OF LABOR ARBITRATION IN AMERICA 159 (J. Correge, V. Hughes, & M. Stone eds. 1976).

a contract of employment without cause simply because the parties have not agreed upon a fixed term for the employment.

It is not the purpose of this article to restate, except in a limited way, the persuasive case already made by others against preservation of the principle that permits employers to discharge employees without cause or even for a bad cause. It is instead to develop additional arguments to force what is frequently a timid and reluctant judiciary to reconsider the problem on the merits. Development of these arguments appears to be necessary because, despite the appeal to academicians of proposals such as that of Professor Summers, there is little chance of enactment of a remedial statute concerning this aspect of the employment relation.

Usually, statutes are not enacted because they incorporate good ideas or principles; rather, they are enacted because organized interest groups lobby for their enactment.[9] Employees who have not been organized by a labor union are exactly that: unorganized and therefore lacking in the unity of purpose and effort that produces a successful lobby. On the other hand, employers have associations that traditionally have lobbied against legislation conflicting with employer interests, and they may be counted upon to oppose legislation that would curtail the present power of employers to terminate employment without proof of cause. Nor can labor unions be expected to lobby for the enactment of a statute to limit that power of employers. The argument that a union will prevent unfairness by establishing a grievance procedure is one of the most persuasive arguments used to acquire members and organize a work force.[10] Unions are not likely to work for adoption of a statute that would eliminate or greatly reduce the potency of such an argument.

Judicial reform and revision of the common law do not conflict with our commitment to a representational democracy in which controversial policy decisions are made in the legislative branch of government. They are instead in keeping with the best traditions of the common law, provided the changes made do not conflict with existing legislation.[11] Further, the courts should take existing enactments as guides to the solution of related and analogous problems. Thus, the entire process may properly be viewed as one in which courts and the legislature engage in a cooperative venture to improve the law, with the courts occasionally performing a catalytic function to provoke legislative consideration of matters. Indeed, judicial interpretation of Title VII of the Civil Rights Act of 1964[12] now provides unexpected protection for all employees against arbitrary or unjustified

---

9. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 281-85 (1963).

10. J. GETMAN, S. GOLDBERG, & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 99, Table 4-15 (1976).

11. R. KEETON, VENTURING TO DO JUSTICE 13-15, 18-24 (1969); Peck, *supra* note 9, at 285-93; Peck, *Judicial Creativity and State Labor Law*, 40 WASH. L. REV. 743, 772-79 (1965).

12. 42 U.S.C. §§ 2000e-2000h (1976).

employer conduct. This cooperative venture appears particularly appropriate if, as will be argued, legislative inactivity continues to create substantial doubts concerning the constitutionality of the currently accepted principles of law.

This article will argue that important constitutional guarantees are violated by continued adherence to the rule that a contract of employment for an indefinite term is to be considered a contract terminable at will by either party. This will, of course, require a showing that governmental intrusion into the employment relationship has now become so comprehensive and intimate that the permission granted private employers by federal and state law to discharge without cause may be considered "state action" in the fourteenth amendment sense. It will be contended that the very important and constitutionally protected interest in continued employment cannot be destroyed without observance of procedural due process guarantees, and that discharge without cause constitutes a deprivation of equal protection of the law to the unorganized employees of private employers. Last, it will be shown that the overwhelming importance of the employment relation to the individual employee, coupled with the arbitrariness and capriciousness of a rule that permits the termination of that relation without cause, necessitates that the courts, in their capacity to shape common-law principles, reexamine the suitability of that rule in the setting of the contemporary employment situation.

A change to a rule requiring that employers have just cause to terminate employment will give rise to a number of problems, both substantive and procedural. As will be shown, the substantive problems will not be unduly troublesome because of the readily available body of law developed by labor arbitrators and because the problems are not significantly different from those currently entrusted to triers of fact under the common law. The procedural problems are more substantial and will be considered in light of recent decisions concerning what process is due for an interest found to deserve constitutional protection.

I. The Need for Job Protection

It might be thought self-evident in today's society that an interest as important as employment deserves comprehensive protection, but the glaring fact is that most workers in the United States have no protection against dismissal without reason or for bad or improper reason. A few examples may illustrate the problem and its significance for employees whose employment is so terminated.

Assume a cashier-checker employed at a supermarket for several years is told one day by the manager that the company has decided to terminate her employment and that she should not report for work the next day. If she inquires why she is being discharged she could be told that management has no obligation to explain its decisions and that the

decision to terminate her employment is firm and final. If the employees of the supermarket are not represented by a labor union there will be no grievance and arbitration procedure to protest the decision. Since her employment was for an indefinite term, a court would hold under prevailing law that her employment was at will and therefore terminable without cause. When she applies for employment elsewhere, prospective employers will inquire why her previous employment was terminated. If she falsifies her application, that falsification may be discovered, with the consequence that she is either denied new employment or later discharged from that employment.[13] If she reports that her former employer refused to state the reason for discharge, that fact will often be interpreted to mean that she was discharged for dishonesty.

The refusal of the supermarket employer to give a recommendation or state the reason for the termination of her employment would not be actionable,[14] nor would it be of legal significance that the supermarket management had assured its employees that they would not be discharged without cause.[15] When the cashier-checker makes application for unemployment compensation, the supermarket management will have a financial incentive to report to the unemployment compensation agency that the termination of employment occurred for some reason that will not adversely affect the employer's experience rating, and hence the rate at which it is taxed to provide unemployment compensation.[16] If the employee is discharged on the basis of "misconduct," that employee will be denied unemployment benefits, and the employer's experience rating will not be affected;[17] thus, in a given instance the employer might state the cause of an employee's termination to be misconduct. If the employer does so, the employee faced with denial of unemployment benefits may obtain an administrative determination whether the disqualification is proper, and that determination will bear a close resemblance to a determination whether the employer had just cause for terminating the employment.[18] But if the employer states a reason that does not constitute a basis for denial of unemployment benefits, the employee is unable to obtain such an administrative determination. If the management did in fact suspect the employee of dishonest practices, it might well have decided that the cheaper and less troublesome way of disposing of the matter was to state an innocuous reason for termination of the employment. The cashier-checker

13. Reported arbitration decisions reveal that discovery of a falsified job application is frequently considered by employers to be cause for discharge. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 658 (3d ed. 1973).

14. *See* Porcelli v. Joseph Schlitz Brewing Co., 397 F. Supp. 889 (E.D. Wis. 1975); McKinney v. Armco Steel Corp., 270 F. Supp. 360 (W.D. Pa. 1967).

15. *See* Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976); Shaw v. S.S. Kresge Co., 328 N.E.2d 775 (Ind. Ct. App. 1975).

16. 1 B. UNEMPL. INS REP. (CCH) ¶ 1120 (Nov. 2, 1976).

17. *Id.* ¶ 1970, at 4451-53 (Jan. 27, 1977).

18. *Id.*

has been rendered unemployable in what may be the only work in which she is experienced and one of the few occupations for which she is competent, suffering the deprivation without hearing or proof of cause.[19]

Of course, even when reason for termination of employment is stated to the employee, no relief is available from the employer on the theory of defamation because of the lack of publication.[20] The individual supervisors who make such statements enjoy a conditional privilege[21] that will relieve them of liability unless they abuse the privilege, which may require proof of reckless disregard of the truth.[22] If the supervisors have been reckless or willful in the statements made to one another concerning an employee's job performance, those statements may be considered not to have been made in the course of the supervisors' employment, with the result that the employer has no liability.[23] If the reason stated to the employee is defamatory, reflecting upon the employee's honesty or competence in his trade or profession, that employee will face the dilemma whether to falsify a job application or state a reason that will probably lead to rejection of the application. Moreover, the discharging employer will have a conditional privilege to make defamatory statements concerning the character or conduct of the discharged employee.[24] A decision of the state unemployment compensation agency to the contrary is likely to be viewed by prospective employers with considerable skepticism.

Given the favored position of employers, it appears likely that relatively few suits are brought by discharged persons who were employed for an indefinite period of time and hence under a contract terminable at will. The reported cases do, however, give an impression of the manner in which employers use the power to terminate employment for any reason, even a bad reason. Thus, according to the allegations in a leading case, a business agent of a union was discharged for failure to commit perjury before a state legislative committee.[25] Employees have alleged, and in some cases it has been found, that they had been discharged for filing workmens' compensation claims,[26] for making themselves available for jury duty,[27]

19. The events set out are essentially those related to me by a student concerning the termination of the employment of his mother by one of the largest retail chains in the United States.

20. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113, at 766 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS §§ 558(b), 577, Comment b (1977).

21. *See* W. PROSSER, *supra* note 20, § 115, at 789-90; RESTATEMENT (SECOND) OF TORTS §§ 593, 596, Comment c (1977).

22. *See* RESTATEMENT (SECOND) OF TORTS, Special Note on Conditional Privileges and the Constitutional Requirement of Fault, at 259-61 (1977); *id.* § 600.

23. Pirre v. Printing Devs., Inc., 432 F. Supp. 840, 842 (S.D.N.Y. 1977).

24. RESTATEMENT (SECOND) OF TORTS § 595, Comment c (1977).

25. Petermann v. International Bhd. of Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), *noted in* 14 RUTGERS L. REV. 624 (1960).

26. Leach v. Lauhoff Grain Co., 51 Ill. App. 2d 1022, 366 N.E.2d 1145 (1977); Kelsay v. Motorola, Inc., 51 Ill. App. 3d 1016, 366 N.E.2d 1141 (1977); Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976).

27. Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

for refusal to vote as directed in a public election,[28] for refusal to falsify medical records in a psychiatric service,[29] for filing an accusation with a state department of investment charging unlawful use of corporate funds,[30] for reporting to a friend and officer of a corporation that metal tubing had not been adequately tested for the purposes for which it was being marketed,[31] for a married woman's refusal to "go out with" her foreman after finishing the night shift,[32] for refusal to comply with a supervisor's demands for a sexual relationship,[33] or for attempting both within and outside the corporate structure to correct instances of misleading if not fraudulent public statements concerning the employer's activities.[34]

Other cases do not suggest such a patent conflict with public policy, but nonetheless present factual situations in which the equities call for relief for the employee or at least for some review of the basis for the employer's action. In one case the plaintiff had been a supervisory employee and was discharged one day short of completing thirty years of service, which would have qualified him for a pension. He was discharged despite an agreement made at the time he became a supervisor that if his services as a supervisor ever became unsatisfactory he would be permitted to return to his previous bargaining unit job.[35] An employee who had worked for the same employer for twenty-eight and one-half years sought protection from a termination that he claimed was based upon a conspiracy to produce an erroneous medical report, even though his long service with that employer had rendered him unsuitable for employment at an equivalent level elsewhere.[36] And it is understandable that employees have sought judicial relief from a discharge because of a decision to enter a night law school[37] or a refusal to take a version of a lie detector test.[38]

It is probably true that most employers do not misuse their power over employees working under employment contracts terminable at will. A business concern for maintaining good personnel relations dictates that decisions not be made on an arbitrary, irrational, or unfair basis. But one of the functions of law is to govern the undesirable conduct of those who

28. Bell v. Faulkner, 75 S.W.2d 612 (Mo. Ct. App. 1934).

29. Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1977).

30. Marin v. Jacuzzi, 224 Cal. App. 2d 549, 36 Cal. Rptr. 880 (1964).

31. Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974).

32. Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

33. Tomkins v. Public Serv. E. & G. Co., 568 F.2d 1044 (3d Cir. 1977); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Garber v. Saxon Business Prods., Inc., 552 F.2d 1032 (4th Cir. 1977); Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975). *See* Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123 (1977).

34. Percival v. General Motors Corp., 400 F. Supp. 1322 (E.D. Mo. 1975), *aff'd*, 539 F.2d 1126 (8th Cir. 1976).

35. United Steelworkers Local No. 1617 v. General Fireproofing Co., 464 F.2d 726 (6th Cir. 1972).

36. Pearson v. Youngstown Sheet and Tube Co., 332 F.2d 439 (7th Cir. 1964).

37. *See* Scroghan v. Kraftco Corp., 551 S.W.2d 811 (Ky. Ct. App. 1977).

do not conform to civilized standards of conduct. It is therefore appropriate to give consideration to the dimensions of the problem created by the prevailing rule concerning contracts of employment terminable at will.

II. DIMENSIONS OF THE PROBLEM

In 1976 there were approximately 96,900,000 persons employed in the work force in the United States,[39] of whom approximately 80,000,000 were employed in the nonagricultural work force.[40] Union activity receives considerable attention in the news media, but in 1976 only 21,000,000 persons were members of the unions,[41] and somewhat less than twenty-eight percent of the nonagricultural work force worked under the terms of a collective bargaining agreement.[42] Those who did work under the terms of a collective bargaining agreement were likely to enjoy contractual protection against unjust discharge since approximately ninety-five percent of the collective bargaining agreements contain grievance and arbitration provisions,[43] and approximately eighty percent of the agreements specifically require that there be cause or just cause for a discharge.[44] Employers have the burden of proving just cause for discharge or discipline in cases that reach the stage of arbitration.[45] Employees of the United States government constitute another group that enjoys job protection. In 1976 there were 2,879,000 civilian employees of the federal government, who constituted about three percent of all persons employed in the United States.[46] Over ninety percent of these federal civilian employees are tenured and enjoy the procedural safeguards that Congress and the Civil Service Commission have provided against "adverse action" taken by supervisors.[47] In 1976 there were 12,169,000 state and local government employees, of whom 3,343,000 were state employees.[48] Reliable information apparently is not available on how many of these

38. *See* Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (1977).

39. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1977, at 387, Table 625 (98th ed. 1977) [hereinafter cited as STATISTICAL ABSTRACT 1977].

40. *Id.* at 400, Table 654.

41. *Id.* at 418, Table 678.

42. U. S. BUREAU OF LABOR STATISTICS, DIRECTORY OF NATIONAL UNIONS AND EMPLOYEE ASSOCIATIONS 1973, at 72. Union members constituted less than 23% of the total workforce. *Id.*

43. U. S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1425-1, MAJOR COLLECTIVE BARGAINING AGREEMENTS: GRIEVANCE PROCEDURES (1965), *summarized in* [1965] LAB. REL. YEARBOOK (BNA) 34-35.

44. 2 COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) 40:1 (Dec. 28, 1978). Ninety-six percent of the contracts in the BNA sample had provisions relating to discharge and discipline.

45. F. Elkouri & E. Elkouri, *supra* note 13, at 621.

46. STATISTICAL ABSTRACT 1977, *supra* note 39, at 268, Table 441.

47. Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196, 198, 209 (1973).

