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PROTECTION AGAINST UNJUST DISCHARGE: THE NEED FOR A FEDERAL STATUTE

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MICHAEL MURRAY**

Each year labor arbitrators in the United States decide thousands of grievances that have been brought by unions on behalf of their members against employers. Although this private voluntary system of arbitration has its shortcomings, both unions and employers believe that it affords due process to workers covered by collective bargaining agreements. Grievance arbitration provisions are found in over ninety-five percent of all collectively bargained labor contracts.1

Grievances concerning discipline and discharge constitute roughly forty percent of all issues submitted to arbitration. This is by far the largest proportion of issues submitted to arbitration, and reflects a ten percent rise from the early 1970's.2 Moreover, it appears that discharge cases are appealed to arbitration about twice as frequently as grievances involving lesser disciplinary penalties.3 The seriousness of the discharge penalty to the affected employee and the frequency with which American employers invoke it have prompted much scholarly commentary; many commentators have criticized the common law employment-at-will doctrine as it applies to employees who are not protected by collective bargaining agreements or by anti-discrimination legislation, civil service, or teacher tenure arrangements.4

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1. According to a Bureau of National Affairs survey of 400 major collective bargaining agreements, arbitration of grievances is provided for in 96% of the sample contracts. 2 COLLECTIVE BARGAINING NEGOTIATIONS & CONT. (BNA) 51:5 (1979) [hereinafter cited as BNA SURVEY]. In a speech reported in Daily Record No. 206, October 25, 1982, A-8 (Bureau of National Affairs, Wash., D.C.), the Solicitor of the United States Department of Labor said the percentage of arbitration provisions had risen to 98%.

2. 34 FMCS ANN. REP. 41 (1982).

3. See generally D. BEELER, DISCIPLINE & DISCHARGE (1978) (discussing arbitration decisions involving a variety of employee grievances).

We argue that only a federal statute can fully protect American workers from the harsh consequences of the employment-at-will rule. Part I of this Article outlines the nature and scope of the problems caused by the at-will doctrine. Part II surveys a variety of potential solutions to these problems — unionism, voluntary internal grievance mechanisms, existing statutes, the Constitution, and judicially created exceptions to the at-will rule — and finds each an inadequate source of protection. The final Part urges the enactment of a federal statute to protect all American workers from unjust discharge and sets out several substantive criteria that such a statute should meet.

I. THE PROBLEM

Discharged employees often ask attorneys, labor relations professionals, and government labor agencies what recourse is available to them. The Michigan Department of Labor reports that it receives hundreds of such queries every month; when asked what it can do to help, the Department answers, "probably nothing, because the reasons why most people are fired are not against the law."6

A. The Nature of the Employment-at-Will Doctrine

Unionized workers in the private sector are shielded from unjust discharge by collective bargaining agreements; government employees are protected either through public sector collective bargaining or civil service procedures. Most teachers are covered by tenure laws. Specific


The International Labor Organization ("ILO") is the oldest specialized agency in the United Nations and the only one with tripartite representation from labor, management, and government. At its June 1982 conference, the ILO adopted a Convention and a Recommendation on termination of employment. The Convention contains a number of critical provisions concerning termination of employment based on the individual capacity or conduct of the worker. Its general tenor was to limit the employer's right to terminate employment at will. The United States was the only major industrialized nation whose employers' and government representatives voted against the Convention. See id. at 211.


6. Id.
groups of employees (the handicapped, veterans, and those between the ages of forty and seventy) are protected from discriminatory employment practices by federal and state anti-discrimination legislation. Women and minorities are the primary beneficiaries of legislation proscribing discriminatory treatment on the basis of race or sex. Although the precise scope of this statutory protection is debatable, these laws unquestionably limit the previously unfettered discretion of employers to discharge and otherwise discriminate against these employees.

The employment-at-will doctrine leaves the balance of the work force largely unprotected. To the extent that they cannot demonstrate prohibited discrimination, this doctrine also jeopardizes groups protected by statutes. The doctrine holds that oral contracts of employment under which the employee supplies no consideration other than his labor are terminable at the will of either party. As Professor C.W. Summers has shown in his review of the historical roots of that rule, there is little justification for its continued existence. Nor do contemporary notions of fairness favor giving employers an unfettered right to fire at will, given the devastating effect of this right on individual employees. Yet, until very recently, few commentators argued that private employers had no right to discharge employees at will in the absence of an applicable statute or unmistakable public policy. The courts have held that privately employed individuals may be discharged for "any or no reason" and that an oral contract of employment "is not violated even by an arbitrary, and capricious discharge."

Case law indicates that nonunionized employees are discharged for a wide variety of reasons. Workers have been fired, *inter alia*, for being reluctant to testify against their supervisors in criminal investigations, for refusing to submit to a "psychological stress evaluation test," for testifying truthfully but against employer interests in an administrative proceeding, and for filing a worker's compensation claim. Hourly workers and lower level salaried employees are not the only victims of the American common law employment-at-will doctrine. For example, a fifty-two year old executive was given seventy-

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8. Summer, *supra* note 4, at 484-86.


two hours to clean out his desk and vacate the premises, allegedly because his job was being eliminated after a corporate reorganization. He subsequently learned that the job was reestablished after he left. Fourteen months later he was still looking for suitable employment and wondering why he had been let go.  

