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# At-Will Employment and the Handsome American: A Case Study in Law and Social Psychology

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**THE SECOND ANNUAL BENJAMIN AARON LECTURE ON THE  
ROLE OF PUBLIC POLICY IN THE EMPLOYMENT RELATIONSHIP**

**At-Will Employment and the Handsome American:  
A Case Study in Law and Social Psychology**

**Theodore J. St. Antoine**

**Co-sponsored by the UCLA Institute of Industrial Relations and the  
Labor Law Section of the Los Angeles County Bar Association**

**November 1987**

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**BENJAMIN AARON**, Professor of Law, Emeritus, School of Law, UCLA. Affiliated with UCLA Institute of Industrial Relations since 1946 (Director, 1960-75) and with the UCLA School of Law since 1960 as Professor of Law. Chair, University of California State-Wide Academic Senate (1980-81). Chair, UCLA Academic Senate (1970-71). A.B., University of Michigan; LL.B., Harvard Law School. Service on National War Labor Board (1942-45) and National Wage Stabilization Board (1951-52). Extensive experience as arbitrator, mediator, and fact-finder in the private and public sectors (1942-present). Affiliations: American Arbitration Association, Section of Labor Relations and Employment Law (Secretary, 1967); Industrial Relations Research Association (President, 1972); International Society for Labor Law and Social Legislation (President, 1985-88); National Academy of Arbitrators (President, 1962). Member: International Labor Organization (ILO) Committee of Experts; United Auto Workers Public Review Board. Author of numerous publications on domestic and comparative labor law and industrial relations.

**THEODORE J. ST. ANTOINE**, Degan Professor of Law, University of Michigan, A.B., summa cum laude, Fordham College, 1951; J.D. University of Michigan Law School, 1954 (Editor-in-Chief, Michigan Law Review, 1953-54); post-graduate study in law and economics, University of London, 1957-58 (Fulbright grant). Memberships: American Bar Foundation.; Michigan Bar Foundation.; Order of the Coif; Phi Alpha Delta (law fraternity); American Bar Association (past co-chairman, Committee on Practice and Procedure under the NLRA; co-chairman, Committee on Practice and Procedure under the NLRA; co-chairman, Committee on Individual Rights in the Workplace, 1981-84; Secretary, 1969-70 and 1971-72, and Council member, 1984-present, Section of Labor Relations Law); Industrial Relations Research Association; Panel of Labor Arbitrators, American Arbitration Association; Panel of Arbitrators, Federal Mediation and Conciliation Service; Advisory Employment Relations Committee of the Michigan Civil Service Commission, 1972-73; United Automobile Workers Public Review Board, 1973-present; Chairman, Michigan Governor's Workmen's Compensation Advisory Commission, 1974-75; Governor's Special Counselor on Workers' Compensation, 1983-84; President, National Resource Center for Consumers of Legal Services, 1974-78; Committee Chairman, NLRB Task Force, 1975-77; Intl. Soc. for Labor Law & Social Security (Executive Committee, 1984-present); National Academy of Arbitrators (Board of Governors, 1985-present); Board of Trustees, Fordham University, 1978-84; State Bar of Michigan (Judic. Qual. Comm., 1974-78; Chairperson, 1978-80, Labor Relations Law Section; Chairperson, Scope and Correlation Committee, 1983-85); Faculty, Salzburg Seminar in American Studies, Summer 1979; Board of Visitors, Duke Law School, 1980-84; Chair, Administrative Committee, UAW-GM Legal Services Plan, 1982-present. Publications: *Labor Relations Law: Cases and Materials* (1968, 1974, 1979, 1984) with R. Smith, L. Merrifield & C. Craver; articles and papers in various law reviews and in the proceedings of the N.Y.U., Midwest, and Southwestern labor conferences and of the annual meetings of the American Bar Association, the Industrial Relations Research Association, and the National Academy of Arbitrators.

# AT-WILL EMPLOYMENT AND THE HANDSOME AMERICAN: A CASE STUDY IN LAW AND SOCIAL PSYCHOLOGY

Theodore J. St. Antoine\*

## I. Introduction

For a man as youthful and vibrant as Ben Aaron, it must come as a somewhat chilling realization that he is now, in the considered judgment of his peers, the reigning dean of American labor law scholars. At the initiation of this series last year, one of our most distinguished federal appellate judges, Harry Edwards, who to the best of my knowledge has never studied or worked extensively with Ben, nonetheless pronounced Ben one of the four "heroes" whom he sought to emulate in his own work.<sup>1</sup> Whether it be the Industrial Relations Research Association or the National Academy of Arbitrators on the domestic scene, or the International Society for Labor Law and Social Security on the worldwide scene, whenever academics and practitioners in the employment field want a leader who will be a master of both theory and practice, it is Ben Aaron whom they elect to head their organizations. And for all of us who toil in the vineyard of industrial relations, it is Ben Aaron who so often sets the agenda -- just as he did in his magisterial inaugural lecture right here a year ago.

At that time Ben outlined "two problems of immediate urgency" that he felt had to be addressed, namely, plant closings and wrongful discharge.<sup>2</sup> Now, it would take a more intrepid spirit than I to tackle the first topic, at least in Ben Aaron's own backyard. Ben has already done that subject to a fare-thee-well.<sup>3</sup> Besides, it appears that in the meantime the U.S. Congress may have got the message.<sup>4</sup> So tonight I shall

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\* James E. & Sarah A. Degan Professor of Law, University of Michigan. I wish to acknowledge the imaginative research assistance of Gregg Gilman and Claire Mercurio, especially in collecting pertinent sociopsychological references.



deal with unjust dismissal, where the changes in legal doctrine surely constitute the most important development in the whole field of employment law during the past decade. I am more honored than I can say by this opportunity to cover one of the items on Ben's agenda.