48. STATISTICAL ABSTRACT 1977, *supra* note 39, at 306, Table 489.

employees have civil service-type protection, but a conservative estimate would be that more than half of them are so protected.[49] There is likewise no reliable information concerning the number of persons employed under contracts with a fixed term, but common observation leads to the conclusion that the number constitutes but a small percentage of the total work force. It therefore appears that between thirty-five and forty percent of the nonagricultural work force enjoys some substantial job protection against discharge without just cause, and between sixty and sixty-five percent of that work force is employed under contracts of employment that are terminable at will and hence terminable without cause.

Another weakness in statistics concerns the frequency with which discharge from employment occurs and the frequency with which a neutral observer would conclude that the discharge was not for just cause. In its 1976 fiscal year the Federal Mediation and Conciliation Service (FMCS) provided parties with panels from which an arbitrator could be selected in 22,090 cases and made 10,509 appointments of arbitrators.[50] In 1977 the American Arbitration Association (AAA) provided parties with panels of arbitrators in 14,661 cases.[51] Because of settlements reached by the parties, only 5,550 of the 10,509 appointments made by the FMCS in fiscal 1976 resulted in an arbitrator's award,[52] but 2,150 of the cases decided concerned discharge or discipline.[53] Assuming that the same proportion of AAA cases for which panels are submitted result in an award and relate to discharge or discipline, it would appear that approximately 3,500 discharge or discipline cases are decided annually by arbitrators appointed by the FMCS or the AAA. Again, there are no reliable statistics, but it appears likely that there are at least as many cases heard by arbitrators who either serve as permanent arbitrators or are selected on an ad hoc basis by the parties without use of an appointing service. If so, each year produces around 7,000 cases of discharge or discipline of employees that labor union officers believe to be unjustifiable and hence worthy of arbitration. The judgment of the union officers receives vindication from arbitrators, who overturn the management decision in somewhat more than half of the cases.[54] It would appear likely that employers who know that their decisions to discharge are subject to review in arbitration proceedings would be much more careful about discharging an employee than would

49. "All of the states now have at least some of their employees under a merit system due to the personnel requirements of the Social Security Act of 1939, with 34 states and practically all cities over 100,000 population having comprehensive civil service laws." Helburn & Bennett, *Public Employee Bargaining and the Merit Principle*, 23 LABOR L.J. 618, 621 (1972).

50. FEDERAL MEDIATION AND CONCILIATION SERVICE, 29TH ANNUAL REPORT, FISCAL 1976 AND TRANSITION QUARTER, at 49, Table 20 (1976).

51. Note, *Study by Professors Julius Rezler and Donald Petersen, Loyola University of Chicago on "Strategies of Arbitrators Selection,"* DAILY LAB. REP. No. 123, at D-1 (June 26, 1978).

52. *Id.* at 55, Table 26.

53. *Id.* at 56, Table 27.

54. Jennings & Wolters, *Discharge Cases Reconsidered*, 31 ARB. J. 164, 169, Table 1 (1976). The management decision was sustained in only 44% of the discharge cases studied.

employers not subject to such constraint.[55] If so, at least 12,000 to 15,000 employees are discharged or disciplined each year under circumstances that would have led to arbitration if they had been working under a collective bargaining agreement and represented by a union. At least half of the discharges would have been found to be unjustifiable. There are no reliable statistics concerning the number of discharges that are withdrawn as a result of negotiations in the grievance procedures established by collective bargaining agreements, but if negotiation of discharge and discipline grievances produces settlements at a rate comparable to that experienced in other dispute settlement negotiations, the number of discharge and discipline cases in the nonunionized sector that would have been subjected to that process in a collective bargaining relationship could be as high as 300,000 a year. Whatever the exact number, those employees have no legal remedy because their employment was at will and terminable without cause. The problem thus is substantial and causes severe injury to many persons each year.

III. THE IMPORTANCE OF THE EMPLOYMENT INTEREST

The employment relationship has long received legal protection. The employers' interest in that relationship found early protection in the fourteenth century Statute of Laborers, which required able-bodied persons not otherwise employed to perform services at regulated rates of pay, and also provided remedies for employers whose servants were enticed away by others.[56] The latter protection of an employer's interest continues today as a species of the action for interference with contractual relations,[57] and, subject to a limited number of privileges,[58] the protection is available even though the contract of employment is at will.[59] Indeed, until the enactment of the Norris-LaGuardia Act[60] and other contemporary labor legislation, the legal protection accorded an employer's interest in a contract of employment, even though terminable at will, provided a potent weapon against union organizational activities.[61] In that

55. A study of arbitration discharge cases in which cases decided between January 1942, and August 1951, were compared with cases decided between September 1951, and March 1956, showed a higher rate of affirmance of management decisions in the latter period, which the author attributed in part to improved managerial discipline administration. Holly, *Consideration in Discharge Cases*, 80 MONTHLY LAB. REV. 684 (1957).

56. *See* W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 459-64 (3d ed. 1923). The Statute of Laborers was enacted in 1350 to protect employers and society from the adverse effects of the labor scarcity following the Black Death plague. *Id.*

57. *See* RESTATEMENT OF TORTS § 766, Comment b (1939); W. PROSSER, *supra* note 20, § 129, at 927-31.

58. *See* RESTATEMENT OF TORTS §§ 767-774 (1939); W. PROSSER, *supra* note 20, § 129, at 942-46.

59. *See* RESTATEMENT OF TORTS § 766(b), Comment c (1939); W. PROSSER, *supra* note 20, § 129, at 932-33.

60. Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-115 (1976)).

61. The technique was known as a "yellow dog contract": an agreement that the employee would not become a member of a union while employed by the employer was made a part of the employment contract that was terminable at will. *See* Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 239-40, 251 (1917).

era of judicial hostility to labor unions, the Supreme Court of the United States recognized as a constitutionally protected right an employer's interest in entering into contracts of employment terminable at will.[62]

The employee's interest in the employment relationship has also long received legal protection. English law provided at an early date that if the hiring of a servant was general, without any particular time limit, the law would construe it to be a hiring for a year.[63] Moreover, no master could "put away his servant" during the term of employment "unless upon reasonable cause, to be allowed by a justice of the peace."[64] Nor could the master terminate the relationship at the end of the term "without a quarter's warning."[65] Apprentices could be discharged "on reasonable cause" upon the request of the master at the quarter session courts.[66] At this time, laborers hired by the day or the week who did not live in the house of the master apparently did not enjoy these protections.[67] But during the nineteenth century the English common law developed a rule that, unless otherwise specifically agreed, employment could be terminated only after a notice period fixed by the custom of the trade, or a reasonable time if there were no custom, unless there was cause for summary dismissal.[68]

Since 1971, employees in the United Kingdom have enjoyed statutory protection against unfair dismissal from employment, dismissals being unfair unless based on the employee's capability, qualifications, conduct, "redundancy," or other substantial reason.[69] The protection extends to unjustified selection for dismissal in the event of "redundancy,"[70] and even in proper cases of dismissal for "redundancy," statutory requirements exist for advance notice and lump-sum compensation.[71] The English

62. Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161, 175-76 (1908).

63. 1 W. BLACKSTONE, COMMENTARIES *425.

64. *Id.* at *425-26. A servant might likewise leave a master upon allowance by a justice of the peace.

65. *Id.*

66. *Id.* at *426. An apprentice might also be discharged upon his request at the quarter sessions court.

67. *Id.* at *426-27. Such persons could be compelled to accept work if able to perform it. *Id.* For a time in the seventeenth century the King's Council required employers to provide work in order that there be no unemployment. 4 W. HOLDSWORTH, *supra* note 56, at 380-81.

68. 2 J. CHITTY, CONTRACTS §§ 103, 1105 n.22 (22d ed. J. Morris 1961); F. MEYERS, OWNERSHIP OF JOBS: A COMPARATIVE STUDY 21-22 (1964).

69. Industrial Relations Act 1971, §§ 22, 24, 41 HAL. STAT. 2062, 2088, 2090, 2091 (1971 Cont. Vol.). *See* INTERNATIONAL LABOUR CONFERENCE, 59TH SESS., REPORT III (PART 4B), GENERAL SURVEY OF THE REPORTS RELATING TO THE TERMINATION OF EMPLOYMENT RECOMMENDATION, 1963, No. 119, at 129-34 (1974); Summers, *Individual Protection, supra* note 8, at 513-15. The protection has been continued in the Trade Union and Labour Relations Act 1974, §§ 4, 6, 44 HAL. STAT. 1766, 1787, 1789, 1790 (1974 Cont. Vol.). *See* Covington, *American and British Employment Discrimination Law: An Introductory Comparative Survey*, 10 VAND. J. TRANS. L. 359, 367-75 (1977).

70. Trade Union and Labour Relations Act 1974, § 7(7), 44 HAL. STAT. 1766, 1790 (1974 Cont. Vol.).

71. The time period of the notices, which must be given to any person continuously employed for thirteen weeks or more, range from one to eight weeks, depending upon the person's length of service. Contracts of Employment Act 1972, § 1, 42 HAL. STAT. 310, 311 (1972 Cont. Vol.). Compensation is payable to persons who have been continually employed for at least 104 weeks. The amount of

developments convincingly demonstrate that common-law traditions do not dictate the absence of protection from unjust dismissal that characterizes American law.[72]

The failure of American law to protect against unjustifiable dismissal is also out of keeping with standards of other economically developed countries, as well as countries with a lower level of development. In 1960 the Governing Body of the International Labour Office placed a series of questions concerning termination of employment before the member states of the organization. One question was whether the conference should adopt the position that no dismissal should take place without a valid reason.[73] Of the sixty-four countries that responded, only Greece and Japan replied in the negative, while Switzerland reserved decision.[74] To the question whether an employee who believes he was unjustly discharged should be able to challenge his dismissal before a neutral body,[75] fifty-nine of the sixty-five responding countries gave an affirmative answer.[76] In France an employer can be held liable for "abuse of right" in terminating employment; in Germany an employer is liable for a "socially unwarranted dismissal"; in Sweden an employer must have "objective cause" for dismissal from employment.[77] Although responses of member states to a more recent inquiry of the ILO concerning practices that relate to termination of employment may perhaps be self-serving, it nevertheless gives one pause to read, for example, that in Algeria the grounds for dismissal must be connected with the capacity or conduct of the worker or the economic circumstances of the employer;[78] that in Egypt a worker dismissed without justification is entitled to damages;[79] that in Italy a worker may be dismissed only for just cause or valid reasons;[80] or that in Luxembourg a worker who shows that he has been dismissed without a valid reason may recover damages.[81]

---

compensation is related to weekly pay and length of service and age. Redundancy Payments Act 1965, §§ 1, 8, 12 HAL. STAT. 236, 238, 245, 287 (3d ed.).

72. *See* note 4 and accompanying text *supra.*

73. INTERNATIONAL LABOUR CONFERENCE, REPORT VII(1), *supra* note 7, at 65.

74. INTERNATIONAL LABOUR CONFERENCE, 46TH SESS., REPORT VII(2) ON TERMINATION OF EMPLOYMENT (DISMISSAL AND LAY-OFF) 185 (1962) [herinafter cited as INTERNATIONAL LABOUR CONFERENCE, REPORT VII(2)]. In assessing the significance of Japan's response, it should be noted that in Japan, a company is regarded as a familial organization, in which regular employees have lifetime employment and discharges or dismissals are relatively rare. *See* R. COLE, JAPANESE BLUE COLLAR: THE CHANGING TRADITION 12, 113-22, 171-89 (1973); Pendergrass, *Practicability of American Personnel Concepts in Japan,* in MANUAL OF EMPLOYMENT PRACTICES IN JAPAN 34 (American Chamber of Commerce in Japan Employment Comm. ed. 1975).

75. INTERNATIONAL LABOUR CONFERENCE, REPORT VII(1), *supra* note 7, at 65 Question 8.

76. INTERNATIONAL LABOUR CONFERENCE, REPORT VII(2), *supra* note 74, at 188.

77. Summers, *Individual Protection, supra* note 8, at 508-19. This article presents a helpful summary of the law on termination of employment in each of the countries and in Great Britain as well.

78. INTERNATIONAL LABOUR CONFERENCE, 59TH SESS., REPORT III (Part 2), TERMINATION OF EMPLOYMENT, SUMMARY OF REPORTS ON RECOMMENDATION NO. 119, at 2 (1974).

79. *Id.* at 39.

80. *Id.* at 67.

81. *Id.* at 77-78.

Of course, employees in the United States are protected, as are employers, from interference with contractual relations under existing principles of tort law.[82] In the typical case, the defendant sought to obtain advantage over a person by persuading his employer to discharge him unless he took desired action.[83] Thus, a third party is held liable for persuading an employer to do that which the employer may do with impunity, demonstrating that the lack of protection against unjust dismissal lies not in the unimportance of employment at will, but in an assumed importance of preserving an employer's freedom to direct and control a work force.

IV. CONSTITUTIONAL PROTECTION OF THE EMPLOYMENT INTEREST

The fifth and the fourteenth amendments to the federal constitution in tandem prohibit any governmental action, whether federal or state, that deprives "any person of life, liberty, or property, without due process of law."[84] The fourteenth amendment also provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws,"[85] and the strictures imposed by that clause have likewise been held applicable to actions taken by the federal government.[86] A necessary element of any alleged due process or equal protection violation is that the challenged acts can be characterized as governmental action rather than purely private conduct.[87] Thus, in determining whether a doctrine that permits an employer under a contract terminable at will to discharge employees without cause is violative of the foregoing due process and equal protection clauses, there must first be an examination whether the continued implementation of that principle has been the result of federal and state intervention in the regulation of the employment relationship.

A. *Governmental Intrusion into the Employment Relationship*

1. Federal and State Regulation of the Employment Relationship

The employment relationship is subject to comprehensive and detailed regulation by the federal, state, and local governments. In

82. *See* notes 57-59 *supra.*

83. *See* W. PROSSER, *supra* note 20, § 129, at 946.

84. U.S. CONST. amend. V provides in part: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1 provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The protection of these clauses extends only to action taken by the federal and state governments, and does not extend to purely private action. Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

85. U.S. CONST. amend. XIV, § 1.

86. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Bolling v. Sharpe, 347 U.S. 497 (1954).

