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Protection Against Unjust Discipline: An Idea Whose Time Has Long Since Come

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III. PROTECTION AGAINST UNJUST DISCIPLINE: AN IDEA WHOSE TIME HAS LONG SINCE COME

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Introduction

The law seems able to absorb only so many new ideas in a given area at any one time. In 1967 Professor Lawrence Blades of Kansas produced a pioneering article in which he decried the iron grip of the contract doctrine of employment at will, and argued that all employees should be legally protected against abusive discharge.[1] The next dozen years witnessed a remarkable reaction. With a unanimity rare, if not unprecedented, among the contentious tribe of labor academics and labor arbitrators, a veritable Who's Who of those professions stepped forth to embrace Blades' notion, and to refine and elaborate it —Aaron,[2] Blumrosen,[3] Howlett,[4] Peck,[5] Stieber,[6] and Summers,[7] to name only some. But the persons who ultimately counted the most, the judges and the legislators, hung back. In the 1960s the country had taken vast strides, at both the federal[8] and state[9] levels, to stamp out discrimination in employment based on such invidious and particularized grounds as race, sex,

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[1]Blades, *Employment at Will vs. Individual Freedom: Of Limiting the Abusive Exercise of Employer Power,* 67 Colum. L. Rev. 1404 (1967).

[2]*Cf.* Aaron, *Constitutional Protections Against Unjust Dismissals from Employment: Some Reflections,* in New Techniques in Labor Dispute Resolution, ed. Howard J. Anderson (Washington: BNA Books, 1976), 13.

[3]Blumrosen, *Strangers No More: All Workers Are Entitled to "Just Cause" Protection under Title VII,* 2 Ind. Rels. L.J. 519 (1978).

[4]Howlett, *Due Process for Nonunionized Employees: A Practical Proposal,* in Proceedings of the 32nd Annual Meeting, Industrial Relations Research Association, ed. Barbara D. Dennis (Madison, Wis.: IRRA, 1980), 164.

[5]Peck, *Unjust Discharges from Employment: A Necessary Change in the Law,* 40 Ohio St. L.J. 1 (1979).

[6]Stieber, *The Case for Protection of Unorganized Employees Against Unjust Discharge,* in Proceedings of the 32nd Annual Meeting, Industrial Relations Research Association, ed. Barbara D. Dennis (Madison, Wis.: IRRA, 1980), 155.

[7]Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute,* 62 Va. L.Rev. 481 (1976).

[8]*E.g.,* Equal Pay Act, 77 Stat. 56 (1963), 29 U.S.C. §206(d) (1976); Civil Rights Act of 1964, Title VII, 78 Stat. 253 (1964), as amended, 42 U.S.C. §2000e (1976 & Supp. II 1978); Age Discrimination in Employment Act, 81 Stat. 602 (1967), as amended, 29 U.S.C. §621 (1976 & Supp. III 1979).

[9]All the states have comprehensive laws against discrimination in employment except Alabama, Arkansas, Georgia, Louisiana, Mississippi, Texas, and Virginia. Fair Employment Practices Manual 8A (Washington: BNA, 1980), 451:102–107.

religion, national origin, and age. It was as if we needed a pause to catch our breath before venturing on into more open and exposed territory. Now, as we enter the 1980s, there are signs of quickening interest by both courts and legislatures in broader protections for employees' job interests, and the time seems ripe for an appraisal of where we have arrived and where we may be headed.

I see no reason to retrace at length the trail that has been blazed by my many predecessors. My principal purpose will be to consider the numerous practical problems that must be resolved if we are to effectuate the concept of protecting employees generally against unjust discipline. First, however, I shall briefly survey the existing body of law, both here and abroad, with special emphasis on the significant changes occurring in the United States over the past two decades. Following that will come a summary of the various major proposals for dealing with the unfair treatment of employees. Finally, I shall focus on some concrete suggestions concerning appropriate procedures and remedies.

Existing Law of Employee Discipline

United States

It is an oft-told tale that the rule making employment arrangements of indefinite duration contracts at will, terminable by either party at any time, is not a rule which has roots deep in the English common law,[10] but one which sprang full-blown in 1877 from the busy and perhaps careless pen of an American treatise writer.[11] However dubious may have been the precedent he cited,[12] his pronouncement was admirably suited to the *zeitgeist* of an emerging industrial nation. Before the nineteenth century was out, our courts could confidently assert: "All [employers] may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."[13]

[10]Summers, *supra* note 7, at 485; Blackstone, Commentaries on the Laws of England 1 (Philadelphia: Robert Bell, 1771), 425–426 (general hiring of menial labor for an unfixed term presumed to be for a year).

[11]Wood, Law of Master and Servant (Albany, N.Y.: John D. Parsons, Jr., 1877), 272–273.

