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THE COVENANT OF GOOD FAITH AND FAIR DEALING: A COMMON GROUND FOR THE TORTS OF WRONGFUL DISCHARGE FROM EMPLOYMENT

I. INTRODUCTION

Over the past twenty years, the California Supreme Court has led efforts to ameliorate the inequitable effects of the increasing economic concentration in our industrialized society. The court has sought to adjust gross disparities in bargaining power by using the flexibility of the common law to fashion remedies that are openly based on an assessment of the social and economic realities of the relationship or “status” of the parties. In this manner, the California Supreme Court and other state courts concerned with changing social relationships have adjusted unequal power in the relationships between workers and unions, doctors and professional societies, insurers and insureds, patients and hospitals,

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depositors and banks,7 and consumers and producers.8 In each area, the court has pierced the veil of "arms-length bargaining" implicit in traditional contract doctrine and has often imposed a tort measure of damages to deter abuse by the stronger party in what would otherwise be treated as a contractual relationship. This comment suggests that a similar approach should be given to the employee/employer relationship9 by judicial infusion of content into the covenant of good faith and fair dealing that is implied by law in every contract, including contracts of employment.10

The twentieth century has witnessed a growing imbalance of the economic power between the employer and employee. Although the labor union movement attempted to redress the imbalance,11 its impact has shrunk along with its dwindling representation of the labor force.12 In the meantime, increased


[A] single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer.

occupational immobility, compounded by limited reemployment opportunities due to technological specialization and the shrinking opportunities for self-employment due to concentration of economic power, has created a socio-economic environment which prompted one writer to observe:

We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. For our generation, the substance of life is in another man's hands.

In contrast to the employee's dependence on the employment relation, the employer is relatively unconcerned with the identity of the person with whom he shares the relation. The employer's interest is merely to have someone—anyone—occupy a predesigned job role and perform the functions assigned to it. Even where the specific identity of the employee is important, or where the availability of employees with the requisite skills is limited, the employer has recourse to market mechanisms that permit increased labor costs to be shifted to third party consumers. Thus, employees can expect little protection of their interests in the continued employment relation through the operation of employer self-interest. To the contrary, the employer's relative disinterest works a profound harm to employees by operation of the rule that an employment contract for an indefinite period may be terminated at any time at the will of either party. In the classic statement of the rule, an employer may discharge an employee "for good cause, for no cause, or even for cause morally

14. See Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404, 1405 n.9 (1967). The author offers as an example B.F. Goodrich v. Wohlgumuth, 137 U.S.P.Q. (BNA) 805 (Ohio App. 1963), where the employee, having learned trade secrets while working for Goodrich as a space suit expert, was enjoined from working for one of the few other companies in the space suit field.
wrong, without being thereby guilty of legal wrong." The employee's interests are hardly vindicated by dogged insistence that he may quit his job for equally capricious reasons. The rule has been justly criticized as a species of that law which permits rich and poor alike to sleep beneath bridges.

As might be expected the at-will rule has resulted in judicial sanction of the most egregious employer behavior. 


18. For further discussion of the misapplication of mutuality concepts to the employment relation, see text accompanying notes 61-72 infra. Professor Blades has noted the irony of using the mutuality rule in defense of abusive exercise of employer power where the origins of the rule can be traced to concerns for employee freedom. Blades, supra note 14, at 1419 (citing Pitcher v. United Oil & Gas Syndicate, Inc., 174 La. 66, 69, 139 So. 760, 761 (1932)):

An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition; indeed, in this land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself; and the law will presume . . . that he did not so intend. And if the contract of employment be not binding on the employee for the whole term of such employment, then it cannot be binding upon the employer; there would be a lack of 'mutuality.'

The fallacy of this legal logic lies in an unstated correlative presumption: public policy and the spirit of our institutions lead the law to presume that the employee intended to subject himself to arbitrary dismissal. This presumption has as little foundation in the reality of the employment relation as it has in the modern legal conception of mutuality. See J. Calamari & J. Perrillo, The Law of Contracts § 4-14 (2d ed. 1977).


20. Percival v. General Motors Corp., 539 F.2d 1126 (8th Cir. 1976) (employee mechanical engineer fired because of refusal to falsify reports submitted to government agency); Hablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1969) (employer need not return contributions to pension fund made by employee who was fired without cause after 43 years of service); Comerford v. International Harvester Co., 235 Ala. 376, 178 So. 384 (1938) (employee fired because employer failed to alienate affections of employee's wife); Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960) (employee fired for accepting jury duty although management had advised her to do so); Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956) (employee fired because he filed worker's compensation claim against his employer); Wegman v. Dairylea Coop., Inc., 50 A.D.2d 108, 376 N.Y.S.2d 728 (1975), leave to appeal denied, 38 N.Y.2d 918, 346 N.E.2d 817, 383 N.Y.S.2d 979 (1976) (employee fired because he refused to participate in illegal standardization of milk products).
though significant groups of unionized21 and public employees22 have found shelter from the rule, the majority of American employees23 remain subject to its excesses. Although some statutory24 and judicial action25 has limited the scope of the at-will rule, the protection thus afforded is merely incidental to larger statutory and public policy goals rather than based upon an assessment of the competing interests of employer and employee. A reevaluation of the at-will rule is necessary: the scope of the rule far exceeds its social utility and shifts to the employee the burden of unproductive and unwarranted employer discretion at the expense of important employee interests that deserve protection.

This comment first examines the origins of the at-will rule, the rule's legal and policy foundations, and the employer's interest in maintaining control of the work place. It then discusses the limited effectiveness of various judicial attempts to control abuses of employer power. Finally, the comment concludes that effective relief must be predicated on a

21. Unionized employees are protected from employer abuse by collective bargaining agreements containing express or implied "just cause" standards for dismissal. Labor arbitrators have developed a "common law" of dismissal in the course of interpreting these just cause provisions. C. Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 VA. L. REV. 481, 499-501 (1976).

22. Public employees are protected from employer abuse by civil service laws and regulations. See, e.g., 5 U.S.C. § 7512(a) (1976), which permits discharge only "for such cause as will promote the efficiency of the service." Public employees also enjoy substantial procedural safeguards in the determination of cause for dismissal. Frug, Does the Constitution Prevent the Discharge of Civil Service Employees? 124 U. PA. L. REV. 942, 945 (1976); Lowry, Constitutional Limitations on the Dismissal of Public Employees, 43 BROOKLYN L. REV. 1 (1976).


25. See text accompanying notes 87-119 infra.
balancing of competing interests of employer and employee and suggests that the implied covenant of good faith and fair dealing achieves that purpose and provides a common theoretical structure under which previous attempts to produce a remedy can be consolidated.

II. THE AT-WILL RULE: THE SOURCE OF POTENTIALLY ABUSIVE EMPLOYER POWER

A. Origins of the Rule

The modern employment relationship has its origins in the English common law of master and servant. Developed from status notions of tenure in land, the doctrine of master and servant was heavily influenced by the nature of the servant's relationship with his feudal lord. The familial characteristics of the relation, the law of master and servant was regarded as a branch of the law of domestic relations which included husband and wife, parent and child, guardian and ward, and infancy. In each case, the law severely restricted the ability of the parties to sever the bonds of the relationship. When the Black Death reduced the labor force by half, these bonds were further tightened by a series of English statutes. The statutes provided that no master could discharge his servant or apprentice except on reasonable cause.

Not until 1875, when the statutes were repealed, did contract notions prevail over the old status concepts. Status notions of the bonds between master and servant nevertheless continued to influence development of contract doctrine; in the English common law the limited ability to sever the


28. Statute of Labourers, 1349, 23 Edw. 3, c. 1; Statute of Labourers, 1562, 5 Eliz. 1, c. 4, §§ 5, 13, 35.


master-servant relation was preserved by the presumption that employment was for one year. Thus, the English employer's discretion to discharge an employee for no cause or bad cause was curtailed by the prospect of breach of contract damages.

In the United States, the received common law of employment was in considerable disarray by the mid-nineteenth century. Several approaches to discharge problems were evident. Finally, in 1877, the treatise writer H.G. Wood settled the confusion by formulating the employment at-will rule.

In England, it is held that a general hiring, or a hiring by the terms of which no time is fixed, is a hiring by the year. . . . With us, the rule is inflexible that a general or indefinite hiring is, *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.

This announcement, which amounted to a rejection of prior English law was made without analysis or justification. The four American cases cited as authority for the rule did not support it. Despite its questionable authority, the at-will

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32. 2 W. BLACKSTONE, COMMENTARIES *425. This rule later evolved into a rule permitting termination only after a notice period determined by custom in the trade or, in the absence of custom, some reasonable time unless a shorter notice period was expressly agreed to or there was cause for summary dismissal. This English common law rule was displaced in 1963 by statutory minimum notice standards. The Industrial Relations Act of 1971 provided English workers with comprehensive protection against unjust dismissal. For a review of protective laws in other countries, see C. Summers, *supra* note 21, at 508-19. Summers concludes that "[t]he United States is one of the few industrial countries that does not provide general legal protection against unjust dismissals." *Id.* at 508.

33. Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 336, 341 n.50 (1974). One approach analyzed the circumstances surrounding the employment relation to determine the duration of the contract. Another relied on a presumption that the duration of the contract was equal to the pay interval.


35. Wilder v. United States, 5 Ct. Cl. 462 (1869), *rev'd on other grounds*, 80 U.S. 254 (1871); DeBrian v. Minturn, 1 Cal. 450 (1851); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870); Franklin Mining Co. v. Harris, 24 Mich. 115 (1871). For an analysis of these cases demonstrating their lack of support for the at-will rule, see Note,
rule was rapidly adopted by the courts and was firmly in place by the beginning of the twentieth century. The courts adopted the rule with minimal legal analysis and even less concern for the injury to employee interests caused by its application. 36 By operation of the rule, employment contracts for an indefinite term became devices for creating legally unsupervised relationships that effectively gave management absolute discretion. 37 The employer was free to use his power to discharge for purposes that would not be tolerated if the employer had used a different means of coercion. 38

Given this result and the benefit of hindsight, the rapid acceptance of the at-will rule is difficult to understand. Several commentators have suggested that the rule squared well with the then dominant ideology of laissez-faire and its legal analogue, freedom of contract. 39 Further support was found in the contractual principle of mutuality of obligation: if the employee has the right to quit his job at will, then his employer must also have the right to fire the employee for any reason, whether good, bad, or indifferent. 40 As suggested earlier, 41 the "freedom" imported into the employment relation by the at-will rule is hardly mutual and cannot be fairly described as freedom of contract. 42 The rule may perhaps be more accurately described as serving the perceived economic needs of

supra note 33, at 341 n.54.