87. The Civil Rights Cases, 109 U.S. 3, 11 (1883).

particular, government regulation extends to decisions to discharge or discipline employees, and prohibits discharge or discipline for numerous reasons.[88] Title VII of the Civil Rights Act of 1964[89] makes it an unlawful employment practice to discharge any individual because of that individual's race, color, religion, sex, or national origin. The federal Age Discrimination in Employment Act[90] protects persons between the ages of forty and seventy against discrimination in employment. A very common form of age discrimination is, of course, termination of employment for a supposed lower level of efficiency and productivity. Most states have laws that prohibit discrimination in employment on the basis of race, color, sex, or national origin.[91] Many states also have laws prohibiting discrimination on the basis of other attributes, such as handicap or marital status.[92] Cities and other governmental subdivisions have adopted similar prohibitions against discrimination in employment on the basis of race, color, religion, sex, or national origin, the effectiveness of which is indicated by the fact that in some instances the Equal Employment Opportunity Commission defers assertion of its jurisdiction for a period of sixty days so that thirty-one local agencies may first entertain those disputes.[93] As of March 1978, there were forty-two municipalities that had enacted ordinances to prohibit discrimination in employment on the basis of sexual orientation.[94]

Since 1935, the National Labor Relations Act (NLRA) has prohibited discrimination against employees or prospective employees to encourage or discourage membership in labor unions in industries affecting interstate commerce.[95] Such discrimination had earlier been prohibited by the Railway Labor Act[96] with respect to employees or employers covered by that law. Similar laws applicable to private employer have been adopted in fifteen states.[97] Thirty-two states have adopted statutes conferring upon public employees the right to organize, thereby providing protection against discriminatory discharges for those public employees who previously did not enjoy the protection of a civil service system.[98] Statutes

88. *See* Summers, *Individual Protection, supra* note 8, at 491-99.

89. 42 U.S.C. § 2000e-2 (1976). Discrimination on the basis of race is also prohibited by the post-Civil War Civil Rights Act, 42 U.S.C. § 1981 (1976).

90. 29 U.S.C. §§ 621-634 (1976).

91. 8A LAB. REL. REP. (BNA) 451:101-105 (April 1978).

92. *Id.*

93. 29 C.F.R. § 1601.54 (1977). The Equal Employment Opportunity Commission is required by statute to defer to state or local agencies that are authorized to remedy an alleged unfair employment practice, 42 U.S.C. § 2000e-5(c) (1976).

94. Bradbury, *Young Lawyer Trustees Oppose Initiative 13*, SEATTLE-KING COUNTY BAR ASS'N BULL. 2 (April 1978).

95. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-169 (1976)).

96. 45 U.S.C. §§ 151-188 (1970). *See* Texas & N.O.R.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548 (1930).

97. 4 LAB. REL. REP. (BNA) 1:42 (Jan. 29, 1979).

98. *Id.* at 1:46.

protecting employees from discharge for union activities obviously require review of an employer's decision to discharge or discipline an employee for the purpose of determining whether that decision was motivated by consideration of the employee's union activities; they may also result in condemnation of employer decisions that are viewed as inherently destructive of employee organizational rights.[99] A measure of the significance of such regulation can be obtained from the fact that in its 1977 fiscal year the National Labor Relations Board (NLRB) alone received 16,697 charges against employers alleging illegal discrimination or discharge, and awarded back pay of over seventeen million dollars to 7,552 employees.[100]

The Selective Service Act of 1940 required reinstatement of veterans to their former positions of employment after discharge from military service, specifically providing that a person so reinstated "shall not be discharged from such position without cause within one year after such restoration."[101] The Consumer Credit Protection Act provides another specialized protection against discharge, prohibiting discharge because of a wage garnishment "for any one indebtedness."[102] Several states have enacted laws prohibiting discrimination against employees because of their political activities,[103] because of acceptance of jury duty,[104] or for refusal to take lie detector tests.[105] All states have laws protecting employees from employment believed to be dangerous because of physical conditions,[106] and many have protective laws concerning the length of the workday, the age or sex of the employee, or the time of day at which work is to be performed.[107] A familiar, although not universal, provision in such statutes is to make it illegal for an employer to discharge or otherwise discriminate against an employee for having invoked the protection of such a law.[108]

The federal government by statute and by executive order[110] has imposed prohibitions against various types of discrimination in employment upon contractors doing business with the government. Some state

99. *See* R. GORMAN, LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 337-38 (1976).

100. 42 NLRB ANN. REP. 11, 15 (1977).

101. Selective Training and Service Act of 1940, ch. 720, § 6(C)(1), 54 Stat. 885.

102. 15 U.S.C. § 1674(a) (1976).

103. 4 LAB. REL. REP. (BNA) 1:45 (Jan. 29, 1979).

104. *Id.* at 1:42.

105. *Id.* at 1:42-43.

106. *Id.* at 1:39. Arizona and Mississippi apparently make requirements only with respect to certain facilities.

107. *Id.* at 1:41, 1:37, 1:11-14, 1:44.

108. *E.g.*, CONN. GEN. STAT. ANN. § 31-379 (West Supp. 1978); WASH. REV. CODE ANN. § 49.17.160 (Supp. 1978).

109. Vocational Rehabilitation Act of 1973, Pub. L. No. 93-112, § 503, 87 Stat. 393 (codified at 29 U.S.C. § 793 (1976)); Veterans Readjustment Act of 1974, Pub. L. No. 92-540, § 402, 86 Stat. 1097 (codified at 38 U.S.C. § 2012 (1976)).

110. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 compilation) (nondiscrimination in employment); Exec. Order No. 11,141, 3 C.F.R. 179 (1964-1965 compilation) (age discrimination).

governments have done the same.[111] Among the prohibited discriminations are discharge or discipline based on specified characteristics.

Judicial developments under the NLRA and the Railway Labor Act have extended the protection of employees considerably beyond the prohibition of discharge or discipline by employers because of union activities. The Supreme Court has found in those statutes a duty of fair representation that runs from a union to all employees in a represented bargaining unit.[112] Indeed, the duty runs even to employees not represented by a union.[113] Breach of the duty of fair representation constitutes an unfair labor practice under the NLRA, with the consequence that an aggrieved employee is able to obtain the investigatory and legal services of the NLRB.[114] This is of immediate significance when the claimed breach of the duty of fair representation is the union's failure to process properly a grievance concerning discharge or discipline. If the violation is found to have occurred, the NLRB may require the union to provide the proper services.[115]

The basic duty of fair representation is violated when a union engages in conduct that is arbitrary, discriminatory, or in bad faith.[116] The duty does not require a union to process all grievances of represented employees, but it may not perform its duty with respect to grievances in "a perfunctory fashion."[117] A union must handle grievances honestly and in good faith, using the contractual grievance arbitration machinery with some minimum level of integrity.[118] While there is some disagreement in the cases, it appears likely that unions will be held liable for negligence in the investigation and processing of an employee's grievance.[119]

Both the judicial remedy of a law suit and the administrative remedy of a NLRB proceeding are available for breach of the duty of fair

---

111. *See* Associated Gen. Contractors of Mass., Inc. v. Altschuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974).

112. For a general discussion of the duty of fair representation, see R. GORMAN, *supra* note 99, at 695-728. By basing the duty on the implications of the statutory scheme, the Court avoided deciding whether conferral of power as bargaining representative was constitutional only if the use of that power were subjected to constitutional standards. *See* the concurring opinion of Justice Murphy in Steele v. Louisville & N.R.R., 323 U.S. 192, 208 (1944) (Murphy, J., concurring).

113. Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952). The result of the decision was to prohibit a union of white trainmen from enforcing an agreement with an employer that would have caused the discharge of black porters.

114. Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). The filing of an unfair labor practice charge triggers the investigatory and enforcement powers of the Board under § 10 of the NLRA. 29 U.S.C. § 160 (1976). It should be noted, however, that the doctrine promulgated by the NLRB in *Miranda Fuel* has met a mixed reception in the courts, and its validity has been subject to question. *See* Modjeska, *The Uncertain* Miranda Fuel *Doctrine*, 38 OHIO ST. L.J. 807 (1977).

115. *E.g.*, United Steelworkers (InterRoyal Corp.), 223 N.L.R.B. 1184 (1976); Truck Drivers Local 705 (Associated Transp.), 209 N.L.R.B. 292 (1974), *enforced*, 532 F.2d 1169 (7th Cir. 1976).

116. Vaca v. Sipes, 386 U.S. 171, 190 (1971).

117. *Id.* at 191.

118. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 571 (1976).

119. R. GORMAN, *supra* note 99, at 720; Summers, *The Individual Employee Rights Under the Collective Agreement*, in THE DUTY OF FAIR REPRESENTATION 60 (J. McKelvey ed. 1977).

representation. The federal government has thus become involved in providing remedies for discharge or disciplinary actions that do not have a basis in just cause, requiring at a minimum a judicial or administrative determination whether a union could in good faith have decided that a grievance protesting a discharge did not deserve to be processed. And this governmental involvement arises in cases in which an employer's action has in no way violated federal law, but merely fails to conform with arbitral standards of what constitutes just cause for discharge. It is an involvement with what, except for the development of federal labor law, would have been governed by the common-law rule concerning employment terminable at will.

2. *The Impact of the Civil Rights Act on Managerial Decisions Lacking Business Justification*

The ramps constructed in recent years at sidewalk curbs for the benefit of the handicapped probably receive much greater use by the physically fit riders of bicycles and skateboards than by the handicapped. In somewhat the same manner, the Civil Rights Act of 1964 may afford white members of the work force significant protection against harmful and unjustifiable employer decisions that would be impermissible if directed at minorities. Conceivably, protection against unjustified discharge or discipline may be included in those unexpected benefits.

Decisions under the Civil Rights Act have established that employer practices that have a disparate impact upon members of racial minorities or women constitute unlawful employment practices unless those practices can be justified by business necessity. Included in the practices found to be unlawful because of a lack of business justification have been the requirement of a high school diploma[120] or the passing of various psychological tests[121] to obtain employment. Also found to be unlawful employment practices have been disqualification for employment because of a record of arrests without conviction,[122] because of poor credit records,[123] because of conviction of gambling,[124] or of a crime that is not job-related,[125] because of adverse reports from prior employers if no opportunity is given for rebuttal,[126] or because of failure to meet a minimum height requirement.[127] Probably most employers who learn that they may no longer pursue such a practice with respect to women or

120. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
121. *Id.*
122. Gregory v. Litton Sys., Inc., 472 F.2d 631 (9th Cir. 1972).
123. EEOC Dec. 72-0427, 4 FAIR EMPL. PRAC. CAS. 304 (August 31, 1971).
124. EEOC Dec. 71-2682, 4 FAIR. EMPL. PRAC. CAS. 25 (June 28, 1971).
125. Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975).
126. EEOC Dec. 72-2103, 4 FAIR EMPL. PRAC. CAS. 1169 (June 27, 1972).
127. Dothard v. Rawlinson, 433 U.S. 321 (1977).

members of a racial minority voluntarily give up the practice with respect to all employees and job applicants. Having learned that it does not serve a business purpose, they may be expected to abandon the practice because it creates unnecessary expense. The administrative inconvenience of maintaining two parallel personnel policies would also urge abandonment of the practice. But should employers refuse to abandon the suspect practice with respect to white employees, the decision of the Supreme Court in *McDonald v. Santa Fe Trail Transportation Co.*[128] emphatically indicates that the refusal would constitute a violation of Title VII and section 1981 of Title 42 of the United States Code.

In *McDonald v. Santa Fe Trail Transportation Co.*, three union employees, two white and one black, were charged by their employer with misappropriation of property carried for a Santa Fe customer. The two white employees were discharged; the black employee was not. The Supreme Court held that the discharges of the white employees constituted racial discrimination that violated both Title VII of the Civil Rights Act and section 1981.[129] It further held that the union could be liable under Title VII for its failure to obtain for the white employees it represented the same consideration that it obtained for the black employee.[130] Of particular interest for present purposes is the Court's statement that "[w]hile Santa Fe may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be 'applied, alike to members of all races,' and Title VII is violated if, as petitioners alleged, it was not."[131]

There is even less reason to permit an employer to discriminate racially with respect to invalid job criteria than there is with respect to what could arguably be valid cause for discharge, such as theft. It follows in almost all cases that, if a test or other criterion may not be used with respect to the employment of a black for lack of validation or business justification, it may not be used against a white without constituting prohibited discrimination. Possibly some tests with strong cultural biases might have a disparate impact on racial minorities, yet would be valid predictors of the job performance of whites. This would seem to be a matter of proof for the employer—a proof which could be produced only if the tests of other criteria had been differentially validated by race.[132] In almost all cases differential validation will not be possible,[133] and whites

128. 427 U.S. 273 (1976).

129. *Id.* at 279, 296.

130. *Id.* at 285.

131. *Id.* at 283.

132. Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures, issued on Nov. 24, 1976, required differential validation for minority and nonminority groups wherever technically feasible. 29 C.F.R. § 1607.5(b)(5) (1977). There was no such guideline concerning cause for discharge.

133. The technical standards of the Proposed Uniform Guidelines on Employee Selection Procedures do not require differential validation. Proposed Rules § 14, 42 Fed. Reg. 65,542, 65,546-49 (Dec. 30, 1977). The American Psychological Association has taken the position that the hypothesis

will therefore benefit from the protection that racial minorities enjoy against employer practices not shown to advance the employer's business interest.

Indeed, Professor Blumrosen has suggested that combination of *McDonald v. Santa Fe Trail Transportation Co.* with another Supreme Court decision under the Civil Rights Act of 1964 may produce a requirement of just cause for the discharge or discipline of all employees, without regard to race or sex.[134] At the least, the combination creates a strong force for movement in that direction. In *McDonnell Douglas Corp. v. Green*[135] the Supreme Court turned its attention to what a plaintiff must prove to establish a prima facie case of racial discrimination under Title VII. The Court said:

> This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[136]

When a plaintiff has satisfied the requirements for establishing a prima facie case, the burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for rejection of the plaintiff.[137] A recent per curiam decision of the Court indicates that such "articulation" can be accomplished with less evidence than would be required to prove the absence of a discriminatory motive.[138] But if the employer does rebut the prima facie case with such an explanation, the plaintiff must be given an opportunity to prove that the cause asserted was but a pretext for racially motivated discrimination.[139] Only slight modification need be made in this formula to govern cases in which the discharge of a formerly satisfactory employee is alleged to have occurred because of discrimina-

---

underlying the concept of differential validation needs extensive research; in an amicus brief filed with the Court of Appeals for the Fifth Circuit, it asserted that when a differential validity test is not feasible a carefully planned test that shows a job relationship for whites will usually hold true for blacks. United States v. Georgia Power Co., 474 F.2d 906, 914 n.8 (5th Cir. 1973). The reported cases concerning employment testing do not appear to contain any examples of differential validation or even attempted differential validation.

134. This particular possibility was first suggested to me by Professor Blumrosen in a conversation, during which he expressed regret that other demands on his time prevented his development of the idea in a law review article. The development that follows here is the author's, for which Professor Blumrosen has no responsibility.

135. 411 U.S. 792 (1973).

136. *Id.* at 802.