[12]For detailed criticism, see Note, *Implied Contract Rights to Job Security,* 26 Stan. L.Rev. 335, 340–345 (1974).

[13]*Payne* v. *Western & A.R.R.,* 81 Tenn. 507, 519–520 (1884).

Three quite different groups of employees have managed to escape these harsh strictures. The first consists of the minuscule handful of persons whose knowledge or talents are so unusual and valuable that they have the leverage to negotiate a contract for a fixed term with their employer. Second, over half of the approximately 15 million employees of federal, state, and local governments are protected by tenure arrangements or other civil service procedural devices.[14] The third category, of course, is composed of the workers covered by collective bargaining agreements, 80 percent of which expressly prohibit discharge or discipline except for "cause" or "just cause."[15] Union membership in the United States, however, has now declined to less than 20 percent of the total labor force.[16] We may thus assume that something like three-quarters of our 100-million workforce operates under contracts at will. Extrapolating from such figures and from the arbitration records of the American Arbitration Association and the Federal Mediation and Conciliation Service, Cornelius Peck has estimated that at least 12,000 to 15,000 nonunion workers are discharged or disciplined annually whose cases would have been arbitrated if they had been subject to a collective agreement.[17] About half these disciplinary actions would presumably have been found unjustified. Perhaps even more important, Peck suggests that as many as 300,000 disciplinary cases a year arising in the nonunionized sector might have been subjected to negotiation and possible settlement if mandatory grievance procedures had been available. Jack Stieber calculates that about one million private industry employees with more than six months service are fired in a typical year without recourse to grievance and arbitration procedures.[18] He thinks that about 50,000 would be reinstated if they could appeal to impartial tribunals.[19] The gravity of the problem needs no further elaboration.

The first significant inroads on the doctrine of contract at will were made in situations where employers had retaliated against

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[14]Peck, *supra* note 5, at 8–9.

[15]*Id.*, at 8.

[16]Bureau of Labor Statistics, Handbook of Labor Statistics—1978, Bull. No. 2000 (Washington: U.S. Government Printing Office, 1979), 507; New York Times, July 13, 1980, §3, p. 1, col. 1.

[17]Peck, *supra* note 5, at 10.

[18]Stieber, *supra* note 6, at 160.

[19]Letter from Jack Stieber to author, dated April 29, 1981. The estimate will appear in a forthcoming article, and is based on extrapolations from figures in the unionized sector.

employees for exercising their civil rights or declining to act unlawfully. These included cases where workers were fired for serving on a jury,[20] for filing a workers' compensation claim,[21] or even for refusing to give perjured testimony.[22] Plainly, such egregious instances of retaliatory discipline enabled the courts to invoke overarching concepts of "public policy" without reaching the question of whether an employer needed a positive justification for his action. They were akin to decisions that, while a landlord may ordinarily evict a tenant at the end of a lease for any reason or for no reason, he may not evict because the tenant has filed charges under the housing code.[23] Even so, right through the 1960s and 1970s other courts continued to apply the contract-at-will principle with full rigor. A secretary's discharge was sustained, for example, when she went against her immediate supervisor's order and indicated her availability for jury service, even though a senior partner in the firm had said she should do her civic duty.[24] And a court left untouched the dismissal of a long-time salesman for a steel manufacturer because he complained to his superiors and ultimately to a company vice president, justifiably as it later proved, that a new tubular casing could seriously endanger anyone using it.[25]

Another breakthrough occurred in *Monge* v. *Beebe Rubber Co.*,[26] when the New Hampshire Supreme Court extended the concept of retaliatory discharge to an action on an oral employment contract for an indefinite term. A female worker had been fired after rejecting her foreman's sexual advances. The court concluded:

> "We 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 in the best interest of the economic system or the public good and constitutes a breach of the employment contract."[27]

Monge may be said to go beyond the earlier retaliation cases because it did not involve the assertion of a statutory right

[20] *Nees* v. *Hocks*, 272 Ore. 210, 536 P.2d 512 (1975).
[21] *Sventko* v. *Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976).
[22] *Petermann* v. *Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25, 44 LRRM 2968 (1959).
[23] *See, e.g., Edwards* v. *Habib*, 397 F.2d 687 (D.C.Cir. 1968), *cert. den.* 393 U.S. 1016 (1969).
[24] *Mallard* v. *Boring*, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960).
[25] *Geary* v. *United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974).
[26] 114 N.H. 130, 316 A.2d 549 (1974).
[27] *Id.*, at 133.

or other clearly enunciated public policy. It stops short, however, of imposing any affirmative obligation on an employer to demonstrate a reasonable basis for adverse personnel action.