36. The leading case adopting the at-will rule is Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895) (no analysis of employee expectations or reliance after ten years of employment). See also Clarke v. Atlantic Stevedoring Co., 163 F. 423 (C.C.E.D.N.Y. 1908) (200 black stevedores hired for permanent employment discharged to accommodate white stevedores); Boyer v. Western Union Tel. Co., 124 F. 246 (C.C.E.D. Mo. 1903) (court sustained demurrer to a claim of conspiracy to discharge employees for union activity and indicated result would be the same if employees had been discharged for being Presbyterians).

37. P. SELZNICK, supra note 34, at 131-35.

38. See cases cited notes 20 & 36 supra.

39. Blades, supra note 14, at 1416-19; Feinman, supra note 26, at 118; Note, supra note 33, at 343.

40. Blades, supra note 14, at 1419-21; Note, supra note 33, at 346-47.

41. See note 18 supra.

42. The court in Payne v. Western & Atl. R.R., 81 Tenn. 507, 520 (1884) asserted that freedom of contract was the primary policy behind employment at-will, but was less concerned with the employee's freedom to negotiate a bargain at arms length than the employer's freedom to discharge employees for any reason. This so called freedom of contract "secured all civil and industrial liberty." Id. at 520. Accord, Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908). See text accompanying notes 73-81 infra for the somewhat more accurate description of this doctrine as freedom of enterprise.
capital interests during a period of industrial expansion.\footnote{Feinman, supra note 26, at 118. See notes and text accompanying notes 73-81 infra.} Those interests have been described as a philosophy of freedom of enterprise\footnote{Blumrosen, supra note 17, at 481; Note, supra note 33, at 343.} which included the "fundamental right" of the employer to discharge employees at will.\footnote{Adair v. United States, 208 U.S. 161 (1908).} Whatever social utility these legal and policy justifications for the at-will rule may have had at the beginning of the century have been substantially eroded by the passage of time and events.

B. The Eroding Legal and Policy Foundations of the At-Will Rule


Nineteenth century concepts of freedom of contract presumed that parties were free to bargain in reaching agreements that would impose reciprocal rights and obligations based on mutual consent. Although the parties may have held unequal bargaining power, each was free to give or withhold his consent to the resulting deal, however lopsided the agreement may have been. Any attempt to interfere or limit the self-imposed rights and duties created by consent was viewed as inimical to the basic right of individuals to form contracts among themselves.\footnote{J. Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States 3-35 (1956).} Thus, it is not surprising that the employer's unrestrained right to discharge under an at-will employment contract was jealously guarded. So prevalent were these ideas that the employer's right to discharge attained constitutional proportions within a scant thirty years of Wood's announcement of the at-will rule.

In \textit{Adair v. United States},\footnote{208 U.S. 161 (1908).} the United States Supreme Court declared unconstitutional a federal statute that sought to limit the employer's right to discharge because of union membership. The Court found that any legislative interference with the "equality of right" to consent to a contract was an "arbitrary interference with the liberty of contract"\footnote{Id. at 175.} and an unwarranted taking of a property right protected by the
fifth amendment. The Supreme Court, in effect, declared that liberty of contract gave the employer but not the employee a property right in the employment relation. Seven years later, the Court struck down similar state legislation, thus reaffirming the employer's "inviolable right of property and uninhibited freedom of contract." The Court held that any law that interfered with "the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from a person offering to sell it" was a violation of the due process clause of the fourteenth amendment. The Court dismissed concern for employee interests by suggesting that any inequality in the bargaining process was a natural and unavoidable by-product of the right of private property.

The idea that contract rights were unrestrained by competing interests did not last long. Under the weight of the Depression and the social legislation it spawned, the notion of economic due process that was so prominent in Coppelage was, of necessity, put aside. For the employer, the ideal of complete freedom of contract which supported the absolute right to discharge had become an anachronism. The Supreme Court recognized the inherent inequality of the employment

49. Id. at 176.
50. C. Summers, supra note 21, at 486.
51. Blades, supra note 14, at 1417 (discussing Coppelage v. Kansas, 236 U.S. 1 (1915)).
53. Writing for the majority, Justice Pitney observed:

As to the interest of the employees, it is said by the Kansas Supreme Court . . . to be a matter of common knowledge that 'employees, as a rule, are not financially able to be as independent in making of contracts for the sale of their labor as are employers in making contracts of purchase thereof.' No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances . . . . [S]ince it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

Id. at 17.
55. Blades, supra note 14, at 1418 ("The System of 'free' contract described by nineteenth century theory is now coming to be recognized as a world of fantasy, too orderly, too neatly contrived, and too harmonious to correspond with reality.") (quoting Dawson, Economic Duress and the Fair Exchange in French and German Law, 11 Tul. L. Rev. 345 (1937)).
relation and the necessity of limiting the employer's right to discharge when it upheld the National Labor Relations Act (NLRA)\(^5\) in *NLRB v. Jones & Laughlin Steel Corp.*\(^7\) The NLRA sought to remedy employer abuse of termination practices by protecting the employee's right to unionize and prohibiting retaliatory dismissal for union activity.\(^8\) The Court observed that the NLRA did not interfere with the "normal" exercise of the employer's right to discharge but was intended only to prohibit "using the right to discharge as a means of intimidation and coercion" against employees who exercised their rights to organize.\(^9\) The limitation on the right of discharge was narrowly confined to union activity, but the lesson seemed clear: employee interests that are sufficiently important may limit the otherwise unrestricted employer right to discharge. Although the at-will rule had survived, any vitality it enjoyed because of freedom of contract was lost.\(^0\)

2. **Mutuality of Obligation**

The employer's absolute right of discharge is often justified by reference to the employee's right to quit at any time. Unless the employer's right is equal in scope to that of his employee, it is said that the contract would lack mutuality of obligation. This is a legal *non sequitur.* Modern contract theory does not require mutuality of obligation. Most authorities agree that it has lost all utility as an analytical tool and ought to be abandoned.\(^1\) The real question is whether there is mutual consideration\(^2\) which will support reciprocal rights and obligations. The rights and obligations supported by consideration need not be equal.\(^3\) Thus, the employee's single promise

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60. "The course of decisions in this Court since *Adair v. United States* . . . [and] *Coppage v. Kansas* . . . have completely sapped those cases of their authority." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941).


62. J. CALAMARI & J. PERRILLO, *supra* note 18 ("The supposed requirement of mutuality of obligation is merely one of mutuality of consideration.").

63. *Id.* § 4-22.
to provide services while retaining his rights to terminate at
will could support multiple promises of the employer to pay
compensation, provide benefits, and continue employment for
a definite period, or even to limit the employer’s right to ter-
minate for ulterior purposes. The at-will rule, however, denies
this possibility.

In complete derogation of the modern theory of consider-
ation, the at-will rule first assumes that an employee would
not contract away his right to quit without an express state-
ment to that effect. The rule then leaps to the unwarranted
conclusion that, in the absence of such a statement, the em-
ployer’s right to terminate must also be unlimited. In effect,
the at-will rule replaces analysis of the consideration passing
between the parties with a rigid set of presumptions based
upon discredited notions of mutual obligation.

The contract created by the at-will rule is as curious as
the theory on which it is based. The terminable at-will em-
ployment contract exists from moment to moment, impliedly
renewed by the simple fact that neither party has terminated
nor modified the relationship.64 Consideration and perform-
ance are exchanged continuously and simultaneously. Each
successive moment the relationship survives acts as a separate
executed agreement. Neither party to such a fleeting agree-
ment can have any contractually recognizable expectancy that
the employment will exist beyond the immediate moment.
Thus, there is really no breach of any executory duty when
one of the parties exercises his “right” not to form a new con-
tract. This right to terminate the relation does not flow from
contractual elements of consideration and consent supporting
prior executed agreements to exchange services, but rather
from the presumption the law imposes. These curious quali-
ties have led some writers to say that the employment relation
has nothing to do with contract law65 and certainly lends sup-
port to those who contend that the at-will rule is based more
on economic assumptions66 than on legal theory. The courts
nevertheless have continued to treat an at-will employment as
a contract rather than a status relationship.

64. P. Selznick, supra note 34, at 134 (citing J. Commons, Legal Foundations
of Capitalism 285 (1924)).
65. Rideout, The Contract of Employment, 19 CURRENT LEGAL PROBS. 111
66. Feinman, supra note 26, at 118. See text accompanying notes 73–81 infra.
In applying a strict contract analysis to this curious relation, the courts are prevented from finding "further consideration" to support any expectation of future performance by the employer. Such consideration is precluded by the rule's central and unproven premise that, absent a specified term of employment, there can be no justified expectation that a contract will continue to exist. The courts are led to rule out, without any real inquiry, the possibility that the parties may have contemplated a definite, although unstated, contractual term of employment or that events occurring in the course of a continuing employment relation have raised between the parties an objective, contractual expectancy in the future existence of the relation. Thus, the at-will rule's assumption that the employee has retained his right to quit supports, by way of mutuality, the employer's right to discharge even where there is clear evidence that the parties intended otherwise, as where permanent employment or subsequent events—such as accrual of seniority, pension, or death benefits—have plainly induced the employee to forego exercise of his right to terminate at will. Since the at-will rule precludes accrual of any contractual expectancy, employer inducements of continued employee performance may be viewed as mere gratuities which do not contractually obligate the employer to continued performance.

67. See Note, supra note 33, for an excellent discussion on methods of evading the at-will rule by finding consideration for a contract of fixed period.

68. See note 35 supra on lack of support for the at-will rule at the time it was announced.

69. Marin v. Jacuzzi, 224 Cal. App. 2d 549, 36 Cal. Rptr. 880 (1964) (contract for permanent employment is terminable at will of either party for any reason whatsoever); Skagerberg v. Blandin Paper Co., 197 Minn. 291, 266 N.W. 872 (1936) (employee is terminable at will notwithstanding correspondence indicating permanent employment was intended).

70. The presence of inducement and detrimental reliance suggests the application of promissory estoppel. Restatement (Second) of Contracts § 90 (Tent. Drafts Nos. 1-7, 1973). See note 130 infra.