137. *Id.*

138. Board of Trustees of Keene State College v. Sweeney, 99 S. Ct. 295 (1978). A five-member majority asserted that the Court's earlier decision in Furnco Constr. Co. v. Waters, 98 S. Ct. 2943 (1978), had made it clear that "articulat[ing] some legitimate, nondiscriminatory reason" would suffice to rebut a prima facie case, and that the Court of Appeals had imposed a heavier burden on the employer than warranted by *Furnco* when it required the employer to prove absence of a discriminatory motive. Four members of the Court insisted that *Furnco* had made no change in the law established by *McDonnell Douglas.*

139. 411 U.S. at 804.

tion, and the courts have shown a willingness to make such modifications.[140]

The Court in *McDonnell Douglas* spoke of rebutting the prima facie case with proof of "some legitimate, nondiscriminatory reason" for rejection of a plaintiff's application, which suggests that the determination will be made only on the basis of an objective evaluation of the validity of the claim. The plaintiff in that case had engaged in an illegal stoppage of traffic to and from the employer's plant, conduct that the Court considered to constitute legitimate cause for refusal of employment when evaluated on an objective basis.[141] The Court recognized, however, that the employer's employment policies and practices might reveal that the reason assigned by the employer for refusing to rehire the plaintiff was pretextual. It therefore would require an employer to be consistent in its use of what was found to be "legitimate reason" for failing to employ an applicant.

The Court did not give specific attention to what would be required in a case in which the trier of fact concluded that, viewed objectively, the reason given by the employer was not a good one but nevertheless was the real basis for the decision. Such a case might arise when the employer could prove that he had used the same irrational reason to disqualify many other applicants, all without regard to race. On a literal reading of the Court's language, the prima facie case would stand and entitle a plaintiff to judgment. This inference is reinforced by the Court's failure to disagree with the lower court's reasoning that refusals based on "subjective" rather than "objective" criteria are entitled to little weight.[142] It is therefore possible that an employer will be held liable under the Civil Rights Act to a member of a racial minority when the criteria used for employment or discharge do not meet objective standards of legitimacy but instead reflect only an erroneous or arbitrary judgment about employment matters.

If a black employee whose work previously was acceptable can place on an employer the burden of proving or articulating that there are objective justifications for discharge, by showing that the employer continued to employ someone in his former job, may a white employee likewise impose such a burden? White employees do not constitute a racial minority, but the decision in *McDonald v. Santa Fe Trail Transportation Co.* does establish that they are a class entitled to protection against racial discrimination. As a matter of inferential reasoning, satisfying the prima facie case leads much more easily to a conclusion that a black was denied employment or discharged because of his race than it would with respect to a white employee for the simple reason that racial discrimination has frequently been practiced against blacks but not against whites. Statistically it is also much more likely that the person who ultimately fills

140. Wilson v. Sealtest Foods Div., 501 F.2d 84 (5th Cir. 1974); Hochstadt v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318 (D. Mass.), *aff'd*, 545 F.2d 222 (1st Cir. 1976).

141. 411 U.S. at 804.

142. *Id.* at 798.

the contested position will be white instead of black. But should not a white who belongs to an unorthodox religious organization, or a white of southern or eastern European ancestry, be entitled to an equally mechanical application of the prima facie case? Can members of racial minorities alone insist upon proof of consistency in the use of objectively valid criteria for employment decisions? More important, can we tolerate a legal system that entitles an employee who is a member of a racial minority to force an employer to prove that a discharge was made for a legitimate reason that it has consistently applied, but denies such protection to a white employee?

3. *State Action and Employment at Will*

More than ten years ago Professor Charles Black correctly said that, viewed doctrinally, the state action cases are "a conceptual disaster area."[143] Professor Tribe has recently concurred in that assessment,[144] a concurrence made even more appropriate by recent opinions of the Supreme Court in which narrow readings have been given to earlier decisions. But those decisions have not been rejected or overruled and are, therefore, apparently available for rereading.

The discussion in the two sections immediately preceding demonstrates that the employment relationship is subject to intensive regulation by both the federal and state governments. Of particular significance is the fact that governmental regulation has become focused on what constitutes justification for termination of employment, with the consequence that employers may no longer discharge employees for reasons that were legally unquestionable a few years ago. As the list of forbidden causes lengthens, the implication is strengthened that there is governmental approval of the remaining causes. Moreover, the courts and the NLRB regularly pass judgment on whether a breach of the duty of fair representation resulted from the manner in which a union processed a grievance concerning a discharge. Finally, the Civil Rights Act of 1964 has caused the courts to determine whether employers had legitimate nondiscriminatory reasons for terminating the employment of members of racial minorities, members of religious or ethnic groups, or women.

Does this intensive regulation of the employment relationship with respect to what constitutes justification for termination of the employment relationship make it appropriate to characterize a private employer's decision to terminate the employment of an employee as an act of the state or federal government? Three recent opinions of the Supreme Court, all authored by Justice Rehnquist, suggest a negative answer. In each of the cases, however, the Court was divided, and, as mentioned above, it did not

---

143. Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

144. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1149 (1978).

overrule prior decisions, which remain as precedents to be reconsidered when the occasion arises.

The most recent of the cases, *Flagg Bros. v. Brooks*,[145] sustained the constitutionality of a provision of the New York Commercial Code that permitted a warehouseman to foreclose a lien by private sale. In this section 1983[146] suit, it was contended that such a sale constituted state action. Justice Rehnquist distinguished the *Sniadach v. Family Finance Corp.*[147] line of cases[148] that had found state action and due process violations in state statutory procedures that allowed creditors to use prejudgment garnishment and replevin remedies without giving the debtor any prior notice and hearing; the basis of the distinction was that the warehouseman's proposed sale presented no overt action by a public official. The sale by the warehouseman was not a function "traditionally exclusively reserved to the State."[149] Nor did the state's refusal to act with respect to the sale convert the warehouseman's decision into state action because, Justice Rehnquist explained, the Court has never held that mere acquiescence in a private action converts it into state action.[150]

The decision in *Jackson v. Metropolitan Edison Co.*[151] rejected a claim that the action of a privately owned public utility in terminating service for failure to pay charges constituted state action for the purposes of a suit under section 1983.[152] The fact that the utility was subject to extensive and detailed regulation did not convert its action into state action.[153] What was required to accomplish that was a sufficiently close nexus between the state and the challenged action.[154] That nexus was not present, although the state had conferred a monopoly on the utility,[155] the utility provided an essential public service,[156] and the state had not disapproved of the tariff provision permitting the challenged termination.[157] The Court's earlier decision in *Burton v. Wilmington Parking Authority*,[158] finding state action in the racially discriminatory practice of the private lessee of restaurant space in a public building, was not considered apposite. That case, Justice Rehnquist explained, presented a

145. 436 U.S. 149 (1978).

146. 42 U.S.C. § 1983 (1976).

147. 395 U.S. 337 (1969).

148. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Kahn v. Shevin, 407 U.S. 67 (1972). *See* notes 192-97 and accompanying text *infra*.

149. 436 U.S. at 157.

150. *Id.* at 164.

151. 419 U.S. 345 (1974).

152. 42 U.S.C. § 1983 (1976).

153. 419 U.S. at 350.

154. *Id.* at 351.

155. *Id.* at 351-52.

156. *Id.* at 352-53.

157. *Id.* at 354-57.

158. 365 U.S. 715 (1961).

symbiotic relationship in which the state had so far insinuated itself into a position of interdependence with the restaurant operator that it was a joint participant in the enterprise.[159]

The decision in *Moose Lodge No. 107 v. Irvis*[160] rejected the claim that the action of a private club in refusing to serve alcoholic beverages to a black guest constituted state action because of the detailed regulation to which the state subjected those licensed to sell liquor. It did recognize the right of the guest to an injunction against enforcement of a liquor control board regulation requiring private clubs to adhere to all provisions of their constitutions and bylaws, because such enforcement would require compliance with a bylaw denying service to nonwhite guests. The *Burton* case was again distinguished as concerning a symbiotic relationship,[161] and the detailed nature of the regulation was said to lack significance because it did not encourage racial discrimination.[162]

In assessing the impact of these three recent decisions on the question at hand, it should first be noted that state supreme courts are under no compulsion to adopt the standards set out by Justice Rehnquist for the purpose of determining what constitutes state action within the meaning of the due process clauses of state constitutions. Moreover, they are free to read the earlier state action decisions to determine whether, for the purposes of state constitutional law, Justice Rehnquist properly read the earlier decisions. Presumably the Justices of the United States Supreme Court will also enjoy the freedom exercised by Justice Rehnquist in reading former decisions of the Court.

Unexplored in Justice Rehnquist's opinions is the question whether the lawmaking function of state legislatures and courts constitutes state action that is subject to due process requirements, both substantive and procedural. Conspicuously absent from his discussions of what constitutes state action is an analysis of the decision in *Reitman v. Mulkey*.[163] In that case the Court affirmed the conclusion of the California Supreme Court that enactment of an initiative that incapacitated the state from preventing discrimination in the sale or rental of housing unconstitutionally involved the state in private discrimination in such transactions. In *Flagg Bros.*, Justice Rehnquist did recognize that a state may act through its judiciary as well as through its legislature. Having thus negated the argument that the statutory basis for the foreclosure sale alone constituted state action,[164] he did not continue the analysis to determine whether, as in *Reitman*, judicial action under the statute would involve the state in unconstitutional action. He found it sufficient to express incredulity that mere denial of

159. 419 U.S. at 357-58.
160. 407 U.S. 163 (1972).
161. *Id.* at 175.
162. *Id.* at 176-77.
163. 387 U.S. 369 (1967).
164. 436 U.S. at 165.

judicial relief was sufficient to make the state responsible for private acts that injured property. Yet in *Reitman*, plaintiffs sought relief against landlords who had refused to rent an apartment to them; it was denial of that relief in the courts that was the gravamen of plaintiffs' claim that their rights under the fourteenth amendment had been violated.[165]

Of course, *Reitman v. Mulkey* did not deal with "mere acquiescence" in private action. Adoption of the initiative amending the state constitution was a political act performed with the design and intent to overturn state laws that previously prohibited discrimination in the sale or renting of housing;[166] the change in the law was viewed by the state supreme court as encouraging private discrimination.[167] The action had greater significance than mere repeal of statutes because it conferred constitutional protection on those who would discriminate.[168] But these distinguishing facts did not provide infallible proof of state involvement. Instead, the majority in *Reitman v. Mulkey* reaffirmed the necessity of " 'sifting facts and weighing circumstances' on a case by case basis" to determine whether a subtle involvement of the state in private action constituted state action.[169] The majority then referred to several previous decisions in which it had concluded that a permissive state law constituted authorization to discriminate.[170]

There are by now many facts to be "sifted" concerning governmental supervision and regulation of the termination of employment by private employers. Given the extent of that regulation and the "nexus" it establishes with discharge it becomes increasingly difficult to conclude that failure to prohibit discharges without cause or for a bad cause is merely an acquiescence in the private use of power. Failure to provide protection against unjust discharge constitutes governmental policy that may properly be viewed as permitting and thus condoning, if not explicitly approving, arbitrary, discriminatory, invidious, or unjust treatment of persons in employment. Moreover, an inquiry limited by notions of "mere acquiescence" rests on a distinction between misfeasance and nonfeasance—a distinction as wooden and unacceptable as the "right-privilege" distinction that the Court has abandoned as a means of determining whether an important interest has received the protection under the fourteenth amendment to which it is entitled.[171]

The inactivity of both courts and legislatures with respect to the problem of employment at will is the result of the sovereign prerogative to choose to do nothing about it. That choice must be made each time that a

165. 387 U.S. at 372.
166. *Id.* at 374.
167. *Id.* at 375.
168. *Id.* at 377.
169. *Id.* at 378.
170. *Id.* at 379-80.
171. *See* Schware v. Board of Bar Examiners, 353 U.S. 232, 239 n.5 (1957).

judicial remedy is denied an employee who contends that he has been discharged improperly. Realists long ago demonstrated that judges make law, and that the lawmaking function is state action. As Professor Tribe has pointed out, it is of little significance to track down an appropriate official actor in determining whether there has been state action; the important thing is to recognize that a governmental rule is under challenge.[172] The fundamental question is whether federal or state law can validly distribute authority between governmental and private actors as it purports to do.[173]

The opposition to such a broad view of the question of state action is based in part upon the concern that it would characterize as state action all private discriminatory or arbitrary action permitted (that is, not forbidden) by state law.[174] But the law that currently governs the employment relation differs from the broadly permissive law that applies to many other areas. There are, for example, no laws about whom one must have for friends or whom one must receive at home as a social guest. The intensive regulation of the employment relationship has evolved not only because employment ranks high among the interests incorporated in the concept of liberty, but also because the contemporary employment situation typically does not include a personal relationship between employee and employer. Rather, the relationship runs between an employee and a supervisory employee, both of whom work for an impersonal corporation that employs hundreds of persons.[175] The corporation has been organized under and by virtue of a state law.[176] The intensive regulation of the employment relationship reflects a societal concern for actions taken within that relationship and distinguishes it from other areas of law in which permissiveness is the rule. The manifested social concern provides a distinctive basis for the conclusion that private action affecting this relationship can now properly be viewed as governmental action.[177]

On the foregoing basis, it is reasonable to conclude that continued implementation of the rule that an employer under a contract terminable

172. L. TRIBE, *supra* note 144, § 18-6, at 1171.

173. *Id.* § 18-3, at 1158-59.

174. *See, e.g.*, G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 915-17 (9th ed. 1975); Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 475-77 (1962).

175. For example, in 1972, excluding administrative offices, 6.2% of the persons employed in manufacturing worked in establishments with under 20 employees, whereas 57.3% of the persons employed in manufacturing worked in establishments of 250 or more employees. STATISTICAL ABSTRACT 1977, *supra* note 39, at 810.

In contrast, the 276,000 firms engaged in wholesale trade in 1972 had an average of 14.5 paid employees, but more than half of those establishments had sales of less than $1,000,000, which would tend to indicate the median average number of employees per firm would be even lower than the average number of employees. *Id.* at 829.

176. A. BERLE, THE THREE FACES OF POWER 39-50 (1967).

177. *Cf.* Henkin, *supra* note 174, at 500. (Professor Henkin suggests that government involvement in and regulation of the descent of property should provide a basis for invalidating private attempts to discriminate by will). *But cf.* Evans v. Abney, 396 U.S. 435 (1970) (permitting reverter to the estate of a testator who had left property in trust to a city for use as a park "for white people only").

at will may discharge employees without cause is sufficiently bound up with governmental action that the protections of the fourteenth amendment are applicable. The matters left for consideration are whether an individual's interest in the employment relationship is entitled under the fourteenth amendment to the protection of procedural due process guarantees and whether governmental adherence to this rule violates the equal protection clause.

