THE DOCTRINE OF AT-WILL EMPLOYMENT IN THE PUBLIC SECTOR

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I. INTRODUCTION

The common law concept of employment at will, employment which may be terminated for any or no reason, was long the rule which governed the conduct of employer-employee relations.[1] Historically, limitations on the power of employers to discharge employees arose chiefly from employment contracts, if they arose at all.[2] This, however, is no longer the case in most states.[3] Presently, the employment relationship is in large part governed by collective bargaining contracts, individual employment contracts, and complex statutory schemes.[4] To the extent that unionization and laws place restrictions

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[1] *See, e.g.*, Adair v. United States, 208 U.S. 161 (1908) (federal statute making it unlawful for interstate rail carrier to discriminate against employee because of membership in labor organization declared invalid); Conrad v. Delta Air Lines, 494 F.2d 914 (7th Cir. 1974) (probationary employee's termination without hearing held valid); Wilson v. Red Bluff Daily News, 237 Cal. App. 2d 87, 46 Cal. Rptr. 591 (1965) (managing editor's employment terminable at will); Land v. Delta Air Lines, 130 Ga. App. 231, 203 S.E.2d 316 (1973) (statutory presumption that employee's indefinite hiring was terminable at will); Jorgensen v. Pennsylvania R.R., 25 N.J. 541, 138 A.2d 24 (1958) (discharged dining car steward has rights to grievance only as provided in collective bargaining agreement); Parker v. Brock, 5 N.Y.2d 156, 182 N.Y.S.2d 577, 156 N.E.2d 297 (1959) (individual union member could not bring action for alleged discharge without cause); Sooner Broadcasting v. Grotkop, 280 P.2d 457 (Okla. 1955) (company could terminate employee at will but still held liable for commissions earned on option contracts); *see also* A. CORBIN, CORBIN ON CONTRACTS § 684 (1960); C. LABATT, MASTER AND SERVANT § 183 (2d ed. 1904); RESTATEMENT (SECOND) OF AGENCY § 442 (1933); S. WILLISTON, WILLISTON ON CONTRACTS § 1017 (3d ed. 1967); Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967); Blumrosen, *Employer Discipline: United States Report*, 18 RUTGERS L. REV. 428 (1964).

[2] In one case it was noted that an employer "may dismiss [his] employees at will . . . for good cause, for no cause, or even for cause normally wrong, without being thereby guilty of legal wrong." Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915).

[3] Nat'l L.J., Jan. 18, 1982, at 26, col. 1.

[4] *E.g.*, National Labor Relations Act, 29 U.S.C. §§ 151-187 (1976); Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976); Occupational Safety & Health Act, 29 U.S.C. §§ 651-678

on the power of an employer to discharge an employee "at will," the common law doctrine has been abrogated.

The common law concept of employment at will, though it was developed in the context of the private labor market, has been recognized to have some force in employment in the public sector as well.[5] Yet, because of certain constitutional limitations on the power of a public employer to discharge a public employee for any or no reason, the concept of at-will employment has never been imported wholesale into public sector labor relations.[6] Thus, because employment decisions by public employers are often subject to the constraints of the Federal Constitution, the employment at will doctrine in the private sector provides only an analogy, rather than a direct corollary, to public sector employment.

Nevertheless, to the extent that it does apply to the public sector the analogy is a useful one. Limitations by statute or judicial decree imposed upon the freedom of private employers to discharge employees at will may have an impact on the ability of public employers to take similar actions.[7] The purpose of this Article is to explore the treatment of so-called employees at will in the public sector, to examine the limitations imposed upon public employer discretion with regard to such employees, and to propose a further limitation on public employer discretion.

(1976); Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1381 (1976); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-16 (1976). In addition there are legislative schemes in most states governing various aspects of the employment relationship. *See, e.g.*, N.J. STAT. ANN. §§ 34:15-128 (West 1959 & Cum. Supp. 1981-1982).

[5] *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 578 (1972) (university professor); Shelton v. Tucker, 364 U.S. 479, 482 (1960) (high school teacher); Nicoletta v. North Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 150, 390 A.2d 90, 92 (1978) (water district police officer); English v. College of Med. & Dentistry, 73 N.J. 20, 23, 372 A.2d 295, 297 (1977) (morgue supervisor).

[6] Since any action taken by a public employer with regard to the employment status of a public employee constitutes state action, such action is circumscribed by the requirements of the Federal Constitution. Specifically, such action may not constitute a deprivation of liberty or property without due process or equal protection of the laws in violation of the fifth and/or fourteenth amendments. See *infra* note 12 and accompanying text. The issue, then, in the discharge of a public employee will generally be whether he had a property interest within the meaning of the fifth and fourteenth amendments so as to fall under their protection. *See generally* Board of Regents v. Roth, 408 U.S. 564 (1972). Additionally, the issue may be whether the discharge was under such circumstances so as to constitute a deprivation of liberty within the meaning of those amendments and thus come under their protection. *Id.* at 573-74; *cf.* Bishop v. Wood, 426 U.S. 341 (1976) (policeman's discharge for failing to perform adequately did not constitute deprivation of liberty interest); Paul v. Davis, 424 U.S. 693 (1976) (inaccurate listing of petitioner on active shoplifters list did not infringe upon liberty interest protected by fourteenth amendment).

[7] This impact may be in the form of fostering similar legislation applicable to the private sector, or may result through extensions and applications of the rationale and policy consider-

Neither state nor federal courts, nor commentators have devoted much time and attention to the concept of employment at will in the public sector. Indeed, though certain language from various cases seems implicitly, and sometimes even explicitly, to recognize the existence of such employees, the recognition appears to be almost in passing in the court's rush to surge ahead and confront more interesting constitutional issues.[8] For purposes of this discussion, the definition used by the Supreme Court of New Jersey will be applied. That court described the at-will status of a public employee as one who is "unprotected by any statutory tenure, contractual commitment or collective negotiation agreement. Nor . . . [does such an employee] enjoy Civil Service tenure or other protection."[9] Moreover, for the sake of this discussion public employees will be broken into two groups: (1) employees with a constitutionally cognizable property interest, and (2) employees with no such interest.