Before proceeding, however, I should like to add a personal word. Ben is more than a highly esteemed professional colleague. I am proud to count myself among Ben's and his wife Eleanor's globe-girdling contingent of friends and acquaintances. To be a recipient of their hospitality is to experience something akin to Old World warmth and graciousness. Both of them are *bon vivants* in the very best sense, and their enthusiasm for sharing their pleasures and discoveries has enriched the lives of many of us. I can only hope my presentation this evening will serve as a small token of my regard for this splendid pair. I might add that last year, with typical modesty but uncharacteristic inaccuracy, Ben remarked that he was looking forward to seeing "abler and more distinguished scholars"<sup>5</sup> succeeding him in this series. I am confident that I speak for many of those lecturers when I say that we shall be more than satisfied if our contributions come close to meeting the high standards set by Ben Aaron.

The past decade has seen a genuine revolution in employment law, as some forty American jurisdictions, in square holdings or strong dictum and on one or more diverse theories, have modified the conventional doctrine whereby employers "may dismiss their employees at will . . . for good cause, for no cause or even for cause morally wrong."<sup>6</sup> In this paper I shall briefly review the theories most frequently invoked by the courts in dealing with wrongful dismissal and indicate their deficiencies as a permanent solution for the problem. Next, I shall summarize the major arguments for and against the doctrine of employment at will. Finally, I shall consider some of the particular issues that will have to be resolved in any proposed legislation. But first, to view the whole question from a somewhat different perspective, I should like to look at a few sociopsychological factors that may help explain why the United States remains today the last major industrial democracy in the world without generalized "just cause" protections for its workers.

## II. Social Psychology and the Handsome American

Americans are known as a generous and caring people. If a natural disaster occurs in India or Latin America, Americans can be counted on to rally around with medical supplies and open pocketbooks. We take such compassionate impulses almost



for granted; they go along with our image of ourselves as the perennial good guys, as nature's noblemen. But there may be some darker shadows in the picture. On occasion, condescending or patronizing attitudes may accompany our proffered aid. In the late 1950s William Lederer and Eugene Burdick wrote a novel about this country's involvement in Southeast Asia that introduced a new phrase into popular usage -- "The Ugly American."<sup>7</sup> Significantly, for most persons, the term became shorthand for any oafish, uncouth, irresponsible citizen abroad. Our predisposition to regard the normal cleancut American as the very embodiment of virtue blinded us to other possibilities. In fact, the original ugly American was one of the heroes of the Lederer-Burdick book. He spent his time out in the rice paddies helping the natives to help themselves. The handsome, well-manicured Americans stayed back in their isolated urban compounds, drawing up grandiose but unrealistic plans for reshaping the countryside with giant dams and sprawling factories.

Over the last few years I have struggled to reconcile the notion of a caring, giving, open-hearted America with the resistance I have frequently encountered, even in many traditionally progressive circles, to the concept of universal "just cause" safeguards for this country's working persons. The image of Lederer and Burdick's "handsome" Americans, who operated apart from the people they were purporting to assist, and in ignorance of their real wants and needs, led me to indulge in some amateur psychologizing about the more appealing and enduring mythic figures of our history, and the lessons they might impart about our national character. I discovered that two of my own candidates as prototypical icons -- the self-sufficient frontiersman and the hard-boiled private eye, two quintessential "loners" -- have been taken quite seriously as national symbols in one of the most influential of recent sociological works, *Habits of the Heart*.<sup>8</sup> The authors draw on such figures from an earlier era as James Fenimore Cooper's Deerslayer, the Lone Ranger, and the beleaguered sheriff in *High Noon*, and such solitary modern heroes as the detectives Sam Spade, Philip Marlowe, and Lew Archer to illustrate a central thesis of their book: "Individualism lies at the very core of American culture."<sup>9</sup> It is, however, an ambivalent individualism, for it involves, as these scholars describe it, "a commitment to the equal right to dignity of every individual combined with an effort to justify inequality of reward, which, when extreme, may deprive people of dignity."<sup>10</sup>

At its best, individualism produces Lederer and Burdick's ugly but achieving and sharing American; at its worst, as a host of sociologists and psychologists have demonstrated, excessive emphasis on personal responsibility can result in self-loathing

by the moderately successful and a "blaming of the victim" for his or her economic or social woes.<sup>11</sup> Having failures around to identify and derogue may even be a way for the relatively unsuccessful to justify and console themselves.<sup>12</sup> An overly individualistic society is harsh and unforgiving. Failure is invariably attributed to personal fault and almost never to socioeconomic forces that may often be beyond one's control. In such a dog-eat-dog milieu, it will not be easy for the fired worker to generate much sympathy for his claims of unjust treatment.