Some courts have refused to sanction discharges which run afoul of a discrete "public policy." Early examples include cases in which employees were fired for rejecting sexual advances, refusing to evade jury duty, filing a worker's compensation claim, refusing to alter pollution control reports, and refusing to participate in an alleged price-fixing scheme. At least one state supreme court has held that a professional code of ethics may contain an expression of public policy which an employee may refuse to violate without being subject to discharge. These few cases do not, however, signal a broad abandonment of the employment-at-will doctrine; rather, they represent only a narrow exception to the general rule permitting discharge.

B. The Scope of the Employment-at-Will Doctrine

In 1981, there were approximately seventy-five million nonagricultural workers on private payrolls in the United States. Of these, fewer than sixteen million, or twenty-two percent, were represented by labor organizations. Some fifty-nine million private sector employees remain unprotected against arbitrary and possibly unfair disciplinary penalties, including discharge, that may be imposed unilaterally by employers for unacceptable behavior.

16. Wall St. J., Jan. 8, 1980, at 1, col. 5. One of the authors of this Article received more than a hundred letters and phone calls, most of them from middle management persons who had been discharged, allegedly without cause, after he wrote an article that appeared on the Op-Ed page of the New York Times, see Stieber, Speak Up, Get Fired, N.Y. Times, June 10, 1979, at E-19, col. 2, and was quoted in Business Week, see The Growing Cost of Firing Non-union Workers, Bus. Wk, Apr. 6, 1981, at 95.


23. For a comprehensive collection of cases, see Annot., 12 A.L.R. 4th 544 (1982). For an excellent state-by-state summary of recent developments in this area see The Employment-at-Will Issue, 111 LAB. REL. REP. BNA No. 23 (Nov. 22, 1982) (concluding that 20 states now recognize a public policy exception to the employment-at-will doctrine) [hereinafter cited as BNA REPORT].

Strong arguments support allowing employers an unfettered right to discharge employees who are still undergoing a probationary period without having to prove "just cause." Consequently, most union agreements provide that employers may dismiss workers during the first thirty to ninety days of employment without a showing of just cause. Assuming a probationary period of six months, some twelve million nonunionized probationary employees would not be entitled to protection against unjust discharge. The remaining forty-seven million unorganized private sector employees who have completed probationary periods should be protected from at-will discharge.

In about half of all discharge cases appealed to arbitration under collective bargaining agreements the arbitrator finds just cause for the discharge. Excessive absenteeism or tardiness, loafing or sleeping on the job, leaving work without permission, fighting, insubordination, using profanity or abusive language to supervisors, falsifying records, theft, dishonesty, incompetence, gross negligence or carelessness, gambling, possessing or using drugs or alcoholic beverages at work, or reporting to work under the influence of drugs or alcohol, can seriously impair an employee's work performance and, if proven, will usually constitute just cause for discharge. Research based on published arbitration decisions, however, indicates that in over fifty percent of all discharge cases, the employer did not present sufficient evidence to satisfy an arbitrator that the discharge was justified. In such cases, arbitrators usually reinstate the grievant to his former job with full, partial, or no back pay depending upon the circumstances in each case. If unorganized discharged employees had an analogous right to appeal to an impartial tribunal, they would almost certainly fare at least as well as discharged unionized workers whose cases are appealed to arbitration.

There are no statistics on the number of unorganized employees who are discharged "for cause" each year in the United States, much less how many would have been found to have been dealt with unfairly had they had recourse to impartial arbitration. Indeed, we do not know how many discharge grievances are appealed to arbitration under collective bargaining agreements or the number in which the grievant is

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27. In January 1981, 18.2% of all employees had been on their jobs for six months or less. Job Tenure of Workers in January 1981, 105 MONTHLY LAB. REV., Sept. 1982, at 34. We have assumed that 20% of all nonunionized workers in the private sector had six months or less experience with their current employers.


sustained. We do, however, have data which enable us to make a rough estimate of the magnitude of the problem.

Unpublished figures from the Bureau of Labor Statistics ("BLS") indicate that, between 1959 and 1971, the mean annual discharge rate was about 4.6% in manufacturing. During the early 1950's, when the BLS was still publishing monthly discharge rates, the annual rate per hundred employees in manufacturing appears to have been somewhat lower — about 4.0%. A recently completed survey of a sample of Michigan employers found that the annual discharge rate in 1980 for all industries was 6.8%. An industry breakdown showed a rate of 4.8% in manufacturing, a somewhat lower rate among financial employers (3.7%), and the highest rate among service employers (10.5%).

These studies suggest that a conservative estimate of the annual discharge rate for all private sector employees would be approximately 4.0%. Assuming that the discharge rate for employees with six months or less service is three times that for all employees, the discharge rate for employees with more than six months service would be reduced to about 3.0%. Applying this rate to the forty-seven million employees who have completed their probationary periods, we find that some 1.4 million nonprobationary employees were discharged in 1981.

What proportion of these discharges is likely to have been without just cause? It is impossible to tell. Suppose, however, that: (1) unorganized workers had the same right of appeal to an impartial tribunal as unionized workers; (2) one out of every five discharged employees — about 280,000 individuals — exercised this right; and (3) as in reported arbitration cases, fifty percent of such appeals were decided in favor of the discharged employees. Based on these assumptions, some 140,000 discharged nonunionized workers with more than six months service would have been reinstated to their jobs with full, partial, or no back pay.

We believe that the foregoing estimates and assumptions are conservative and reasonable. Even allowing for major discrepancies in the data and the assumptions, it is clear that there are many thousands of workers who are discharged without cause because of the at-will rule.

Such is the nature and the magnitude of the problem. We turn now to a consideration of alternative approaches to providing protection against unjust discharge in the United States.