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ations found in judicial decisions which underlie the private sector regulation. In either case, this would lead to comparable restraints on public employer discretion. An example of the former situation is most clearly seen in the effect of the National Labor Relations Act, 29 U.S.C. §§ 151-181 (1976), on public sector employment. A joint report by the Department of Commerce and the Department of Labor, released in 1978, showed that 15.8% of government entities had labor relations policies requiring collective bargaining and/or meet and confer discussions. Included in this figure were 82% of state governments, 22% of county governments, 11.7% of municipal governments, 4.9% of township governments, 2.7% of special districts, and 50.6% of school districts. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE & U.S. LABOR-MGMT. SERV. ADMIN., STATE & LOCAL GOV'T SPECIAL STUDIES No. 88, LABOR-MGMT. RELATIONS IN STATE & LOCAL GOV'T: 1976, at 1-2 (1978), *reprinted in* H. EDWARDS, R. CLARK, C. CRAVER, LABOR RELATIONS IN THE PUBLIC SECTOR 15 (2d ed. 1979). Many of these labor relations policies are patterned after the National Labor Relations Act.

[8] *See* cases cited *supra* note 5.

[9] Nicoletta v. North Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 150, 390 A.2d 90, 92 (1978) (citation omitted). The court went on to note that "[i]n such circumstances, under the common law, the employer, even though a public employer, has the right to discharge such employee with or without cause." *Id.* In Justice Pashman's concurring opinion, he summarized the status of an at-will employee this way: "In the absence of any reasonable employee expectancy of continued employment, derived from law, regulation, contract or practice, a governmental employer has a relatively free rein with respect to the termination of an employee." *Id.* at 172, 390 A.2d at 104 (Pashman, J., concurring).

Apparently, at least one United States Supreme Court Justice, Justice Marshall, would hold that there are no employees at will in the public sector. In his dissenting opinion in *Roth* he said:

> The prior decisions of this court . . . establish a principle that is as obvious as it is compelling—i.e., federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect to employment opportunities that they either offer or control. Hence, it is now firmly established that whether or not a private employer is free to act capriciously or unreasonably with respect to employment practices, at least absent statutory or contractual controls, a government employer is different. The government may only act fairly and reasonably.

Board of Regents v. Roth, 408 U.S. 564, 588 (1972) (Marshall, J., dissenting). He went on to say that "every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment." *Id.*

II. CONSTITUTIONAL LIMITATIONS

There are certain constitutional limitations placed on the freedom of public employers to discharge public employees.[10] These constraints apply to both classes of employees at will mentioned above. Although equal protection analysis will arguably apply to any employment decisions made by a public employer, as a practical matter it has little utility in such decisions. Consequently, it is not often seen in challenges to such decisions, at least where terminations of employment are concerned.[11]

More often one finds challenges to such employment decisions based upon the due process provisions of the Constitution.[12] In order

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[10] Historically, employment by the government was deemed a privilege rather than a right and the public employee had no entitlement to constitutional protections. *See, e.g.*, *Ex parte* Hennen, 38 U.S. (13 Pet.) 225 (1839), wherein the Supreme Court held that the Constitution did not intend for inferior offices to be held for life and "it would [therefore] seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment." *Id.* at 259. For a detailed discussion of the "right-privilege" doctrine, see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

The concept of public employment as a right rather than a privilege evolved slowly. In particular, constitutional challenges to such an idea were based on the first, fifth and fourteenth amendments. *See infra* notes 11-13 & 66 and accompanying text.

[11] See U.S. CONST. amends. V & XIV, *infra* note 12. The requirement of equal protection of the law is expressed in the fourteenth amendment, which applies to the states, and is implied in the fifth amendment, which is applicable to the federal government. *See, e.g.*, Bolling v. Sharp, 347 U.S. 497 (1954) (compulsory racial segregation in public schools violated due process clause of fifth amendment).

The fact that equal protection analysis is not often used by the courts in cases where public employees have allegedly been terminated at will may be attributed to a number of reasons. One is that such analysis requires the definition of a class of employees who are being unequally treated. That type of discrimination may itself not be that commonplace. This, however, may change with the worsening financial conditions of major American cities and consequent need of those governments to cut back costs. Since saving city money is often accomplished by laying off city employees, equal protection arguments may arise when terminations are made in a discriminatory manner in efforts to preserve gains made in the past pursuant to affirmative action programs.

Another reason equal protection challenges may not often be seen in public employee at will terminations is that, as a practical matter, such challenges are of little utility unless a fundamental right or suspect class is involved. This has two effects in the context involved here. First, since employees at will are often, though not universally, managerial level employees there may be comparatively few members of those classes occupying these positions. Second, unless the class involved is suspect, the courts will look only for a rational basis for the alleged discrimination; if that basis is not immediately discernible the court may even speculate as to a possible cause. *See, e.g.*, Allied Stores v. Bowers, 358 U.S. 522, 530 (1959) (sustained property tax on goods held in storage in state but not applicable to goods owned by non-resident); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 563 (1946) (upheld pilotage law requiring six month apprenticeship under incumbent pilots as condition to certification of new pilots where in operation of system only relatives and friends of existing pilots were selected); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-3, at 996 (1978).

[12] U.S. CONST. amends. V & XIV. The fifth amendment provides in part: "[N]or [shall any person] be deprived of life, liberty, or property, without due process of law . . ." The fourteenth

to invoke the protections of the fifth and fourteenth amendments' due process clauses, one must assert the deprivation of a liberty or property interest.[13] Thus, it is essential to next examine the requisites for finding such interests.

A. Property Interest in Public Employment

It should be noted at the outset that there is tension between the concept of employment at will and the existence of a constitutionally protected property interest. This friction may be deemed by some to make the two incompatible. Hence, once a property interest is determined to exist, the public employer might no longer be able to discharge a public employee for any or no reason.

It is helpful first to determine what constitutes a protectable property interest in public employment. The seminal case in this area is *Board of Regents v. Roth*.[14] There, a non-tenured state university professor was notified that he would not be rehired.[15] Under state law, Roth had no tenure rights and he was not entitled to anything after the expiration of his contract.[16] Roth sued the university in federal district court alleging that his fourteenth amendment rights had been infringed by the university.[17]

In addressing the attributes of a property interest, Justice Stewart, writing for the majority, noted: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[18] In determining whether such a "legitimate claim of entitlement" existed, the Court further held that "[p]roperty interests . . . are created and

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teenth amendment in part states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[13] *See supra* note 6.

[14] 408 U.S. 564 (1972).