The centrality if not primacy of individualism in American life is hardly a new discovery. As early as the 1830s Tocqueville analyzed the phenomenon, but he gave it only the worst of possible connotations: "Individualism . . . disposes each citizen to isolate himself from the mass of his fellows . . . . All a man's interests are limited to those near himself."<sup>13</sup> In his classic 1893 essay, "The Significance of the Frontier in American History," Frederick Jackson Turner declared that it is "to the frontier that American intellect owes its striking characteristics," including "that dominant individualism, working for good and for evil."<sup>14</sup> In that prophetic work, *An American Dilemma*, Gunnar Myrdal commented on the "low degree of law observance" in the United States, noting that the "authorities . . . will most often meet the citizen's individualistic inclinations by trying to educate him to obey the law less in terms of collective interest than in terms of self-interest."<sup>15</sup>

The national psyches of Western Europe and especially of the Orient plainly differ from ours, stressing interdependence over rugged individualism. Thus, psychiatrist Irvin Yalom contrasts Europe's "geographic and ethnic confinement, the greater familiarity with limits, war, death, and uncertain existence," with America's "expansiveness, optimism, limitless horizons, and pragmatism."<sup>16</sup> Social psychologists point out that training for independence begins earlier in the West, particularly in the United States, than in non-Western societies.<sup>17</sup> In Japan, specifically, "mature interdependence is defined in terms of reciprocal responsibilities," so that an employee's "loyalty to the firm is quite compatible with self-actualization."<sup>18</sup>

The American brand of individualism is obviously not all bad. It accounts in part for those peculiar national traits of self-reliance, inventiveness, and sheer exuberance that have frequently been the envy of the world. And at widely separated but perhaps equally critical stages in our history, as Tocqueville<sup>19</sup> and Myrdal<sup>20</sup> have observed, the higher values of democracy -- such as political freedom and a concern for the public welfare -- have prevailed over the grosser excesses of individualism. Perhaps it is not



too quixotic to hope that, given sufficient time for education and reflection, Americans will appropriately reorder their values concerning the issue of employment at will.

### III. Judicial Theories of Unjust Discharge

Let me now turn to a brief overview of the three principal theories employed by the courts to modify the at-will employment doctrine, along with my reasons for believing these theories are ultimately inadequate for the task. The three theories include tort -- violation of public policy, or "abusive" discharge; breach of an express or implied contract; and breach of the covenant of good faith and fair dealing.

#### A. Tort Theories

The courts have acted along a spectrum of public policy violations. At one extreme end employers have actually fired employees for refusing to commit a crime, such as perjury<sup>21</sup> or price-fixing.<sup>22</sup> I should like to think that we are past the point when any court would countenance such an outrage. Next along the spectrum are cases where employees are discharged for performing a public duty, like serving on a jury<sup>23</sup> or "blowing the whistle" on wrongdoing within a company.<sup>24</sup> Lastly, there are dismissals for exercising a public right, such as filing a workers' compensation claim.<sup>25</sup>

The first type of case, where criminal conduct is importuned, is going to be easy, and also extremely rare. After that, the issues will get tougher for the courts. "Public policy" is a slippery concept. For example, it may be one thing if a "whistleblower" has been subpoenaed to appear at an official inquiry. It may be quite another if he has taken it upon himself to share his good-faith but mistaken suspicions with the media, seriously damaging his employer's reputation. Some courts have simply thrown up their hands over public policy claims, insisting such matters should be left to the legislature.<sup>26</sup> Except in the most egregious situations, therefore, judicial theories of public policy are no sure answer to the problem of unfair dismissal.

Even more nebulous is the notion of "abusive" discharge. One celebrated decision sustained a suit by a female worker who was fired for refusing to date her foreman.<sup>27</sup> Other courts, however, have declined to remedy such personal abuse.<sup>28</sup> Moreover, there is a growing tendency to require that the public policy relied upon be "clearly articulated" and "well accepted,"<sup>29</sup> or even that it be "evidenced by a constitutional or statutory provision."<sup>30</sup> That will give small comfort to most employees who are discharged spitefully or arbitrarily.

## B. Contract Theories

At one time an employer's oral assurance of "permanent" employment, or a policy statement in a personnel manual that employees would be discharged only for just cause, was not considered legally binding.<sup>31</sup> In the early 1980s, however, a number of courts began taking employers at their word, and started treating such declarations as express or implied contracts.<sup>32</sup> But many courts continued to regard these employer statements as merely nonbinding expressions of present intent.<sup>33</sup> Furthermore, individual promises of job security will probably be given only to higher-ranking personnel, and only the more enlightened employers are likely to issue protective policies applicable to employees generally. Thus, the person who undoubtedly needs these safeguards the most -- the rank-and-file worker in the marginal establishment -- is the very one who will get the least.

Even where courts recognize the new contractual qualification on employment at will, an employer can of course avoid liability by refraining from any assurances.<sup>34</sup> Clear and prominent disclaimers of any legal intent in an employee handbook will also accomplish the purpose.<sup>35</sup> Although it is more problematical, I also believe an employer can ordinarily purge a manual of any guarantees against future terminations, even as to incumbent employees.<sup>36</sup> After all, one would not consider an employer stuck forever with an existing, unilaterally established pay scale, even if economic conditions worsened dramatically. In short, the contract exceptions to the at-will principle seem no panacea, either.

## C. Good Faith and Fair Dealing

Massachusetts and California have led the way in developing the most expansive judicial qualification of the employment-at-will doctrine. This modification is based on the covenant of good faith and fair dealing, which is said to inhere in every contract. "Bad faith" has been found when a jury concluded an employer had dismissed an employee to avoid paying him the full commission due on a multimillion-dollar sale,<sup>37</sup> and when an employer discharged a long-term employee without good cause.<sup>38</sup> This novel use of the good faith concept appears contrary to its traditional function. It has not been regarded as applicable to contract termination as such, but rather to the mutual obligation of the parties not to interfere with each other's performance or their receipt of the benefits of the agreement.<sup>39</sup> My judgment is that most courts will follow the New York Court of Appeals<sup>40</sup> in rejecting the good-faith covenant in this context as fundamentally incompatible with the whole theory of at-will employment.



#### IV. The Case for Just Cause Legislation

About 60 million persons work in private sector, nonunion firms in the United States, and thus are not protected against unjust dismissal by either collective bargaining agreements or constitutional or civil service provisions. A careful scholar has estimated that of this group, some two million nonprobationary employees are discharged annually. He further calculates that about 150,000 of these would be restored to their jobs if they had the same just cause protections as unionized workers.<sup>41</sup> The problem is a substantial one, then, in terms of the numbers alone.