32. R. Block, J. Stieber & D. Pincus, Collective Bargaining and The Labor Market For Discharged Workers: A Preliminary Analysis (March 1982) (unpublished paper based on research supported by the U.S. Department of Labor, Grant No. 21-26-80-11) (on file with the authors).
II. Potential Solutions: Alternatives to a Statutory Approach

A. Unionism

It can be argued that if private employees wish to obtain review and arbitration of discharges, they should organize to obtain such protection through collective bargaining. To grant this protection to non-unionized employees by statute or legal innovation could be viewed as giving "for free" that which union men and women have struggled long and hard to obtain.\(^{33}\)

One difficulty with this argument is that the tide of unionization appears to be receding rather than advancing. Between 1960 and 1980, the percentage of unionized nonagricultural employees fell from 31.5% to 23.3%.\(^{34}\) Even in manufacturing, where unions remain strongest, union membership dropped from 51.3% of all employees in 1960 to 40.0% in 1978.\(^{35}\)

It is the consensus of industrial relations specialists that unions will not soon reverse this trend.\(^{36}\) In addition, a recent analysis casts doubt on the prospect of unionism in the rapidly growing service sector of the economy.\(^{37}\)

Another problem is that under the National Labor Relations Act ("NLRA") even employees who join unions do not receive the benefits of unionization unless they represent a majority of the bargaining unit in which they are employed. Thus, if 51% of a plant's workers vote not to unionize, 100% of the individuals in the plant remain unprotected from unjust discharge. Furthermore, foremen, supervisors, and other managerial employees are not covered by the NLRA.\(^{37}\) For these reasons, unionism is not an adequate solution to the problem of protecting employees from unjust discharge.

B. Voluntary Employer Systems

A second potential solution is the voluntary adoption by private employers of a system of grievance adjustment that includes arbitra-

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33. See the exchange of letters between the president of the United Plant Guard Workers of America and the president of the American Arbitration Association which focus on the controversy of the AAA's neutrality. DAILY LAB. REP. (BNA) No. 131, at A-2 (July 6, 1979), and No. 136, at A-4 (July 6, 1979).
34. U.S. BUREAU OF LABOR STATISTICS NEWS, Sept. 3, 1979, Table S. See also supra note 25.
tion. Robert Coulson, president of the American Arbitration Association, notes that nine out of ten nonunion employers are reported to have some mechanism for handling employee complaints, most of them utilizing an "open door" policy under which management makes the final decision.\textsuperscript{38} Coulson proposes the voluntary use of arbitration as a final recourse where significant complaints are involved.

Many companies, including Northrup Corporation, Trans World Airlines, the American Optical Company, Polaroid, and Pittsburgh Plate Glass, have adopted voluntary arbitration for their nonunion employees.\textsuperscript{39} A study of twenty-six large nonunion companies found that two had formal procedures for arbitration of final-step grievances, with the company paying the arbitrator's fee.\textsuperscript{40} In these companies, the arbitration step is used very infrequently. Other employers, including Xerox, General Electric, Boeing, and McDonald's, have tried an alternative approach: appointing a company ombudsman.

Such unilaterally instituted programs are rare, though, according to studies by The Conference Board and the Bureau of National Affairs.\textsuperscript{41} Although such voluntary systems are highly desirable, experience and common sense suggest that the employers most in need of outside review would be those least likely to provide it.

The approach most likely to be voluntarily adopted by employers would be a system of review wherein some level of management would have the last word. Any such system, though, is unlikely to enjoy great credibility among employees. A Conference Board study of nonunion complaint systems found that "[g]etting employees to make use of a complaint procedure is harder than one might think. In evaluating their complaint systems . . . some executives noted that the systems were rarely used, and this, of course, seriously affects their credibility."\textsuperscript{42} The report noted that in most companies terminations were rarely appealed through the complaint process.\textsuperscript{43}

Another deficiency of voluntary systems is that they do not usually bind the employer: a benefit unilaterally granted by a nonunion employer may also be unilaterally revoked. Although a few decisions have held that an employer is bound by voluntarily adopted limitations on its discharge prerogatives,\textsuperscript{44} the impact of such decisions is probably quite

\textsuperscript{39.} \textit{Id.} at 412-13.
\textsuperscript{40.} F. Foulkes, \textit{Personnel Policies in Large Nonunion Companies} 299 (1980).
\textsuperscript{42.} \textit{Nonunion Complaint Systems, supra} note 41.
\textsuperscript{43.} \textit{Id.} at 41.
limited. Thus, measures voluntarily established by the employer are unlikely to afford much protection against unjust discharge.

C. Existing Law

At least two commentators contend that present law, properly interpreted, already protects the unorganized private employee from unjust discharge. Though we disagree with these commentators for the reason explained in the pages that follow, they have written imaginative and scholarly pieces, to which we are unable to do full justice in these few pages.

1. Title VII—Professor A.W. Blumrosen argues that Title VII of the Civil Rights Act of 1964 ("Title VII") as interpreted by the United States Supreme Court, guarantees all workers the right to be free from discharge other than that for just cause. Professor Blumrosen reasons that when the Supreme Court held in *McDonald v. Santa Fe Trail Transportation Co.* that Title VII protects whites as well as blacks, it "extended to all workers the law of discrimination that had been developed in cases involving discrimination against minorities and..."
women. If a principle of just cause has emerged from the administrative and judicial actions under Title VII, that principle is now applicable to all workers.**49**

To determine the scope of *McDonald*, one must first examine the line of cases from which *McDonald* stemmed. A suitable beginning is *Griggs v. Duke Power Co.*,50 an early Title VII case, in which the Supreme Court examined an employer’s use of standardized tests to screen job applicants. In evaluating this practice, the Court considered Title VII and succinctly stated: “Discriminatory preference for any group, minority or majority is precisely and only what Congress has proscribed.”51

It is thus apparent from the beginning that Title VII’s protections accrue to those discriminated against on the basis of religion or on the basis of personal characteristics present at birth. Title VII is a congressional attempt to compel employers to treat job applicants and employees as individuals, not as members of racial groups.