[15] *Id.* at 566. David Roth had been hired by the university for only a fixed one year term. *Id.*

[16] *Id.* at 566-67. In fact, the university only had to inform Roth by February 1 of their intention not to rehire him. *Id.* at 567. The president of the school did so notify Mr. Roth. *Id.* at 568. No reason was given for the decision. *Id.*

[17] *Id.* The district court granted Roth's motion for partial summary judgment and ordered the university to grant Roth a hearing and furnish him with reasons for their decision not to rehire him. *Id.* at 569. The court of appeals affirmed, and the university appealed to the Supreme Court. *Id.*

[18] *Id.* at 577. *See* Reich, *The New Property*, 73 YALE L.J. 733 (1964). It was Professor Reich who first posed the "entitlement" test for determining the existence of a property interest. *See also* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965). The first indication that the Supreme Court was willing to accept this concept of property came in Goldberg v. Kelley, 397 U.S. 254, 262 n.8 (1970).

their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[19]

Where "existing rules or understandings" create a property interest, that property interest may not be denied or abridged without due process. The fundamental requisites of due process are notice and an opportunity to be heard.[20] Although the process which happens to be due in any given case must be determined from the facts there involved,[21] it remains true that the requirement of a hearing and notice is a limitation on the ability of the public employer to dismiss a public employee. To that extent, employees with a property interest might not be deemed employees at will at all; rather, only those employees with no protectable property interest would be classified as employees at will.[22] This argument has support in logic. By definition, any employee at will could be dismissed without cause. If no reason has to be given for the dismissal, then no expectation nor entitlement could be asserted on which to base the alleged property interests.

Yet, wedding the concept of property with the concept of employment at will in the public sector is unnecessary. In light of the discussion below regarding other limitations on employer freedom to dismiss public employees, it may not even be accurate.[23] Thus, it is arguable that even some employees who can assert legitimate claims to entitlement may be employees at will. Under the currently prevailing[24] "instrumental" view of procedural due process, wherein due

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[19] 408 U.S. at 577. An application of this use of state law to determine when such a property right exists can be seen in Bishop v. Wood, 426 U.S. 341 (1976). There, a North Carolina policeman who was classified as a "permanent employee" under a city ordinance was discharged without being afforded a pretermination hearing. *Id.* at 343. The ordinance provided that such an employee would, however, be given certain other procedural protections, such as notice of his deficiencies and how to correct them, and notice of discharge in writing stating the reasons therefore. *Id.* Since those provisions did not accord the employee an actual guarantee of any kind of continued employment, under North Carolina law no such expectation was enforceable and the employee could be terminated at will as long as the provisions of the city ordinance were complied with. *Id.* at 346-47. The court held that the policeman's discharge under the terms of the ordinance did not deprive him of a property interest. *Id.* at 347; *see also* Arnett v. Kennedy, 416 U.S. 134 (1974).

[20] Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951); Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1864).

[21] The facts of these cases vary tremendously. *See generally* L. TRIBE, *supra* note 11, § 10-12 to -17, at 532-57.

[22] This seems to be the position adopted by the New Jersey Supreme Court in Nicoletta v. North Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 390 A.2d 90 (1978), where the court noted that the "termination need not be predicated on just cause, and accordingly no 'property' interest is implicated, such as to invoke the due process shield." *Id.* at 154, 390 A.2d at 94.

[23] *See infra* notes 32, 34, 36, 40, 50, 56, 57, 62, 66, 77 and accompanying text.

[24] L. TRIBE, *supra* note 11, § 10-13, at 539.

process[25] is seen "as [the] means of assuring that the society's agreed-upon rules of conduct, and its rules for distributing various benefits, are in fact accurately and consistently followed,"[26] it would seem possible that an employee might have a legitimate claim of entitlement to a job, yet in effect still be an employee at will. Such a situation might exist where, for example, an employee with some statutory security in his job is given, in the same statute creating the entitlement, so little procedural protection that he is effectively relegated to the status of an employee dischargeable at will.[27]

As can be seen from the foregoing discussion, use of the concept of employment at will in the public sector context, where a property interest might exist, leads unnecessarily to analytical and practical problems in its application. Trying to import the concept of an employment terminable at the whim of the employer, such as may exist in the private sector, into public sector employment can only lead to confusion. This results from two factors: (1) there are myriad limitations placed upon public employer discretion, and (2) due process rights might be modified by the statute creating the public position.[28]

B. No Property Interest in Public Employment

Regardless of the result reached above, the fact remains that employment at will is recognized in the public sector. Ignoring the twists in the concept introduced by Justice Rehnquist's plurality opinion in *Arnett v. Kennedy*,[29] it is assumed here the term will have the definition used by the New Jersey Supreme Court.[30] It is submitted, however, that the term "employment at will" is misleading and, perhaps, inaccurate. Even where the employee has no statutory or contractual protection in his job, nor any expectation based on prac-

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[25] *See id.* at 503.

[26] *Id.* Professor Tribe continued: "Rather than *expressing* the rule of law, procedural due process in this sense *implements* law's rules—whatever they might be." *Id.* (emphasis in original). An example of the practical application of this view might be seen in Justice Rehnquist's plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974), where he argued that "the property interest which [the employee] had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of the interest." *Id.* at 155. Thus, "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right a litigant . . . must take the bitter with the sweet." *Id.* at 153-54; *see also* Bishop v. Wood, 426 U.S. 341 (1976).

[27] *See, e.g.*, Bishop v. Wood, 426 U.S. 341 (1976) (district court's interpretation of North Carolina city ordinance effectively relegated former policeman to status of employee at will even though language of ordinance allowed employee written notice of deficiency).

[28] *See* L. TRIBE, *supra* note 11, § 10-7, at 503.

[29] 416 U.S. 134 (1974).

[30] See *supra* note 9 and accompanying text.

tice, a public employer is not free to discharge a public employee in his absolute and unfettered discretion.

1. Liberty Interests

Although an employee in the public sector is otherwise terminable at will, he is entitled to a due process hearing and notice thereof when the discharge is under such conditions as to constitute a denial of a liberty interest cognizable under the fifth and fourteenth amendments. That an employee might have a liberty interest in his job was first recognized by the Supreme Court in *Meyer v. Nebraska.*[31] There the Court held that liberty denotes, *inter alia*, "the rights of an individual . . . to engage in any of the common occupations of life."[32] This language was quoted with approval, and expanded upon, by the Supreme Court in *Board of Regents v. Roth.*[33] The Court noted there that:

> There might be cases in which a State refused to reemploy a person under such circumstances that interests in liberty would be implicated. But this is not such a case.
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> The State . . . did not make any charge against him [the employee] that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge . . . that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' In such a case, due process would accord an opportunity to refute the charge before University officials. . . .
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> Similarly, there is no suggestion that the State, in declining to re-employ [the employee], imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. . . . Had it done so, this again, would be a different case. For '[t]o be deprived not only of a present government employment but of future opportunity for it certainly is no small injury. . . .'[34]

In a footnote the Court explained that the hearing granted to protect the employee's reputation "is to provide the person an opportunity to

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[31] 262 U.S. 390 (1923).