71. See, e.g., MacCabe v. Consolidated Edison Co., 30 N.Y.S.2d 445, 447 (N.Y. City Ct. 1941), where the court said, in considering the employee's rights under a retirement plan:

'In this state, the rule is settled that, unless a definite period of service is specified in the contract, the hiring is at will; and the master has the right to discharge and the servant to leave at any time.' . . . If the hiring can be terminated at will, and provision for an employee's retirement is not embodied in a judicially recognizable obligation of the employer, then whatever provision may be made is, in the eye of the law, not a right, but a gift.
In practice, then, the mutuality justification for the at-will rule bears little relation to the contractual requirement of consideration. Mutuality becomes no more than a device that permits employers to induce employee dependence while retaining absolute discretion to terminate the employee.72

3. Freedom of Enterprise

The rather one-sided nature of the mutuality and contractual freedom of the at-will rule suggests that the true justification for the rule lies in the doctrine of freedom of enterprise. Implicit in this philosophy is the economic assumption that absolute employer discretion to discharge for any reason is necessary to facilitate economic growth. Under this reasoning the analogous right of the employee to quit at will is irrelevant to the rule’s justification. Key to the freedom of enterprise justification is the conviction that shifting the risks of business away from employers and onto employees is a necessary social cost of an expanding economy.73 The economic justification for this conviction is doubtful.

Even at the time the at-will rule was announced, other

72. The employee’s right to quit, which is used to justify the employer’s right to terminate, is not as great as it might seem. Several causes of action have developed which limit the employee’s ability to quit where the employer’s interests might be injured. Theories concerning unfair competition or trade secrets may effectively limit the employee’s ability to find other work. See note 14 supra and cases collected in Note, supra note 33, at 364 n.192, 365 n.195. See also Note, An Employer’s Competitive Restraints on Former Employees, 17 Drake L. Rev. 69 (1967). The possibility of an action for tortious interference with contract may further limit an employee’s ability to take a new job. Patterson Glass Co. v. Thomas, 41 Cal. App. 559, 183 P.190 (1919) (employment contract is subject to protection by injunction against interference by third persons even though contract is terminable at the will of either party).

73. Similar policy considerations led the courts to limit the employer’s tort liability by superimposing the assumption of risk doctrine on the employment relation. The Supreme Court has observed:

Assumption of risk is a judicially created rule which was developed in response to the general impulse of common law courts at the beginning of this period to insulate the employer as much as possible from bearing the ‘human overhead’ which is an inevitable part of the cost—to someone—of the doing of industrialized business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry.

Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 58-59 (1943) (footnotes omitted). Application of assumption of risk doctrine to the employment relation was justified by the freedom of contract notion that employees are free to contractually allocate the risks of employment. More recently, courts have recognized the absence of contractual freedom in employment contracts and have applied adhesion concepts to invalidate employer attempts to limit their liability for negligent injury to employees. See, e.g., Blanco v. Phoenix Compania De Navigacion, S.A., 304 F.2d 13 (4th Cir. 1962).
industrial nations did not find it necessary to give the employer such broad discretion. Great Britain, for example, provided a modicum of protection to the employee by implying a term of employment for one year. In modern times, the number of industrial nations that provide some comprehensive protection for employees has grown. Even the newly independent nations of the world, who might be expected to sacrifice employee interests in the drive for economic development, have enacted protective employment legislation. The International Labor Organization (ILO) has adopted Recommendation No. 119 Concerning Termination of Employment on the Initiative of the Employer, which prohibits dismissal of an employee "unless there is a valid reason . . . connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking . . . ." Although the United States recently rejoined the ILO, we remain the only major industrial nation that does not protect all employees from the potentially abusive exercise of employer power.

In the United States, the free enterprise notions of absolute employer discretion inherent in the at-will rule have been steadily eroded by collective bargaining agreements, statutory provisions, and judicial decision. Although the United States has yet to provide protection to all employees, the rapidly progressing attempts to limit employer abuse have become so pervasive that "the courts cannot ignore the new climate prevailing generally in the relationship of employer and em-

74. See text accompanying note 32 supra.
75. For an excellent review of employee protections in France, West Germany, Great Britain, and Sweden, see C. Summers, supra note 21, at 508-19.
76. See ILO, DISMISSAL PROCEDURES IN NINE COUNTRIES (1959); DISMISSAL PROCEDURES: A COMPARATIVE STUDY, 81 INT'L LAB. REV. 403 (1960).
78. President's Statement on the U.S. Decision to Rejoin the ILO, 16 WEEKLY COMP. OF PRES. DOC. 306 (Feb. 13, 1980).
ployee." It is no longer credible to assert that the discretion conferred on the employer by the at-will rule is necessary to the effective functioning of the American enterprise. Indeed, the United States is now in an anomalous situation where two bodies of law co-exist, even within the same company: one body of law grants broad protection to some employees while the other denies any protection to other employees. If it is admitted that the protection from employer abuse given to civil servants and workers covered by collective bargaining agreements is not inimical to American enterprise, it becomes extremely difficult to justify the unlimited discretion which employers exercise under the at-will rule.

C. Employer Control of the Workplace: A Justification for a Limited At-Will Rule

The single common denominator between these diverse bodies of American industrial jurisprudence provides the only continuing justification for the at-will rule. Professor Werne has observed: "Anglo-American common law established fully that the right of the employer to discipline his employees is a basic management prerogative. This authority flows from management's responsibility for the efficient functioning of the plant." To the extent the at-will rule achieves this purpose it appears justified. But where the exercise of dismissal power is not reasonably related to the legitimate functions of the enterprise, it should be carefully scrutinized with a view toward protection of employee interests that may be unnecessarily harmed.

81. C. Summers, supra note 21, at 483. Professor Summers notes that "[t]his cleavage in our industrial jurisprudence, which leaves the majority of workers without any protection against arbitrary discipline, becomes even more anomalous when our law is compared with that of other countries." Workers in the United States protected by collective bargaining agreements often have more complete and effective protection than employees in any other country, while unprotected classes of American workers are "almost alone" in the world in not having any general protection against unjust dismissal. Id. at 483-84. See also D. Ewing, Freedom Inside the Organization 229-30 (1977).
83. Several writers contend that the at-will rule has lost all credibility. See Blumrosen, Settlement of Disputes Concerning the Exercise of Employer Discretionary Power: United States Report, 18 Rutgers L. Rev. 428, 428 (1964) (American law "may be moving toward a general requirement of just cause and fair dealing between employer and employee."). Most recently, Professor Blumrosen has argued
That the interests of employee and employer can be balanced without harm to commercial enterprise is amply demonstrated by the other regimes of our industrial jurisprudence. In every legal regime that limits the employer's power to discharge—whether it is collective bargaining, statutory protection, or the developing common law limitations—the law has preserved the right of the employer to manage the enterprise and direct the work force. Requiring just cause for dismissal is generally recognized as not intruding on this vital area of employer prerogative.\textsuperscript{84} In each of these regimes, the interests of the employee are recognized and balanced against those of the employer. The at-will rule, however, precludes any balancing of interests. When interpreted to permit discharge "for good cause, for no cause or even for cause morally wrong"\textsuperscript{85} the at-will rule plainly confers power on the employer which far exceeds that necessary to achieve its purpose. The exercise of this excess power that is unrelated to direction of the work force toward achievement of the legitimate goals of the enterprise, has often been the vehicle for infliction of unnecessary, unwarranted, and unconscionable injuries upon that the Equal Protection Clause extends to all workers the protection against arbitrary dismissal that minorities and women receive under Title VII of the Civil Rights Act of 1964. Professors Glendon and Lev contend that the evolution of the law has thoroughly eroded the foundation of the at-will rule and it now awaits a merciful retirement. Glendon \& Lev, \textit{supra} note 19, at 460-61 (1979).

Although much of the justification for the rule is discredited, this comment contends that the at-will rule remains valid to the extent that it assures employer control of the work force in pursuit of the legitimate goals of the enterprise. Nor could the California courts afford the views of Professors Blumrosen, Glendon, and Lev. A variant of the at-will rule is enacted in \textit{CAL. LAB. CODE} § 2922 (West 1974) which provides in part: "An employment, having no specified term, may be terminated at the will of either party on notice to the other . . . Employment for a specified term means an employment for greater than one month." Nothing in this statute, however, requires absolute employer discretion. \textit{See, e.g.}, Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

84. The standard of good faith advanced in this comment is less intrusive on employer perogative than the good cause standard commonly used in collective bargaining requirements. The good cause standard imposes on the employer the burden of proving a justification for termination. Under the good faith standard, however, the employee has the burden of proving bad faith termination. \textit{See Note, Contracts—Employment at Will: Contractual Remedy for Discharge Motivated by Bad Faith, Malice, or Retaliation—Monge v. Beebe Rubber Co., 16 B.C. INDUS. & COM. L. REV. 232, 240 (1974-1975).}

employee interests. To argue that discredited notions of freedom of contract or mutuality of obligation have fairly limited employee's compensable interests to those almost nonexistent contractual expectancies of a terminable at-will employment contract does little for the reputation of justice. 86

III. LIMITING THE AT-WILL RULE IN THE NAME OF PUBLIC POLICY

The potential for abuse of the employer's excess power has not gone unnoticed by the courts. In the last twenty years, the courts have confronted a growing number of unjust discharge cases which clearly demand a remedy. The difficulty in providing a remedy is finding a basis for defining and then imposing those duties on what is essentially a private relationship. By what right or rationale may the courts intrude to adjust the rights and obligations within the private employment relationship?

Thus far, the major rationale for judicial intervention centers on the presence of some statute or judicial expression of public policy. If either the coercive force of permitting a discharge or the employer's motive for discharge tends to frustrate such a policy, the courts will grant the injured employee a tort cause of action. In these cases, the tort action is intended not so much to compensate the injured employee as to deter employer injury to the state's policy interests. The effect of the cases, however, is to provide protection to an expanding range of employee interests.

A. The Origin of the Public Policy Rationale

The seminal case in this area is Petermann v. International Brotherhood of Teamsters. 87 During the course of an investigation into Teamster activities, Petermann, a Teamster employee, was subpoenaed to testify before a State Assembly committee. Prior to his testimony, the Teamster's Secretary-Treasurer instructed Petermann to give false testimony. Petermann did not follow instructions and was fired the next day.

The trial court granted the union's motion for judgment

86. See text accompanying notes 67-72 supra.
on the pleadings. The court of appeal reversed, holding that the employer’s right to discharge under an at-will contract may be limited by statute or by “considerations of public policy.” Since no statute specifically prohibited discharge for refusing to commit perjury, the court was left with the public policy arm of the exception to absolute employer discretion. The court recognized the inherent impossibility of providing a precise definition of “public policy” and instead offered a variety of definitions advanced by commentators and cases. The court noted that both the commission and solicitation for the commission of perjury were illegal and that to permit discharge in this situation would be “obnoxious to the interests of the state and contrary to public policy.” Although criminal penalties would normally be sufficient to deter the commission or solicitation of perjury, the Petermann court found no reason to deny a civil action which tended to effectuate the declared policy of the state. In so concluding, the


89. 174 Cal. App. 2d at 188, 344 P.2d at 27.
90. The Petermann court’s discussion deserves repetition here.
   "The term “public policy” is inherently not subject to precise definition.
   . . . "The question, what is public policy in a given case, is as broad as the question of what is fraud." Also . . . “[p]ublic policy is a vague expression, and few cases can arise in which its application may not be disputed. Mr. Story in his work on Contracts (§ 546), says: ‘It has never been defined by the courts, but has been left loose and free of definition in the same manner as fraud.’ By ‘public policy’ is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good . . . .’” (quoting) (Safeway Stores v. Retail Clerks etc., Assn., 41 Cal. 2d 567, 575 [261 P.2d 721]) (emphasis added).