Cases discussing what a Title VII plaintiff must demonstrate to place upon an employer the burden of justifying its actions bolster this interpretation of Title VII. In *McDonnell Douglas Corp. v. Green*,52 the Court was confronted with a case in which discriminatory hiring practices were alleged. In discussing what a Title VII plaintiff must do to shift the burden of going forward to the employer, the Court said:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.53

In a footnote, the Court cautioned that the facts and, consequently, the prima facie proof required from plaintiffs, would necessarily vary in Title VII cases.54 Once the plaintiff has established his prima facie case the burden is on the employer “to articulate some legitimate, non-discriminatory reason for the employee’s rejection.”55 The plaintiff may

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49. Blumrosen, *supra* note 4, at 524 (footnote omitted).
51. *Id.* at 431.
53. *Id.* at 802.
54. *Id.* at 802 n.13.
55. *Id.*
rebut this reason by demonstrating that the purportedly legitimate and nondiscriminatory reason is a pretext.

For present purposes, we need not examine what the Court has said in subsequent cases about an employer’s obligation to come forward with responsive proofs, or the plaintiff’s opportunity to rebut. We focus instead on what constitutes a plaintiff’s prima facie case under Title VII.

In McDonald the issue was whether Title VII protection extended to two whites who, with a black worker, were involved in a single episode of employee misconduct. The two whites were fired; the black was retained. Writing for the majority, Justice Marshall indicated that although the McDonnell Douglas procedure required plaintiffs to show a racial element in the employer’s actions, McDonnell Douglas did not imply a substantive limitation that blacks alone benefit from Title VII. According to the McDonald Court, “Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson [the retained black] white.”

What protection do blacks and whites alike enjoy under Title VII? McDonald simply extends to whites that which McDonnell Douglas gives to blacks: the opportunity to force an employer to justify its actions if and only if the employee can first show a prima facie case of racial discrimination.

The Court has most recently reiterated this point in International Brotherhood of Teamsters v. United States and Furnco Construction Corp. v. Waters. Professor Blumrosen relies on these cases to support his thesis that Title VII presently provides a remedy against unjust discharge for all employees. He believes that the McDonald holding, that Title VII applies to both blacks and whites, implicitly creates a good cause standard for all discharges:

If an employer is required by Title VII to have good reasons for its personnel actions with respect to minorities and women, then, under McDonald it must apply the same principle and standards to its white male employees. The result is a de facto substantive law rule requiring the employer to produce good reasons or just cause for adverse personnel actions. Thus the common law rule is abolished in toto.

The difficulty with this view is that Title VII does not protect all

56. 427 U.S. at 280.
59. Blumrosen, supra note 4, at 560.
blacks and women, or all white males, from discharge absent just cause.\textsuperscript{60} Rather, it protects employees only to the extent that they can make out a prima facie case of discriminatory treatment.\textsuperscript{61} Consequently, Title VII is of little help to a black who is fired by a black-owned business and replaced by another black, to a female who is discharged and later replaced by another woman, or to a white male who is replaced by another white male. Title VII does not bar \textit{any} arbitrary discharge that is not racially motivated. Because of this, we believe that Title VII does not furnish a general solution to the problem of unjust discharge for employees.

\textbf{2. The Constitution—} Professor Cornelius J. Peck has argued that the federal Constitution should be read to provide protection against unjust discharge.\textsuperscript{62} He believes that when a private employee is discharged without just cause and without an apparent remedy, he has suffered a deprivation of "property" within the constitutional prohibition against the taking of life, liberty, or property without due process.\textsuperscript{63} To find such a deprivation, there must be both a "property" interest and "state action."\textsuperscript{64}

It is true that on occasion employment has been held to be a property interest entitled to constitutional protections. In both \textit{Perry v. Sinderman}\textsuperscript{65} and \textit{Arnett v. Kennedy},\textsuperscript{66} government employment was found to be property within the meaning of the Fifth Amendment.\textsuperscript{67} As the Supreme Court has recently observed, though, "the Constitution does not create property interests. Rather it extends various procedural safeguards to certain interests 'that stem from an independent source such as state law.'"\textsuperscript{68}

\textsuperscript{60} The thesis that Title VII presently provides a remedy for the unjust discharge of an unorganized privately employed white male is here evaluated in light of the cases that were decided prior to the publication of Professor Blumrosen's article. More recent is the case of United Steelworkers of Am. \textit{v. Weber}, 443 U.S. 193 (1979). Although explicitly limiting its ruling to an examination of voluntarily adopted "bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the [plan there considered]," \textit{Weber} clearly suggests that Title VII must be viewed foremost as a remedial measure for the benefit of the classes that Congress viewed as having been the historical objects of discrimination. \textit{But see Note, Alternatives to Seniority-Based Layoffs: Reconciling Teamsters, Weber, and the Goal of Equal Employment Opportunity}, 15 U. Mich. J.L. Ref. 523 (1982) (arguing that \textit{Weber} is limited to its facts).