[32] *Id.* at 399.

[33] 408 U.S. at 572. For an explanation of the facts of *Roth*, see *supra* notes 14-17 and accompanying text.

[34] *Id.* at 573-74 (footnote and citations omitted) (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971), and Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 185 (1951)).

clear his name. [But], once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons."[35]

Thus, regardless of the fact that an employee is terminable at will,[36] the public employer is under significant procedural restraints on the exercise of his power to discharge. To this extent, then, the term "employee at will" can be considered a misnomer. On the other hand, it would appear that a public employer is under no restraint as to the *reason* for discharging an employee at will, but is only required to afford the employee certain procedural protections to avoid after-the-fact harm to his reputation. In that respect, the concept of employment at will still has some force in the public sector.

Since *Roth*, the Supreme Court has engaged in some retrenchment from the broad implications initially indicated by their language. Aside from the possibilities implicit in the quotation above, there were two limitations on employer actions. These limitations would impose due process restraints to protect a liberty interest: (1) where the reason for the discharge was such that "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him;" and, (2) where the government's action imposes on the employee "a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities."[37] Each situation, noted the Court, would have presented a case different from *Roth*. Both, however, have since been substantially eroded by subsequent Supreme Court decisions.[38]

Although the Supreme Court has shown reluctance to abide by the clear implications of *Roth* and the cases upon which it relied, this does not necessarily mean that the concept of a liberty interest being implicated in a public employee discharge case is doomed to demise. Indeed, the one recurring area in which such an interest is reaffirmed is the area of public employment.[39] It seems, however, that there is a clear antagonism on the part of the present Court with regard to the notion of liberty interests in an employee's reputation. In spite of the qualifications offered by the Court in the context of employment, such antagonism cannot bode well even for that limited area.[40]

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[35] *Id.* at 573 n.12.

[36] This conclusion is obviously limited only to due process restraints. Equal protection limitations, on the other hand, will affect the reason for a public employee's discharge irrespective of the procedural safeguards accorded. *See supra* note 9 and accompanying text.

[37] 408 U.S. at 573.

[38] *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976) (reputation alone does not implicate liberty interest); Bishop v. Wood, 426 U.S. 341 (1976) (no liberty interest impaired when communication not made public).

[39] *E.g.*, Paul v. Davis, 424 U.S. 693 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972).

[40] *See, e.g.*, Bishop v. Wood, 426 U.S. 341 (1976).

Paul v. Davis,[41] for example, was the first case after *Roth* to deal with the liberty interest in reputation. That case involved the distribution of plaintiff's picture on a list of active shoplifters to area merchants in Louisville, Kentucky.[42] Though plaintiff had been arrested for shoplifting, the charges were dismissed soon after the list of shoplifters was distributed.[43] As a direct result of the circulation of his picture, plaintiff found himself in a tenuous position in his employment as a newspaper photographer.[44] He instituted an action in federal district court for damages, and injunctive and declaratory relief against the city and county police officials, contending that distribution of his picture had deprived him of a constitutional liberty interest.[45] The district court dismissed his complaint.[46] The Court of Appeals for the Sixth Circuit reversed[47] on the basis of the Supreme Court decision in *Wisconsin v. Constantineau*.[48]

Justice Rehnquist, writing for the *Paul* majority, purported to examine the precedents relied upon in *Constantineau*[49] and reached the following conclusion:

> While we have in a number of our prior cases pointed out the frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, *apart from some more tangible interests such as employment*, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause.[50]

Having thus noted that in the employment context the liberty interest in reputation was still viable, the Court discussed among other cases, *Joint Anti-Fascist Refugee Committee v. McGrath*.[51] Among

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[41] 424 U.S. 693 (1976).

[42] *Id.* at 694-95.

[43] *Id.* at 696.

[44] *Id.* at 695-96.

[45] *Id.* at 696. In particular, the plaintiff brought the action under 42 U.S.C. § 1983 (1976), which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

[46] *See* Davis v. Paul, 505 F.2d 1180 (6th Cir. 1974), *rev'd*, 424 U.S. 693 (1976). The district court decision was unreported.

[47] 424 U.S. at 697.

[48] 400 U.S. 433 (1971).

[49] 424 U.S. at 702-09.

[50] *Id.* at 701 (emphasis added).

[51] 341 U.S. 123 (1951).

the various opinions in that case, Justice Rehnquist noted that of Justice Jackson, wherein the latter wrote that " '[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury when government employment so dominates the field of opportunity.' "[52] Justice Rehnquist concluded that six justices in *McGrath* were of the opinion that "any 'stigma' imposed by official action of the Attorney General of the United States, *divorced from its effect on the legal status of . . . a person, such as . . . loss of government employment,* [was] an insufficient basis for invoking the Due Process Clause of the Fifth Amendment."[53]

Noting similar language in *Cafeteria Workers v. McElroy*[54] and in *Roth*,[55] Justice Rehnquist stated:

> The Court has recognized the serious damage that could be inflicted by branding a government employee as 'disloyal,' and thereby stigmatizing his good name. But the Court has never held that the mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process *absent an accompanying loss of government employment.*[56]

Clearly, then, the liberty interest in reputation, at least insofar as it affected a public employee's current position, and perhaps his ability to obtain future positions, still acted as a due process limitation on the ability of a public employer to discharge at will a public employee after *Paul v. Davis.*

This due process limitation as it affects public employment may, however, essentially be non-existent after the Supreme Court decision in *Bishop v. Wood.*[57] In *Bishop*, a city police officer, classified by ordinance as a "permanent employee" was discharged for alleged

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[52] 424 U.S. at 704 (quoting *McGrath*, 341 U.S. at 185 (Jackson, J., concurring)).

[53] 424 U.S. at 705 (emphasis added).

[54] 367 U.S. 886, 898 (1961). The language quoted by Justice Rehnquist was: "Finally, it is to be noted that this is not a case where government action has operated to bestow a badge of disloyalty or infamy, *with an attendant foreclosure from other employment opportunity.*" 424 U.S. at 705 (quoting Cafeteria Workers v. McElroy, 367 U.S. at 898) (emphasis in *Paul*).