Michigan edged closer to a broader requirement of just cause for discharge in certain circumstances with its two 1980 decisions in *Toussaint* v. *Blue Cross & Blue Shield of Michigan* and *Ebling* v. *Masco Corporation.*[28] Toussaint and Ebling had been employed in middle management positions for five and two years, respectively. Each had been told upon hiring that he would be employed as long as he "did the job." Toussaint had also been handed a personnel manual that stated it was company "policy" to release employees "for just cause only." The court held that a jury could find that a provision forbidding discharge except for cause had become part of the indefinite term contracts either by "express agreement, oral or written," or, in Toussaint's case, as a result of "legitimate expectations grounded in his employer's written policy statements set forth in the manual of personnel policies."[29] Although the Michigan approach opens the door for a court to infer a just cause provision from an employer's overly hearty welcome to sought-after employees, there are a couple of important qualifications. First, the factual basis for the inference, by its very nature, is likely to be found only in dealings with higher level personnel, not rank-and-file workers. Second, the employer can eliminate the protection simply by refraining from any assurance about the reasons for termination.

A further wrinkle was added by the Supreme Court of California in *Tameny* v. *Atlantic Richfield Co.*[30] An employee alleged he had been discharged for refusing to participate in an illegal scheme to fix retail gasoline prices. The court held that the plaintiff could sue not only in contract but also in tort for a wrongful act committed in the course of the contractual relationship. The practical significance of this is that the employee is entitled to pursue compensatory tort and punitive damages, which are not generally available in contract actions. The Supreme Court of New Jersey has also sustained a cause of action

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[28]408 Mich. 579,.292 N.W.2d 880 (1980).

[29]*Id.*, at 598–599. *Accord: Cleary* v. *American Airlines, Inc.*, 168 Cal. Rptr. 722 (Cal. App. 1980); *Pugh* v. *See's Candies, Inc.*, 171 Cal. Rptr. 917 (Cal. App. 1981). *See also Fortune* v. *National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977) (duty of fair dealing).

[30]164 Cal. Rptr. 839 (Cal. Sup. Ct. 1980).

in both tort and contract when an employee is discharged for "refusing to perform an act that violates a clear mandate of public policy."[31]

Despite these salutary developments, however, the blunt reality is that even in the most enlightened American jurisdictions, unorganized private employers need make no positive showing of cause before ridding themselves of an unwanted employee.

Western Europe

The story is quite different concerning job terminations in most of the rest of the industrial world. The International Labor Organization recommended in 1963 that there should be a "valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements [of the employer]."[32] Protection against unfair discharge is afforded by statute in all Common Market countries and in Sweden and Norway.[33]

"Unfair" is variously defined, but the differences in phraseology seem to indicate little if any difference in meaning.[34] An American arbitrator would not feel uncomfortable applying the standards. Ordinarily, there must be advance notice for a discharge, but summary dismissal may be allowed for "flagrant" misconduct or "urgent cause." The burden of proving a "fair" discharge generally rests on the employer. Compensation for periods that vary from country to country is the usual remedy for an unfair dismissal. Reinstatement is rarely authorized and even more rarely employed.

The common pattern in Western Europe is to try discharge cases before specialized labor courts or industrial tribunals.[35] Typically these are tripartite, with a professional judge or legally trained individual serving as chairman, and with laypersons drawn from the ranks of employers and employees serving as associates.

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[31] *Pierce* v. *Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980).

[32] *Recommendation No. 119, Employer Discipline: I.L.O. Report*, 18 Rutgers L.Rev. 446, 449 (1964).

[33] Stieber, *supra* note 6, at 157–159; *see also* Summers, *supra* note 7, at 509–519. Canadian employees covered by the federal Labour Code are also protected. Howlett, *supra* note 4, at 166. Japan and many other non-European countries provide protection as well. Committee Report, *At-Will Employment and the Problem of Unjust Dismissal*, 36 The Record 170, 175 (1981).

[34] Stieber, *supra* note 6, at 157–159; Summers, *supra* note 7, at 509–519.

[35] Summers, *supra* note 7, at 510–519.

Proposals for Ensuring "Just Cause"

At this late date I take it as a given that employees, generally, should be protected, generally, against unjust discipline. Anyone not convinced about this premise is commended to the writings of the illustrious band I have previously cited.[36] But the consensus on objective is not matched by any consensus on means.

