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You're Fired!

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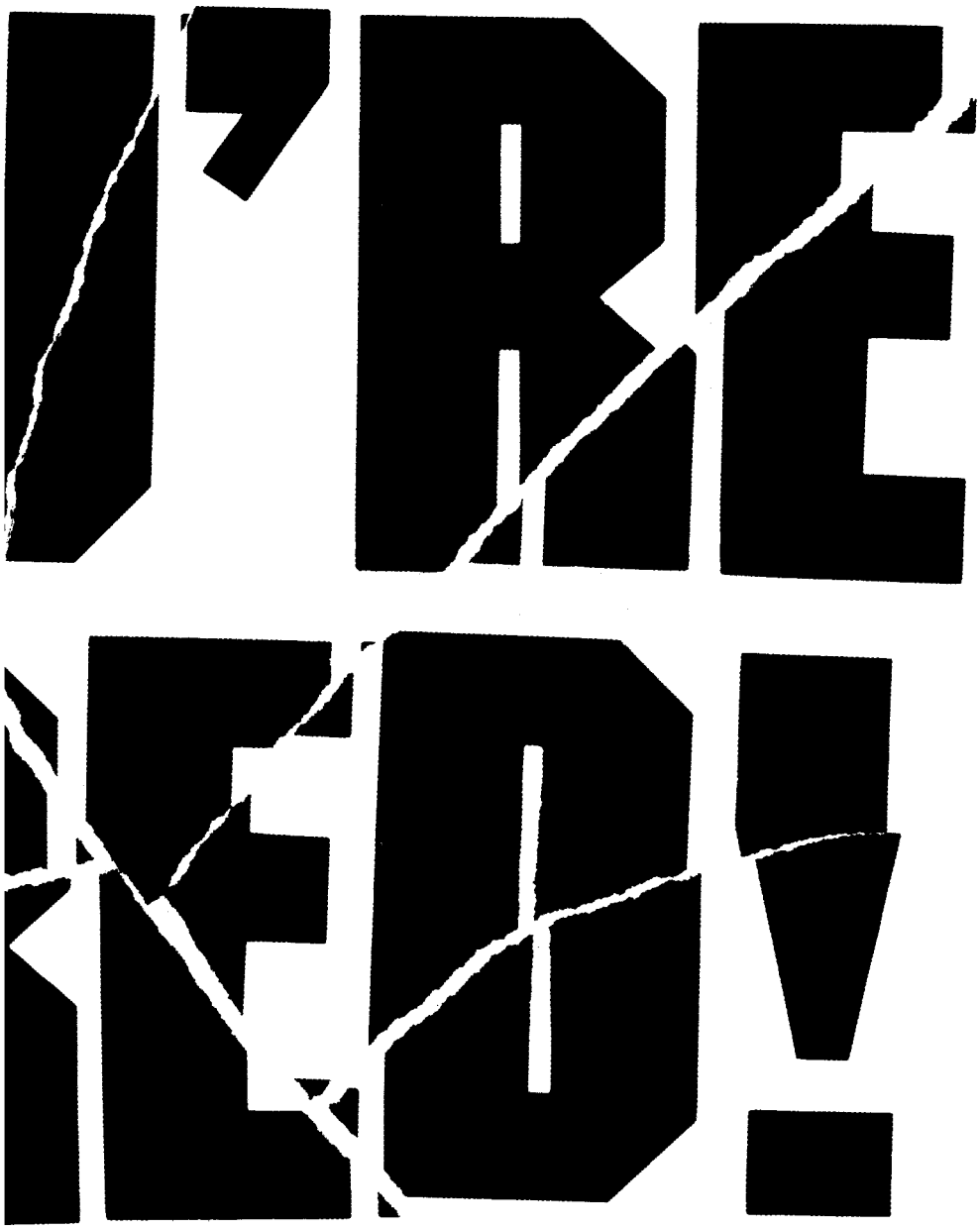
For the nonunion worker, protection against arbitrary dismissal is an idea whose time has come

by Theodore J. St. Antoine

In 1967 Professor Lawrence Blades of Kansas criticized the iron grip of the contract doctrine of employment at will, and argued that all employees should be legally protected against abusive discharge.[1] The next dozen years saw a remarkable reaction. With rare unanimity, a veritable Who's Who of labor academics and labor arbitrators, Aaron,[2] Blumrosen,[3] Howlett,[4] Peck,[5] Stieber,[6] and Summers,[7] to name only some, stepped forth to embrace Blades' notion, and to refine and elaborate it. But the persons who counted the most, the judges and the legislators, hung back.