[55] The *Roth* language quoted by Justice Rehnquist was:

> The State *in declining to rehire the respondent,* did not make any charge against him that might seriously damage his standing and associations in his community. . . .
>
> Similarly, there is no suggestion that the State, *in declining to re-employ the respondent,* imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.

[56] 424 U.S. at 706 (emphasis added and footnote omitted).

[57] 426 U.S. 341 (1976).

insubordination, causing low morale, and conduct unsuited to an officer.[58] These reasons were initially conveyed to the discharged officer in private. They were not made public until reiterated in answer to interrogatories propounded by the officer in his suit.[59] The officer asserted that the allegations were false. Based upon these facts, the majority of the Court concluded that there was no deprivation of a liberty interest.[60] The Court noted:

> Since the former [private] communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honor, or integrity' was thereby impaired. And since the latter communication [answers to interrogatories] was made in the course of a judicial proceeding which did not commence until after petitioner had suffered the injury for which he seeks redress, it surely cannot provide retroactive support for his claim.[61]

Bishop was the first substantive limitation imposed upon the liberty interest in reputation in the public employment context. In effect, it limits that interest to only the protection of reputation as it is viewed in the common law sense of general reputation in the community, regardless of the actual impact that privately uttered damage to his reputation may have had on his ability to find future employment. This is an unwarranted and unnecessarily narrow view of the interest involved. Indeed, it completely ignores the purpose of recognizing the interest in the first place.

Certainly, severe damage to reputation can cause an adverse impact on one's current job, or on one's ability to find future employment. This, in fact, was precisely the case in *Paul v. Davis*.[62] It is absurd, however, to limit the liberty interest in reputation to such a case. The policy underlying the protection of reputation, even as heretofore limited by the Court, has been to protect the liberty interest, not just in reputation, but as it affects the basic right to work. Further, the policy was to prevent the deprivation of that right unless due process had been accorded. This interest remains and is vitally affected, regardless of the fact that the defamation involved did not effect the employee's general reputation, but rather was privately uttered. As Justice Brennan stated in his dissent in *Bishop*:

> [In deciding *Paul*] the Court eviscerated the substance of a long line of prior cases . . . by confining their protection of 'liberty' to

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[58] *Id.* at 350 (Brennan, J., dissenting).
[59] *Id.* at 342-43.
[60] *Id.* at 350 (Brennan, J., dissenting).
[61] *Id.* at 348 (footnote omitted).
[62] *See supra* notes 41-56 and accompanying text.

> situations in which the State inflicts damage to a government employee's 'good name, reputation, honor, or integrity' in the process of terminating his employment. Today the Court effectively destroys even that last vestige of protection for 'liberty' by holding that a State may tell an employee that he is being fired for some nonderogatory reason, and then turn around and inform prospective employers that the employee was in fact discharged for a stigmatizing reason that will effectively preclude future employment.[63]

This observation is well-made. In light of the long line of cases developing the liberty interest in reputation, the reasons giving rise to its development in the first place, and the implicit recognition of these reasons, even in the Court's process of circumscribing the interest, the result reached in *Bishop* is not simply anomalous. It has no basis in law or reason. The Court now apparently focuses wholly on the tortious nature of the defamation, a result it was decrying in *Paul*,[64] while the liberty interest in public employment, the interest which really was the only one giving substance to the whole concept after *Paul*, has apparently evaporated into the ether.

Additionally, it may be argued that the liberty interest giving rise to a due process limitation on the ability of public employers to discharge public employees at will has lost any force it may have had. Nevertheless, the fact that this conclusion is certainly warranted at present does not mean that it will remain so. There is, of course, clearly a good deal of antagonism among a majority of the present Court to the whole concept of a protected liberty interest in reputation, even as it affects one's employment. But the cases evidencing their retrenchment from the position taken in *Constantineau* and *Roth* are hardly models of clarity, and may, should reasoned analysis prevail, prove very unsteady foundations upon which to build in the future. Indeed, it might be hoped that both *Paul* and *Bishop* will indeed be "short-lived aberration[s]."[65]

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[63] 426 U.S. at 351-52 (Brennan, J., dissenting) (citations and footnote omitted).

[64] 424 U.S. at 700-01.

[65] *Id.* at 735 (Brennan, J., dissenting).

The court of appeals correctly relied upon Wisconsin v. Constantineau, 400 U.S. 433 (1971), to find in the plaintiff a liberty interest in his reputation, honor, and good name. Justice Rehnquist, on the other hand, was driven to reinterpret *Constantineau* by torturing the precedents relied upon there into completely unnatural meanings. One commentator has described Justice Rehnquist's handling of precedent in *Paul* as "iconoclastic," *see* L. TRIBE, *supra* note 11, § 15-13, at 259, while another accurately observed that "[i]t is hard to respond to this discussion dispassionately." Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 326 (1976).

It is submitted that Justice Brennan was correct in his assessment of the majority's opinion. Thus, it was necessary to put *Paul* in perspective since that case, together with *Bishop*, represents a major limitation of the liberty interest in reputation which theretofore had been a major

2. First Amendment Rights

Another restriction on the ability of public employers to discharge public employees freely is that premised upon the need to preserve individual liberties as guaranteed by the first amendment. Thus, an employer may not discharge an employee, even when such employee has no legitimate interest in, or entitlement to, his position "on a basis that infringes his constitutionally protected speech or associations."[66] To allow a public employer to dismiss an employee on the basis of controversial speech or association would be to grant to such an employer the power to do indirectly that which the first amendment forbids him to do directly.[67] This restriction, commonly known as that of "unconstitutional conditions,"[68] emerged as an exception to the notion of public employment as a privilege bestowed upon fortunate citizens by a benevolent government.[69] Thus, public

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limitation on the freedom of public employers to discharge "at will" public employees. Though it can be argued that that liberty interest is now a shadow without substance, one that is interesting for discussion but ineffectual as a limitation on public employer discharges of public employees, it is hoped that the contrary is true. It is submitted that Justice Brennan was correct in his desire that these cases, in their incredible disregard of and iconoclastic handling of precedent, will indeed be short-lived aberrations. The most disheartening aspect of the decisions is that four justices joined in Justice Rehnquist's result in *Paul*. There must have been a certain depth of feeling on the part of the justices in order to induce them to approve of such a decision. To that extent the opinion may be very hard to overcome.