To begin with, there is a dispute over the appropriate theory to employ. Blades in his seminal article thought that contract doctrine was so weighted down with the baggage of mutuality of obligation and consideration that it should be shelved in favor of the "more elastic principles" of tort law.[37] Most of the early decisions upholding an employee's cause of action for "abusive discharge" did indeed proceed on the basis of a prima facie tort.[38] Moreover, tort law has the advantage of permitting a wider range of remedies, including punitive damages where appropriate. Yet tort law, grounded as it is in rather nebulous notions of "public policy," has inherent limitations. Often a judge will not be persuaded that an individual injury has risen to the height of an offense against public policy—witness the case of the hapless steel salesman.[39] More fundamentally, public policy may be too coarse a net to catch the more personalized wrong; how should we classify the unwanted overtures of the macho foreman?[40]

Responding to these concerns, a number of commentators have argued that the action should sound in contract rather than tort. Thus, Professor John Blackburn of Ohio State contends that implying a right not to be discharged without good cause would actually conform to the probable intent of the parties to the employment relation.[41] It would also enlarge the scope of employee protection, extending redress to any dismissal not supported by cause instead of restricting relief to malicious or abusive discharges. Blackburn even views the loss of punitive damages as a gain for healthy personnel relations, since he believes the goal should be a make-whole remedy and not a com-

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[36] *See* notes 1–7, *supra.*
[37] Blades, *supra* note 1, at 1422.
[38] *See* cases cited in notes 20–22, *supra.*
[39] *See* note 25, *supra.*
[40] *See* note 26, *supra.*
[41] Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment at Will,* 17 Amer. Bus. L.J. 467, 482 (1980).

bined penalty and windfall. *Monge,* the case of the rebuffed foreman, relied on an implied contract theory, and *Toussaint,* involving oral assurances and written personnel policies, seemed to intermingle express and implied contract.

I see no reason for having to choose between tort and contract law. Either or both would seem appropriate, as the occasion warrants. For me the more important questions are whether we seek common law or statutory solutions and what kinds of tribunals, procedures, and remedies we ought to provide. Here, too, there is disagreement. Summers, for example, is satisfied that the courts are unwilling "to break through their self-created crust of legal doctrine,"[42] and that we must look to the legislatures for the vindication of employees' rights. Peck, on the other hand, believes legislation is so much the product of organized interest groups that almost by definition unorganized workers are an ineffective lobby and must turn to the courts for redress.[43]

Both these assessments contain a good deal of truth. With the benefit of several years' extra hindsight and the further perspective provided by the 1980–1981 decisions from California, Michigan, and New Jersey, I am prepared to say that it is not at all impossible a solution will be fashioned by the judiciary. But the courts are likely to be long on generalization and short on detail when it comes to spelling out procedures, remedies, and the like. At the same time, even though the legislatures may not wish to take the initiative for a whole fistful of understandable political reasons, they may be goaded into action by the boldness of some courts. Furthermore, it is entirely conceivable that at some point employers themselves might support legislation on the ground the compromises and greater exactness of a statutory solution are preferable to the broad strokes and blurred outlines often produced by an innovative judiciary. The upshot may be that in a number of states the process will go through two stages. The first few steps, halting, tentative, or even blundering, will be taken by the courts, and then the legislatures will be almost compelled to move in and provide a more definitive blueprint.

A critical factor in securing legislative relief may be the attitude of organized labor. It is about the only interest group one can identify that might be willing to take the lead in promoting

[42]Summers, *supra* note 7, at 521.
[43]Peck, *supra* note 5, at 3.

such a cause. A common assumption, however, is that unions will not favor legislation protecting employees against arbitrary treatment by employers because it will eliminate or detract from one of the unions' prime selling-points in their efforts to organize the unorganized. I cannot deny this possibility, but I think it would be as short-sighted as was organized labor's initial hostility toward the Fair Labor Standards Act.[44] First, and not insignificantly, organized labor could profit considerably from refurbishing its image as the champion of the disadvantaged. Second, and perhaps more practically, a universal rule against dismissal without cause should actually prove beneficial to unions in their organizing drives. Now, when a union sympathizer is fired in the middle of a campaign, it must be established by a preponderance of the evidence that he or she would not have been discharged but for the exercise of rights protected by the Labor Act.[45] That is frequently a burden too heavy to bear. With a just cause requirement generally applicable, it would be up to the employer to show that some positive, acceptable basis existed for the discharge. Finally, I believe there is a strong likelihood that just cause standards will act more as a spur than a hindrance to union organizing. The promise of fair treatment will be held out to employees; the promise may remain a tantalizing and unrealized dream, however, unless there is present the means to actualize it. Constant, effective representation and advocacy is the surest way to ensure any right. That is the lesson for unions and the unorganized to heed.

In addition to the possible reservations of organized labor, some neutrals in industrial relations might oppose a statutory just cause requirement for fear that it would erode such worthy values as voluntarism, private initiative, and creativity, and more particularly the collective bargaining process itself. I, too, treasure the unique American institution of union-employer bargaining, but when even so hardheaded an observer as John Dunlop can be found rhapsodizing on its "beauty,"[46] I think we should all be wary about being carried away by the mystique of the process. Collective bargaining, after all, is a means and not an end. The objective is the betterment of the individual work-

[44]Dulles, Labor in America (New York: Thomas Y. Crowell, 1960), 283–285.