In the 1960s, vast strides were taken at both the federal and state levels to stamp out discrimination in employment based on such invidious and particularized grounds as race, sex, religion, national origin, and age. After a lull during the 1970s, as we settle into the '80s there are



signs of quickening interest from courts and legislatures in broader protections for employees' job interests. The time seems ripe for an appraisal of where we have arrived and where we may be headed.

In this article, I will consider the practical problems to be resolved if we are to effectuate the concept of protecting employees generally against unjust discipline. First, however, I shall briefly survey the existing body of law, both here and abroad, with special emphasis on the significant changes occurring in the United States over the past two decades. Second, I will summarize the various major proposals for dealing with the unfair treatment of employees. Finally, I shall focus on some concrete suggestions concerning appropriate procedures and remedies.

The rule making employment arrangements of indefinite duration contracts at will, terminable by either party at any time, is not one which has roots deep in the English common law but one which sprang full-blown in 1877 from the busy and perhaps careless pen of an American treatise writer.[8] However dubious may have been the precedent he cited, his pronouncement was admirably suited to the *zeitgeist* of an emerging industrial nation. Before the Nineteenth Century was out, our courts could confidently assert: "All [employers] may dismiss their em-

ployees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."[9]

Three different groups of employees have managed to escape these harsh strictures. The first consists of the handful of persons whose knowledge or talents are so unusual and valuable that they have the leverage to negotiate a contract for a fixed term with their employer. Second, over half of the approximately fifteen million employees of federal, state, and local governments are protected by tenure arrangements or other civil service procedural devices.[10] The third category is composed of workers covered by collective bargaining agreements, eighty percent of which expressly prohibit discharge or discipline except for "cause" or "just cause."[11]

Union membership in the United States, however, has now declined to less than twenty percent of the total labor force.[12] We may thus assume that three-quarters of our 100-million-person work force operates under contracts at will. Extrapolating from such figures and from the arbitration records of the American Arbitration Association and the Federal Mediation and Conciliation Service, Cornelius Peck has estimated that at least 12,000 to 15,000 nonunion workers are discharged or disciplined annually whose cases would have been arbitrated if they had been subject to a collective agreement. About half these disciplinary actions would presumably have been found unjustified. Perhaps even more important, Peck suggests that as many as 300,000 disciplinary cases a year arising in the nonunionized sector might have been subjected to negotiation and possible settlement if mandatory grievance procedures had been available.

Jack Stieber calculates that in a typical year about one million private industry employees with more than six months service are fired without recourse to grievance and arbitration procedures. He thinks that about 50,000 would be reinstated if they could appeal to impartial tribunals.[13] The gravity of the problem needs no further elaboration.

The first significant inroads on the doctrine of contract at will were made in situations where employers had retaliated against employees for exercising their civil rights or declining to act unlawfully. These included cases where workers were fired for serving on a jury, for filing a workers' compensation claim, or even for refusing to give perjured testimony.[14]

Plainly, such egregious instances of retaliatory discipline enabled the courts to invoke overarching concepts of "public policy" without reaching the question of whether an employer needed a positive justification for his action. They were akin to decisions that, while a landlord may ordinarily evict a tenant at the end of a lease for any reason or for no reason, he may not evict because the tenant has filed charges under the housing code.[15] Even so, throughout the 1960s and '70s other courts continued to apply the contract at will principle with full rigor. For example, a secretary's discharge was sustained when she went against her immediate supervisor's order and indicated her availability for jury service, even though a senior partner in the firm had said she should do her civic duty.[16] In a second case, a court left untouched the dismissal of a long-time salesman for a steel manufacturer because he complained to his superiors and ultimately to a company vice-president, justifiably as it later proved, that a new tubular casing could seriously endanger anyone using it.[17]