[66] Perry v. Sinderman, 408 U.S. 593 (1972).

[67] Van Alstyne, *supra* note 10, at 1445; *see* Speiser v. Randall, 357 U.S. 513, 526 (1958); *see also* Frost & Frost Trucking v. Railroad Comm'n, 271 U.S. 583 (1926), where Justice Sutherland, writing for the majority, held:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of *express divestment*, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the *same result* is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the State threatens otherwise to withhold.

Id. at 593-94 (emphasis added).

[68] Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1596 (1960). Professor Van Alstyne explains the "unconstitutional conditions exception" as follows:

> Essentially, this [exception] declares that whatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly. As a consequence, it seems to follow that the first amendment forbids the government to condition its largess upon the willingness of the petitioner to surrender a right which he would otherwise be entitled to exercise as a private citizen. The net effect is to enable an individual to challenge certain conditions imposed upon his public employment without disturbing the presupposition that he has no 'right' to that employment.

Van Alstyne, *supra* note 10, at 1445-46; *e.g.*, Perry v. Sinderman, 408 U.S. 593, 597 (1972).

[69] Note, *supra* note 68, at 1596. Thus an employee could challenge his discharge on grounds of constitutional infringement rather than "disturbing the presupposition that he has no right to that employment." Van Alstyne, *supra* note 10, at 1446. An employee need only show that the

employees, such as teachers, cannot be dismissed for writing letters criticizing their local school boards;[70] nor can policemen be dismissed for refusing to waive their right against self-incrimination.[71]

The Court utilizes the "unconstitutional condition" standard and unquestioningly reverses any discharge which has directly deprived an employee of a first amendment right. When, however, the discharge has resulted from the imposition of a condition only indirectly inhibiting the exercise of such rights, the Court will balance such detrimental effects against the alleged state interest furthered by allowing the discharge.[72] In *Shelton v. Tucker*,[73] for example, the Court reviewed an Arkansas statute requiring public school teachers to annually list all organizations to which they belonged or contributed in the preceding five years. This statute did not directly affect the right of association because there was no penalty for membership itself. The Court, however, found that the state's alleged interest in enacting the statute—that of avoiding conflicts of interest among local public school teachers—did not outweigh the "chilling effect" of "discouraging controversial political associations where no tenure system provid[ed] job security."[74] Therefore, where a statute premises the retention of one's public employment upon the acceptance of the "unconstitutional condition," the Court will invalidate such a statute. Where a statute inhibits one's public employment by resulting in an "unconstitutional effect," however, the Court will employ a balancing test and uphold the stronger of two competing interests; that of preserving first amendment rights, or that of promoting compelling state interests.[75]

This is a direct limitation on the ability of a public employer to discharge a public employee who is otherwise completely without contractual or statutory protection. In addition, the limitation does not apply to the discharge of employees at will in the private sector.[76]

"condition of which he complains is unreasonable in that it prohibits or abridges the exercise of a right protected by an *explicit* provision of the Constitution." *Id.* at 1447 (emphasis added).

[70] Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

[71] Gardner v. Broderick, 392 U.S. 273, 278-79 (1968).

[72] Van Alstyne, *supra* note 10, at 1447.

[73] 364 U.S. 479 (1960).

[74] Van Alstyne, *supra* note 10, at 1449.

[75] *See, e.g.*, United Pub. Workers v. Mitchell, 330 U.S. 75 (1947). There the Court balanced the alleged interference with free expression with the "requirements of orderly management of administrative personnel." *Id.* at 94. The Court held that it "must balance the extent of the guarantees of freedom against a Congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of the government." *Id.* at 96; *see also* Shelton v. Tucker, 364 U.S. at 485-86.

[76] Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Holodnak v. Avco Corp., 514 F.2d 285 (2d Cir. 1975). In *Holodnak*, an employee was discharged for writing an article critical of the employer and the union. An examination of the facts showed that the business of the

Thus, there is further support for concluding that the concept of employment at will is inconsistent with the realities of public sector employment and that in that context employment at will is a misnomer.

3. Public Policy Limitations

A final possible limitation on the freedom of public employers to discharge public employees may be found in considerations of public policy. The public policy exception to the ability of employers to discharge employees at will has been developed almost entirely in the private sector, and may in fact evidence growing dissatisfaction with the at-will doctrine.[77] Before discussing the public policy limitation in the specific context of public employment, it is best to discuss the area generally, for there are various approaches to, and applications of, the public policy limitation.

The leading case in this area is *Petermann v. International Brotherhood of Teamsters, Local 396.*[78] In that case, the at-will employee was discharged after refusing to give false testimony at a legislative hearing.[79] The California court of appeals held that the discharge was an abuse of the employer's contractual rights to discharge because it jeopardized the public policy of encouraging full and honest testimony.[80] Other courts have reached a similar result relying upon tort rather than contract principles.[81]

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employer was confined almost exclusively to defense contracting. *Id.* at 287. The land, buildings, and equipment were almost wholly owned by the United States, and the government maintained a substantial workforce at the site for the purpose of supervisory production. *Id.* at 289. In view of this close nexus between the government and the employer the actions of the employer were deemed those of the state and the employee's rights of free speech and press received first amendment protection. *Id.* at 288; *see also* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

[77] *See* Blades, *supra* note 1; Weyand, *Present Status of Individual Employee Rights*, N.Y.U. 22D ANNUAL CONFERENCE ON LABOR 171 (1970); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975); Note, *Implied Contract Right to Job Security*, 26 STAN. L. REV. 335 (1974); Note, *California's Controls on Employer Abuse of Employee Rights*, 22 STAN. L. REV. 1015 (1970).

[78] 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

[79] *Id.* at 188, 344 P.2d at 26.

[80] *Id.* at 188-89, 344 P.2d at 27.

[81] Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (tort action for retaliatory discharge of at-will employee who filed legitimate worker's compensation claim); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (tort action lies for discharge of employee who accepted jury duty); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978) (discharge for serving on jury); Harless v. First Nat'l Bank, 246 S.E.2d 270, 275 (W.Va. 1978) (tort claim for discharge for notifying superiors at bank of consumer credit protection law violations).