\textsuperscript{61} We do not believe that minorities and women can, as a practical matter, shift the burden to an employer to justify a discharge merely by asserting that the discharge was motivated by bias. \textit{See Texas Dep't of Community Affairs v. Burdine}, 450 U.S. 248, 252-254 (1981).

\textsuperscript{62} Peck, \textit{supra} note 4.

\textsuperscript{63} U.S. Const. amends. V \& XIV.

\textsuperscript{64} Peck, \textit{supra} note 4, at 13-35.

\textsuperscript{65} 408 U.S. 593 (1972).

\textsuperscript{66} 416 U.S. 134 (1974).

\textsuperscript{67} Government employment continues to be accepted by the judiciary as property protected by the constitutional safeguard of due process. Ashton v. Civiletti, 613 F.2d 923 (D.C. Cir. 1979).

\textsuperscript{68} Leis \textit{v. Flynt}, 439 U.S. 438, 441 (1979) (per curiam).
In other words, a private employee's job is constitutionally protected only if the employee has an identifiable property interest in that job deriving from a source extraneous to the Constitution. The Constitution cannot protect a "right" if the right itself does not exist. The plaintiff in *Perry* was entitled to his job by virtue of a de facto tenure system at the university which employed him, while civil service gave the plaintiff in *Arnett* a continued substantive right to employment. In the absence of such a substantive right, one does not reach the question of how to safeguard that right.

*Board of Regents of State Colleges v. Roth*\(^69\) illustrates this point perfectly. Decided the same day as *Perry*, *Roth* involved an untenured university professor who had been hired for a fixed term of one academic year. Roth completed the year, but was told that he would not be rehired for the next academic year. The Supreme Court held that Roth had no property right that was protected by procedural due process. It explained that "[p]roperty interests, of course, are not created by the Constitution," but "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."\(^70\)

Presently, the only source of substantive employment rights for most unorganized privately employed individuals is the oral employment contract, which the courts have held to be terminable at will.\(^71\) State law, then, does not create a substantive property right which the procedural safeguards of the Constitution may be called upon to protect.

The second aspect of the constitutional analysis is equally troublesome. One must find state action to state a case of constitutional dimension. Acknowledging this requirement, Professor Peck argues that omitting unorganized, privately employed individuals from an otherwise comprehensive package of legislative protections precluding discharge without just cause constitutes state action.

Remedial legislation proscribing discriminatory treatment on the basis of sex, race,\(^72\) age,\(^73\) and disability\(^74\) is already in place. Civil service legislation protects many, if not most, government employees.\(^75\) There is also express legislative\(^76\) and judicial\(^77\) support for the right to organize and the grievance and arbitration procedures enjoyed by workers covered

\(^{69}\) 408 U.S. 564 (1972).

\(^{70}\) Id. at 577.

\(^{71}\) But see cases cited supra note 44.


\(^{77}\) See generally Vaca v. Sipes, 386 U.S. 171 (1967) (discussing the duty of fair representation as it relates to the processing of grievances to arbitration).
by collective agreements. This comprehensive scheme, Professor Peck argues, provides an outside objective review of discharges. He therefore believes that it is state action when an employer's decision to discharge is facilitated by the narrow window in all this protective legislation that exposes the unorganized, privately employed individual to arbitrary action.  

The Supreme Court, however, would be unlikely to find state action in a failure to legislate. In recent cases the Court has shied away from finding state action where private parties are the primary actors. For example, the Court has refused to find state action in a private lien foreclosure sale or when a highly regulated monopoly utility terminates service for nonpayment of user charges, even though such a utility arguably functions in virtual partnership with government. Similarly, the Court found no state action in a private club's refusal to admit a black guest to its lodge, even though the state tightly controlled the club's right to serve liquor by the glass. In notable dictum, Justice Rehnquist recently stated in Flagg Bros. v. Brooks that the Supreme Court "has never held that a state's mere acquiescence in a private action converts that action into that of the State." Looking at these recent cases, we think it most unlikely that the courts will soon find an activity of a private person or entity to be state action solely because the government has declined to include the activity within the scope of legislation.

Moreover, it is not wholly accurate to say that the government has erected structures providing just cause determination for all groups except unorganized, privately employed white males. As discussed above, we do not believe that Title VII provides a just cause determination for every discharged minority or female worker, but only for those who establish a prima facie case of racial discrimination. Similarly, the NLRA and a union's duty of fair representation do not provide a substantive right to employment tenure from management or to just cause determinations of discharges. The duty of fair representation,

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78. Peck, supra note 4, at 24-25.
81. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). The Supreme Court has found state action in the discriminatory practices of a lessee of a municipal parking ramp, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), and in the passage of a California initiative barring open housing laws, Reitman v. Mulkey, 387 U.S 369 (1967). In both cases, though, the state was an actual party to the activity claimed to be state action.
83. Id. at 164.
84. Moreover, the disparate benefit to minorities and women of civil rights legislation has received at least implicit approval from the Supreme Court. See United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
stemming from the union's exclusive right to speak for the employee, serves only to assure that such substantive and procedural rights as the employee receives from the contract will be enforced. The duty of fair representation does not give a unionized employee the right to arbitration. That right, if it exists, comes from the contract; the duty of fair representation simply requires the union to enforce fairly this contractual right. Thus, the premise that the government has erected protective structures enabling minority, female, and organized workers to avoid discharges unsupported by just cause is faulty. Minorities and women still must make out a prima facie case of discrimination. The organized worker receives from the law only the assurance that the union will fairly enforce contractual rights against unjust discharge.