The courts of the more progressive states, like California, Massachusetts, and Michigan, have probably neared the limits of their willingness to modify at-will employment. They will entertain suits alleging serious violations of accepted public policy. They will hold employers to their unretracted word not to fire except for good reason. But ordinarily they will not impose an affirmative obligation on employers to prove just cause to support a discharge. The next move therefore seems up to the legislatures.

Conceptually, there appears little or nothing to be said in favor of an employer's right to treat its employees arbitrarily or unfairly. For most commentators, it is a matter of simple justice.<sup>42</sup> Perhaps the most outspoken academic dissenter is Professor Richard Epstein of Chicago. He views at-will contracts as fair because they are the product of freedom of contract between parties with equal bargaining power seeking a mutually beneficial relationship.<sup>43</sup> He even suggests that workers will profit from "risk diversification," since the contract at will offsets "the concentration of individual investment in a single job."<sup>44</sup> The Epstein thesis exudes the rarefied ozone of the ivory tower, not the rank air of the plant floor. His analysis admits of no living, breathing human beings, who develop irrational antagonisms or exercise poor judgment, on the one hand, or who suffer the psychological as well as the economic devastation of losing a job, on the other. Numerous studies document the increases in cardiovascular deaths, suicides, mental breakdowns, alcoholism, ulcers, diabetes, spouse and child abuse, impaired social relationships, and various other diseases and abnormalities that develop even in the wake of impersonal permanent layoffs resulting from plant closings.<sup>45</sup> Presumably such effects are at least as severe when a worker is singled out to be discharged for some alleged incompetence or rule infraction. Even if Epstein were correct in all his statements about employees collectively, this searing harm to individuals would still justify eradicating the at-will principle.

This reform will probably come at some cost. Many persons will naturally think of the employer's loss of flexibility in its operations, and the need for extra staff in the personnel office. That will almost surely be a piece of the story, but it may not be the whole by any means. One scholar has suggested a lower wage level could result because the more stable and attractive employment situation would cause both a decrease in the demand for labor and an increase in the supply.<sup>46</sup> In effect, the employees themselves would pay at least partially for their greater job security. That is a time-honored tradeoff among unionized workers,<sup>47</sup> however, and should not be considered inappropriate here. There is also evidence that the net increase in employers' costs in maintaining a for-cause discharge system would not be exorbitant. For example, in all the demands by unionized firms for "givebacks" or bargaining concessions during the early 1980s, scarcely ever did employers seek to remove "just cause" contract clauses, or the grievance and arbitration procedures to enforce them.

The "competitiveness" of American business in international markets should not be markedly affected by the elimination of at-will employment. Statutory protection against unfair discharge now exists in about sixty countries around the world, including all of the Common Market, Sweden and Norway, Japan, and Canada.<sup>48</sup> We are the last major holdout against the recommendations of the International Labor Organization in 1963 and again in 1982 that workers not be terminated except for a valid reason. Furthermore, experience both here and abroad suggests that the prevention of arbitrary treatment of employees may be good business as well as humane. Significant correlations have been shown between a secure work force and high productivity and quality output.<sup>49</sup>

A more rational, systematic method of dealing with wrongful terminations would save many employers the crushing financial liability imposed by emotionally aroused juries under our existing, capricious common-law regime. For example, separate studies at different times by a plaintiff's attorney<sup>50</sup> and a management attorney<sup>51</sup> in California indicated that plaintiffs won between 78 and 90 percent of the cases that went to juries, with the awards averaging between \$425,000 and \$450,000. Jury awards for single individuals have gone as high as \$20 million, \$4.7 million, \$3.25 million, and \$2.57 million.<sup>52</sup> Eventually, an informed employer lobby might well conclude that comprehensive just cause legislation, which would exclude jury verdicts and punitive damages, was the more favorable alternative.

There are signs, indeed, of some movement, glacial though it is. Bills forbidding wrongful discharge have been introduced in a dozen or more legislatures.<sup>53</sup> In addition



to the positive recommendations of the special committee of the California Bar's Labor and Employment Law Section,<sup>54</sup> the individual rights committee of the ABA Section on Labor and Employment Law has drafted a questionnaire regarding the critical issues to be considered in any proposed law.<sup>55</sup> The AFL-CIO's Executive Council has ended organized labor's longstanding ambivalence on the subject by endorsing the concept of wrongful discharge legislation.<sup>56</sup> The Commissioners on Uniform State Laws have decided to draft a model statute. And this past summer Montana became the first state to adopt a comprehensive law protecting employees against unjust discharge.<sup>57</sup>

## V. Statutory Proposals

Ben Aaron himself has provided us with a road map of the subjects that must be covered in writing legislation to deal with wrongful termination.<sup>58</sup> With a few minor detours, I shall be happy to follow his directions. Ideally, we should probably have a uniform federal law. But the political climate is such that legislation in some of the more receptive states seems the most feasible course for the foreseeable future.

### A. Coverage

In the higher ranges of management, one official's evaluation of another's business judgment may become so intertwined with questions of fair treatment that the two cannot be separated. These top executives should be excluded from coverage. On the other hand, shop foremen and supervisors who are not protected by the National Labor Relations Act because they are management's representatives with rank-and-file employees do not present such potential conflicts of interest under just cause safeguards, and should be covered. Several proposed bills draw the line by excepting persons entitled to a pension above a certain amount, or persons with a fixed-term contract of two years or more. Probationary employees may also be excluded. Six months is a common probation period but a California bill specifies two years.<sup>59</sup> That is the sort of quantitative issue which lends itself to compromise.