The public policy exception has been extended the furthest in *Monge v. Beebe Rubber Co.*[82] There, the New Hampshire Supreme Court, in an action in assumpsit to recover damages for breach of an oral contract of employment,[83] observed that:

> In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two. [The court went on to hold] 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 the best interest of the economic system or the public good* and constitutes a breach of the employment contract.[84]

For courts which exhibit hostility to the doctrine of employment at will and which hold or express the opinion that the public policy exception to the doctrine is important, the tort approach to recovery by discharged employees has, or should have, particular appeal. Since, in those courts public policy is deemed important enough to abrogate, in whole or in part, a well established common law principle of employment relations, it would also seem substantial enough to warrant the added inhibitory effect of punitive damages and damages for mental distress which are recoverable in tort but not in contract. *See, e.g.*, Monge v. Beebe Rubber Co., 114 N.H. 130, 135, 316 A.2d 549, 552 (1974).

[82] 114 N.H. 130, 316 A.2d 549 (1974). In 1980 the New Hampshire Supreme Court had an opportunity to construe their *Monge* decision and did so much more narrowly than its broad language would otherwise imply. In Howard v. Dorr Woolen Co., 120 N.H. 295, 414 A.2d 1273 (1980), a widow and the administrator of her late husband's estate alleged the husband had been discharged due to age and a debilitating angina condition. *Id.* at 297, 414 A.2d at 1274. They further alleged that such a discharge was contrary to the broad public policy enunciated in *Monge*. *Id.* The supreme court, however, took a narrower view, and held that *Monge* applied "only to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn." *Id.* A discharge due to sickness did not fall in that category, nor did a discharge due to age. *Id.* at 298, 414 A.2d at 1274. Any claim based upon age discrimination was to be governed by the applicable statutes. *Id.*

In Cloutier v. Great Atl. & Pac. Tea Co., 121 N.H. 915, 436 A.2d 1140 (1981), the combined effects of *Monge* and *Howard* were described by the New Hampshire Supreme Court as creating a two-part test. *Id.* at 919, 436 A.2d at 1143. First, a plaintiff employee must show that the defendant employer was motivated by bad faith, malice, or retaliation in discharging the employee. *Id.* Second, the plaintiff must demonstrate that he was discharged because he performed an act public policy would encourage or he refused to do what public policy would discourage. *Id.* at 920, 436 A.2d at 1143-44. Thus, New Hampshire now aligns itself with the public policy approach adopted by states such as New Jersey in utilizing the two-part test and requiring a showing of a violation of a clear public policy interest. *See* Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980).

[83] 114 N.H. at 134, 316 A.2d at 551.

[84] *Id.* (emphasis added). In making this statement the New Hampshire court surely overstepped its bounds. As a general proposition, it is true that courts have historically developed new principles to accommodate changing values. O. HOLMES, THE COMMON LAW 5 (M. Howe ed. 1968). But when courts move from simply trying to develop principles to accommodate policies declared in one way or another by the electorate's representatives, to deciding themselves for the people what the economic system and the public good are, or should be, then the courts have

Thus, the scope of the cause of action for a discharged employee in New Hampshire, pursuant to *Monge*, is extremely broad. In fact, the *Monge* court effectively eliminated the at-will doctrine altogether.[85]

A problem with the approach used by the court in *Monge* is finding the source of the public policy. The answer would seem to be that one finds it in the *Monge* decision itself, which simply declares that certain types of discharges are violative of its own private conception of public policy, without any indication of exactly where that policy arises or of its nature. All that need be found is that the discharge was of a certain character, and the violation of public policy is thereafter presumed. For these reasons, the approach of the Court in *Monge* is unsatisfactory.[86]

An alternative approach to the one used in *Monge* is that adopted by the New Jersey Supreme Court in *Pierce v. Ortho Pharmaceutical Corp.*[87] The court there held:

> [A]n employee has a cause of action for wrongful discharge when the discharge is contrary to a *clear mandate of public policy.* The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy. However, not all such sources express a clear mandate of public policy. . . . Absent legislation, the judiciary must

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gone too far. In this regard they make their decisions based on their personal observations and biases, from the relatively rarefied heights of the bench, without the benefit of the slightest input from the people or their representatives. Such conduct is forbidden even in the common procedural matter of taking judicial notice. Unless the matter is generally known, the judge may not rely upon personal experience in taking such notice. 9 J. WIGMORE, WIGMORE ON EVIDENCE §§ 2565, 2569 (Chadbourn rev. 1981). Certainly no lesser strictures should be put on judges purporting to declare the existence or nature of such ephemeral concepts as economic systems as they affect the public good.

[85] The court held that "[s]uch a rule affords the employee a certain stability of employment and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably." 114 N.H. at 136, 316 A.2d at 551-52. That the rule affords "a certain stability" of employment would seem to be an understatement. What it does do is impose a just cause requirement for termination, thereby imposing a *de facto* tenure system in private employment at will situations. It makes organization of those workers pointless. Thus, such employees are given even more protection than employees who are probationary in an establishment which is unionized. That is, discharged at-will employees would be provided with at least some explanation for their termination, whereas probationary unionized employees typically receive no such explanation. This is in spite of the fact that employees commonly have the right to organize if they wish; if they may not organize, it is because they are excluded from the protection of the National Labor Relations Act (NLRA), 29 U.S.C. § 151-187 (1976), and that exclusion by Congress must itself be deemed a statement of public policy. Moreover, many states have employment statutes which parallel the NLRA. Of course, where a state has no such statute, no conflict of this sort will exist.

[86] *See also supra* note 84 and accompanying text.

[87] 84 N.J. 58, 417 A.2d 505 (1980). The case involved the discharge of a medical doctor who refused to participate in research on a new drug she felt was controversial, but did not allege was harmful.

> define the cause of action in case-by-case determinations. . . . [U]nless an employee at will identifies a specific expression of public policy, he may be discharged with or without cause.[88]

The New Jersey court, therefore, restricted its role in construing "public policy" by requiring the discharged employee to show the existence of and expressly identify a "mandate of public policy" which allegedly has been violated. This approach effectively removes the court from a position of policymaker and returns the power inherent in such a position to those by whom it should properly be exercised—the elected representatives of the people. Yet, it is broad enough to cover almost any abusive discharge which the public might have a legitimate interest in deterring.[89]

It is not asserted here that the public policy exception to employment at will is an inappropriate concept. Indeed, whatever force it does or should have in the private sector, there is an undeniable need for the exception in the public sector.