Another breakthrough occurred in *Monge v. Beebe Rubber Co.*,[18] when the New Hampshire Supreme Court extended the concept of retaliatory discharge to an action on an oral employment contract for an indefinite term. A female worker had been fired after rejecting her foreman's sexual advances. The court concluded:

> We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract.[19]

Monge may be said to go beyond the earlier retaliation cases because it did not involve the assertion of a statutory right or other clearly enunciated public policy.

Michigan edged closer to a broader requirement of just cause for discharge in certain circumstances with two 1980 decisions in *Toussaint v. Blue Cross & Blue Shield of Michigan* and *Ebling v. Masco Corporation*.[20] Toussaint and Ebling had been employed in middle management positions for five and two years, respectively. Each had been told upon hiring that he would be employed as long as he "did the job." Toussaint had also been handed a personnel manual that stated it was company "policy" to release employees "for just cause only." The court held that a jury could find that a provision forbidding discharge except for cause had become part of the indefinite term contracts either by "express agreement, oral or written," or, in Toussaint's case, as a result of "legitimate expectations grounded in his employer's written policy statements set forth in the manual of personnel policies."[21] Although the Michigan approach opens the door for a court to infer a just cause provision from an employer's overly hearty welcome to sought-after employees, there are important qualifications. By its very nature, the factual basis for the inference is likely to be found only in dealings with higher-level personnel, not rank-and-file workers. Second, the employer can eliminate the protection simply by refraining from any assurance about the reasons for termination.

A further wrinkle was added by the Supreme Court of California in *Tameny v. Atlantic Richfield*.[22] An employee alleged he had been discharged for refusing to participate in an illegal scheme to fix retail gasoline prices. The court held that the

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plaintiff could sue not only in contract but also in tort for a wrongful act committed in the course of the contractual relationship. The practical significance of this is that the employee is entitled to pursue compensatory and punitive damages, which are not generally available in contract actions. The Supreme Court of New Jersey has also sustained a cause of action in both tort and contract when an employee is discharged for "refusing to perform an act that violates a clear mandate of public policy."[23]

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

Job terminations are treated quite differently in most of the rest of the industrial world. The International Labor Organization recommended in 1963 that there should be a "valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements [of the employer]."[24] Protection against unfair discharge is afforded by statute in all Common Market countries and in Sweden and Norway.

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

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

I take it as a given that employees should be protected against unjust discipline. However, the consensus on objective is not matched by any consensus on means.

To begin with, there is a dispute over the appropriate theory to employ. Blades thought that contract doctrine was so weighted down with the baggage of mutuality of obligation and consideration that it should be shelved in favor of the "more elastic principles" of tort law.[25] Most of the early decisions upholding an employee's cause of action for "abusive discharge" proceeded on the basis of a prima facie tort. Moreover, tort law has the advantage of permitting a wider range of remedies, including punitive damages where appropriate. Yet tort law, grounded as it is in nebulous notions of "public policy," has inherent limitations. Often a judge will not be persuaded that an individual injury has risen to the height of an offense against public policy—witness the case of the hapless steel salesman (*Geary, supra*). More fundamentally, public policy may be too coarse a net to catch the more personalized wrong; how should we classify the unwanted sexual overtures of the foreman (*Monge, supra*)?

A number of commentators have argued that the action should sound in contract rather than tort. John Blackburn contends that implying a right not to be discharged without good cause would actually conform to the probable intent of the parties to the employment relation.[26] It would also enlarge the scope of employee protection, extending redress to any dismissal not supported by cause instead of restricting relief to malicious or abusive discharges. Blackburn views the loss of punitive damages as a gain for healthy personnel relations, since he believes the goal should be a make-whole remedy and not a combined penalty and windfall. *Monge*, the sexual harassment case, relied on an implied contract theory, and *Toussaint*, involving oral assurances and written personnel policies, seemed to intermingle express and implied contract.