B. *Due Process Protection of the Employment Interest*

In determining whether the minimum procedural safeguards of the due process clause are applicable in the private employment relationship, a threshold question is whether the employee's interest in continued employment that has been abridged with governmental sanction is a "liberty" or "property" interest cognizable under the fourteenth amendment.[178] Supreme Court decisions in the early 1970s expanded the range of "liberty" and "property" interests entitled to due process protection, with the Court conferring protection upon interests that had not previously received constitutional or common-law recognition as rights.[179] In 1972, in *Board of Regents of State Colleges v. Roth*,[180] the Court stated a formula by which the application of due process requirements is determined first by analysis of the "nature of the interest at stake," followed by a determination of what process is "due" if the nature of the interest is found to be within the fourteenth amendment's protection of liberty and property.

That the interest in employment is sufficient to merit constitutional protection under the fourteenth amendment was established early in this century by the Supreme Court's decision in *Smith v. Texas*.[181] In that case the Court invalidated a Texas statute that made it a crime for any person to act as the conductor of a freight train without having previously served for two years as a conductor or brakeman. In its opinion the Court said:

> In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.[182]

That the constitutional protection extended to state regulation of employment at will was soon thereafter made explicit by the Court's decision in *Truax v. Raich*.[183] In *Truax*, an alien working under a contract

178. Arnett v. Kennedy, 416 U.S. 134, 164 (1973).

179. L. TRIBE, *supra* note 144, § 10-9, at 514.

180. 408 U.S. 564, 570-71 (1972).

181. 233 U.S. 630 (1914).

182. *Id.* at 636.

183. 239 U.S. 33 (1915).

of employment at will[184] successfully challenged an Arizona statute prohibiting employers from employing less than eighty percent qualified electors or native-born citizens of the United States. After noting that the plaintiff was entitled to equal protection of the laws even though he was an alien, Justice Hughes said,

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure . . . . If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.[185]

Finding no special state interest with respect to the business in question—operation of a restaurant—the Court concluded that the statute fell under the condemnation of the fourteenth amendment.

A few years later the case of *Meyer v. Nebraska*[186] presented the Court with the prosecution of a teacher of German under a statute prohibiting instruction in languages other than English to students who had not completed the eighth grade. In holding the statute unconstitutional, the Court gave consideration to what is encompassed within the liberty protected by the fourteenth amendment:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, *to engage in any of the common occupations of life*, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[187]

The interest in employment has more recently been recognized as a part of the liberty protected by the fourteenth amendment. In *Morrissey v. Brewer*,[188] the United States Supreme Court held that the due process clause establishes minimum hearing requirements for revocation of parole. In his opinion for the Court, Chief Justice Burger noted that the liberty of a parolee enables him, among other things, to be gainfully employed.[189] In *Bell v. Burson*,[190] invalidating a financial responsibility statute that required suspension of a driver's license without hearing, the court noted that deprivation of the petitioner's license would severely handicap him in the performance of his occupation since, as a clergyman, he was required to travel to three rural communities in Georgia.[191] In *Sniadach v. Family*

184. *Id.* at 38.
185. *Id.* at 41.
186. 262 U.S. 390 (1923).
187. *Id.* at 399 (emphasis added).
188. 408 U.S. 471 (1972).
189. *Id.* at 482.
190. 402 U.S. 535 (1971).
191. *Id.* at 537.

Finance Corp.,[192] the Supreme Court invalidated on fourteenth amendment due process grounds a Wisconsin garnishment statute that permitted the holding of a defendant's wages without a prior hearing. Writing for the majority, Justice Douglas noted: "We deal here with wages — a specialized type of property presenting distinct problems in our economic system."[193] He observed that the taking permitted by the prejudgment garnishment statute might impose tremendous hardship on wage earners with families to support,[194] a hardship that is as easily recognized and as certain to occur when the employment is at will, as when it is for a fixed term. In applying the holding of *Sniadach* to invalidate state statutes permitting replevin of household goods without prior hearing, the Supreme Court majority in *Fuentes v. Shevin*[195] rejected a suggestion that *Sniadach* reflected the special importance of wages.[196] Although the Court has vacillated in its treatment of the *Sniadach* holding, it has emphasized the importance of an individual's interest in wages in determining whether due process protection precludes use of summary procedures.[197]

The Court has not explicitly recognized an interest in public employment as an aspect of "liberty" protected by due process guarantees, as it has done for the interest in private employment. In recent cases concerning state and local employment, the approach of the Supreme Court has been to determine whether an independent source, such as state or local law, gave the employee what might be characterized as a "property" interest protected by the due process clause of the fourteenth amendment. The leading cases are *Board of Regents of State Colleges v. Roth*[198] and *Perry v. Sindermann*,[199] both of which concerned employment at state colleges. In *Roth* the Court considered the claim of a teacher employed at a college at which the appointment system followed did not create expectancies of reappointment. The Court concluded that the teacher did not have a due process right to a statement of the reasons why he was not reappointed or a hearing on the decision not to rehire him because no state law or custom utilized by the university vested him with an entitlement to continued employment that would amount to a "property" interest protected by the due process clause. The majority specifically noted that the state had not made any charge against him when it failed to reemploy him, nor had it imposed a stigma upon him, suggesting that had it done so the case might have involved an interest in "liberty" within the principle of *Truax v. Raich*.[200]

192. 395 U.S. 337 (1969).

193. *Id.* at 340.

194. *Id.*

195. 407 U.S. 67 (1972).

196. *Id.* at 89.

197. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 614-15 (1975) (Blackmun, J., dissenting); Mitchell v. W.T. Grant Co., 416 U.S. 600, 614 (1974).

198. 408 U.S. 564 (1972).

199. 408 U.S. 593 (1972).

200. *See* notes 184-85 and accompanying text *supra*.

In *Sindermann*, the Court held that a proper cause of action was alleged when a state junior college professor contended that the failure of the college to grant him a hearing before refusing to renew his contract deprived him of his fourteenth amendment right to procedural due process. Although he was protected by no formalized tenure system recognized by statute, the plaintiff would be allowed on remand to prove the existence of a de facto tenure system arising out of "an unwritten 'common law' . . . that certain employees shall have the equivalent of tenure";[201] such a de facto tenure system would substantiate his claim of a right to continued employment absent "cause" for termination, which would, in turn, confer on him a "property" interest entitled to procedural due process protection.

The divided opinions of the Justices in *Arnett v. Kennedy*,[202] the most recent case dealing with federal employment, make it impossible to state a majority rationale for the results reached by the Court. At least six of the Justices found that the plaintiff's interest in continued employment by the federal government was a constitutionally protected "property" interest because the act under which he was employed provided for discharge "for cause" only. Thus, that interest in continued employment was entitled to due process protection such that at least minimal procedural requirements attached to the making of the decision to terminate the employment.[203] Minimal due process procedures were required prior to termination even though the employee was entitled to a post-termination trial-type hearing, the result of which could be reinstatement with full back pay.[204] Those six Justices specifically rejected the position advanced by Justice Rehnquist that the interest in federal employment could be defined and limited by the statutes enacted concerning that employment and thus be limited to the procedures established by those statutes.[205]

Given this background, the Supreme Court's recent decision in *Bishop v. Wood*[206] is amazing. The case began with a suit by a chief of police who had been employed under an ordinance classifying him as a "permanent employee." He challenged the termination of his employment without a hearing to determine the sufficiency of the cause for his discharge. A majority of five Justices accepted the trial judge's determination that under state law the chief of police held his position at the pleasure of the city, and, therefore, state law did not give him a property interest protected by the fourteenth amendment. In a marked departure from its holding in *Perry v. Sindermann*,[207] the Court refused to

201. 408 U.S. at 602-03.

202. 416 U.S. 134 (1974).

203. Justices Powell, Blackmun, and White concluded that the procedures established by statute and regulation satisfied the requirements of due process. Justices Marshall, Douglas, and Brennan would have found those procedures to be inadequate.

204. 416 U.S. at 145-46.

205. *Id.* at 166, 177, 210.

206. 426 U.S. 341 (1976).

207. *See* notes 199-201 and accompanying text *supra*.

examine whether the city's employment practices and policies had created among its police force an objectively reasonable expectation of continued employment absent cause for discharge, which would, under *Sindermann*, constitute a "property" interest entitled to due process protection.

The majority also rejected the plaintiff's claim that the reasons given for his discharge constituted a stigma that might severely damage his reputation in the community, largely because the reasons for that discharge were not made public. The Court assumed that discharge for reasons that are not made public has no more severe effect on an employee than refusal to renew a contract after employment for an agreed-upon fixed term, which the Court had previously held in *Roth* did not impair an interest in "liberty" protected under the fourteenth amendment. The Court's assumption ignores the reality of the employment situation. A refusal to renew after a fixed term when there are no practices or administrative standards that determine eligibility for reemployment does not carry with it a strong implication of unfitness. The fixed term of employment is, in essence, a trial period in which excellence may be pursued or personal preferences tested. On the other hand, the practice with regard to discharge under a contract terminable at will is to discharge only for cause—for some inadequacy of performance; the strong implication is that the discharge is premised upon the employee's unfitness. Whether there has been an injury to the employee's reputation because of the discharge, such that his constitutionally sanctioned interest in "liberty" is endangered,[208] would appear to be a factual matter requiring an evidentiary determination, but the Court did not require one here.[209]

Moreover, the majority's decision in *Bishop v. Wood* was based on its unanalyzed assumption that a state rule allowing termination of employment at will was constitutionally valid.[210] Plaintiff had not challenged that proposition because he believed his employment was not at will, but rather was permanent under the ordinance, and that this conferred on him a property interest protected by due process guarantees. The assumed validity of the rule led the majority to conclude that the truth or falsity of the reasons given for the discharge were relevant only to whether the decision to discharge was prudent, but irrelevant to his claim that his constitutionally protected interest in liberty had been impaired.[211]

208. *See* Wisconsin v. Constantineau, 400 U.S. 433 (1971).

209. The reasons for the discharge of the chief of police had been communicated orally to him in private and first appeared in public as the answer to an interrogatory filed in the law suit. Equating the failure to renew a contract for a fixed term, which had been at issue in *Roth*, with a discharge, the majority concluded that there was no deprivation of liberty in the discharge of a public employee whose position is terminable at will when there is no public disclosure of the reasons for the discharge. 426 U.S. at 348. The fact that the reasons given for his discharge might be false and the assumption (for the purposes of summary judgment) that his discharge was a mistake did not enhance his claim of deprivation of liberty because the Constitution could not, in the majority's opinion, be construed to require federal judicial review for every error in the multitude of personnel decisions made by public agencies. *Id.* at 349-50.

210. Indeed, one of the analytical defects of all cases that deal with public employment is the assumed validity of the employment at will rule.

211. 426 U.S. at 349.

But if the interest in remaining employed enjoyed constitutional protection, as this article contends it should, discharge for a bad reason would be relevant to the due process claim. Furthermore, the majority incorrectly assumed that an examination of whether minimal due process procedural requirements attached to termination of employment at will would inevitably lead to judicial review to determine whether the correct decision was made; the due process clause might require only review to assure that there had been compliance with those minimal procedural requirements.

The basic fault in *Bishop v. Wood* is its misreading of the earlier established standards for determining what constitutes a constitutionally protected "property" interest. The majority opinion in *Roth* did not state that constitutional protection extends only to property interests created by state law. It said, rather, that the protected interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source *such as* state law."[212] Those sources included "rules *or understandings* that secure certain benefits and that support claims of entitlement to those benefits."[213] *Roth*'s companion case, *Perry v. Sindermann*, specifically stated that the " 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms."[214] The "property" interest recognized in *Sindermann* did not arise out of a statutory or judge-made rule of state law, but rather was derived from "an unwritten 'common law' . . . that certain employees shall have the equivalent of tenure."[215] That there would have been an "understanding" and a supported claim in *Bishop v. Wood* that a "permanent employee" would not be discharged except for cause seems most natural; the existence of an understanding of permanent employment absent cause for discharge most certainly was not eviscerated by citation of a state court decision permitting the termination of the employment of a school teacher at the end of the school year without filing charges or giving reasons.[216] But in sustaining the motion for a summary judgment the majority in *Bishop v.*

212. 408 U.S. at 577 (emphasis added). The error of limiting the property interests to those created by state law has been compounded and reinforced by Justice Rehnquist in Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978), when he states, "Because property interests are creatures of state law, Perry v. Sindermann, 408 U.S. 593, at 599-603 (1972), respondent would have been required to show at trial that her seat at the Medical School was a 'property' interest recognized by Missouri state law." 435 U.S. at 82. But references to the cited pages of the decision in *Sindermann* brings one to a discussion indicating that protected "property" interests are not limited to those formally recognized under state law. Justice Rehnquist's reliance upon *Sindermann* for the stated proposition is not justified by the *Sindermann* text.

213. 408 U.S. at 577 (emphasis added).

214. 408 U.S. at 601.

215. *Id.* at 602. The Court made reference to labor arbitration cases in which a "common law of a particular industry or a particular plant" might supplement a collective bargaining agreement, citing one of the decisions in the *Steelworkers* trilogy of arbitration cases. *Id.* That decision, United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), made it clear that an arbitrator was not limited to traditional sources of law or required to reach the same conclusion as would a court.

216. That was the holding in Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971), which was accepted as the North Carolina law on the subject.

Wood did not look beyond the interests that had been recognized under state law.

At the outset, this limitation of constitutional protections to interests established by substantive state law assumes an artificial distinction between the procedural protections of the Constitution and rights created by substantive law. The theory adhered to by the majority assumes that courts can, in assessing whether a particular interest deserves due process protection, isolate the substantive law of a state, and determine whether a particular interest can be characterized as "property" thereunder, without regard to the constitutional considerations that prompt the inquiry. Yet, to the extent that a constitutional procedural protection exists there also exists a substantive right. To the extent that procedural protections are withdrawn the substantive right is diminished. Professor Tribe has pointed out that while *Sniadach* and *Fuentes* were conceived as providing procedural protection for wage earners and debtors, the consequence was to work a change in the state substantive law.[217] After the decision in *Fuentes*, debtors had an enlarged measure of quiet enjoyment of property that previously could be obtained under state law only by those who could afford to pay for it. That enlarged right was not found in preexisting state law; it was created by the procedural protection accorded conditional vendees prior to repossession of the property purchased even though they might ultimately lose on the merits of their contract claims. It is apparent that constitutional notions of "property" interests guaranteed due process are broader than state property law concepts.

A more fundamental error exists in the *Bishop v. Wood* majority opinion, however. In limiting the procedural protections of the due process clause to only those interests that can be characterized as "property" under the state substantive law, the majority conferred upon the states " 'unfettered discretion' in defining 'property' for purposes of the Due Process Clause of the Federal Constitution."[218] In so doing, Justice Brennan pointed out in his dissent, the majority resurrected the long abandoned right-privilege distinction, "for a State may now avoid all due process safeguards . . . merely by labeling [the interest at issue] as not constituting 'property.' "[219] The notion that the customs and reasonable expectations of the parties in the employment relationship are not alone sufficient to give the employee a "property" interest in continued employment absent cause for discharge reflects the rationale of the discredited right-privilege distinction: the state can decline to characterize any interest at all as "property" and thus deny it due process protection, or it can grant that status and the accompanying constitutional protection in any manner it chooses.[220] Such a construction of the due process clause

217. L. TRIBE, *supra* note 144, at 1110.

218. Bishop v. Wood, 426 U.S. 341, 353 n.4 (1975) (Brennan, J., dissenting).

219. *Id.* at 353-54 n.4.