   In 72 Corpus Juris Secundum . . . it is stated that public policy ‘is the principles under which freedom of contract or private dealing is restricted by law for the good of the community. Another statement, sometimes referred to as a definition, is that whatever contravenes good morals or any established interest of society is against public policy.’

92. 174 Cal. App. 2d at 188, 344 P.2d at 27 (emphasis added).
93. Presumably, the deterrent effect of criminal prosecution by which the state’s interest might be vindicated was still available against the Teamsters for solic-
court implied both a limitation on the at-will rule and a non-statutory cause of action for the employee injured by the exercise of excessive employer power.\footnote{Upon remand, Petermann obtained an award of $50,000 as damages for wrongful discharge. The judgment was affirmed in Petermann v. Teamsters Local 396, 214 Cal. App. 2d 155, 29 Cal. Rptr. 399 (1963).}

A similar rationale was used in \textit{Glenn v. Clearman's Golden Cock Inn, Inc.},\footnote{192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961).} where plaintiff employees were allegedly discharged because of their attempts to organize a union. The court of appeal held that a cause of action for damages was implied from the California Legislature's declared policy of recognizing the right of employees to organize.\footnote{CAL. LAB. CODE §§ 922-923 (West 1971). Section 923 declares the public policy of the state and provides in part: 
Negotiations of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the \textit{individual unorganized worker is helpless to exercise actual liberty of contract} and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. (Emphasis added).} The court reasoned that an exception to the employer's otherwise unrestrained power to discharge must be made in order to effectuate the State's interest in providing employees a means—in this case unionization—of self-protection against excessive employer power. Although the public policy involved in \textit{Glenn} was more directly related to the employee \textit{qua} employee than that in \textit{Petermann}, the court's method was the same; considerations of public policy were found to limit the employer's right to discharge and where employer action exceeds those acceptable limits, a cause of action will be implied to protect state and employee interests.

\textbf{B. Expansion of Employee Protection Under the Public Policy Rationale}

Language in both \textit{Petermann} and \textit{Glenn} suggested that a broad scope of policy concerns may provide a basis for limitations on excessive employer power. Later California cases,
however, interpreted the Petermann-Glenn rationale as limited to legislatively expressed policies which proscribed criminal behavior (Petermann) or which directly affected the employment relation (Glenn). Outside of California, the public policy limitation on employer power went unused until the 1970’s when Petermann suddenly became the basis for a variety of decisions favoring employees in diverse factual situations. Some of these cases fit within the narrow reading given to Petermann by California courts. Others, however, have read the rationale more broadly, and have granted relief even in the absence of a legislatively expressed public policy.

1. Discharge in Retaliation for Filing a Workman’s Compensation Claim

Frampton v. Central Indiana Gas Co. is representative

97. See, e.g., Becket v. Welton & Assocs., 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974) (employee acting as executor of his father’s estate and who sued employer for accounting of estate’s assets has no cause of action when discharged by employer because employee refused to dismiss the suit); Patterson v. Philco Corp., 252 Cal. App. 2d 63, 60 Cal. Rptr. 110 (1967) (employee with an at-will employment contract has no cause of action against employer who discharges him due to allegedly false performance rating, as long as no statute or public policy is violated); Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960) (notwithstanding the importance of jury service to proper functioning of legal system, employee has no cause of action when discharged for accepting jury duty). But see Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970) (statutory policy protecting employee’s right to organize and choose representatives is broadly construed and employee has cause of action when discharged because she hired an attorney to represent her); Wetherton v. Growers Farm Labor Ass’n, 275 Cal. App. 2d 168, 79 Cal. Rptr. 543 (1969) (employees who allege that members of association entered into a conspiracy to coerce employees not to join labor organization have a cause of action).


of several cases that protect policies inherent in state workman's compensation laws. In Frampton, an employee injured her arm while working. Upon returning to work, she experienced continued difficulty with the arm although she was able to perform her duties capably. She avoided filing a workman's compensation claim for fear of losing her job but finally did file nineteen months after the injury, claiming a thirty percent loss in the use of her arm. She received a settlement for the injury and was fired a month later without explanation. The employee sued for actual and punitive damages, alleging that the discharge was in retaliation for filing the workman's compensation claim. The case came before the Indiana Supreme Court on appeal from the lower court's dismissal for failure to state a cause of action.

The Indiana Supreme Court held that the allegations of retaliatory discharge presented a question of fact which, if proved, "would constitute an intentional, wrongful act on the part of the employer for which the injured employee is entitled to be fully compensated in damages." The court reviewed the history and purposes of the workman's compensation statutes and found that they created a "duty in the employer to compensate employees for work-related injuries (through insurance) and a right in the employee to receive such compensation." Although, strictly speaking, the employer had complied with his duty to compensate, permitting retaliatory discharge would have the practical effect of inhibiting employee claims and would frustrate the compensatory policy of the statute. Moreover, permitting retaliatory discharge "opens the door to coercion and other duress-provoking acts." The court admitted the absence of precedent for its conclusion but analogized to parallel developments in landlord-tenant law which declared that retaliatory evictions offend public policy and may be raised as a defense in actions by landlords for possession. The court then cited the California case of Aweeka v. Bonds for the proposition that re-

100. Id. at 253, 297 N.E.2d at 428.
101. Id. at 251, 297 N.E.2d at 427.
102. Id. at 252, 297 N.E.2d at 428. This language suggests that coercive use of employer power may be limited in other situations.
104. 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1971). The analogy between retalia-
taliatory eviction may be redressed by an affirmative cause of action in tort.

*Frampton* certainly fits within the narrower reading of *Petermann*, as the policy of the workman’s compensation statutes impacts directly on the employment relationship. In *Frampton*, however, the cutting edge of the employer’s coercive power fell directly on the employee’s interest in continued employment rather than on the state’s interest expressed by the statute. Permitting the cause of action in *Frampton* did not directly promote a statutory goal as the cause of action in *Petermann* did. *Petermann* observed the stated public policy and refused to perjure himself. *Frampton*, however, received the compensatory benefits that the statute sought to achieve. Thus, the vindication of state policy was of secondary importance to the compensation of the employee’s injury when wrongfully discharged. *Frampton*, then, suggests that the private interests of the employee in continuing employment must be considered in evaluating the negative impact of coercive employer power.

2. Discharge in Retaliation for Accepting Jury Duty

The cases granting a cause of action to employees discharged for accepting jury duty demonstrate a further expansion of the public policy rationale for limiting employer power. The statutory basis for the public policy involved is somewhat vague, arising not so much from a specific statute creating rights or duties in either employer or employee, but rather from the importance of trial by jury, the summons power which often attaches to the imposition of jury duty, and general considerations of judicial efficiency. Unlike the workman’s compensation statutes, the policies involved in the jury duty cases do not directly affect the rights and duties of employer and employee as such. Nor is the employee likely


107. *But see* Campbell v. Ford Indus., Inc., 274 Or. 243, 546 P.2d 141 (1976), where the court denied a cause of action to an employee discharged because he exer-
to become subject to criminal sanctions if he succumbs to employer pressure and declines jury service. Nevertheless, several courts have held the policy considerations involved to be of sufficient importance to warrant a tort cause of action to limit employer power to discharge when an employee accepts jury duty.

For example, in *Reuther v. Fowler & Williams, Inc.* a Pennsylvania Superior Court held that an employee stated a cause of action where he alleged that he was "maliciously, wrongfully, injuriously and intentionally discharged" for having taken a week off work to serve on a jury. The court observed that although there is generally no nonstatutory cause of action for termination of an at-will employment relationship, the employer's power may be limited where a clear exercise his statutory right as a shareholder to inspect corporate books. The court distinguished *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975), saying we believe it to be significant that the conduct of the plaintiff for which she was discharged in *Nees* (her refusal to request that she be excused from jury duty in order that she might perform her duties as an employee) related much more directly to her rights as an employee than did the conduct of the plaintiff in this case. His demand to inspect corporate books and records was an attempt to exercise his rights as a stockholder, and had no direct relation to his rights as an employee.

274 Or. at 250-51, 546 P.2d at 146.

108. *But see Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. Ct. 28, 34 n.6, 386 A.2d 119, 121 n.6 (1978) (accepting jury service may constitute refusal to commit perjury where employer advised employee to "tell them you formed an opinion by what you read in the newspaper.").

109. See cases cited note 105 *supra*. A few legislatures have prohibited discharge of employees who accept jury duty. See *Cal. Lab. Code* § 230 (West 1971) (prohibiting discharge of employee for acceptance of jury duty); 44 *Mass. Gen. Laws. Ann.* ch. 268, § 14(a) (West 1971) (making contemptuous employer's discharge of employee performing jury duty). Although the California statute does not provide the discharged employee with a cause of action, one may be implied in the same manner as with other statutory limitations on employer discharge power. See note 88 *supra*. Section 230, as amended by 1978 Cal. Stats., ch. 161, § 1, at 392, abrogated the result in *Mallard v. Boring*, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960), captioned at note 97 *supra*. Therefore, California employees enjoy the same limitation of employer power regarding performance of jury duty as created by the cases discussed here.

*Cal. Lab. Code* § 230(c) now provides in part:

Any employee who is discharged, threatened with discharge, demoted, suspended, or in any manner discriminated against in the terms and conditions of such employment by his employer because such employee has taken time off to serve on an inquest or trial jury or to appear in court as a witness shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer.