I see no reason for having to choose between tort and contract law. Either or both would seem appropriate, as the occasion warrants. For me the more important questions are whether we seek common law or statutory solutions and what kinds of tribunals, procedures, and remedies we ought to provide. Here too there is disagreement. Summers, for example, believes that the courts are unwilling "to break through their self-created crust of legal doctrine,"[27] and that we must look to the legislatures for the vindication of employees' rights. Peck, on the other hand, believes legislation is so much the product of organized interest groups that almost by definition unorganized workers are an ineffective lobby and must turn to the courts for redress.

Both assessments contain a good deal of truth. With the benefit of several years' extra hindsight and the further perspective provided by the 1980-81 decisions from California, Michigan, and New Jersey, it is not at all impossible to foresee that a solution will be fashioned by the judiciary. But the courts are likely to be long on generalization and short on detail when it comes to spelling out procedures, remedies, and the like. At the same time, even though the legislatures may not wish to take the initiative for understandable political reasons, they may be goaded into action by the boldness of some courts. Furthermore, at some point employers themselves might support legislation on the ground that the compromises and greater exactness of a statutory solution are preferable to the broad strokes and blurred outlines often produced by an innovative judiciary. The upshot may be that in a number of states the process will go through two stages. The first few steps, halting, tentative, or even blundering, will be taken by the courts, and then the legislatures will be almost compelled to move in and provide a more definitive blueprint.

The attitude of organized labor may be a critical factor in securing legislative relief. It is the only interest group that might be willing to take the lead in promoting such a cause. A common assumption, however, is that unions will not favor legislation protecting employees against arbitrary treatment by employers because it will undercut one of the unions' prime selling points. I cannot deny this possibility, but I

think it would be as short-sighted as was organized labor's initial hostility toward the Fair Labor Standards Act. Organized labor could profit considerably from refurbishing its image as the champion of the disadvantaged. More practically, a universal rule against dismissal without cause should actually prove beneficial to unions in their organizing drives. Now, when a union sympathizer is fired in the middle of a campaign, it must be established by a preponderance of the evidence that he or she would not have been discharged but for the exercise of rights protected by the Labor Act.[28]

Some neutrals in industrial relations might also oppose a statutory just cause requirement for fear that it would erode such worthy values as voluntarism, private initiative and creativity, and more particularly the collective bargaining process itself. Collective bargaining, however, is a means not an end. The objective is the betterment of the individual working person. When less than a quarter of the labor force is currently afforded protection against unjust discipline, the needs of the other three quarters outweigh some theoretical risk to traditional bargaining processes. Even then, assuming history is any guide, we underrate the flexibility and resilience of collective bargaining if we believe it cannot adapt to, and indeed exploit, a new legal environment.

If employees are to be fully and effectively protected against unjust discipline, new specialized legislation will be necessary. The judiciary, as we have seen, may be able to respond to extreme cases and to the atypical situations of middle management personnel. But the courts have no capacity to construct an administrative apparatus for enforcement purposes, and their more formalized processes are not readily accessible to rank-and-file workers. Unlike Peck and Blumrosen, I see little hope in either the Constitution or existing civil rights legislation.

A federal statute would seem foredoomed in this period of national retrenchment. State legislation appears more promising, and it offers the additional advantage of the opportunity for some healthy experimentation with alternative procedures. During the past few years bills have been proposed in such states as Connecticut, Michigan, and New Jersey to provide "just cause" protection to unorganized workers. In the remainder of this paper I shall consider some of the principal issues almost any statutory proposal will have to confront. Obviously, there will be substantial values in competition, and more than one choice could be supported. My own suggestions will try to take account of both the ideal and the politically feasible.

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

It is hard to argue that any employee should be subject to an unjust termination. There are practical reasons for excluding certain classes of employees from the protection of a statute.