D. The Judiciary

Several writers have suggested ways for the judicial branch to protect employees against unjust discharge. Professor Lawrence Blades, for example, urges courts to fashion a remedy in tort for "abusive" discharge: "the afflicted employee [should have] a personal remedy for any damage he suffers when discharged as a result of resisting his employer's attempt to intimidate or coerce him in a way which bears no reasonable relationship to the employment." This tort would be analogous to the abuse of process tort in attempting to punish as unlawful lawful acts which are performed with improper motives. Professor Blades acknowledges, though, that the employer would retain the "power" to discharge. In keeping with the tort formulation of this cause of action, punitive damages would be available to an aggrieved employee.

Professor John Blackburn advocates contract rather than tort as the proper arena for change. Instead of creating a new tort to balance a continuing power to discharge without just cause, he suggests redefining the terms of oral employment contracts.

Professor Blackburn argues that the employment-at-will doctrine is a judicial creation designed to add a durational term to an employment contract that does not address duration. He believes that the courts should cease to infer that parties intend employment to be terminable at will. In the absence of information on what employers and prospective employees expect when they enter into an employment relationship,

86. Blades, supra note 4, at 1413.
87. Id. at 1423-24.
88. Id. at 1423.
89. Id. at 1427.
90. Blackburn, supra note 4.
courts should presume that each expects the relationship to continue as long as the employee adequately performs the job. 91

There is certainly no doubt that the judiciary has the power to work such changes in the common law. The great bulk of tort law is common law, developed over the centuries in continuing adaptation to changing circumstances and evolving notions of fairness. The courts' ability to effect dramatic evolutions in the law of contract is equally clear. It is unlikely, however, that such a fundamental change in the law of the workplace will emerge out of the judiciary. Robert Howlett, former chairman of the Michigan Employment Relations Commission and of the Federal Services Impasse Panel, and a respected advocate for change in this area, has concluded that "the courts, in the foreseeable future are unlikely . . . to expand the 'just cause' doctrine to include discriminatory, arbitrary, capricious, unfair or unreasonable discharge or discipline." 92 Professor Summers also believes that "the Courts are not likely to develop legal theories that will give any meaningful protection against unjust dismissal." 93

There is good reason for this belief. Abolishing the employment-at-will rule, either on a tort or contract theory, would result in a fundamental change in employment law. Were the legislature to initiate such a change, the final product would emerge only after extensive political debate. Unlike a court, which is primarily concerned only with the arguments of the litigants before it, a legislative body could draw on all segments of society for assistance in drafting a broad remedy for the problem of unjust discharge.

III. A STATUTORY APPROACH

A. State Legislative Efforts

Only a few state legislatures have formulated statutory protection against unjust discharge for all employees. 94 A Missouri statute requires any corporation, upon written request of a former employee who has

91. Id. at 18-24.
93. Summers, supra note 4, at 491.
94. The Connecticut legislature has twice rejected such legislation — in 1973 (Comm. Bill No. 8738) and in 1975 (Comm. Bill No. 5151). The 1975 bill proposed discharge only for just cause, a bona fide business reason, or because of a reduction in force, and stipulated that an employee was entitled upon request to a written statement giving reasons for dismissal. In addition, it advocated a grievance procedure, including a preliminary investigation by the Connecticut Board of Mediation and Arbitration and, on a finding of probable cause, binding arbitration. Similar bills have been introduced in Michigan (Mich. H.B. 5892) (introduced June 17, 1982), Pennsylvania (Penn. H.B. 1742) (introduced July 1, 1981), and New Jersey (Ass. B. 1832) (introduced June 16, 1980).
voluntarily quit or been discharged after at least ninety days of service, to provide the employee with a letter stating "the nature and character of the service rendered by such employee to such corporation and duration thereof, and truly stating for what cause, if any, such employee has quit such service." Missour courts have held that the cause of discharge must be provided on request, notwithstanding the use of the term "quit" in the quoted clause. Although disputes have arisen as to the scope of this statute there is no authority holding that the statute provides a substantive right to be free from unjust discharge.

In South Carolina, the Department of Labor, pursuant to statute, mediates disputes between all employers and unorganized employees over involuntary terminations, unfair hiring practices, and unfair promotional practices. The Commissioner of Labor also may appoint arbitrators or act as arbitrator if requested by both sides. In 1978 there were 3,129 complaints, including 2,621 involving involuntary terminations. According to the Commissioner, 92% of all complaints were resolved.

Although no state has legislated protection against unjust discharge for all employees, many states have recently enacted statutes forbidding employers from firing or disciplining workers for going on jury duty, testifying in criminal trials, doing military or reserve duty, obtaining mental health treatment, or filing worker's compensation claims. Congress also has acted to protect "whistleblowers" against employee reprisals for calling attention to violations of laws dealing with environmental protection, product safety, and consumer protection. In 1980, the state of Michigan enacted a law protecting whistle blowers.