[45]*Miller Elec. Mfg. Co.* v. *NLRB*, 265 F.2d 225, 43 LRRM 225 (7th Cir. 1959); *NLRB* v. *West Point Mfg. Co.*, 245 F.2d 783, 40 LRRM 2234 (5th Cir. 1957); *cf. Wright Line*, 251 NLRB No. 150, 105 LRRM 1169 (1980).

[46]Dunlop, *The Social Utility of Collective Bargaining*, in Challenges to Collective Bargaining, ed. Lloyd Ulman (Englewood Cliffs, N.J.: Prentice-Hall, 1967), 168, 173.

ing person. When less than a quarter of the labor force is currently afforded protection against unjust discipline, I feel the needs of the other three-quarters outweigh some theoretical risk to traditional bargaining processes. Even then, assuming history is any guide, we underrate the flexibility and resilience of collective bargaining if we believe it cannot adapt to, and indeed exploit, a new legal environment.

Statutory Arbitration

If employees are to be fully and effectively protected against unjust discipline, new specialized legislation will eventually be necessary. The judiciary, as we have seen, may be able to respond to extreme cases and to the atypical situations of middle-management personnel. But the courts have no capacity to construct an administrative apparatus for enforcement purposes, and their more formalized processes are not readily accessible to rank-and-file workers. Nor do I see much hope, as do Peck[47] and Blumrosen,[48] in either the Constitution or existing civil rights legislation. To me the former route seems barred by the courts' increasing reluctance to expand the "state action" concept,[49] and the latter by the need to accord some modicum of respect to the legislative intent to forbid job discrimination only on the specified bases of "race, sex, religion, national origin, age," and the like.[50] It comes down, then, to a matter of further legislation. A federal statute would seem foredoomed in this period of national retrenchment. State legislation appears more promising, and it offers the additional advantage of the opportunity for some healthy experimentation with alternative procedures. During the past few years bills have been drafted in such states as Connecticut,[51] Michigan,[52] and New Jersey[53] to provide "just cause" protection to unorganized workers. In the remainder of this paper I shall consider some of the principal issues almost any statutory proposal will have to confront. Obviously, there will often be substantial values in competition, and more

[47]Peck, *supra* note 5, at 26–42.
[48]Blumrosen, *supra* note 3.
[49]*See, e.g., Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972).
[50]See text at note 8, *supra*.
[51]Conn. Comm. Bill No. 5151 (1975).
[52]At the time of writing, Michigan Representative Perry Bullard had completed the fourth draft of a proposed bill and was planning to introduce it shortly.
[53]N.J. Assembly Bill No. 1832 (1980).

than one choice could be supported. My own suggestions will try to take account of both the ideal and the politically feasible.

"Just Cause" Standard

The first question can be disposed of the easiest. The statute should articulate a standard for lawful discharge or discipline in terms of "just cause" or equivalent language, without further definition. Even in Western European countries having nothing like the body of American arbitral precedent interpreting "just cause" requirements, there has apparently been little difficulty in applying broadly phrased statutory criteria. Any effort at specification is bound to risk underinclusiveness. The decision-makers can be counted on to flesh out "just cause" in the same way as have the arbitrators.

The statute should probably remain discreetly silent on such items as the burden and the quantum of proof. The differing standards that have been applied by public tribunals in job discrimination cases and by private arbitrators under collective bargaining agreements will tug in opposite directions. Concrete cases would appear to provide the best vehicle for dealing with such issues.

Protected Classes of Employees

It is hard to argue in principle that any employee should be subject to an unjust termination. Still, when one reaches the presidency of the Ford Motor Company, it does not seem wholly unfitting that one accepts the risk of being confronted one day by an announcement from the chairman of the board, "I'm getting rid of you because I don't like you." Beyond that, there are practical reasons for excluding certain classes of employees from the protection of a statute.

Managers and Supervisors. In the higher ranges of management, one official's evaluation of another's business judgment may become so intertwined with questions of fair personal treatment that the two cannot be separated. That does not reach down to the level of shop foremen and other supervisors, who are excluded from the organizational protections of the National Labor Relations Act because they are management's immediate representatives to rank-and-file employees and any union that may be bargaining for them. This concern about potential conflicts of interest plainly does not apply to "just cause" legisla-

tion, and supervisors as such should be covered. More troubling is the position of middle-management personnel, who are among the most exposed and vulnerable. Unfortunately, our lexicon of industrial relations usage does not contain a convenient term distinguishing middle management, whom we should protect, from higher management, whom we may wish to exclude. I would suggest pointing the direction with as serviceable a definition as we can muster, and leaving the rest to interpretation.