220. L. TRIBE, *supra* note 144, at 524.

would permit the states to define the extent of their obligations under the fourteenth amendment to the federal constitution.

In order to avoid this circular construction of the due process clause, it must be recognized that property interests protected by the due process clause are not limited to those characterized as such under the state substantive law. Rather, in determining the coverage of due process protection the starting point should be the "*nature* of the interest at stake,"[221] and it should be recognized that "property" interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source *such as* state law."[222] If the rules or understandings that constitute the source of protected "property" interests do not arise exclusively from state law, but instead may develop from a practical and nonlegal appraisal of the human significance of the interest affected,[223] the conclusion follows that the interest in continued employment, by its nature, deserves due process protection. And other recent cases, not overruled, have conferred constitutional protection upon interests that rank below employment by almost any practical appraisal.[224]

It is true that in recent years the Supreme Court has narrowed the protection offered to various interests.[225] Thus, in *Paul v. Davis*[226] Justice Rehnquist, writing for the majority, held that due process principles were not violated when police, without prior hearing, put plaintiff's name and photograph on a flyer describing him as a known shoplifter. Misreading the Court's prior decision in *Wisconsin v. Constantineau*,[227] Justice Rehnquist stated for the majority that injury to reputation, standing alone, did not constitute a deprivation of either liberty or property.[228] But *Constantineau* and the cases upon which it relied remain standing precedent, awaiting a proper rereading when the occasion arises, and the limiting effect need not be permanent. Moreover, language in the opinion[229] suggested that injury to reputation stemming from the termination of employment might still be considered an interest in "liberty" protected under the due process clause.

---

221. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972).

222. *Id.* at 577 (emphasis added).

223. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits).

224. Goss v. Lopez, 419 U.S. 565 (1975) (ten-day suspension from a public school); Wolff v. McDonnell, 418 U.S. 539 (1974) (prisoner's "good time" credits); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole); Fuentes v. Shevin, 407 U.S. 67 (1972) (purchaser's interest in a stove, stereo set, and other furniture); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (stigma of public identification as an excessive drinker). It should be remembered that in the leading case of Goldberg v. Kelly, 397 U.S. 254 (1970), plaintiffs were indisputably entitled to an eventual trial-type hearing on the merits of their eligibility for welfare benefits; the issue before the Court was whether they had to be afforded an evidentiary hearing prior to termination of benefits. *Id.* at 259-60.

225. L. TRIBE, *supra* note 144, §§ 10-10, 10-11, at 522-32.

226. 424 U.S. 693 (1976).

227. 400 U.S. 433 (1971).

228. 424 U.S. at 701. *See* L. TRIBE, *supra* note 144, § 10-11, at 528-29.

229. *Id. See* L. TRIBE, *supra* note 144, § 10-11, at 528.

There is in the majority decision in *Paul v. Davis* an implication that the presence of a remedy under state tort law for defamation provides at least a partial explanation for the conclusion that there was no violation of the liberty protected by the fourteenth amendment.[230] *Ingraham v. Wright*[231] is another limiting case, holding that due process does not require a hearing prior to the administration of corporal punishment to students in a public school. The majority found that use of corporal punishment in public schools implicated a constitutionally protected liberty interest, but explicitly adopted the view that the presence of state common-law tort remedies was sufficient to satisfy the requirements of due process.[232] If the rationale of these limiting cases is that when state law provides an adequate protection for important interests additional procedural due process requirements do not attach, they suggest the conclusion that procedural due process requirements should attach if state substantive law provides no protection for an interest as important as that of continued employment and employability.[233]

Thus, a survey of the Supreme Court opinions delineating the range of interests protected under the due process clause provides a sturdy foundation for the conclusion that an employee's interest in continued employment under a contract with an indefinite term is such a protected interest. Decisions early in this century established that the right to continued employment is an essential component of the "liberty" interest guaranteed due process safeguards. More recent decisions under the due process clause support the contention that the injury to reputation arising from termination of employment under an indefinite term contract implicates the "liberty" aspects of the fourteenth amendment. Cases dealing with termination of public employment suggest that the understandings and reasonably induced expectations of the parties to an employment contract of indefinite term may be relevant in assessing

230. *Id.* at 697-99, 712. *See* Justice Brennan's dissenting opinion, *id.* at 715 (Brennan, J., dissenting).

231. 430 U.S. 651 (1977).

232. *Id.* at 672, 675-80.

233. Comparable support may be found in what would otherwise appear to be a limiting case, Mathews v. Eldridge, 424 U.S. 319 (1976), in which it was held that an evidentiary hearing of the sort required before termination of welfare payments was not required prior to termination of disability insurance benefits under the Social Security Act. An important part of the rationale set forth by Justice Powell for the majority was that the prescribed procedures for termination of the benefits provided a claimant an effective process for asserting his claim prior to administrative action and that those procedures went far to establish the fairness and reliability of the conclusions reached. *Id.* at 343, 349. Of course, the stated concern for the administrative burden and expense of pretermination hearings, *id.* at 347, 348, presses in the other direction, but that concern was partially prompted by knowledge that the existing procedures already provided for an evidentiary post-termination hearing. *Id.* at 339.

The recent decision in Codd v. Velger, 429 U.S. 624 (1977), might also be viewed as a limiting case. It held that a discharged public employee was not entitled to a hearing because he had not asserted the falsity of a report that led to the termination of his employment. Perhaps it was wrong, as argued by the dissenting justices, to require the employee to allege the falsity of a stigmatizing report, but the pleading problem will not be insuperable in cases in which a discharge does falsely impose a stigma upon an employee. The majority assumed the continued vitality of *Roth's* indication that improper imposition of a stigma would entitle the employee to a hearing.

whether that employment relationship constitutes a "property" interest deserving due process protection. In the context of the modern employment situation, the understanding would seem to be that an interest as important as that in continued employment would not be subject to sudden termination on an arbitrary basis. The Supreme Court's determination in *Perry v. Sindermann*[234] makes it clear that such an understanding would vest the employee with an entitlement to continued employment absent cause for discharge that would amount to a "property" interest subject to the procedural safeguards of the due process clause. In addition, a fair appraisal of the Court's decisions in this area would indicate that the recognition of these constitutional rights would work a de facto change in state substantive law,[235] and afford employees a further measure of protected enjoyment of their rights to continued employment.

A consideration of what process is due when the state sanctions arbitrary discharge under a contract of employment with an indefinite term will be taken up below. At this point, the state's role in implementing this scheme of employment relations will be scrutinized under the equal protection standard of the fourteenth amendment.

C. *Equal Protection Scrutiny of Employment Contracts Terminable at Will*

While a significant proportion of the employees in private employment and approximately one-half of the employees in public employment are legally protected against discharge or discipline that is unjust, without cause, or for a bad cause, it is an obvious and undeniable fact that most employees in the private sector are not.[236] Moreover, federal law imposes upon unions acting as collective bargaining representatives an affirmative obligation to act in good faith in protecting represented employees from discharge or discipline that is unjust, without cause, or for bad cause.[237] The protection public employees receive from civil service laws is reinforced by the constitutional protection given to many of those employees.[238] Whether the government's refusal to accord protection against arbitrary discharge to employees working under a contract with an indefinite term, as it has done for significant numbers of other employees, constitutes a denial of equal protection of the law will depend on the importance that the courts, acting as arbiters of societal values, attach to the interest in employment and on the strictness with which the courts

234. 408 U.S. 593 (1972).

235. *See* note 201 and accompanying text *supra*.

236. *See* text accompanying notes 39-55 *supra*. The assertion of this inequality of protection is subject to the caveat that an unintended effect of the Civil Rights Act of 1964 has been to confer job protection on all employees whose employment is subject to the protection of that Act. *See* text accompanying notes 120-42 *supra*.

237. *See* text accompanying notes 112-19 *supra*.

238. *See* text accompanying notes 198-216 *supra*.

scrutinize asserted justifications for the differential treatment. Recent developments in the Supreme Court's approach to equal protection problems make less likely, but most certainly do not bar, the conclusion that the differential treatment is a prohibited denial of equal protection of the law.

Early decisions of the Supreme Court established a test of minimum rationality for the classifications established by state law in regulation of economic matters, pursuant to which a classification would withstand a challenge if its establishment could be reasonably related to the legislative purpose for which the state acted.[239] The test included a considerable tolerance for overinclusion and underinclusion in the categories established.[240] The Court, under the leadership of Chief Justice Warren, substantially developed equal protection analysis with its recognition of "fundamental rights" and "suspect classifications." The existence of either would result in strict scrutiny to determine whether a compelling state interest was served by a legislative classification, and whether that classification was drawn with some precision.[241] The Burger Court has not repudiated the Warren Court's development of this two-tier model of review, but it has manifested an unwillingness to expand upon the list of fundamental interests that evoke strict judicial scrutiny in equal protection contexts.[242] On the other hand, the Burger Court has been more demanding of proof of a rational basis for classifications that serve an articulated state purpose, using what Professor Gunther has called a test of "minimum scrutiny with bite."[243]

In 1976 the Court gave specific consideration to an equal protection claim in an employment context. *Massachusetts Board of Retirement v. Murgia*[244] presented a challenge to a statute that required the retirement of uniformed state police officers who had attained the age of fifty. The majority's per curiam opinion concluded that the appropriate standard by which to test whether compulsory retirement at age fifty violated equal protection was that of "rational basis," which it characterized as "a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and

239. L. TRIBE, *supra* note 144, § 16-2, at 995.

240. *Id.* § 16-4, at 997-99.

241. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-10 (1972).

242. *Id.* at 12-18. For recent illustrations of the Court's reluctance, see Lindsey v. Normet, 405 U.S. 56 (1972), and San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). In *Lindsey*, a majority of the Court refused to consider the interest in housing to be a fundamental right, turning back an equal protection attack on the summary procedures of the Oregon Forcible Entry and Wrongful Detainer Act. The Court did, however, invalidate the statute's requirement of a bond for double the amount of the rent for the purposes of appeal as an arbitrary and irrational discrimination against the poor. In *Rodriguez* the Court refused to consider the interest in education to be a fundamental right, with the consequence that differences in educational expenditures between school districts in Texas were not found to be a denial of equal protection of the law.

243. Gunther, *supra* note 241, at 20-24.

244. 427 U.S. 307 (1976).

an unavoidable one."[245] It found the decision to mandate retirement at age fifty to be rationally related to the state's objective of assuring physical preparedness of the officer, noting that physical ability generally declines with age and that there was no showing that only a few officers over the age of fifty would be unqualified for service.[246]

The *Murgia* majority specifically rejected the argument that the statute should be tested for equal protection purposes with the standard of strict scrutiny,[247] refusing to consider uniformed state police officers a suspect class. Nor did old age, in the majority's opinion, define a "discrete and insular" group in need of extraordinary protection under the strict scrutiny test.[248] The court also rejected an argument that the employment interest of an officer was a fundamental right, but it did so by saying that its prior decisions gave "no support to the proposition that a right of governmental employment *per se* is fundamental."[249] The Court did not consider the distinct question whether the interest in private employment, which a number of decisions have placed in that bundle of interests constituting liberty,[250] is a fundamental right for the purpose of testing state law under equal protection standards.

It should also be noted that the retirement requirement in *Murgia* was derived from a statute that incorporated the legislature's deliberate choice made after study by a special commission.[251] This, and a concession that there was a general relationship between advancing age and decreasing physical ability to respond to the demands of the job, obviously strengthened the case for finding rationality in the challenged rule. The statute also withstood an attack that the state had erred in not using annual individual physical examinations, as was done for officers between the ages of forty and fifty years, instead of the automatic rule requiring retirement.[252]

The haphazard way in which job protection has been extended to some employees but not to those in private employment working under an indefinite term contract demonstrates that the present situation is not the product of any deliberate legislative consideration whether there is a desired purpose served by characterizing employment for an indefinite term as employment at will. An equal protection challenge to that rule therefore is not a challenge to the decision made by elected representatives or to the system of representational democracy generally. The judicially

245. *Id.* at 314.

246. *Id.* at 315-16.

247. *Id.* at 312.

248. 427 U.S. at 313.

249. *Id.*

250. *See* text accompanying notes 181-97 *supra.*

251. 427 U.S. at 314 n.7.

252. *Id.* at 316-17. The attack upon the failure to use the more precise test drew some strength from the lack of evidence in the record indicating that individual testing lost its predictive value after age 50. *Id.* at 326 n.6. (Marshall, J., dissenting).

made rule under examination was accepted by mistake and is in conflict with its historical antecedents.[253] An abstract principle of contract law that there be mutuality of obligation to establish more than a relationship terminable at will can, in today's world, hardly serve as a basis for permitting injury to an interest as important as that of an employee in continued employment and continued employability.

Conceivably, the special problems created by use of the spoils system in government hiring might provide a basis for distinguishing between the job protection of employees in the public sector and employees in the private sector. It should be noted, however, that that rationale is weakened by the recent rapid growth of statutorily mandated collective bargaining in the public sector, which has widened the disparity of treatment by providing a duplicative protection of job security. Conceivably one might argue that a rational basis for the distinction existing between the protection required for employees in the private sector who are represented by unions and those private sector employees who are unorganized is that federal labor law policy has encouraged the use of collective bargaining in the private sector.[254] Again, however, the history of the development of the duty of fair representation indicates that this was not its purpose.[255] And imposition on employers of a duty to bargain about the economic demands of unions as well as individual grievances hardly suggests a congressional determination that the needs of our economy require preservation of employer power to deal with employees free from legal restraints. To the contrary, at least since 1935 our national labor policy has been based on the assumption that government must intervene on the side of employees to protect them from possible abuse of the power of employers.

Indeed, the broad range of prohibitions against various types of discrimination found in recently enacted federal and state statutes reflects repeated legislative judgment that our economy can afford the cost of limiting arbitrary use of power by employers. The absence of a universal prohibition against the arbitrary use of power by employers is explainable by the manner in which legislatures respond to pressures created by interest groups. There has been no deliberate legislative choice to preserve the authoritarian powers of employers. Legislatures certainly are not required to act to cure all the evils of society, but when they *have* acted the statutory pattern they leave should meet a standard of rationality.