111. *Id.*
public policy would otherwise be violated. The court quoted an earlier Pennsylvania Supreme Court case that recognized the possibility of limitations on employer power:

It may be granted that there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened.\footnote{112}

The court found a recognized facet of public policy in the various provisions of state and federal constitutions and statutes that demonstrate the importance of trial by jury. From this, the court implied a civic obligation that each individual carried with him into the employment relation. The "necessity of having citizens freely available for jury service\footnote{113} was a sufficient state policy interest to warrant limitation of employer power by implying a tort cause of action for a discharged employee. Finally, the court overruled the nonsuit granted by the lower court based on plaintiff's evidence which suggested that

\footnote{112. Id. at 31, 386 A.2d at 120 (quoting Geary v. United States Steel Corp., 456 Pa. 171, 184, 319 A.2d 174, 180 (1974)) (emphasis added). The Geary court went on to say, "The notion that substantive due process elevates an employer's privilege of hiring and discharging his employees to an absolute constitutional right has long since been discredited." 456 Pa. at 184, 319 A.2d at 174. In Geary the court sustained the discharge of an employee who went over the head of his immediate supervisor in a successful effort to have a dangerous product withdrawn from the market. Apparently, the policy of products liability law that seeks to limit distribution of defective products, e.g., \textit{Restatement (Second) of Torts} § 402A (1965), was not a sufficient basis to warrant protection of Geary's employment interests. Cases like Geary, where the employee is discharged for what is in essence an action to secure the employer's best interests, are difficult to justify. They are perhaps explained by the perception that the conflict is internal and purely private. If, however, Geary had reported the dangerous product to a concerned regulatory agency, he might well be afforded protection even though such action is not, from the employer's viewpoint, the best means of protecting his employer's interests. See Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270 (W. Va. S. Ct. 1978) and text accompanying notes infra. See also Comment, Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy, 1977 Wis. L. Rev. 777. This conflict may be particularly acute where the employee's actions emanate from a sense of obligation to observe professional standards. See Blades, supra note 14, at 1408; Note, Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics, 28 Vand. L. Rev. 805 (1975). California attorneys may enjoy a bit more protection in this regard due to the quasi-statutory status of the California Rules of Professional Conduct.}

he was fired, not because of jury service, but because he was discourteous and inconsiderate in failing to notify his employer that he would be absent from work. Although this would be a justifiable reason for discharge, the conflicting evidence of discharge in retaliation for accepting jury service presented a question of fact for the jury to decide.

The Reuther case presents a further broadening of the public policy rationale. The policy interests considered are more attenuated than those in Petermann or Frampton. In using the term “recognized facet of public policy” the court minimizes the need for a clear statutory source for the policy. Additionally, and perhaps most importantly, the competing interests of employer and employee are openly considered and assigned relative values. Both the language quoted from Geary v. United States Steel and the characterization of the question of fact to be presented to the jury suggest that only certain legitimate employer interests will justify an exercise of discharge power that would intrude on the essentially personal rights and duties that the employee enjoys in his status as a citizen. Thus, when carried into the employment relationship, the exercise of a citizen’s duty to perform jury service becomes an employee’s personal right to be free from employer disciplinary power having no relation to legitimate employer interests.

3. Discharge in Retaliation for Employee’s Efforts to Prevent Employer’s Illegal Acts

Harless v. First National Bank in Fairmont presents the broadest application of the public policy rationale to date. During the course of his employment as a manager of First National’s consumer credit department, Harless became aware of intentional violations of state and federal consumer credit and protection laws. He brought these practices to the attention of his superiors. Harless was then fired in June 1975 but reinstated a week later. Several months later he informed a member of the bank’s Board of Directors of continued illegal practices. Within weeks, he was demoted in a manner allegedly calculated to embarrass and humiliate him. Harless re-

114. Id. at 34, 386 A.2d at 122. The court noted that “even when an important public policy is involved, an employer may discharge an employee if he has a separate, plausible, and legitimate reason for doing so.” Id.
115. Id.
tained counsel who made further contacts with Board members. An investigation was initiated that resulted in reinstatement to his former position in November 1976. Shortly thereafter, he was interviewed by an outside auditor who was reviewing the bank’s consumer credit practices. Upon being informed the audit was confidential Harless turned over certain incriminating documents that he had retrieved from wastebaskets. A few days later, Harless was summarily fired without any reason being given.

Harless sued on two counts, the first alleging discharge in retaliation for his efforts to require First National’s compliance with consumer credit laws, and the second alleging that the manner in which he was fired was extreme, malicious, and outrageous resulting in severe emotional distress. The West Virginia Supreme Court sustained both causes of action holding that a discharge “motivated by an intention to contravene some substantial public policy” was actionable in tort and that damages could be recovered for emotional or mental distress resulting from such intentional or wanton wrongful acts. The court reasoned that the “substantial public policy” inherent in the consumer credit laws would be frustrated by permitting a lending institution to discharge an employee who sought to insure employer compliance with the law.

Significantly, the public policy involved here has no direct impact on the employment relationship as such. Nor does it create any specific right or duty in the employee as in the workman’s compensation or jury duty cases. The coercive impact of employer power is also absent here; Harless was not forced to choose between retaining his job or actively committing a crime as in Petermann. The only support for his actions is the somewhat vague policy contained in the old common law actions for misprision of a felony that encourage citizen disclosure of criminal acts. Here, the public policy involved in the consumer credit laws is focused entirely on the permissible scope of the bank’s conduct. Clearly, the bank had a duty to cease violating the law, but the nature of that duty

117. Id. at 273. The employee, of course, carries the burden of proving this motive and intent.
118. Id. at 276.
119. For a discussion of misprision in the employment context, see Blumberg, Corporate Responsibility and the Employee’s Duty of Loyalty and Obedience: A Preliminary Inquiry, 24 Okla. L. Rev. 279, 294 (1971).
makes it doubtful that permitting a cause of action for tortious discharge will add much to the deterrent effect of statutory penalties. Thus, many of the considerations that led the courts to impose liability in earlier cases are absent or considerably diminished in Harless. The result is that protection from employer power is given to an employee who might otherwise be considered a mere officious intermeddler in his employer's affairs. The focus in Harless shifts from the employee's right or duty to act or not act to the legitimacy of employer behavior. If the employer has no legitimate purpose for his acts, the employee cannot be subjected to discipline for attempting to change or to stop them. Thus, the interests of the employees that are protected have nothing to do with the public policy which limits employer power.

C. The Limits of the Public Policy Rationale

The public policy exceptions are of limited utility in protecting employee interests from excessive employer power. What protection employees do receive seems to be incidental to the protection of larger "public" interests. At least on its surface, the public policy rationale precludes consideration of employee interests alone as a justification for limiting employer power. Thus, the courts applying the rationale, like those applying the at-will rule, fail to attach legal significance to the internal characteristics of the employment relationship. The concern is not so much for potential overbearing and injury to a weaker party, but rather for limiting those repercussions emanating from such behavior that have an unacceptable effect on public interests. Implicit is the assumption that, like those other domestic relations from which the law of master and servant emerged, the employment relation is a private affair with which the state should seldom interfere. Several courts have denied protection to discharged employees precisely because their interests were "merely private."

120. See note 27 supra.
121. Becket v. Welton Becket & Assocs., 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974) (employee acting as executor of father's estate who sued employer for accounting of estate's assets has no cause of action when discharged because he refused employer's demand to dismiss the suit; executor's fiduciary duty to protect legal rights of the estate is private in nature); Campbell v. Ford Indus. Inc., 274 Or. 243, 546 P.2d 141 (1976) (employee shareholder fired after exercising shareholder's statutory right to examine corporate books; right to examine books is for protection of private pro-
If, however, the demise of substantive due process and the rapacious concepts of strict contractual freedom and laissez-faire teach anything, it is that the conduct of private affairs may well have a wide impact of general concern to all. Indeed, when compared to its progenitor of the nineteenth century, the modern employment relationship is highly regulated. The statute books are replete with laws predicated on policy statements recognizing the public impact of private conduct within the employment relationship. Thus, it is not entirely accurate to say than an employee's concern in maintaining his livelihood is, in the largest sense, "merely private." Nor is it true that our system of law condones the infliction of injury without justification simply because it occurs within such a questionably "private" relationship.

To the extent that the public policy rationale narrowly focuses only on the external impacts of conduct inside the employment relation to the exclusion of an open assessment of the legitimate justifications for the exercise of employer power it will fail to provide the comprehensive protection that employee interests require. Public policy exceptions to the at-will rule announced in the last ten years, however, have not been so narrowly focused. Employee interests having little to do with the policies in question have received protection. Policy considerations that once focused on the justification for employee action are now focusing on the legitimacy of the exercise of employer power. With increasing frequency, the language used by the courts betrays a recognition that employer discretion is not absolute, and that "there are areas of an em-

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122. See, e.g., CAL. UNEMP. INS. CODE § 100 (West 1972) which provides in part:

As a guide to the interpretation and application of this division the public policy of this State is declared as follows:

Experience has shown that large numbers of the population of California do not enjoy permanent employment by reason of which their purchasing power is unstable. This is detrimental to the interests of the people of California as a whole.

One intended purpose of the compensation law is "to reduce involuntary unemployment and the suffering caused thereby." Id.

123. Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974) ("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.").

124. E.g., CAL. CIV. CODE § 3523 (West 1970) provides: "For every wrong there is a remedy."
ployee's life in which his employer has no legitimate interests.'

It seems apparent that in developing further public policy exceptions to the at-will rule, the courts are in reality taking the first steps toward reevaluation of the rule and the recognition that employer discretion must be balanced against public and employee interests in maintaining employment. The case-by-case approach of recognizing public policy exceptions has permitted the courts to ease into the task of reassessing the justifiable limits of employer discretion. As this hidden agenda of the various exceptions becomes clear, however, the limited and sometimes inconsistent results of the public policy rationale will become less tolerable. At that point, the courts must develop an analysis, based squarely on the realities of the employment relationship, that will provide employee protection while maintaining the degree of employer discretion necessary to achieve the legitimate goals of the enterprise. Such an analysis must recognize that the manner in which ostensibly private employment relations are conducted is of general importance because of the otherwise high potential for abuse in our "nation of employees."

126. Glendon & Lev, supra note 19, at 468 ("Even in recent cases that favor employers and purportedly follow the [at-will rule], courts have begun to recognize exceptions in the fashion characteristic of that common law process which often leads to the interment of an unsatisfactory rule.") Id.
127. See cases cited at note 121 supra, demonstrating the public policy rationale's failure to protect "merely private" employee interests. When viewed from an interest balancing perspective there is little justification for failing to protect the exercise of the employee's private shareholder rights or executor duties where such exercise does not interfere with employer direction of the work force to achieve the legitimate goals of the enterprise. The suppression of shareholder inquiry or civil suit by coercive force of a magnitude similar to termination of employment would not be tolerated in another context. In the absence of any interference with employer control, no good reason exists to require employees to check these rights or duties at the employer's door.
129. F. TANNENBAUM, supra note 16. See quote accompanying note 16 supra.
IV. BALANCING EMPLOYER AND EMPLOYEE INTERESTS USING THE IMPLIED COVENANT OF GOOD FAITH

The major difficulty in balancing the gross power disparity within the at-will employment relation lies in traditional judicial resistance to the creation and imposition of rights and duties that supplement or limit those created by an existing contract. This resistance is particularly apparent when the court uses contractual theories in an attempt to limit potential employer abuse. Such attempts are frustrated by the theoretical difficulties of adjusting concepts of consideration to support any modification of the rights and obligations created by consent. This theoretical rigidity is largely due to the tendency of contract theory to examine the relationship of the parties as the unique product of an isolated transaction rather than a manifestation of a larger social process. Accordingly, those equitable theories developed in contract law by which the courts limit abuse by stronger parties—theories of adhesion, unconscionability, and economic duress—are used only to invalidate overreaching contractual terms rather than to create separate obligations based on the general characteristics of the contract relationship. These theories are of little use in an at-will contract where contractual terms and expectancies are almost nonexistent. The very absence of contract terms leaves the at-will employee subject to employer abuse. Therefore, any effective balancing of employer-employee interests will depend on the characteristics of the at-will employment relationship.