Probationary Employees. There is almost a presumption that an employer will not dismiss an employee unfairly in the early days of employment—otherwise, why hire? Moreover, the first few weeks or months of employment enable the employer to size up the new recruit and assess his or her performance on the job. On the other hand, it is not until an employee has been part of an establishment for some measurable time that he can reasonably feel he possesses anything like an equity in his position. For all these reasons it is generally recognized in collective bargaining agreements and elsewhere that so-called "probationary" employees are not entitled to just cause protections. Howlett would make the probation period one year;[54] Summers and the Michigan and New Jersey bills opt for six months.[55] The latter seems adequate to me.

Small Employers. Theoretically, job protections should not depend on the size of the employer. Indeed, arbitrariness and individual spite may well be more common on the part of an idiosyncratic sole entrepreneur than on the part of a large, structured corporation. Nonetheless, we feel uneasy about intruding too quickly into the sometimes intensely personal relationships of small, intimate establishments. There is also concern about not dissipating our resources in an endless pursuit of minor culprits instead of concentrating on the major malefactors. A suitable dividing line, at least at the outset, would seem to be employers having between ten[56] and fifteen[57] or more employees.

Public Employees. Public employees generally have constitutional guarantees against the deprivation of their "vested" job

[54]Howlett, *supra* note 4, at 167.
[55]Summers, *supra* note 7, at 525; Mich. draft bill, §3(1); N.J. Assembly Bill No. 1832 (1980), §1.
[56]Summers, *supra* note 7, at 526; Mich. draft bill, §3(2).
[57]Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e(b).

interests without due process. Approximately half also have more specific civil service or tenure protections against unjust dismissal. At least the latter group, as the Michigan bill proposes, could properly be excluded from any new statutory procedures. In addition, since American employment legislation has traditionally differentiated between the public and private sectors, it may be politically advantageous to maintain that distinction by limiting any new protections to private industry.

Organized Employees. Most of the arguments in favor of just cause requirements have been phrased in terms of protecting "unorganized" workers. The Michigan bill expressly excludes employees "protected" by a union contract.[58] Furthermore, there is at least some potential for a federal preemption problem in covering unionized workers, as any state statute would necessarily affect collective bargaining under the NLRA. The risk is slight, however, since the Supreme Court has taken a liberal attitude toward state regulation in the areas of employment discrimination,[59] unemployment compensation,[60] and similar welfare concerns.[61] The issue must be faced as a matter of policy, then, whether to include workers subject to a collective bargaining agreement.

Except for the possible conservation of limited administrative resources, I see no justifiable grounds for treating organized employees differently from the unorganized with respect to basic statutory protections. If we conclude that workers in general are entitled to invoke a just cause standard, the same public policy should extend to all, regardless of the existence of parallel protections in a collective bargaining agreement. There is precedent for such an approach in both the NLRA and civil rights legislation, which clearly extend to workers who are also covered by antidiscrimination guarantees in their union contracts.[62]

For me the difficult question is the proper relationship of statutory and contractual rights and remedies, when both are

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[58] Mich. draft bill, §3(1). New Jersey more specifically limits protection to an employee "without the benefit of . . . a collective bargaining agreement that contains a grievance procedure covering these matters which terminates in binding arbitration." Assembly Bill No. 1832 (1980), §1.

[59] *E.g., Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines*, 372 U.S. 714, 52 LRRM 2889 (1963).

[60] *New York Tel. Co.* v. *New York State Dept. of Labor*, 440 U.S. 519, 100 LRRM 2896 (1979).

[61] *See, e.g., Teamsters Local 24* v. *Oliver*, 358 U.S. 283, 297, 43 LRRM 2374 (1959).

[62] *General American Transp. Corp.*, 228 NLRB No. 102, 94 LRRM 1483 (1977); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974).

available. Summers would give the contract priority to the extent of requiring a disciplined employee to exhaust the contractual grievance procedure, and would make any arbitral award that is obtained final and binding.[63] But he would not let the union enter a binding settlement with the employer, as it now may do under *Vaca* v. *Sipes,*[64] subject only to its duty of fair representation toward the employee. Instead, if the union declines to arbitrate under the contract, Summers would permit the employee to proceed on his or her own to the neutral tribunal provided by the state. He believes only "the most stubborn individual" would persist in the face of the union's settlement. From my experience with the United Automobile Workers' Public Review Board, I suspect there are more such "stubborn individuals" about than Summers imagines. Otherwise, I find his conclusions reasonable, but not entirely logical. For example, if the statutory right is so powerful that the union cannot waive it, why should not the employee be able, like an employee charging employer discrimination under section 8(a)(3) of the NLRA,[65] to circumvent the grievance procedure completely, instead of being compelled to exhaust contractual procedures first? My own inclination would be to put more trust in the flexibility of collective bargaining, and to leave some of these questions for future resolution amidst the counterpoint of particular facts, negotiated tradeoffs, dollar costs, and the union's overriding duty of fair representation. I see no reason here to engage in the same close scrutiny of union, employer, or arbitrator conduct that may be appropriate in dealing with such sensitive and divisive issues as race and sex discrimination.[66]