Is there a rational basis for requiring an employer who has discharged a machine operator upon discovery that he has an epileptic condition to

253. *See* text accompanying notes 4 and 63-68 *supra.*

254. *See* the statement of findings and declaration of policy of the National Labor Relations Act, 29 U.S.C. § 151 (1976).

255. *See* text accompanying notes 112-19 *supra,* indicating the judicial source of the duty and its recognition as a matter of statutory construction so as to avoid serious constitutional questions concerning conferral of such broad powers on private organizations.

prove that the operator cannot safely perform the job but not to require an employer to prove that inability to perform the machine operator's job in fact justified the discharge of a person of normal health? Human freedom and personal dignity may be served by prohibiting discharge from employment because of a homosexual preference, but is the interest of society so much greater in those cases than it is when an employee's reputation for workmanship or simple honesty is severely injured by an unjust discharge? Is it rational to require an employer to hire a person with a record of criminal conviction that is not job related but to permit the discharge of an employee on mere suspicion of dishonesty? Current social pressures make it unlikely that there will be a retreat from those cases holding that sexual harassment of women is a violation of Title VII of the 1964 Civil Rights Act,[256] but should the protection of a woman's employment rest on the tenuous proposition that this was a form of discrimination that Congress intended to end? Racial discrimination is undoubtedly more pervasive in our society than generalized employer tyranny, but is it rational to require an employer to prove that the discharge of a black employee was based upon legitimate and objective considerations, consistently applied, but make no such requirement for an employee who cannot qualify as a member of a racial minority?

A possible answer to questions of this sort is that the individuals protected by the multitude of recently enacted statutes prohibiting discrimination are, as members of "discrete and insular minorities,"[257] entitled to special legislative protection for the same reasons that the courts apply a standard of strict judicial scrutiny to legislation that particularly affects them. A persuasive rejoinder is that not all of the protected classes—women for example—are discrete minorities, and the rationale for the protective legislation must be that in today's society members of those classes do not have the power to achieve what a sense of justice indicates is properly theirs without the assistance of law. It is this same assessment of the weakness of employees generally that has produced protective legislation[258] establishing minimum wages and limitations upon hours of work, fixing safety standards, or promoting collective bargaining. Given that general assessment and the patchwork of protections now established, preservation of the common-law rule concerning employment at will no longer seems rational.

There is an unusual aspect of the equal protection argument sketched

256. *See* note 33 *supra.*

257. The reference is, of course, to Justice Stone's famous footnote four in United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938), which provided much of the basis for the Warren Court's development of the concept of suspect classifications for purposes of equal protection analysis.

258. Some of that legislation—*e.g.*, minimum wage laws—does reflect the desire of organized labor to protect itself from the market weakness of unorganized employees, thus demonstrating the presence of political and economic strength in the labor force. Nevertheless, the abundance of protective labor legislation stands as proof that employees generally are weak and deserving of legal protection.

here that deserves brief mention. The inequality in protection from arbitrary discharge afforded different groups of employees in our society becomes most obvious when attention is given to both federal and state law, and is correspondingly less conspicuous if attention is given only to one body of law. But when a challenge is made to a principle of law it would seem that an assessment of that challenge requires that attention be given to the total setting, both legal and factual, in which that principle operates.[259] State courts have accordingly recognized the necessity of conforming common-law rules applicable to private disputes to the evolving standards of society for determining what equal protection requires.

An example may be found in the recent use of equal protection arguments to invalidate automobile guest statutes in a number of states.[260] The statutes limit the liability of owners and operators to social guests

259. *See* the opinion of Justice Schaefer in Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 203 N.E.2d 573 (1973).

260. Other examples may be given. Thus, prior to 1950 courts in this country uniformly denied a woman damages for loss of consortium from one who had negligently injured her husband. W. PROSSER, *supra* note 20, at 894-95. In that year the Court of Appeals for the District of Columbia considered such a claim and found the reasons for denial to be unpersuasive. Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950). Since that time the clearly discernible trend of the decisions has been to give recognition to such claims. W. PROSSER, *supra* note 20, at 895-96. A significant factor in producing that change in the law has been the conclusion that denial to a wife of damages for loss of consortium in a state that allows husbands such a recovery would constitute denial of equal protection of the law. *See, e.g.*, Duncan v. General Motors Corp., 499 F.2d 835, 838 (10th Cir. 1974); Mann v. Golden, 428 F. Supp. 560, 564 (D. Kan. 1977); Karczewski v. Baltimore & O.R.R., 274 F. Supp. 169, 179-80 (N.D. Ill. 1967); Owen v. Illinois Baking Corp., 260 F. Supp. 820, 821 (W.D. Mich. 1966); Gates v. Foley, 247 So. 2d 40, 45 (Fla. 1971); Hastings v. James River Aerie No. 2337—Fraternal Order of Eagles, 246 N.W.2d 747, 751 (N.D. 1976); Leffler v. Wiley, 15 Ohio App. 2d 67, 69, 239 N.E.2d 235, 236 (1968). It is significant that this conclusion was reached by a number of courts without a holding by the Supreme Court that sex is a suspect classification. *See* Frontiero v. Richardson, 411 U.S. 677 (1973), in which only four Justices were willing to consider sex to be a suspect classification.

Justice Schaefer of the Supreme Court of Illinois has also demonstrated that equal protection arguments may invalidate a legislatively created pattern of separate statutes for lack of a rational basis in the distinctions drawn. The Supreme Court of Illinois abolished the tort immunity of municipal corporations in 1959 by its decision in Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959). Anticipating a broad application of the *Molitor* decision, the Illinois legislature enacted a number of laws dealing with the tort liability of various governmental units. The statutes set different levels of liability, different periods of limitations, and various notice requirements, which would have produced substantially different results for persons injured in the same manner by employees of different governmental units. *See* Comment, *Governmental Immunity in Illinois: The* Molitor *Decision and the Legislative Reaction*, 54 NW. U.L. REV. 588 (1959). After reviewing the maze created by the legislation thus adopted, Justice Schaefer concluded that the pattern created bore no discernible relationship to the realities of life and that a statute establishing complete immunity for a park district was therefore arbitrary and unconstitutionally discriminated against the injured plaintiff. Harvey v. Clyde Park Dist., 32 Ill. 2d 60, 203 N.E.2d 573 (1965). The view was reaffirmed in subsequent decisions of the Supreme Court of Illinois concerning private schools. *See* Cleary v. Catholic Diocese, 57 Ill. 2d 384, 312 N.E.2d 635 (1974); Haymes v. Catholic Bishop, 41 Ill. 2d 336, 243 N.E.2d 203 (1969). More recently, in 1975, an equal protection attack that necessitated an examination of a range of statutes provided the basis for invalidation by the Supreme Court of Washington of a special statute of limitations for tort suits against counties. *See* Jenkins v. State, 85 Wash. 2d 883, 540 P.2d 1363 (1975). In doing so the Washington court said what might, with only slight change, be said of statutes limiting the immunity of employers to claims of persons employed under contracts terminable at will: "Once sovereign immunity has been waived, even partially, any legislative classifications made with reference thereto will be constitutional only if they conform to the equal protection guarantees of the state and federal constitutions." *Id.* at 890, 540 P.2d at 1368.

injured in automobile accidents, and usually require proof of gross negligence or intentional injury to establish liability on the part of an owner or operator. The rationale usually offered for the enactment of such a statute is that it will promote hospitality and protect insurance companies from fraudulent and collusive suits brought by social guests against friendly host-drivers. The development is significant because in 1929 the Supreme Court of the United States sustained the constitutionality of a Connecticut guest statute under the rational basis test for equal protection purposes, noting that it was "not so evident that no grounds exist for the distinction" between guests and other passengers.[261]

In *Brown v. Merlo*[262] the Supreme Court of California found the justification for an automobile guest statute to be inadequate in contemporary society under both federal and state standards for equal protection. For present purposes it should be noted that the Court specifically stated that it could not confine its view to the operation of the specific statute under attack, but was instead required to judge the operation of the statute against the background of other legislative, administrative, and judicial directives governing the rights of similarly situated persons.[263] That analysis led the California court to conclude that there was no rational basis for making a distinction between the protection accorded automobile guests and the protection accorded by California law to other guests or recipients of hospitality.

Although the *Brown v. Merlo* rationale has gained acceptance in several states,[264] a somewhat larger number of courts that have recently considered equal protection attacks upon automobile guest statutes have disagreed with the Supreme Court of California, some of them relying upon the 1929 decision of the Supreme Court of the United States in the challenge to the Connecticut statute.[265] Nevertheless, the record of successful challenges on equal protection grounds to automobile guest

261. Silver v. Silver, 280 U.S. 117, 123-24 (1929).

262. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

263. *Id.* at 862, 506 P.2d at 217, 106 Cal. Rptr. at 392-93.

264. Some state supreme courts have agreed with the Supreme Court of California that automobile guest statutes violate both federal and state standards of equal protection. *See* Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974); Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974); Laakonen v. Eighth Judicial Dist. Court, 538 P.2d 574 (Nev. 1975); McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975). One state intermediate appellate court has reached the same conclusions. *See* Primes v. Tyler, 43 Ohio App. 2d 163, 335 N.E.2d 373 (1974). Other state courts have held that automobile guest statutes violate state standards of equal protection without passing upon the federal question. *See* Bickford v. Nolen, 142 Ga. App. 256, 235 S.E.2d 743 (1977), *aff'd*, 240 Ga. 255, 240 S.E. 2d 24 (1977); Manistee Bank & Trust Co. v. McGowan, 394 Mich. 655, 232 N.W.2d 636 (1975); Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974).

265. Neu v. Grant, 548 F.2d 281 (10th Cir. 1977); Sidle v. Majors, 536 F.2d 1156 (7th Cir.), *cert. denied*, 429 U.S. 945 (1976); Beasley v. Bozeman, 294 Ala. 288, 315 So. 2d 570 (1975); White v. Hughes, 257 Ark. 627, 519 S.W.2d 70, *appeal dismissed*, 423 U.S. 805 (1975); Richardson v. Hansen, 186 Colo. 346, 527 P.2d 536 (1974); Justice v. Gatchell, 325 A.2d 97 (Del. 1974); Delaney v. Badame, 49 Ill. 2d 168, 274 N.E.2d 353 (1971); Sidle v. Majors, 264 Ind. 206, 341 N.E.2d 763 (1976); Keasling v. Thompson, 217 N.W.2d 687 (Iowa 1974) (5-4 decision); Botsch v. Reisdorff, 193 Neb. 165, 226 N.W.2d 121 (1975); Duerst v. Limbocker, 269 Or. 252, 525 P.2d 99 (1974); Behrns v. Burke, 229 N.W.2d 86 (S.D. 1975); Tisco v. Harrison, 500 S.W.2d 565 (Tex. 1973); Cannon v. Oviatt, 520 P.2d 883, (Utah),

statutes suggests a receptivity on the part of state courts to such an attack against the prevailing rule concerning employment at will. Rejection of the rationale offered to support an automobile guest statute necessarily pits the judgment of the judiciary against the judgment of the legislature that enacted the statute, and thus raises questions of the proper role of the judiciary in a representational democracy. Condemnation of a judicially developed rule on equal protection grounds, particularly after consideration is given to the changes which have recently occurred in the legal and social environment in which the rule operates, would pose no similar problems.

It is thus entirely proper and advisable that state and federal courts examine the entire range of statutory and common-law regulation that affects the employment relationship to determine whether the extension of protection from termination of employment without cause to some employees, but not others, constitutes a denial of equal protection to the unprotected group—namely, nonunionized employees in the private sector working under a contract with an indefinite term. The denial appears to constitute a deprivation of equal protection, because there is no rational basis for denying job protection to some employees while granting it to others.

V. JUDICIAL CREATIVITY IN A PRIVATE LAW AREA

Even if the arguments developed above fail to persuade courts that the rule currently applied to employment for an indefinite term is unconstitutional, they may nonetheless achieve their purpose if they induce courts to give serious consideration on the merits to the suitability of that rule in contemporary society. Viewed as a problem of private law, the matter falls in an area in which judicial creativity is appropriate and indeed required if the common law, in conformance with its great traditions, is to be adapted to the changing conditions of society.[266]

The change proposed (or taking place) is undoubtedly an important

---

appeal dismissed, 419 U.S. 810, *rehearing denied*, 419 U.S. 1060 (1974); Brewer v. Copeland, 86 Wash. 2d 58, 542 P.2d 445 (1975) (5-4 decision).

Even the Supreme Court of California may have modified its stance somewhat following legislative reenactment of a portion of the automobile guest statute. *See* Schwalbe v. Jones, 16 Cal. 3d 514, 546 P.2d 1033, 128 Cal. Rptr. 321 (1976).

Thus far, the Supreme Court of the United States has refused to hear any cases in which lower courts have sustained automobile guest statutes against an equal protection attack. *See* Sidle v. Majors, 536 F.2d 1156 (7th Cir.), *cert. denied*, 429 U.S. 945 (1976); White v. Hughes, 257 Ark. 627, 519 S.W.2d 70, *appeal dismissed*, 423 U.S. 805 (1975); Hill v. Garner, 277 Or. 641, 561 P.2d 1016 (1977), *appeal dismissed*, 434 U.S. 989 (1977); Cannon v. Oviatt, 520 P.2d 883 (Utah), *appeal dismissed*, 419 U.S. 810, *rehearing denied*, 419 U.S. 1060 (1974).

266. *See* text accompanying notes 9-12 *supra*. *See also* Morgane v. States Marine Lines, 398 U.S. 375 (1970), in which the Supreme Court recognized the existence of a right of action for wrongful death under general maritime law, overruling a common-law rule of doubtful origins that had become inconsistent with the policies of modern maritime law. In doing so it had to reject an argument that Congress had intended to preclude judicial allowance of a remedy for wrongful death by enactment of particularized federal wrongful death statutes, the Death on the High Seas Act and the Jones Act. *Id.* at 393-403. It found in these and the many state wrongful death statutes a general policy of affording such a remedy, even though the statutes did not cover the particular claim before it. *Id.* at 390-92.

one, but that should not deter the judiciary. Its significance cannot be much more far-reaching than the changes made by the judiciary with respect to products liability in this century. In 1916 Cardozo's opinion in *MacPherson v. Buick Motor Co.*[267] abolished the requirement that there be privity of contract for liability for harm caused by negligently manufactured products. In 1960 the Supreme Court of New Jersey eliminated the requirement of proof of negligence for a products liability case by its decision in *Henningsen v. Bloomfield Motors, Inc.*,[268] camouflaging its creative role with terminology of implied warranty. In 1962 Justice Traynor openly acknowledged the creative role of the courts in his opinion in *Greenman v. Yuba Power Products, Inc.*[269] placing strict liability in tort on a manufacturer who places a defective product on the market. The rule was accepted by the American Law Institute in 1964[270] and incorporated as section 402A of the Restatement Second of Torts. It is now the rule in almost all of the states.[271] The momentous change was made by the judiciary while legislatures stood unmoved by society's need for change. State legislatures did not make the change in products liability law, needed as it was for contemporary society, for the same reason that legislatures are unlikely to change the rule relating to employment for an indefinite term: consumers, like unorganized employees, do not constitute a lobby or an organized interest group capable of exerting the pressure necessary to obtain legislative action.