There is growing judicial recognition that the concentration of economic and other forms of power exposes our population to abuse by stronger parties. Responding to these risks, the courts have developed various methods to impose obliga-

130. See Note, supra note 33, for a discussion of techniques of finding additional consideration to avoid classification of an employment contract as terminable at will. On the proposed use of promissory estoppel, see Fuchs, Promissory Estoppel and Employment Agreements, 49 N.Y. St. B.J. 386 (1977). While these techniques may provide relief from employer abuse in isolated cases, they fail to fundamentally reevaluate the at-will relationship itself.

131. Blades, supra note 14, at 1421.


133. See text accompanying notes 64-66 supra.
tions based upon notions of status or relationship. In the process, the courts often update antiquated legal theories by imposing duties based on an assessment of modern and social realities. One method for imposing such duties utilizes the implied-by-law covenant of good faith and fair dealing. In California, the covenant of good faith is implied in every contract and requires that neither party will do anything to injure the right of the other to receive the benefits of the agreement. Generally, breach of the covenant sounds in contract. But, where judicial intervention is necessary to restore balance to contractual relationships infused with broad public concerns, breach of the duties arising from the covenant are actionable in tort.

The general definition of the duty of good faith—to do nothing to injure—is necessarily vague. The precise nature of the duties imposed under the covenant will depend on the nature of the various relationships in which they are implied. As Professor Robert Summers explains, good faith acts as an "excluder" of certain defined conduct. Good faith is defined by contrast with the various forms of "bad faith" that the courts seek to rule out in a given situation. Thus, in insurance contracts, for example, the covenant of good faith imposes a duty on the insurer not to expose its insureds to risks of loss greater than the policy limits by failing to accept reasonable settlement offers within policy limits. In effect, the court prohibits the insurer from limiting its own losses by exposing its insureds to further risks. To allow such conduct would injure the insured's right to receive the benefits of his agreement, in this case the expectation that purchasing an insurance policy will provide shelter from extensive liability. The expected insurance coverage that the covenant protects is not, 


however, defined by the contract. Strictly speaking, the insurer has no contractual obligation to accept settlement offers. Instead, the duty to settle and the expectation of coverage it secures is derived from a mix of policy and practical considerations reflecting the realities of the insurance relationship.

The insurance and employment relationships are by no means identical, nor need they be to warrant imposing duties of good faith. Many of the factors that led the courts to impose duties on insurers are also present in the employment relationship. Defining the employer's duty of good faith would, of course, depend upon an assessment of the policy and practical considerations involved in the employment relationship. The duty imposed must secure the employee's right to receive the benefits of the agreement while maintaining the employer's control of the work force in pursuit of the legitimate goals of the enterprise. This balance can be achieved by permitting a tort cause of action for breach of the duty of good faith when an employee can prove that he was discharged for reasons unrelated to the employer's legitimate interest in directing the business.

A. Factors Warranting Imposition of a Duty of Good Faith

The factors courts consider in defining a duty of good faith focus on the disparity of power between the parties, the potential for injury, and the public interest in maintaining balance in contractual relationships entered into by necessity rather than for commercial advantage.

1. Contract of Adhesion

There is little doubt that the vast majority of at-will contracts are not the product of arms-length bargaining. The California Legislature has recognized as a matter of policy that "the individual unorganized worker is helpless to exercise actual liberty of contract . . . to obtain acceptable terms and conditions of employment." In our industrialized society, only the comparatively rare and fortunate employee has sufficient bargaining strength to impose conditions on his offer to perform services. For the rest, employment is a take-it-or-
leave-it proposition. Even for those who enjoy the luxury of bargaining, it is unlikely that parties forming an employment relationship will discuss the means of its termination.\textsuperscript{141} Thus, the absence of a specified period of employment or specified terms of dismissal will raise the spectre of the at-will rule with all its potential for abuse.\textsuperscript{142}

Although the absence of adhesion alone should not prevent implications of a duty of good faith,\textsuperscript{143} its presence has traditionally aroused judicial inclination "to protect the weaker party against the harshness of the common law and . . . [the] abuses of freedom of contract"\textsuperscript{144} that often result. Contracts of adhesion generally arise in market situations where negotiation of individual contracts would cripple the enterprise due to the sheer volume of transactions involved. Thus, adhesion contracts do serve a useful social purpose. The difficulty arises when the adhesion contract defines the rights and obligations of its users more narrowly than they might reasonably expect. In this event, the courts will step in because of the disparate bargaining status of the parties and assure those expectations that reasonably would have been secured had good faith bargaining been available.\textsuperscript{145} The adhesion contract is treated by the courts as a marketing device securing access to the mass market which carries with it the corresponding duties to the public. In a similar manner, employers use the adhesion contract to mass market jobs.\textsuperscript{146}


\textsuperscript{142} Even where the at-will termination power is bargained for "a party presumably agrees merely to the grant of a power, and not also to the grant of a power to abuse a power." R. Summers, supra note 136, at 251 n.222. Thus, even if an at-will employee enjoyed an opportunity to bargain, the problem of defining bad faith ("abuse") remains.

\textsuperscript{143} Spindle v. Travelers Ins. Cos., 66 Cal. App. 3d 951, 136 Cal. Rptr. 404 (1977) (implied duty of good faith is breached where insurer cancels extensively negotiated terminable at-will insurance policy for reasons unrelated to purpose of policy). See also L'Orange v. Medical Protective Co., 394 F.2d 57 (6th Cir. 1968) (cancellation of terminable at-will malpractice insurance policy to stifle testimony against other insureds of insurer violates public policy).

\textsuperscript{144} Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629, 636 (1943).

\textsuperscript{145} Tobriner, supra note 2, at 8 (quoting Gray v. Zurick Ins. Co., 65 Cal. 2d 263, 269-70, 419 P.2d 168, 171-72, 54 Cal. Rptr. 104, 107-08 (1966)).

\textsuperscript{146} P. Selznick, supra note 34, at 134. ("In the field of employment, the contract at-will brings to culmination the union of contract and the market. The contract does not establish a relationship. From a legal point of view, the encounter is as cas-
2. Disparity Between Contract and Relational Expectancies

The courts will often impose extra-contractual obligations where the contract rights and duties defined by an imbalanced bargaining process are substantially less than the reasonable expectations of the weaker party that arise from the nature of the subsequent relationship. In such cases, the duty is imposed because the contractual image of the relationship composed by the stronger party simply does not reflect the true facts of life. In such cases, "[r]igid reliance upon [adhesion contract] terms as defining legal obligations between the parties, in effect, produce new forms of subservience in the guise of contract."147

In the at-will employment relation, the almost non-existent obligations arising from the contract have little correspondence to the very real expectations arising from the relationship.148 These relational expectancies, the loss of which are every bit as injurious as the loss of contractual expectan-

147. Tobriner & Grodin, supra note 2, at 1252.

148. Numerous writers have discussed the relational expectancies of employees. Whether these interests are termed "employee equities," "valuable rights," or "new property" their basic importance to the modern employee cannot be denied. See, e.g., E. Ginzberg & I. Berg, Democratic Values and the Rights of Management 172-89 (1963); F. Meyers, Ownership Jobs: A Comparative Study 15-16 (1964); Glendon & Lev, supra note 19, at 475-79; Reich, The New Property, 73 Yale L.J. 733 (1964); Note, supra note 33, at 338-40. In the context of good faith analysis these relational expectancies fall within those interests the court seeks to define as the "reasonable expectations" that the law creates on behalf of a weaker party who has had no opportunity to secure his interests through effective bargaining. The most basic expectation—that the employer will not abuse the power of termination by using it for reasons unrelated to the legitimate conduct of the enterprise—will be present in every case. See note 142 supra. Other expectancies concerning retirement, pension, disability, contingent payments, and limitations on reemployability, arising from job longevity, skill specialization, damage to reputation, induced geographical immobility, and financial and psychological interests in job security, will of course vary from case to case. Loss of such interests should be subject to proof in each case in assessing damages. Proof of these interests should not, however, be required to establish the fact that an injury has occurred. Injury results from breach of the proposed duty of good faith not to use employer power for reasons unrelated to legitimate business interests. Thus, imposing a duty of good faith does not require a showing of subjective factors of actual dishonesty, fraud, or intent to inflict a specific harm. Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967). Liability will be imposed by reference to objective factors demonstrating the absence of any operational justification of employer power. For a discussion of the covenant of good faith as a theory of liability for misconduct which is neither fraudulent nor negligent see R. Summers, supra note 136, at 199.
cies, are left unconsidered when the courts confine themselves to the limited contractual parameters of the at-will rule. The gap between contract rights and the reasonable expectations arising from the relationship creates a high potential for extensive consequential injury resulting from exercises of contractual authority by the stronger party. The potential for consequential injury has been a prominent factor in imposing duties of good faith in insurance contracts. In such situations, "judicial imposition of extra-contractual obligations to protect the individual is equivalent to the imposition of a new, legally created status in lieu of that sought to be imposed by the dominant party." In the case of at-will employment contracts, the imposition of extra-contractual obligations would reestablish social control in what otherwise would be a legally unsupervised relationship.

3. A Necessitous Weaker Party Dependent on the Stronger Party's Performance of a Noncommercial Agreement

When imposing duties of good faith in insurance policies, the courts have often noted that the insured does not seek a commercial advantage from the contract. The parties in such a situation are not using the contract as a mechanism for allocating the business risks of an exchange in the hope of mutual gain. Rather, the insured approaches the insurance policy from the necessitous position of one seeking shelter from catastrophic financial loss. Once the policy is acquired, the buyer is wholly dependent upon the insurer's performance to fulfill the expectation of coverage. The insured may pay on the policy for the balance of his life without ever needing it, but if the need does arise, he expects and is dependent upon the insurer for coverage. The dependence on another for what is considered a necessity of modern financial life prompted the courts to impose the duty of good faith to sharply limit the insurer's opportunities to deny obligations to its insured.