Discipline Covered

Advocates of employee protection have usually talked about protection against discharge, the so-called economic "capital punishment" of industrial relations. That is dramatic. But an extended suspension, a demotion, a denied promotion, or an onerous job assignment, while not as blatant, can be almost as devastating. Such job actions should be regarded as the functional equivalent of discharge. The Michigan bill may be politi-

[63] Summers, *supra* note 7, at 528.
[64] 386 U.S. 171, 64 LRRM 2369 (1967).
[65] *General American Transp. Corp., supra* note 62.
[66] *See, e.g., Alexander* v. *Gardner Denver Co., supra* note 62; *Glover* v. *St. Louis-San Francisco Ry.,* 393 U.S. 324, 70 LRRM 2097 (1969).

cally astute in the way it puts the matter, in effect creating a "constructive discharge," though it requires the employee to engage in a variation on Russian roulette: "Discharge includes a resignation or quit that results from an improper or unreasonable action or inaction of the employer."[67]

European experience indicates that protections against unjust discipline will inevitably force inquiries into an employer's handling of "redundancies," that is, layoffs or other employee reassignments to meet economic downturns or reduced production demands. Otherwise, there is simply too much opportunity to disguise unfair treatment of an individual employee as part of an employer's overall reaction to business oscillations. This hardly imposes an oppressive burden on employers. All they need do is establish almost any sort of rational, verifiable criterion—seniority, skills, past productivity, etc.—as the basis for their job determinations, and they are practically impervious to challenge.

Adjudicators and Procedure

A new statute could pick and choose across a broad spectrum of possible enforcement devices. Most persons would probably rule out the courts as too formal, too costly, and already overloaded. Existing administrative agencies, either the labor relations boards or the civil rights commissions, are more likely candidates. Robert Howlett, the former chairman of the Michigan Employment Relations Commission, favors placing administration in the hands of state labor departments.[68] He feels the hearing officers of the conventional labor relations agencies are more attuned to organizational than to individual concerns. He also believes the whole proposal would face less political opposition if it were divorced from the usual union-employer regulatory context. My view is that a question like this is best answered by reference to the governmental structure and industrial relations climate of each state.

More significant, I think, than the locus of administration is whether we follow the hearing officer-agency model or the arbitration model. I hope I am not merely exhibiting crass professional bias when I join the overwhelming majority of my fellow arbitrators who have addressed the issue in concluding that

[67]Mich. draft bill, §2(3).
[68]Howlett, *supra* note 4, at 167.

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means. That ought to be the standard here. Since a statutory arbitrator is imposed on the parties, however, there may be considerable pressure to adopt the stiffer "substantial evidence" standard. Moreover, some state constitutions require that rulings by public agencies and officials be supported by "competent, material, and substantial evidence on the record considered as a whole."[71] If a "substantial evidence" requirement obtains, one way or the other, it raises the grim prospect of verbatim transcripts, with all their attendant delays and added costs. Although some persons seem to eye a tape recorder in a hearing room the way certain Indians are said to view cameras —as if cameras were out to capture their souls—the sponsor of the Michigan bill was persuaded to accept this cheap, handy device as a sufficient means of documentation,[72] and I should hope others would follow suit.

Remedies

Arbitrators under labor contracts have demonstrated both ingenuity and common sense in devising a range of remedies to counter unjust discharge and other discipline. They have, for instance, evolved the cardinal principle that the punishment must fit not only the offense but also the offender. What is suitable for the short-term employee of spotty record is not right for the long-time veteran of irreproachable deportment. Presumably statutory arbitrators will temper their judgments accordingly.

More specifically, remedies for unjust discharge in the United States have traditionally included reinstatement with or without back pay. In Europe reinstatement is the exception. Apparently it is felt that the lone, unwanted employee can seldom regain a comfortable position in his old workplace, and it is better to award him severance pay and let him go. A number of American experts also seem to believe that reinstatement is unfeasible without the presence of a labor union to support the restored employee. I think awarding severance pay in lieu of reinstatement is an option the arbitrator should have. But I see no reason for precluding reinstatement out of an exaggerated regard for the employee's psychic well-being. American workers are probably more transient than their European

[71] E.g., Mich. Const. 1963, Art.VI, §28.
[72] Mich. draft bill, §10(5).

counterparts, and they are used to handling unfamiliar job situations. A reinstatement order also gives them extra bargaining leverage in working out any future adjustment with the employer. I would grant reinstatement when it seemed appropriate, and let the employee decide what use to make of the award.