Small employers may be more prone to arbitrariness and individual spite than large, structured corporations. But we hesitate to intrude into the sometimes intensely personal relationships of tiny establishments. A suitable dividing line, at least at the outset, would seem to be employers having between ten<sup>60</sup> and fifteen<sup>61</sup> or more employees.

Public employees generally have constitutional guarantees against the deprivation of their "vested" job interests without due process. About half also have more specific civil service or tenure protections against unjust dismissal. It would seem sensible to adopt the approach of several bills in limiting new protections to private industry.

I see no principled grounds for treating organized employees differently from the unorganized with respect to basic statutory safeguards. If workers in general are entitled to invoke a just cause standard, the same public policy should arguably apply to all, regardless of the existence of parallel protections in collective bargaining agreements. Federal precedent for such an approach exists in both the NLRA and civil rights legislation. Nonetheless, there would be federal preemption problems with state laws,<sup>62</sup> and procedural problems in accommodating contractual and statutory rights.<sup>63</sup> There may be much practical wisdom in the solution of several bills to finesse all these complications by excluding unionized employees.

#### **B. Standard Applicable and Discipline Affected**

My proposal would be to articulate a standard for discharge or discipline in terms of "just cause" or equivalent language, without further definition but perhaps with a few illustrative reasons. Even in Western Europe, which had nothing like the body of American arbitral precedent to draw upon, there has apparently been little difficulty in applying broadly phrased statutory criteria. Any effort at specificity is bound to risk underinclusiveness. Decisionmakers should be able to flesh out "just cause" much as have our arbitrators.

Outright discharge, the so-called "capital punishment" of industrial relations, is the usual target of all these proposals. But an extended suspension, a demotion, or an onerous job assignment can be almost as bad. Yet we shrink from subjecting every shop discipline to governmental review. The solution of several bills is to cover "constructive" discharge as well.<sup>64</sup> An employee who feels sufficiently aggrieved may quit, and then test the legitimacy of the employer conduct that triggered his or her departure.

#### **C. Enforcement Procedures**

Administration and enforcement of new just cause legislation will have to be lodged in the courts, or in existing or newly created executive departments or administrative agencies. I would join most persons in ruling out the courts as too formal, too costly, and too slow. Beyond that, I think the locus of administration is



less significant than whether we follow the hearing officer-agency model or the arbitration model. With a unanimity rare among their contentious tribe, those arbitrators confronting the issue have invariably opted for arbitration. I go along with my colleagues. I like to think our dockets are already so bulging that we could not possibly be impelled by crass commercial considerations; I do believe there are valid, objective reasons for our choice.

The arbitration format would immediately make available the vast body of arbitral precedent concerning substance and procedure that has been developed in countless decisions over the years. It would permit the use of an established nucleus of experienced arbitrators, and of the growing number of young, able aspirants who Robben Fleming demonstrated some years ago are objectively qualified to render acceptable decisions, especially in the more straightforward disciplinary cases.<sup>65</sup> Arbitration would facilitate maximum flexibility, at least until more is learned about future caseloads, because there would be no need to engage a large permanent staff at the beginning. The relative informality and speed of arbitration -- though both of those qualities are too often much eroded -- should also appeal to rank-and-file employees. One drawback of arbitration for employees, however, might be that, in keeping with the pattern in the unionized sector, and in recognition of the strained financial resources of most states, the parties themselves would have to bear the cost of the arbitrator.

It would seem highly desirable to have some screening mechanism in the statutory procedure to avoid a flood of hearings. The most obvious would be a preliminary mediation stage of minimum duration, as provided by California and Michigan bills.<sup>66</sup> One knowledgeable observer would have an official in the administering agency make a "reasonable cause" determination before a case could go to arbitration.<sup>67</sup> Such a requirement would be especially appropriate if the state was to bear a major share of the cost of the proceedings. The arbitrator's award itself should be final and binding, without the need for agency adoption or review as in the case of a hearing officer's report or decision. Ordinarily, of course, the courts will not set aside a private arbitration award unless the arbitrator exceeded his jurisdiction or the award was obtained by fraud, bribery, or similar means.<sup>68</sup> Those criteria ought to apply here.

#### **D. Remedies**

Remedies for unjust discharge in the United States have traditionally included reinstatement, with or without back pay. In Europe reinstatement is the exception.

Apparently it is felt that future relations between the employer and the unwanted employee will be too strained, and that the employee is better off to leave with a flat severance payment. A number of American experts also seem to believe that reinstatement is unfeasible without the presence of a labor union to support the restored employee. I believe an award of severance pay in lieu of reinstatement should be an option available to the arbitrator. But I would not preclude reinstatement out of excessive solicitude for the employee. A reinstatement order may also furnish extra bargaining leverage to the employee in negotiating any future settlement with the employer.

The tradeoff for employers would be the elimination of jury verdicts, compensatory and punitive damages, awards for pain and mental suffering, and the like. Something rather analogous occurred in the second decade of this century, when employers swapped their powerful common law defenses to tortious injury of employees in the workplace in return for the no-fault workers' compensation system and its denial of compensatory and punitive damages. Despite some occasional creaks in the joints, workers' compensation has generally served us well. It may stand as a salutary precedent for mutual accommodations in our present deliberations over wrongful dismissal.