It is instructive to note that the judiciary did not profess clairvoyance regarding all the consequences of the change to a strict tort liability rule at the time the change was made. Indeed, Justice Traynor, who played such an important role in bringing about the change, acknowledged several years after his decision in *Greenman* that no definition of "defect" had yet been formulated which would resolve all the cases.[272] And the problem of what is a defect giving rise to strict tort liability still continues to trouble the courts.[273] But the change was made, and undoubtedly it was a needed change that produced a rule better serving society than the rule it displaced. The example should encourage judicial creativity with respect to the problem of employment at will.

As Professor Summers has pointed out,[274] if the judiciary opts to require hearing on the merits of a discharge, there is a large body of

267. 217 N.Y. 382, 111 N.E. 1050 (1916).

268. 32 N.J. 358, 161 A.2d 69 (1960).

269. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). Justice Traynor had much earlier stated his view in a concurring opinion that the principle governing products liability should be that of strict liability in tort. Escola v. Coca Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

270. 41 A.L.I. Proceedings 349 (1964). *See* RESTATEMENT (SECOND) OF TORTS, § 402A (1965).

271. W. PROSSER, *supra* note 20, § 98, at 657-58.

272. Traynor, *The Ways and Means of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367. (1965).

273. Barker v. Lull Eng'r Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978); *See* Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

274. *See* note 8 *supra*.

substantive and procedural rulings by arbitrators that is easily convertible into the law governing an employer's power to discharge or discipline employees. The Bureau of National Affairs is currently publishing its seventieth volume of selected labor arbitration decisions; Commerce Clearing House is currently publishing its thirty-seventh volume. Other labor arbitration services also report awards. Approximately one-third of those reported decisions deal with discharge or discipline. In addition, there is a substantial body of case law concerning what constitutes cause for discharge for the purpose of entitlement to unemployment insurance.[275] In short, there is a host of substantive and procedural decisions considering discharge and discipline cases for which there was no parallel when the judiciary opted to apply a rule of strict liability in products liability cases.

Even if that body of law were not available, there would be no cause for judicial diffidence. A tort law analogy is apt; only slight adjustment need be made from the concept of the reasonably prudent person to the reasonably prudent employer to develop a workable test of whether a discharge or discipline was justifiable.

State courts have already begun to limit the power of employers to discharge under contracts of employment terminable at will. As long ago as 1959 an intermediate court of appeals in California recognized that the rule permitting termination of employment at will for any reason was not entirely satisfactory in today's society. In *Petermann v. Teamsters Local 396*[276] the plaintiff alleged that he had been discharged from his employment under a contract terminable at will because he failed to commit perjury at a state legislative committee hearing. The court concluded that such a discharge so conflicted with the public policy of the state that it was necessary to deny the employer its generally unlimited right to discharge. It therefore recognized the plaintiff's claim as valid. In 1973 the Supreme Court of Indiana had before it a suit in which the plaintiff alleged that he had been discharged for filing a workmen's compensation claim.[277] The court concluded that the discharge was actionable, treating it as a statutorily prohibited "device" for defeating claims. More recently, the Michigan Court of Appeals recognized that a discharge for seeking workmen's compensation was improper, even though the Michigan statute did not contain a prohibition of such discharges.[278] Public policy required modification of the common-law rule.

In 1974 the case of *Monge v. Beebe Rubber Co.*[279] was decided by the

275. *See* note 17 *supra.*

276. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

277. Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973).

278. Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976).

279. 114 N.H. 130, 316 A.2d 549 (1974).

Supreme Court of New Hampshire. Plaintiff was a married woman working on the night shift. She alleged and presented evidence tending to show that she was discharged because she refused to go out with her foreman, and that he, conniving with the personnel manager, therefore brought about her discharge from employment. The New Hampshire court concluded 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."[280] Accordingly, it affirmed a jury verdict for damages in the amount of the wages lost by the plaintiff following her discharge.

In 1975 the Supreme Court of Oregon held that a discharge from employment at will for serving on jury duty was a prima facie tort for which damages should be awarded because of the community interest in encouraging jury service.[281] In 1977 the Supreme Court of Idaho conceptually disapproved termination of employment at will when the discharge is motivated by a consideration that contravenes public policy, but found no such motivation in the case before it.[282] In the same year, different panels of an Illinois intermediate appellate court disagreed about whether an employer was liable for discharging an employee because he filed a workmen's compensation claim, certifying the two cases to the supreme court for resolution of the conflict.[283] The Supreme Court of Washington recently characterized as a compelling issue the question whether the limitation recognized in *Monge* on an employer's power to terminate employment should be accepted in Washington law, but found that the facts of the case before it did not require it to reach the question.[284] Receptivity to such a change is suggested by the court's statement that the issue "is one that must be left for another day and different facts."[285]

Not all courts have been willing to follow *Petermann* or *Monge*. Soon after the decision in *Monge*, the Supreme Court of Pennsylvania heard a case in which the plaintiff alleged that he had been discharged for reporting to a corporate officer who was also a personal friend that the corporation was marketing metal tubing for a purpose for which it had not been adequately tested.[286] Over a strong and appealing dissent, the Court rejected the attack on the rule, permitting discharge without cause by a

280. *Id.* at 133, 316 A.2d at 551. The holding of *Monge* was recently followed by the First Circuit in a diversity case. Pstragowski v. Metropolitan Life Ins. Co., 553 F.2d 1 (1st Cir. 1977).

281. Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975). The Oregon court, however, refused to extend its holding to a case in which the discharge could not be characterized as a matter of community interest. *See* Campbell v. Ford Indus., 274 Or. 243, 546 P.2d 141 (1976).

282. Jackson v. Minodoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977).

283. Kelsay v. Motorola, Inc., 51 Ill. App. 3d 1016, 366 N.E.2d 1141 (1977); Leach v. Lauhoff Grain Co., 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (1977).

284. Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 568 P.2d 764 (1977).

285. *Id.* at 898, 568 P.2d at 770.

286. Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974).

vote of four to three. In 1977 the Supreme Court of Alabama, also by a divided vote, rejected the claim of a person who alleged that she had been discharged from employment because of her refusal to falsify certain medical records of a psychiatric service.[287] Other recent decisions have rejected similar attacks.[288]

Monge of course goes beyond those cases in which discharges were found to be wrongful because they conflicted with a state policy established by statute. But not even *Monge* requires an employer to prove that there was just cause for discharge or discipline, as must be done when a case is presented to an arbitrator under a collective bargaining agreement.[289] *Monge* would not preclude discharges that result from negligent investigation, failure properly to appraise the significance of the employee's conduct, or other inadequate but innocent reasons. Nevertheless, the movement has begun, and almost certainly will continue, as the employee's rights under an indefinite term contract are compared to the protection afforded by laws applicable to the employment relation.

VI. WHAT PROCESS IS DUE AND FEASIBLE

Provision for review on the merits of cases of discharge and discipline for persons now working under contracts terminable at will might result in a substantial increase in the caseload of American courts.[290] In collective bargaining relationships, a grievance procedure produces a settlement of most of the cases which otherwise would go to arbitration. Moreover, access to the arbitration forum is largely under the control of a union, and hence the decision to arbitrate is not made solely by the employee whose economic interests suggest pursuit of a claim to that ultimate remedy.[291] The absence in the unorganized sector of employment of a grievance procedure in which employees receive professional evaluation of the merits of their case might require a higher proportion of cases to go to trial than the proportion of cases taken to arbitration. On the other hand, the review system provided for federal civil servants appears to have suffered, not from excessive use by employees, but from insufficient utilization, because the absence of a grievance procedure leaves many employees without professional advice concerning available remedies.[292] In other contexts, such as settlement of tort claims, compromise of tax liabilities, or plea bargaining in criminal cases, private attorneys have shown their ability to

287. Hinrich v. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1977).

288. *See* Percival v. General Motors Corp., 539 F.2d 1126 (8th Cir. 1976); Pirre v. Printing Devs., Inc., 432 F. Supp. 840 (S.D.N.Y. 1977). *But see* Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977). Scroghan v. Kraftco, 551 S.W.2d 811 (Ky. Ct. App. 1977).

289. *See* note 45 *supra.*

290. *See* text accompanying notes 50-55 *supra.*

291. *See* notes 116-19 and accompanying text *supra.*

292. Merrill, *Procedures For Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196, 238 (1973).

settle most cases without full hearings.[293] They would probably learn to do the same in cases of discharge or discipline. In any event, employees in the unorganized sector of the American work force will not be on equal terms with those represented by unions unless a full hearing on the merits is available to them in the event that negotiation fails to produce a settlement.

Courts might, of course, devise hearing procedures that afford minimal due process short of a full judicial-type hearing. In *Goss v. Lopez*[294] the Supreme Court held that a student was denied due process when he was temporarily suspended from school without being told what he was accused of having done and having been given no opportunity to explain his version of the facts. The rudimentary hearing required was notice of the charge and an opportunity to speak. A similar requirement in the employment context could be enforced without unduly burdening either the courts or employers. Of course, in the employment context this procedure would suffer in that the discharging supervisor would frequently be the judge in his own case; this was a factor that led three Justices to believe that the pretermination hearing given a federal civil servant did not meet due process standards even though a full evidentiary hearing was available after the termination.[295]

Perhaps courts could require employers to provide review by a higher supervisor of a decision to initiate discharge action unless the employer could show that personnel limitations made such review impossible. Such a requirement might produce ceremonial review unless the courts insisted that the basis for a discharge and its rationale be stated, permitting the court to review the reasonableness of the decision to discharge. Comparable remedies have been developed in other contexts without the imposition of a full judicial hearing. For example, in *Kosty v. Lewis*[296] the Court of Appeals for the District of Columbia recognized that the trustees of United Mine Workers Retirement Fund had broad discretion in determining pension eligibility standards, but review of the action taken and the reasons offered in support led the court to conclude that the trustees had acted arbitrarily and capriciously in changing eligibility standards without giving notice to those employees previously eligible, so that they would have an opportunity to retire.[297] The technique applied to decisions to discharge or discipline might produce judicial review comparable to that required by the Supreme Court for administrative

---

293. C. PECK, LABOR RELATIONS AND SOCIAL PROBLEMS: CASES AND MATERIALS ON NEGOTIATION, UNIT FIVE 1-2 (The Labor Law Group 1972).

294. 419 U.S. 565 (1975).

295. Arnett v. Kennedy, 416 U.S. 134, 216 (1974) (Marshall, Douglas, & Brennan, JJ., dissenting).

296. 319 F.2d 744 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964). Of course, the court in *Kosty* found support for what it did in the traditions of equity supervision of trusts.

297. 319 F.2d at 749.

decisions that are not based upon formal findings of fact made after a judicial-type hearing. Illustrative is the judicial review given a decision of the Secretary of Transportation to permit construction of a highway through a city park[298] or the decision of the Comptroller General to license the establishment of a new national bank.[299] Affidavits and testimony supplement the written record of the decisional process and make possible a determination whether the decision was made on a legitimate and rational basis.

Such a limited review could bring to unorganized employees the benefits of the system of corrective or progressive discipline frequently required by arbitrators in the organized sector.[300] Corrective or progressive discipline requires that employees be informed of the existence of a rule, violation of which will lead to disciplinary measures and the possibility of discharge. The first violation may merit no more than a warning, whereas the second violation may result in suspension for a substantial period of time. Only after the employer has thus impressed upon the employee that serious consequences follow violation of the rule may the employer impose the ultimate penalty of discharge. Exceptions are of course recognized for employee conduct that is outrageous and indefensible, such as violent assault on a supervisor or theft of valuable property. Adherence to such a system obviously has advantages for employees and is also valuable to employers in that it preserves their investment in the training of employees.

The imposition of such minimal due process requirements by the judiciary would very likely produce a legislative response recognizing a substantive right to continued employment absent "cause" for discharge and establishing a detailed procedural scheme for employees who have been discharged or disciplined. Indeed, some courts have expressly recognized that they may perform a catalytic function and have openly called upon legislatures for enactment of legislation to establish procedures that they could not devise independently.[301] A desirable result might be enactment of the statute proposed by Professor Summers, making arbitration of discharge and discipline cases available to employees generally.[302]

The legislative process does enjoy an advantage over the judicial process in the manner in which it can establish classifications and make exceptions that generally serve the purposes of justice while accom-

298. Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

299. Camp v. Pitts, 411 U.S. 138 (1973).

300. F. ELKOURI & E. ELKOURI, *supra* note 13, at 630-32; Summers, *Individual Protection, supra* note 8, at 504-06.

301. Whitney v. City of Worcester, 366 N.E.2d 1210 (Mass. 1977); Spanel v. Mounds View School Dist., 118 N.W.2d 795 (Minn. 1962). A court may also use the technique of prospective overruling to give warning of an impending change to those who would otherwise be adversely affected by a change in the law. *See* Peck, *supra* note 9, at 301-02.

302. Summers, *Individual Rights, supra* note 8.

modating conflicting interests. Thus, a legislative solution to the problem here discussed could establish a size limit for employers who are obligated to establish just cause for discipline or discharge, giving recognition to the likelihood that in small operations the factor of personal relations weighs much more heavily than it does in today's typical employment relation. The legislative solution could also establish definite but generally reasonable periods for probationary employment, a workable definition of temporary employment, exceptions for policymaking or confidential employees and high level supervisors, and required notice periods for those who are not protected from discharge without cause.

A possible legislative choice would be to broaden the jurisdiction of existing state boards or agencies to pass upon all cases concerning claims of discriminatory or unjust employer conduct. A single investigation could serve to determine whether there was just cause for discharge or discipline or whether the action was taken for any of the currently prohibited reasons. An agency with such a broadened jurisdiction could, with proper legislative support, develop a corps of investigative officers who would perform a function comparable to that performed by union officials in the grievance and arbitration procedures established by collective bargaining. In the end, the result would be creation of an agency not unlike the specialized labor courts that have functioned in Europe for a number of years.[303]

VII. CONCLUSION

The current state of the law concerning employment in the United States permits employers or their representatives to discipline and discharge employees in a manner that is not consistent with the standards of a civilized society. Indeed, it is not consistent with the standards that have been adopted to govern a broad range of particularized reasons previously utilized by employers in making employment decisions. That the law will be changed is almost certain. The author hopes what has been written here will help to persuade courts that they should abandon a rule governing employment that does not accord human dignity the value it deserves and usually receives in American law.

---

303. *Id.* at 509-19.