Costs

The arbitrator's fee and expenses under collectively bargained arrangements are normally shared, 50-50, by the parties, although occasionally the loser pays all. Each side bears its own representation costs, if any. A few years ago my former colleague, Harry Edwards, calculated that the typical one-day hearing costs a union $2200;[73] that would be a prohibitive figure for many individual employees, especially those out of work. Clyde Summers declares that "in principle" under a statutory scheme the state should cover administrative costs and the arbitrator's fee, just as it bears the expense of courts and judges.[74] He would allow a nominal filing fee, perhaps $100, to discourage frivolous claims. Howlett would require such a fee at the point a case is referred to arbitration by a screening officer.[75]

In theory one cannot fault that approach. But there may be practical problems in implementing it. There is now a strong tradition in the collective bargaining sector that the parties shall pay the arbitrator. Although a few states, like Connecticut and Wisconsin,[76] provide arbitrators at public expense, the trend has been, in a kind of reversal of Gresham's Law, for privately paid arbitrators to replace publicly paid arbitrators. Thus, prior to the Taft-Hartley Act, the old United States Conciliation Service furnished free arbitration through staff personnel. Now, of course, the FMCS simply offers parties the names of private arbitrators. New York continues to provide a choice of staff arbitrators paid by the state and "panel" arbitrators whom the parties must pay.[77] But Robben Fleming reports that "the

[73]Edwards, *Problems Facing Arbitration Process,* in Labor Relations Yearbook—1977 (Washington: BNA Books, 1978), 206.
[74]Summers, *supra* note 7, at 524.
[75]Howlett, *supra* note 4, at 169.
[76]Summers, *supra* note 7, at 524; Mueller, *The Role of the Wisconsin Employment Board Arbitrator,* 1963 Wis. L.Rev. 47, 49.
[77]Summers, *supra* note 7, at 522.

amount of free service is declining by deliberate choice of the state agency."[78] The list of private arbitrators is publicized and the availability of staff personnel is not. Moreover, in a period of severe financial stringency for many state governments, the prospect of one more new and perhaps substantial expense is sure to generate even further opposition to a proposal that is not going to elicit universal acclaim in any event. The Michigan bill has heeded the counsel of prudence and provided that the employer and the employee "shall bear equally" the cost of the arbitrator.[79]

Elite private arbitrators, I regret to have to observe, undoubtedly have a personal interest in this debate over costs. If the state pays the bill, the state will almost certainly, like Connecticut, set the rate.[80] That may be fine for fledgling arbitrators, but it may not be adequate for financing many trips to Maui. I shall leave to others any necessary development of this somber theme, expressing only a modest hope that we may comport ourselves more gracefully and responsibly than some other professions in the perceived face of rampant socialism.

Conclusion

Protection against unjust discipline is an idea whose time has long since come. The common law of contract, tort, or even property needs only a small adjustment to accommodate this new concept. More to the point, statutory relief for this long-neglected abuse of the unorganized worker can now be likened to a moral imperative for conscientious legislators and for all those who labor in the field of industrial relations.

This is not "uncharted territory," as some timid courts have exclaimed.[81] This is terrain that has been carefully mapped in thousands of arbitration decisions since the Second World War. That body of arbitral precedent and a large and potentially much larger body of arbitrators stand ready to be drawn upon in the forging of a new set of statutory guarantees. The debates that remain over this detail or that detail should not obscure one central fact. In the 15 years or so since Blades enunciated his

[78]Fleming, The Labor Arbitration Process (Urbana: University of Illinois Press, 1965), 51.
[79]Mich. draft bill, §8(1).
[80]Summers, *supra* note 7, at 522.
[81]*Geary* v. *United States Steel Corp.*, 456 Pa. 171, 174, 319 A.2d 174 (1974).

thesis, many other experts have joined the chorus. Not a single respected and disinterested voice has been heard to suggest there is any valid, substantial reason for opposing the requirement of just cause.[82] No such reason has been suggested, in my judgment, because there is none.

[82]At the time I first uttered these words in Maui, I believed them to be literally true. I underestimated the Academy membership's almost infinite capacity for differences of opinion. Immediately several "respected and disinterested" voices were heard to challenge the whole concept of a law requiring "just cause" for the discipline of unorganized employees—primarily, as I understand it, for the reasons mentioned in the text accompanying notes 44–46, *supra*. But I have decided to let my original phrasing stand; at least to date no one has seen fit to commit his contrary views to the permanency of print.

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