## VI. Conclusion

The social psychologists -- and the medical diagnosticians -- are only beginning to assess the full meaning of the loss of a job. At least we can now perceive that profound values are at stake, not just economic hardship. Beyond the clinically observable symptoms of impaired, even shattered, minds and bodies, there is a genuine question of identity involved. Studies have found that "most, if not all, working people tend to describe themselves in terms of the work groups or organizations to which they belong. The question 'Who are you?' often elicits an organizationally related response . . . . Occupational role is usually a part of this response for all classes: 'I'm a steelworker,' or 'I'm a lawyer.'<sup>69</sup> To lose one's job is, in a true sense, to risk one's very being.

Rugged individualists though we may be, Americans eventually -- if sometimes belatedly -- recognize moral and social imperatives. In my view, reform of wrongful termination has now assumed that status, and I am confident we shall respond. But I do not expect a widespread response any time soon. It took us some fifty years longer

than that hardly liberal statesman, Chancellor Bismarck of Germany, to see the need for Social Security. On that timetable, counting from the ILO's initial call for just cause legislation in 1963, we shall have accomplished the task by the year 2013. I can only hope that Ben Aaron and I shall be together then -- if not in Southern California, then in some even airier and more pellucid region -- and Ben will uncork one of his favorite vintages. And the two of us shall share a toast.



## NOTES

1. Edwards, *Commentary: Agonizing over the Simple Realities of Labor Relations in the United States*, in B. AARON, THE FIRST ANNUAL BENJAMIN AARON LECTURE ON THE ROLE OF PUBLIC POLICY IN THE EMPLOYMENT RELATIONSHIP 27 (UCLA 1987).
2. B. AARON, *supra* note 1, at 9.
3. Aaron, *Plant Closings: American and Comparative Perspectives*, 59 CHI.-KENT L. REV. 941 (1983).
4. A provision requiring employers to give workers a 60-day advance notice of a plant closing or mass layoffs was included in the Omnibus Trade Bill, H.R. 3, as passed by the Senate on July 21, 1987. 2 LAB. REL. REP., IND. EMP. RTS. (BNA), Aug. 4, 1987, at 3.
5. B. AARON, *supra* note 1, at 1.
6. *Payne v. Western & Atlantic R.R.*, 81 Tenn. 507, 519-20 (1884). See also H. WOOD, LAW OF MASTER AND SERVANT 272-73 (1877).
7. W. LEDERER & E. BURDICK, THE UGLY AMERICAN (1958).
8. R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, HABITS OF THE HEART 144-45 (1985).
9. *Id.* at 142.
10. *Id.* at 150.
11. See, e.g., Hall, *Individualism and Social Problems: A Critique and an Alternative*, 3 J. APPLIED BEHAV. SCI. 85, 91-92 (1983), and authorities cited, including R. SENNETT & J. COBB, THE HIDDEN INJURIES OF CLASS (1972); W. RYAN, BLAMING THE VICTIM (2d ed. 1976). See generally D. McCLELLAND, THE ACHIEVING SOCIETY 281-92 (1961). But cf. Waterman, *Individualism and Interdependence*, 36 AM. PSYCHOLOGIST 762 (1981).
12. Hall, *supra* note 11, at 91, citing M. LEWIS, THE CULTURE OF INEQUALITY (1978).
13. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 477 (J. Mayer & M. Lerner ed. 1966). The French *l'individualisme* emphasized alienation in society, without the more positive aspects the term conveys to contemporary Americans.
14. Turner, *The Significance of the Frontier in American History*, in F. TURNER, THE FRONTIER IN AMERICAN HISTORY 37 (1976).
15. G. MYRDAL, AN AMERICAN DILEMMA 17-18 (20th ann. ed. 1962).



16. I. YALOM, *THE THEORY AND PRACTICE OF GROUP PSYCHOTHERAPY* 94-95 (3d ed. 1985).
17. Rotenberg, "*Alienating-Individualism*" and "*Reciprocal-Individualism*": *A Cross-Cultural Conceptualization*, 17 *HUMANISTIC PSYCHOLOGY* 3, 4-5 (Summer 1977) and authorities cited, including D. McCLELLAND, *THE ACHIEVING SOCIETY* (1961).
18. *Id.* at 8.
19. A. DE TOCQUEVILLE, *supra* note 13, at 481-84.
20. G. MYRDAL, *supra* note 15, at 9. I oversimplify somewhat in reading Tocqueville and Myrdal together. Their generations were different and so were their native tongues. In terms, for example, Tocqueville would put liberty before equality while Myrdal would apparently reverse that order. *Id.* n. "a." But in context I believe they are essentially of like minds.
21. *Petermann v. Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).
22. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330 (1980).
23. *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975).
24. Causes of action were recognized in *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980), and *Palmateer v. Int'l Harvester Co.*, 85 Ill. 2d 124, 421 N.E. 2d 876 (1981), but rejected in *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974), and *Murphy v. American Home Prod. Corp.*, 58 N.Y. 2d 293, 448 N.E. 2d 86 (1983). Some of these seemingly contrary decisions are reconcilable on their facts.
25. Causes of action were recognized in *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E. 2d 353 (1978), and *Firestone Textile Co. v. Meadows*, 666 S.W. 2d 730 (Ky. 1983), but rejected in *Martin v. Tapley*, 360 So. 2d 708 (Ala. 1978), and *Segal v. Arrow Indus. Corp.*, 364 So. 2d 89 (Fla. App. 1978).
26. *Murphy v. American Home Prod. Corp.*, 58 N.Y. 2d 293, 448 N.E. 2d 86 (1983); *see also Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981).
27. *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974). *But cf. Howard v. Dorr Woolen Co.*, 120 N.H. 295, 414 A.2d 1273, 1274 (1980).
28. *E.g., Fawcett v. G. C. Murphy & Co.*, 46 Ohio St. 2d 245, 348 N.E. 2d 144 (1976); *Givens v. Hixson*, 275 Ark. 370, 631 S.W. 2d 263 (1982).
29. *Clifford v. Cactus Drilling Corp.*, 419 Mich. 356, 367, 353 N.W. 2d 469 (1984); *see also Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025, 1034 (1985).

30. Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834, 840 (1983); *see also* Adler v. American Standard Corp., 290 Md. 615, 432 A.2d 464 (1981).
31. *See, e.g.*, Edwards v. Kentucky Utils. Co., 286 Ky. 341, 150 S.W. 2d 916 (1941); Note, *Employee Handbooks and Employment At-Will Contracts*, 1985 DUKE L.J. 196, 200-04.
32. *E.g.*, Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W. 2d 880 (1980); Weiner v. McGraw-Hill, Inc., 57 N.Y. 2d 458, 443 N.E. 2d 441 (1982).
33. *E.g.*, Mau v. Oklahoma Nat'l Bank, 207 Neb. 373, 299 N.W. 2d 147 (1980); Heideck v. Kent General Hosp., 446 A.2d 1095 (Del. 1982); White v. Chelsea Indus., Inc., 425 So. 2d 1090 (Ala. 1983).
34. Reid v. Sears, Roebuck & Co., 790 F.2d 453 (6th Cir. 1986); French v. Dillard Department Stores, Inc., 285 Ark. 332, 686 S.W. 2d 435 (1985). *But cf.* Tirano v. Sears, Roebuck & Co., 99 App. Div. 2d 675, 472 N.Y.S. 2d 49 (1984).
35. Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257, 1260, *modified on other grounds*, 101 N.J. 10, 499 A.2d 515 (1985); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984). *But cf.* Wagenseller v. Scottsdale Memorial Hospital, 147 Ariz. 370, 710 P.2d 1025 (1985) (unclear disclaimer); Schipani v. Ford Motor Co., 102 Mich. App. 606, 302 N.W. 2d 307 (1981) (subsequent assurance); Ferraro v. Koelsch, 124 Wis. 2d 154, 368 N.W.2d 666 (1985) (same).
36. *See* Bullock v. Automobile Club of Michigan, 146 Mich. App. 711, 720-21, 381 N.W. 2d 793 (1985), on appeal as Dkt. No. 78027, Mich. Sup. Ct. *Cf.* Enis v. Continental Illinois National Bank & Trust Co., 795 F.2d 39, 41 (7th Cir. 1986). For the view that a job protection provision *cannot* be rescinded without "independent" consideration, *see* Stack v. Allstate Ins. Co., 606 F. Supp. 472, 477-78 (S.D. Ind. 1983). In Bankey v. Storer Broadcasting Co., Dkt. No. 84-1296, the U.S. Court of Appeals for the Sixth Circuit certified to the Michigan Supreme Court, Dkt. No. 78200, the question whether an employer who has created a "just cause" employment contract can later unilaterally alter the employment relationship as to existing employees to permit discharge at will.
37. Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E. 2d 1251 (1977). *See also* Maddaloni v. Western Mass. Bus Lines, Inc., 386 Mass. 877, 438 N.E. 2d 351



- (1982); *Buyse v. Paine, Webber, Jackson & Curtiss*, 623 F.2d 1244 (8th Cir. 1980) (Minnesota law). Arguing for a broad reading of the covenant that could well eviscerate the whole at-will doctrine is Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 92 HARV. L. REV. 1816 (1980). Coming close to this view is *Crenshaw v. Bozeman Deaconess Hosp.*, 693 P.2d 487 (Mont. 1984); *see also* *Gates v. Life of Montana Ins. Co.*, 196 Mont. 178, 638 P.2d 1063 (1982).
38. *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). Later California decisions have differed over the significance of an employee's longevity in good-faith covenant cases. *Compare* *Wheeler v. Hershey Chocolate Co.*, No. 196250 (Cal. App. Aug. 18, 1985) (longevity alone not sufficient), *with* *Gray v. Superior Court*, 181 Cal. App. 3d 813, 226 Cal. Rptr. 570, 573 (longevity helpful but not essential). *Cf.* *Foley v. Interactive Data Corp.*, 184 Cal. App. 3d 241, 219 Cal. Rptr. 866 (1985), *cert. granted*, 712 P.2d 891 (Cal. 1986) (seven years' longevity not enough).
39. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); 3 A. CORBIN, CONTRACTS §§ 570-71 (1960).
40. *Murphy v. American Home Prod. Corp.*, 58 N.Y. 2d 293, 304, 448 N.E. 2d 86, 461 N.Y.S. 2d 232 (1983). *Accord:* *Walker v. Modern Realty of Mo.*, 675 F.2d 1002 (8th Cir. 1982); *Martin v. Federal Life Ins. Co.*, 109 Ill. App. 3d 596, 440 N.E. 2d 998 (1982); *Gordon v. Matthew Bender & Co.*, 562 F. Supp. 1286 (N.D. Ill. 1983); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W. 2d 834 (1983); *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985).
41. Stieber, *Recent Developments in Employment-at-Will*, 36 LAB. L. J. 557, 558 (1985).
42. *See, e.g.*, Aaron, *Constitutional Protections Against Unjust Dismissals from Employment: Some Reflections*, in NEW TECHNIQUES IN LABOR DISPUTE RESOLUTION 13 (H. Anderson ed. 1982); Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Blumrosen, *Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII*, 2 IND. REL. L. J. 519 (1978); Peck, *Unjust Discharges from Employment*, 40 OHIO ST. L. J. 1 (1979); St. Antoine, *Protection Against Unjust Discipline: An Idea Whose Time Has Long Since Come*, in ARBITRATION ISSUES FOR THE 1980s--PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 43 (J.