In *Monge*, the court found a public interest in stable labor relations in general, noting "the public's interest in maintaining a proper balance between" employer and employee interests. Apparently the court felt that this interest was not fully protected by the National Labor Relations Act. The viability of this argument, however, and its fitness for judicial declaration, are at best debatable. It is highly questionable whether the public *qua* public has a legitimate interest in a private employer's conduct of employment relations *vis-à-vis* employees at will. This doubt, however, does not exist with regard to public employers. Indeed, public employers are by their very nature the concern and interest of the public in general, for they are vested with the administration of public programs and the protection of the public, and they are supported by public monies. While the efficiency and profitability of a private employer's enterprise may not be the legitimate concern of the public, and thus are not generally the proper context in which to invoke the concept of public policy, quite the contrary is true of public employers. The honesty, efficiency, and equitability of public employers and their labor relations are very much the concern of the public, and are uniquely appropriate for invoking the concept of public policy. Conceding, however, that public policy limitations upon the freedom of public employers to discharge employees at will are appropriate, the issue is still unresolved. The question remains: where is the source of public policy? There are two possible approaches here: that of the New Hampshire Supreme

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[88] *Id.* at 72, 417 A.2d at 512 (emphasis added).

[89] *See, e.g.*, cases cited *supra* note 81.

Court in *Monge*, which is inappropriate for use in the public sector; and that of the New Jersey Supreme Court in *Pierce*, which is more appropriate for use in the private sector.

Which of these two approaches is used in the public sector depends, in the final analysis, on the strength of the public interest which attaches to public sector employment decisions, and the nature of that interest.[90] In this regard, the considerations which make the more restricted approach of the New Jersey Supreme Court more appropriate in the private sector are not present in the public sector. Thus, although the public's, as opposed to the individual worker's, interest in the employment decisions is at best debatable when addressing private sector labor relations, quite the opposite is true in the public sector. There the public has an acute interest, which should be self-evident. There can be little doubt that employment decisions have a substantial impact on the efficiency of an operation and the quality of service rendered or product produced. Where the operation is a public one, funded by public monies, and is providing the whole range of essential and nonessential public services, the public clearly has an interest in the efficiency and quality of the operation.

In view of this strong interest, and the traditional wariness of allowing public officials to act unjustifiably, it would seem that in the public sector the approach of the New Hampshire Supreme Court to the discharge of employees at will is the most appropriate. It is emphasized here, though, that this result is obtained not for the reasons enunciated in *Monge*, for such rationale was inappropriate for determination by a court. Rather, the result is necessary in order to protect the more concrete and traditional public interests in efficient and honest government, interests which cannot be furthered through arbitrary or bad faith employment decisions by public employers.[91]

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[90] Another issue which arises when dealing with the doctrine of employment at-will is the possibility of a plaintiff's circumventing limitations periods imposed by the statutes to which he looks for an expression of public policy. For example, one might look to Title VII to find a public policy against discrimination on the basis of race or sex. Assume that in a deferral state a plaintiff has failed to file his claim with the Equal Employment Opportunity Commission (EEOC) within the necessary 300 days and thus is barred from bringing a discrimination complaint in federal court. May that plaintiff, now barred from suit under Title VII, nevertheless bring suit in state court on a theory of wrongful discharge and point to Title VII as the source of public policy? The decision of the New Hampshire Supreme Court in Howard v. Dorr Woolen Co., 120 N.H. 295, 414 A.2d 1273 (1980), would seem to indicate, correctly, that the plaintiff would be limited to his statutory remedy and could not therefore circumvent its limitations period by bringing suit in state court and using the statute as an expression of public policy.

[91] Another public interest might be the more general one which encompasses having public officials who do not act arbitrarily, capriciously, or in bad faith in any of the decisions made in their official capacities. This interest, though, unattached to any concrete interest, is likely to be of little force, though it does have a certain appeal to an innate sense of justice. The argument's

When one considers that the majority of employees at will in the public sector are high ranking individuals, or professionals, who may have a substantial impact on public policy and efficient government operations, avoidance of arbitrary or bad-faith discharge of such high ranking employees becomes a crucial interest to protect.

The conclusion must be reached, then, that the public policy limitation on the freedom of public employers to discharge at will public employees is an appropriate extension of the doctrine currently being developed in the private sector. Moreover, unlike in the private sector, the limitation should be a broad one. It should forbid all such discharges which are "motivated by bad faith or malice or based on retaliation,"[92] thereby effectively abrogating the doctrine of employment at will, such as it is, to the extent that it has in fact any vitality in the public sector.

III. Conclusion

It has been a thesis of this Article that the concept of employment at will in the public sector is a misnomer; that, though such employees may be more easily discharged than employees protected by a collective bargaining agreement or civil service, there are nevertheless substantial, significant limitations placed on a public employer's discretion to discharge them. These limitations arise principally from constitutional strictures. It is further contended that, to the extent the doctrine of employment at will has any remaining vitality in the public sector, it should be abrogated based upon the strong public interest in an efficient, honest, and equitable public service.

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persuasiveness will probably depend on the view taken of the public's interest. That is, one must look to see whether arbitrary employment decisions by public officials, regardless of their practical impact, should be avoided because they injure *me* or *you*, or because they injure *us* by doing violence to the notion of principled decisions by public officials. If the former is the case, then the public *qua* public is not injured by the arbitrary official action, there being no direct impact on *you* or *me*. But if the prohibition of arbitrary official conduct is designed to protect the public in general, from a general injury to our principles, then the interest is one appropriately protected by limitations on public employer discretion in employment decisions. This dichotomous approach is akin to that used in analyzing the protections of the fourth amendment against illegal search and seizure. *See, e.g.*, Amsterdam, *Perspectives on the Fourth Amendment*, 58 U. Minn. L. Rev. 349 (1974). Professor Amsterdam used the same dichotomous analysis in discussing whether the exclusionary rule should be used to exclude evidence which is illegally seized pursuant to a search warrant because the affidavit in support of the warrant contains immaterial but deliberate misrepresentations. The question, he wrote, was "[d]oes it [the fourth amendment] safeguard *my* person and *your* house and *her* parents and *his* effects . . . or is it essentially a regulatory canon . . . that keeps us *collectively* secure in our persons, houses, papers, and effects . . . ?" *Id.* at 367 (emphasis added); *see also* Herman, *Warrants for Arrest or Search: Impeaching the Allegations of a Facially Sufficient Affidavit*, 36 Ohio St. L.J. 721, 753 (1975). Likewise here, absent impact on the *individual*, the question is whether the public *as a body* has an abstract interest in preventing arbitrary or bad faith decisions by public employers.

[92] Cloutier v. Great Atl. & Pac. Tea Co., 121 N.H. 915, 920, 436 A.2d 1140, 1143 (1981).