South Dakota is the only state to enact a law significantly restricting the employment-at-will doctrine per se. A person hired at an annual salary in South Dakota is presumed to have been hired for one year. An employer wishing to terminate such an employee before the year

96. Recent amendments to this law place restrictions on the issuance of service letters and address the issue of punitive damages. Employers of seven or more employees must now issue service letters to employees who have worked for at least 90 days and who have requested a service letter within one year of the date of discharge or voluntary quitting. Daily Labor Report No. 250, Dec. 29, 1982, Bureau of National Affairs, Washington, D.C.
100. See DeGiuseppe, supra note 99, at 21-23.
ends must show that the discharge is justified by "habitual neglect or continued incapacity to perform or willful breach of duty by the employee."\textsuperscript{102}

\textbf{B. The Need for a Federal Statute}

The developments noted above may indicate a trend among the states toward broader protection against unjust discharge. They may, however, represent only specific responses to particular employer practices interfering or conflicting with existing legislation and public policy. Professor Alan Westin sees a trend — at least in these actions — toward guaranteeing an individual the right to fair and equitable treatment and due process in key employment decisions.\textsuperscript{103} He may be right. It will take many more years though, at the current rate of change, before one can reasonably expect judicial recognition of employees' general right to protection against unjust discharge or discipline in the workplace. Piecemeal legislation and narrow judicial decisions are of only limited value. The appropriate remedy for the problem of unjust discharge is comprehensive federal legislation.

There are, of course, good reasons to focus on state legislatures as the primary arena for statutory reform. Enacting such legislation on a state-by-state basis would permit the variety and experimentation that is necessary to test new legislation before introducing it into the federal system.\textsuperscript{104} As a practical matter, it may also be easier to persuade a few of the more progressive state legislatures to break new ground in this area than it would be to move such legislation through both houses of Congress and across a president's desk.

Despite these considerations, we believe that a federal statute is the preferable vehicle for achieving reform. Unjust discharge is a problem common to every state. More significantly, national legislation is necessary because any attempt to introduce protection against unjust discharge into a single state would almost certainly be met with the argument that the additional burden on employers would make that state less attractive to industrial and commercial development.\textsuperscript{105} This argument is especially compelling when, as now, the economy is in recession and many states are finding it difficult to attract new businesses.

\textsuperscript{102.} S.D. Codified Laws Ann. § 60-4-5 (1978).
\textsuperscript{104.} Summers, supra note 4, at 521.
The remainder of this Article outlines a number of considerations which drafters of a federal statute protecting against unjust discharge should take into account.

1. **Scope**— In principle, a case can be made for providing protection against all unjust discipline. Such broad coverage in new legislation, however, would be politically impractical and economically unwise. Including all disciplinary actions — rather than only discharges — in such legislation would cause a huge caseload for the administering agency and dramatically increase administration costs. Limiting the statute to discharge actions, including cases of "constructive discharge" (cases in which the employee is coerced into resigning or is presented by the employer with intolerable alternatives to resignation), would make the legislation more acceptable to legislators, members of the business community, and the general public. In subsequent years, the statute could be modified to include or exclude additional types of discipline as experience dictated.

2. **The "just cause" concept**— Arbitration provisions in collective bargaining agreements almost always provide that discharge or discipline must be for "just cause," though the term is rarely defined. Some forty years of experience and thousands of arbitration decisions in the United States, however, have given both substantive and procedural content to the just cause standard.

A statutory attempt to define just cause, or to enumerate employee acts that would constitute cause for discharge, would likely lead to a great deal of unnecessary litigation. Unjust discharge legislation therefore should not include a separate definition of just cause. Rather, it should incorporate the body of industrial common law that already exists.

What is just cause for discharge in some situations may not be just cause in others. A large number of experienced arbitrators, however, have applied the just cause standard in discharge cases; thousands of their decisions have been published. In an experiment conducted with his class of third-year law students, Professor Robben Fleming found that "[i]n the discipline and discharge areas there is now a sufficient body of experience in published cases and texts to guide an inexperienced decision-maker to the 'general rule.'" This substantial body of decisions and number of experienced arbitrators were not available when other countries enacted unfair dismissal

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106. Summers, supra note 4, at 521.
108. At least two private companies publish these decisions — the Bureau of National Affairs, Inc., Washington, D.C. (LABOR ARBITRATION REPORTS), and Commerce Clearing House, Inc., Chicago, Ill. (LABOR ARBITRATION AWARDS).
laws. These resources should prove valuable in the administration of any American statute, whether enacted at the federal or state level.

3. **Employer coverage**— Practical considerations dictate an exemption for small employers; a sensible line of demarcation would be a work force of ten. Other social legislation, such as Title VII, already exempts small employers.\textsuperscript{110} Were the exemption level set much higher than ten employees, however, many employees who most need protection might lose it. Great Britain’s experience with this issue indicates that employees in small firms have a greater need for protection and have used the unfair dismissal law more often than those in medium-sized and large companies.\textsuperscript{111}

Employers who are parties to collective bargaining agreements providing final and binding arbitration of discharge grievances should also be excluded from coverage. Similarly, an unjust discharge statute should permit the supervising governmental agency to exempt employers with voluntary system that meet specified minimum standards.

4. **Employee eligibility**— Employees who are already protected against unjust discharge through collective bargaining agreements, civil service systems, teachers tenure laws, or individual contracts of employment are adequately protected and may fairly be excluded from coverage. A more difficult problem is the potential overlap between an unjust discharge statute and other antidiscrimination laws. Ideally, all discharge complaints should be resolved in a single forum, whether it be the courts, the NLRB, an existing administrative agency charged with resolving discrimination claims, or a new administrative agency established by an unjust discharge statute. A discharged employee who files a claim in any of these forums should be barred from seeking relief under an unjust discharge statute.

Statutes in other countries and almost all collective bargaining agreements require a minimum period of service before an employee becomes entitled to protection against unjust discharge. In order that employers retain the necessary flexibility in determining employee suitability for continuing employment, a six-month service requirement should be a prerequisite for employee eligibility under an unjust discharge statute.