- Stern & B. Dennis eds. 1982); Stieber, *The Case for Protection of Unorganized Employees Against Unjust Discharge*, in PROCEEDINGS OF THE THIRTY-SECOND ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 155 (B. Dennis ed. 1980); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).
43. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 955, 966-68, 973 (1984). See also Heinsz, *The Assault on the Employment at Will Doctrine: Management Considerations*, 40 MO. L. REV. 855 (1982); Power, *A Defense of the Employment at Will Rule*, 27 ST. LOUIS U. L. REV. 881 (1983); Note, *Limiting the Right to Terminate at Will--Have the Courts Forgotten the Employer?* 35 VAND. L. REV. 201 (1982).
  44. Epstein, *supra* note 43, at 969.
  45. See, e.g., B. BLUESTONE & B. HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* 63-66 (1982), and authorities cited; L. FERMAN & J. GORDUS, *THE ECONOMY AND MENTAL HEALTH* (1979).
  46. Harrison, *The "New" Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327 (1984).
  47. See, e.g., R. FREEMAN & J. MEDOFF, *WHAT DO UNIONS DO?* 55-56 (1984); L. REYNOLDS, S. MASTERS & C. MOSER, *LABOR ECONOMICS AND LABOR RELATIONS* 533 (9th ed. 1986).
  48. Association of the Bar of the City of New York, Committee on Labor and Employment Law, *At-Will Employment and the Problem of Unjust Dismissal*, 36 THE RECORD 170, 175, 179-180 (1981); see also Convention 158 Concerning Termination of Employment at the Initiative of the Employer, reprinted in INTERNATIONAL LABOUR CONFERENCE, RECORD OF PROCEEDINGS, SIXTY-EIGHTH SESSION XXXVIII (June 22, 1982).
  49. Foulkes, *Large Nonunionized Employers*, in U.S. INDUSTRIAL RELATIONS 1950-1980: A CRITICAL ASSESSMENT 129, 134-36, 141-44, 155-56 (J. Stieber, R. McKersie & D. Q. Mills eds. 1980); R. PASCALE & A. ATHOS, *THE ART OF JAPANESE MANAGEMENT* 131-237 (1981); E. VOGEL, *JAPAN AS NUMBER ONE: LESSONS FOR AMERICA* 131-57 (1979). Cf. SPECIAL TASK FORCE, U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, *WORK IN AMERICA* 93-110, 188-201 (1973).
  50. Palefsky, *Wrongful Termination Litigation: "Dagwood and Goliath,"* 62 MICH. B. J. 776 (1983).



51. 1 LAB. REL. REP., IND. EMP. RTS. (BNA), Mar. 3, 1987, at 3.
52. K. Lopatka & J. Martin, *Developments in the Law of Wrongful Discharge*, in ABA NATIONAL INSTITUTE ON LITIGATING WRONGFUL DISCHARGE AND INVASION OF PRIVACY CLAIMS vii, 13-18 (1986).
53. California, Colorado, Connecticut, Massachusetts, Michigan, Montana, New Jersey, Ohio, Pennsylvania, Virgin Islands, Washington, Wisconsin, and the U.S. Congress. *See, e.g.*, Ann Arbor [Mich.] News, June 10, 1984, at C5, col. 1; Daily Labor Report (BNA), Sept. 3, 1987, at A-8.
54. Labor and Employment Law News (State Bar of Cal. Lab. & Emp. L. Sec.), Feb. 8, 1984, at 1-46.
55. 1 LABOR LAWYER 784 (1985).
56. 1 LAB. REL. REP., IND. EMP. RTS. (BNA), Mar. 3, 1987, at 1.
57. Daily Labor Report (BNA), Sept. 3, 1987, at A-8.
58. B. AARON, *supra* note 1, at 13.
59. *See, e.g.*, Mich. H.B. 5155, § 2(c) (1983) (6 months); N.J. A.B. 1832, § 1 (1980) (same); Cal. A.B. 3017, § 2880(b) (1984) (2 years).
60. Mich. H.B. 5155, § 2(d) (1983).
61. Cal. A.B. 3017, § 2880(a) (1984).
62. *Compare* Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468, 1475 (9th Cir. 1984) (preemption when employee filed complaint with Federal Mine Safety and Health Administration), *with* Garibaldi v. Lucky Food Stores, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 2319 (1985) (no preemption when employee notified local health officials about spoiled milk). *Cf.* De Soto v. Yellow Freight Systems, 811 F.2d 1333 (9th Cir. 1987) (preemption when employee refused to drive truck he mistakenly believed was not legally licensed or registered). *See generally* Note, *NLRA Preemption of State Law Actions for Wrongful Discharge in Violation of Public Policy*, 19 U. MICH. J. L. REF. 441 (1986).
63. *See, e.g.*, General Transp. Corp., 228 N.L.R.B. 808 (1977); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
64. *E.g.*, Mich. H.B. 5155, § 2(b) (1983); Mont. H.B. 241, as enacted, § 3(1) (1987).
65. R. FLEMING, THE LABOR ARBITRATION PROCESS 80-83 (1965).
66. Cal. A.B. 3017, § 2881 (d) *et seq.* (1984); Mich. H.B. 5155, § 5 (1983).
67. Howlett, *Due Process for Nonunionized Employees: A Practical Proposal*, in PROCEEDINGS OF THE THIRTY-SECOND ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 169 (B. Dennis ed. 1980).

68. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Paperworkers v. Misco, Inc.*, 56 U.S.L.W. 4011 (U.S. Dec. 1, 1987).
69. SPECIAL TASK FORCE, *supra* note 49, at 6.

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