The employee is in a similar situation. The employment contract is hardly a commercial venture. For the great majority of Americans, employment is the only means by which the basic necessities of life are secured. Indeed, the necessity of

150. Tobriner & Grodin, supra note 2, at 1252.
151. P. Selznick, supra note 34, at 134-35.
employment far exceeds the need for insurance. Once an individual begins work, he is dependent upon the judgment and good will of the employer for his continued tenure and the vitality of the enterprise. For the employee "the substance of life is in another man's hands."  

The courts often speak of the "fiduciary" nature of the relationship that arises from these elements of necessity and dependence in a noncommercial setting. Some language in the insurance cases suggests that duties of good faith are imposed because the relationship is a fiduciary one. The use of the word fiduciary adds little, however, to the analysis of those factors which prompt courts to impose tort liability for breach of a duty of good faith because the meaning of "fiduciary" is difficult to ascertain. The definitions offered by the courts are circular. One court states that a fiduciary relationship may exist where "the parties are so circumstanced or associated in a business transaction that one party must rely on the good faith and integrity of the other." In applying the covenant of good faith to employment contracts, the California Supreme Court defined as fiduciary the duty that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." This is precisely the definition of the duty of good faith that is implied in every contract. Saying that a relationship is fiduciary says nothing about those functional characteristics that led the courts to define and impose a duty of good faith. For purposes of analysis, it is best to recognize that "fiduciary" operates in the law of good faith in the same manner that "duty" operates in the law of negligence. Both terms should be viewed as no more than conclusory expressions of "those considerations of policy which led the law to

152. See text accompanying note 16 supra.
154. Id.
say that the particular plaintiff is entitled to protection."^{158} In the final analysis, the relationship is fiduciary because, after considering the characteristics of the contract, the courts are willing to impose a duty of good faith, the breach of which will sound in tort.

B. Application of the Proposed Duty of Good Faith

This comment contends that the characteristics of the at-will employment contract impose on the employer a duty of good faith not to discharge an employee for reasons unrelated to direction of the work force in pursuit of the legitimate goals of the enterprise. This standard would preserve the exercise of employer disciplinary power to the extent justified by law and policy,^{159} while giving employees a broader protection of their interests than is currently available under the various public policy exceptions to the at-will rule. Imposition of the duty of good faith is an expression of the public policy prohibiting the use of contract law to defeat reasonable expectations arising from certain relationships, such as employment, that are infused with broad public concerns.

The standard proposed here is not without precedent. Although they did not clearly define the duty being imposed, two recent cases from the supreme courts of Massachusetts and New Hampshire have applied the covenant of good faith to provide a remedy to employees who would otherwise have been unprotected under existing public policy exceptions to the at-will rule.^{160} Earlier California cases have applied the covenant in somewhat similar circumstances.^{161} In each of these cases, the courts have sought to preserve legitimate employer control while providing protection to employees who

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159. The proposed standard of good faith would operate in a manner similar to the civil law concept of abuse of right. That doctrine recognizes that "a right is created to serve a certain end or purpose, and that it cannot be exercised in an abnormal way, i.e., in a way contrary to the economic or social purpose for which it exists." Walton, Motive as an Element in Tort in the Common Law and in the Civil Law, 22 Harv. L. Rev. 501, 501 (1909).
would not fall within one of the public policy exceptions. A rough outline of the scope of the protection an employee might receive under the proposed good faith standard emerges from these cases.

1. Securing Relational Expectancies

A strict contract approach to the at-will rule permits the employer to induce employee tenure without incurring any obligation to make good on his representations. The at-will employee can accrue no contractual expectancy in employer offers to pay seniority, pension, disability, death benefits, or other contingent payments. The same is true of offers of bonus or incentive awards subject to employer discretion, or of compensation linked to a percentage of profits. In each case, a noncontractual expectancy arises which the employer can defeat by exercising his contractual right to terminate the employee for any reason including an intent to avoid payment of such benefits. Unless such payments were mandated by statute, the public policy exceptions would provide no protection for these merely personal interests.

 Fortune v. National Cash Register Co. demonstrates the application of the duty of good faith to protect noncontractual expectancies that arise from the relationship of the parties. Fortune was employed by National Cash Register (NCR) as a regional salesman of mercantile equipment. Although terminable at will, the employment contract provided for a fixed salary plus bonus payments computed on a percentage of sales in his area. Seventy-five percent of the bonus would vest on the date of an order. The remaining twenty-five percent would be paid if the area was still assigned to him at the time the equipment was installed. The compensation plan was structured to induce close cooperation between salesmen

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162. See note 148 supra.
163. See text accompanying notes 69-71 supra.
166. Aablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1959) (employee need not return contributions to pension fund made by employee who was fired without cause after forty-three years of service).
and customers. Orville Fortune did just that with a large customer in his area, and finally secured a five million dollar order on November 29, 1968. The total bonus payment due on the sale was in excess of $92,000.00. Three days later Fortune was fired. After making inquiry he was reinstated but not as an area salesman. Nevertheless, he was assigned to supervise delivery of the equipment order as an area salesman would ordinarily do. By mid-1969, Fortune had received seventy-five percent of the bonus due. Upon inquiry regarding the remaining twenty-five percent, he was told to "forget about it." With a son in college and retirement only four years away, Fortune decided he could ill afford to contest NCR's action. Twelve months later he was asked to retire. He refused and was fired in June 1970. Fortune had worked for NCR for twenty-five years. He sued to recover the unpaid bonus contending that his discharges in December 1968 and June 1970 were in bad faith. The Massachusetts Supreme Judicial Court sustained a verdict for Fortune.

Although the court framed the issue as whether a bad faith termination constituted a breach of the at-will contract, it conceded that Fortune had received all the payments due him under the express terms of the contract and that NCR had no further liability under the contract. The court, however, held that NCR's breach of the extra-contractual covenant of good faith was a breach of contract. The court declined to decide whether a tort action would lie in this case, since the parties had stipulated to a contract measure of damages. It seems likely, however, that future cases will hold that a breach of an extra-contractual covenant sounds in tort.168 Had that been the case here, Fortune could have claimed an expanded measure of consequential damages. For example, bad faith termination at his age (62 years) may have effectively prevented his reemployment to retirement age. Thus, he might have recovered lost wages up to his normal retirement age of 65 years.

The Fortune court did not specifically define the bad faith involved. The court did, however, suggest that the jury might have based its finding of bad faith on the conclusion that NCR was motivated by desire to pay Fortune as little of the bonus as possible. Thus, the desire to avoid payment of

Fortune's reasonable expectation was not within the range of legitimate purposes for which the employer may exercise discretionary power. In this regard, the court was careful to preserve the employer's interest in disciplinary power.

We do not question the general principles that an employer is entitled to be motivated by and to serve its own legitimate business interests; that an employer must have wide latitude in deciding whom it will employ in the face of the uncertainties of the business world; and that an employer needs flexibility in the face of changing circumstances. We recognize the employer's need for a large amount of control over its work force. . . . NCR's right to make decisions in its own interests is not, in our view, unduly hampered by a requirement of adherence to this [good faith] standard.

2. Securing Civic Freedoms

The threat of discharge under the at-will rule often puts the employee to a choice between maintaining his job or exercising a civic freedom that the employer may wish to prohibit. As used here, civic freedom means the exercise of a right or performance of a duty that a citizen might freely do but for his status as an employee. This would include, for example, the performance of jury duty which has been brought within one of the public policy exceptions. The limited scope of the public policy exceptions has failed, however, to protect the exercise of other civic freedoms. Fortune suggests a further extension of protection under the covenant of good faith.

a. Civil suits against an employer by an employee qua employee. When Fortune made a request for payment of the final twenty-five percent of the bonus, he was told to "forget it." He had already been fired once under questionable circumstances and most likely thought little action would be required precipitate another discharge. Given his vulnerable position, it is not surprising that he declined to press the matter. But the result in the case indicates he had a contractual right to the twenty-five percent payment. If Fortune had stood his ground and insisted on complete payment, could he have resorted to the courts like any other citizen for a declaration of

169. 373 Mass. at 101, 364 N.E.2d at 1256.
170. The problem of collateral control of the employee beyond the workplace has been recognized since the inception of the at-will rule. See Note, supra note 33, at 339 n.42.
his legal rights without thereby risking discharge? Since Fortune's right to compensation was merely personal, the public policy exceptions would not apply. As the result of the case indicated, however, Fortune clearly had a reasonable expectation that was injured by employer coercion.

Under an interest balancing approach, courts must determine whether litigation of such a dispute prior to discharge would truly interfere with the employer's legitimate control. Legitimate control surely would not include use of coercion to avoid payment. It seems likely that if the employer is a small concern, the acrimony generated by litigation would interfere with day-to-day direction of the work force. In that event discharge may be justified. The employee could still litigate his contractual right to payment after discharge, but breach of the covenant by wrongful discharge would no longer be an issue.

On the other hand, a similar employee suit against a large corporate employer is unlikely to create unmanageable acrimony. Indeed, in such situations, disputes over company policies would likely have impact on numerous employees. The resolution of such disputes may, in fact, aid in directing the work force by conclusively defining the disputed rights and obligations of the parties, thus avoiding future discord. Unless the suit is truly frivolous the employee's access to the courts should be protected whether or not he wins or loses.

b. Civil suits against the employer by an employee acting in some other capacity. In Becket v. Welton Becket & Assocs. an employee was discharged when he refused to dismiss a suit brought against his employer in his capacity as


172. But see Lisec v. United Airlines, 85 Cal. App. 3d 969, 149 Cal. Rptr. 847 (1978) (employees sued employer for money owed for submission of an idea pursuant to a suggestion program on representation that employee would be paid 10% of savings achieved by use of ideas; use of idea resulted in savings in excess of $3,680,000 but employees were paid only $1,000; jury verdict of $368,000 compensatory and $1,476,000 punitive damages reversed on appeal). Several days after the appellate decision became final the employees involved were fired for their participation in the suit. Labor Letter—Unfriendly Skies, Wall St. J., Mar. 6, 1979, at 1, col. 5. For a discussion of employer use and abuse of suggestion programs see Note, Rights to Inventions of Employees—Suggestion Boxes, 1973 Wis. L. Rev. 1203 (1973).

executor of his father's estate. The court held that the interests involved were merely personal and that the general fiduciary duties of executors were not worthy of a public policy exception.