Coverage should extend to all employees except those in relatively high managerial positions with policy-making responsibility and persons working under fixed-term contracts of at least two years duration. Supervisors and foremen, who are not covered by the NLRA, however, should be included. As Professor Summers points out, the NLRA’s exclusion of supervisors is based upon a potential conflict of interest in union-

\textsuperscript{110} 42 U.S.C. § 2000e(b) (1976).
\textsuperscript{111} Dickens, \textit{Unfair Dismissal Applications and the Industrial Tribunal System}, 9 INDUS. REL. J. 7 (1978-79).
management relations that is not relevant to an unjust discharge statute.\(^{112}\) Indeed, this gap in the NLRA probably exposes supervisors and foremen to arbitrary discharge to an even greater extent than bargaining-unit employees who are usually protected by the just cause requirement of a collective bargaining agreement.

5. Conciliation—Empirical data from Great Britain and West Germany indicate that an informal conciliation procedure can resolve a substantial proportion of unjust discharge claims without the use of a formal hearing.\(^{113}\) An unjust discharge statute should, therefore, provide for mediation by either the Federal Mediation and Conciliation Service or an appropriate state agency before a complaint is certified for hearing and arbitration. Unions and employers already utilize federal and state mediators to conciliate grievance disputes, though published statistics demonstrating the frequency of this activity are not available.\(^{114}\) Conciliation not only can speed the resolution of complaints but can reduce administration costs by limiting the number of cases going to formal hearing and arbitration.

6. Remedies—The United States and Canada are the only countries in which reinstatement is the normal remedy when an individual is found to have been discharged without just cause. Some collective bargaining agreements require reinstatement in such cases. Even where the contract is silent on the remedy for unjust discharge, arbitrators almost invariably direct that the employer reinstate the employee with full, partial, or no back pay depending on the circumstances of the case. Several studies, however, have found that employees do not exercise their right to return to their former jobs.\(^{115}\) Instead, they often negotiate with their employers for an alternative remedy; the arbitrator is not involved in these discussions.

An unjust discharge statute should specifically allow reinstatement with back pay as a remedy. The arbitrator should also be free, however, to award compensatory damages in lieu of reinstatement when it appears that reinstatement would be impractical. Damages are likely to be a superior remedy to reinstatement more often under a statute than in situations governed by union-management agreement. As Professor Getman notes, the reinstatement remedy works reasonably well in a unionized plant because of the presence of a union to protect a reinstated

\(^{112}\) Summers, supra note 4, at 526.
\(^{113}\) Stieber, Protection Against Unfair Dismissal: A Comparative View, 3 Comp. Lab. L. 233-36 (1980); Falke & Gessner, The Conciliation Procedures Before the German and Belgian Labour Courts (unpublished paper prepared for the Law and Society Association and the LSA Research Committee on Sociology of Law, June 5-8, 1980) (on file with the authors).
\(^{115}\) See G. Adams, supra note 29, at 41; Holly, supra note 29, at 16; Jones, supra note 29, at 167.
employee from retaliation by an employer after he returns to the job. Nonunion employees reinstated pursuant to an unjust discharge statute would not enjoy such protection. Moreover, the typical arbitration case involves a fairly large establishment, where the personal contact between the reinstated employee and the employer is likely to be quite limited. A large establishment also has more options in the placement of the employee. For example, it can assign a reinstated employee to work under a different supervisor than the one who was involved in the discharge. In a statute covering nonunionized workplaces employing as few as ten employees, reinstatement may appear unworkable or undesirable from the perspectives of both the employer and the employee. In such cases, arbitrators should have the option of awarding compensation in lieu of reinstatement.

7. Cost—In principle, the cost of administering an unjust discharge statute should be borne by the government. To discourage frivolous complaints, though, both parties should be assessed a filing fee that would be returned to the prevailing party. The assessment could either be a relatively modest flat fee, such as one hundred dollars, or a percentage of the discharged employee’s weekly earnings — perhaps twenty-five percent. The parties would also be required to pay any counsel and witness fees, thereby leaving the state with the remaining expenses of the arbitration process. A party who requests a transcript of the proceedings should be required to bear that expense.

8. The tribunal—An unjust discharge statute should provide for a final and binding decision by a single arbitrator. To the extent possible, the arbitration selection procedures used under collective agreements should be followed. These usually provide for joint selection of the arbitrator from a qualified panel and appointment by the administering agency if the parties cannot agree. Hearings should be relatively informal and the judicial system’s rules of evidence should not apply. Court review of the arbitrator’s decision should follow the principles established in the Steelworkers trilogy. To reduce costs, arbitrators should be encouraged to write brief decisions. A practical means of encouraging such brevity would be to pay arbitrators their expenses and an approved per diem rate, and limit the number of days per case to twice the number of hearing days.

States may wish to consider employing staff arbitrators on a full-time basis as an alternative to paying outside arbitrators on a per diem basis. Parties might be given the choice of using such staff arbitrators

or, if they prefer, selecting an outside arbitrator. In the latter event, the parties could share the costs on a tripartite basis with the agency.

CONCLUSION

In this Article we have offered suggestions and guidelines for an unjust discharge statute. There are, of course, many alternative approaches to the issues discussed, as well as other issues that unjust discharge legislation would need to address. Our main objective here is to stimulate discussion and debate among academics, practitioners, legislators, and others in dealing with a problem that cries out for attention. There is no reason that the United States, which has led the way in providing fair and effective procedures against unjust discharge for organized employees, should lag behind other countries in providing equivalent protection for the vastly larger number of unorganized employees.