There is less potential for disruption of employer control in such cases than in a suit over the terms of employment. An executor's suit is less likely to have its origin in some personal confrontation or dispute, since the complainant's motivation is often more ministerial than adverserial. Moreover, such suits have their origins in the generally recognized need to settle estates. But the size of the enterprise may still influence the impact on legitimate employer control and probably justifies the result in this case. In Becket, the corporation was closely held and the plaintiff, who had inherited a majority share of stock in the firm, was co-executor with his brother who was president of the firm and who opposed the suit in his capacity as co-executor. It seems that acrimony in this situation would interfere with the effective functioning of the firm. A contrary result would likely pertain in a large corporation. An IBM employee holding 100 shares of IBM stock as executor of an estate is not likely to seriously threaten managerial control by bringing a suit for an accounting or even a derivative suit for bond manipulation.

c. Exercise of rights conferred by regulatory statutes. The West Virginia case, Harless v. First National Bank in Fairmont,\(^{174}\) involved a regulatory statute which imposed duties upon the employer. As discussed above,\(^{175}\) a broad reading of the public policy rationale will provide a cause of action to an employee who is discharged for his efforts to secure employer compliance with such a statute. The same may not be true, however, where the statute in question merely creates a right in the employee which is not directly related to his status as an employee. In such cases the policy rationale will not protect an employee who asserts such "merely private" interests. The Oregon case of Campbell v. Ford Industries Inc.,\(^{176}\) offers a good example of this result.

Campbell was employed as a mechanical engineer by Ford Industries. He also owned common stock in the corpo-

\(^{175}\) See text accompanying notes 116-19 supra.
tion. In May 1971 Campbell made a request for information concerning the value of his Ford Industries stock pursuant to a state statute giving shareholders the right to inspect corporate records. He was fired on May 28, 1971 in retaliation for his request.

Campbell filed suit alleging intentional and malicious discharge and sought actual and punitive damages. He argued by analogy to an earlier case, *Nees v. Hocks*,\(^{177}\) that an employer may not discharge an employee where doing so would tend to frustrate public policy. In *Nees* the court granted a cause of action to an employee who was fired for accepting jury duty. The Oregon Supreme Court, however, rejected any analogy to *Nees* and denied a cause of action based on the shareholder inspection statute.

The court reasoned that although public policy considerations may be expressed by the statute, the “primary basis” for the inspection right “is not one of public policy, but the private and proprietary interest of stockholders.”\(^{178}\) Thus, there was no compelling public policy basis for a cause of action in this case. The court also attempted to distinguish *Nees* by arguing that the conduct of refusing to request a release from jury duty was more directly related to the employee's rights as an employee than those exercised in the *Campbell* case. This distinction is tenuous at best. The duty to perform jury service and the shareholder's right to inspect corporate books arise totally independently from the employment relation. In the former case, the employee is performing his duty as a citizen. In the latter case, he is exercising his rights as a shareholder. In neither case do the rights and duties created directly affect the employment relation, as is the case with the workman's compensation statute. The exercise of these rights and duties become rights of an employee *qua* employee only to the extent that the courts are willing to protect their exercise from employer coercion. The court has, in effect, assumed the point in contention.

The problem in *Campbell* is the court's failure to examine the justifications for the employer's disciplinary action as would occur under a good faith analysis. In discharging Campbell, Ford Industries acted not as an employer, but as a

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177. 272 Or. 210, 536 P.2d 512 (1975).
178. 274 Or. at 250, 546 P.2d at 145.
stock issuer trying to prevent shareholder access to its records. Under the terms of the disclosure statute the corporation was required, on pain of civil penalty, to respond to shareholder inquiries made for "any proper purpose." Assuming, as the court did, that Campbell's request was proper and not frivolous, the corporation was able to avoid its statutory obligation and potential liability simply because of the fortuity that its shareholder was also a vulnerable employee. The courts have severely limited the stock issuer's ability to use his employees to evade reporting responsibilities under the securities laws even where the potential for harm is remote. There is little logic in permitting injury to employment interests when the statutes providing shareholder access to corporate records are based on many of the same concerns. The result of the Campbell decision is that employees become second-class shareholders at a time when employee stock ownership is on the rise. Apparently, unless a forced merger or other stock manipulation is involved, a corporation has no legitimate interest in the activities of employees in their role as shareholders. A good faith analysis would focus on this fact and deter coercive power in situations like Campbell.

3. Securing Individual Integrity and Personal Freedom

Monge v. Beebe Rubber Co. demonstrates the value of focusing analysis of the at-will relation on the action of the employer. In Monge the employee did not assert any right to take action affecting her employer. Instead, she merely sought to be free from employer behavior that had no legitimate relation to her supervision on the job.

Mrs. Monge worked nights in defendant's factory. After several months she requested transfer to another machine where she would be paid more. Her foreman suggested that

179. OR. REV. STAT. § 57.246(2).
181. O'Hara & Crawford, Will Every Corporation Have an E.S.O.P.?, 61 A.B.A.J. 1367 (1975); Note, Employee Stock Ownership Plans: A Step Toward Democratic Capitalism, 55 B.U.L. Rev. 195 (1975). The court in Campbell v. Ford Indus., Inc., noted that "[d]ifferent considerations might be involved in a case involving the discharge of an employee for exercising [record inspection] rights ... when that employee has acquired the stock under an employee stock ownership plan." 274 Or. at 248, 546 P.2d at 145 (1976) (footnote omitted). The court did not explain why the means of stock acquisition should have any relevance. One must wonder, for example, about the statutory rights of an employee who has acquired stock through a plan and on the open market.
she could have the job if she were "nice" to him. When she later refused to go out with him, she was moved to a lower paying position and in other ways was harassed and ridiculed. Several weeks later she was fired but with union help was reinstated with a warning. Three weeks thereafter she was found unconscious in a factory washroom and was hospitalized. Finally, she was fired again. During her difficulties the plant personnel manager visited her home and acknowledged the foreman's activities, but asked her "not to make trouble." She sued for breach of contract and won a verdict for $2,500. The New Hampshire Supreme Court sustained the lower court on defendant's appeal from a denial of a motion for judgment notwithstanding the verdict.

The court in Monge took the final step in the evolution of the public policy rationale by recognizing a public policy interest in balancing the relative power within the employment relationship. "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."183

The court injected public policy considerations into the employment relation to impose an obligation on the employer that "affords the employee a certain stability of employment" while not interfering with the "employer's normal exercise of his rights to discharge, which is necessary to permit him to operate his business efficiently and profitably."184 Thus, the court defined the permissible scope of employer discretion in terms of the operational requirements of the enterprise—the "necessary" and "normal" exercise of employer power. Any employer disciplinary action not necessary to achieve those ends is an impermissible intrusion on public and employee interests in stability of employment. Unjustified employer action was described as "motivated by bad faith or malice or based on retaliation"185 which the court held was "not in the best interest of the economic system or the public good."186 Such action constitutes a breach of contract.

183. Id. at 133, 316 A.2d at 551 (emphasis added).
184. Id., 316 A.2d at 552 (emphasis added).
185. Id., 316 A.2d at 551.
186. Id.
There is some confusion as to whether the cause of action created in *Monge* sounds in tort or contract. 187 On the one hand, the court emphasized that the question on appeal was whether Beebe Rubber had acted maliciously. This would indicate a tort standard of liability. On the other hand, the court stated that a termination motivated by bad faith or malice is a breach of contract. Further support for the latter view is found in the court’s disallowance of a portion of the verdict attributable to mental suffering. The court noted that such damages were not generally recoverable in a contract action. The court, however, went on to suggest that damages for mental suffering were disallowed for lack of proof and it would remand for new trial unless Mrs. Monge was willing to accept the reduced verdict. This suggests that proof of mental suffering might have been permitted on retrial.

Whatever the status of the case in New Hampshire, a similar case would sound in tort under California’s law of the implied covenant of good faith. In California, a breach of the implied covenant of good faith may sound in contract or tort. Where the duty implied by the covenant is clearly extra-contractual and premised on considerations of public policy as in *Monge*, a breach of the covenant would constitute a tortious breach of contract. Implying such a duty, the breach of which sounds in tort, frees the court from the narrow constraints of contract doctrine and permits imposition of a measure of damages commensurate with the magnitude of harm that may be inflicted by abuse of employer power. 188

The objective in describing the above cases is not to exhaustively define the meaning of good faith in the context of the employment relation. The flexibility of the good faith concept and the unique qualities of each employment relation-

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188. *See* R. Summers, *supra* note 136, at 198 (footnote omitted). In the hands of the courts, good faith is a flexible doctrine which performs the function of furthering the most fundamental policy objectives of any legal system—justice, and justice according to law. By invoking good faith . . . it may be possible for a judge to do justice and do it according to law. Without legal resources of this general nature he might, in a particular case, be unable to do justice at all, or he might be able to do it only at the cost of fictionalizing existing legal concepts and rules, thereby snarling up the law for future cases. In begetting snarl, fiction may introduce inequity, unclarity or unpredictability.
ship make a single comprehensive definition impossible. At best, these cases sketch a broad outline which reveals the utility and adaptability of the covenant of good faith as a legal tool to secure a diverse set of employee interests that deserve protection.

V. Conclusion

The past fifty years have witnessed the rapid development of civil service, collective bargaining, and numerous narrowly focused statutory protections that provide a portion of the American work force with a measure of industrial justice that is unequaled in the modern world. For these workers, a well-developed set of procedural fairness and just cause standards exist that protect employee interests in continued employment while assuring the employer's necessary control of the work place. In bitter contrast, an even greater number of American workers remain subject to the at-will rule which permits an employer to discharge an employee for any reason whatsoever. Often harsh in its operation, the rule presents to unscrupulous employers obvious opportunities for abuse. In reality, the rule is a tattered remnant of nineteenth century social and economic conceptions that have long since been put to rest. Although its foundations have been almost completely torn away by the passage of time and events, the at-will rule has demonstrated a remarkable persistence in our law. This vitality is probably due to the rule's continued usefulness in providing employers with the control necessary to manage their business.

The courts, however, are beginning to recognize that the at-will rule confers on employers a degree of discretion far greater than necessary to secure managerial control. With increasing frequency the courts are "finding" exceptions to the rule which limit its abuse. In a process familiar to the common law, these exceptions are now expanding and are replacing the rule from which they evolved. From these scattered exceptions the outlines of a cause of action for tortious discharge is beginning to emerge. This comment suggests that applying the covenant of good faith and fair dealing to employment contracts provides an ideal vehicle to complete this evolutionary process. Application of the covenant is based on the recognition that supposedly private conduct within the employment relation is of general public importance and war-
rants judicial intervention to prevent unwarranted injury to employee interests. The proposed standard of care to be imposed by the covenant of good faith—that the employer limit his use of his discharge power to situations legitimately related to the conduct of the enterprise—is itself an expression of the increasingly recognized need to balance competing employee-employer interests. By imposing this balancing of interests the courts could retain the valid exercise of employer discretion granted under the at-will rule while protecting employees from overbearing and abusive conduct.

The long awaited rethinking of the at-will rule appears to be at hand. It now remains for the courts to select the means by which to accomplish the task.

*Tom May*