Managers and supervisors. In the higher ranges of management, one official's evaluation of another's business judgment may become so intertwined with questions of fair personal treatment that the two cannot be separated. Any concern about potential conflicts of interest plainly does not apply to "just cause" legislation, and supervisors as such should be covered. More troubling is the position of middle management personnel, who are among the most exposed and vulnerable. Unfortunately, our lexicon of industrial relations usage does not contain a convenient term distinguishing middle management, whom we should protect, from higher management, whom we may wish to exclude. I would suggest pointing the direction with as serviceable a definition as we can muster, and leaving the rest to interpretation.

Probationary employees. There is almost a presumption that an employer will not dismiss an employee unfairly in the early days of employment—otherwise, why hire? Moreover, the first few weeks or months of employment enable the employer to size up the new recruit and assess his or her performance on the job. It is generally recognized in collective bargaining agreements and elsewhere that so-called "probationary" employees are not entitled to just cause protections. Howlett would make the probation period one year; Summers and the Michigan and New Jersey bills opt for six months. The latter seems adequate to me.

Small employers. Theoretically, job protections should not depend on the size of the employer. Indeed, arbitrariness and individual spite may well be more common on the part of an idiosyncratic sole entrepreneur than on the part of a large, structured corporation. Nonetheless, we feel uneasy about intruding too quickly into the sometimes intensely personal relationships of small establishments. A suitable dividing line, at least at the outset, would seem to be employers having between ten and fifteen or more employees.

Public employees. Public employees generally have constitutional guarantees against the deprivation of their "vested" job interests without due process. Approximately half also have more specific civil service or tenure protections against unjust dismissal. Since American employment legislation has traditionally differentiated between the public and private sectors, it may be politically advantageous to maintain that distinction by limiting new protections to private industry.

Organized employees. Any state statute would necessarily affect collective bargaining under the NLRA. The risk is slight, however, since the Supreme Court has taken a liberal attitude toward state regulation in the areas of employment discrimination,[29] unemployment compensation,[30] and similar welfare concerns.[31] The issue whether to include workers subject to a collective bargaining agreement must be faced as a matter of policy. If we conclude that workers in general are entitled to invoke a just cause standard, the same public policy should extend to all, regardless of the existence of

parallel protections in a collective bargaining agreement. There is precedent for such an approach in both the NLRA and civil rights legislation.

The difficult question is the proper relationship of statutory and contractual rights and remedies, when both are available. My own inclination would be to put more trust in the flexibility of collective bargaining, and to leave some of these questions for future resolution amidst the counterpoint of particular facts, negotiated trade-offs, dollar costs, and the union's overriding duty of fair representation.

Advocates of employee protection have usually talked about protection against discharge, the so-called economic "capital punishment" of industrial relations. That is dramatic. But an extended suspension, a demotion, a denied promotions, or an onerous job assignment, while not as blatant, can be almost as devastating. Such job actions should be regarded as the functional equivalent of discharge. The Michigan bill may be politically astute in the way it puts the matter, in effect creating a "constructive discharge," though it requires the employee to engage in a variation on Russian roulette: "Discharge includes a resignation or quit that results from an improper or unreasonable action or inaction of the employer."[32]

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

A new statute could incorporate a variety of possible enforcement devices. Most persons would probably rule out the courts as too formal, too costly, and already overloaded. Existing administrative agencies, either the labor relations boards or the civil rights commissions, are more likely candidates. Robert Howlett, the former chairman of the Michigan Employment Relations Commission, favors placing administration in the hands of state labor departments. My view is that a question like this is best answered by reference to the governmental structure and industrial relations climate of each state. More significant than the locus of administration is whether we follow the hearing officer-agency model or the arbitration model. I hope I am not exhibiting professional bias when I join the overwhelming majority of my fellow arbitrators who have addressed the issue in concluding that arbitration is the superior procedure for "just cause" determinations. Adopting the arbitration format would immediately make available the vast body of arbitral precedent concerning substance and procedure that has been developed 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 are caught in the vicious circle of being denied experience because they have no experience.

The relative informality and speed of arbitration should also appeal to rank-and-file employees. Finally, just cause rulings do not call for the minute technical expertise that may be essential in a permanent hearing officer specializing in unemployment compensation or Social Security claims.

Only a small percentage of the grievances that are filed reach arbitration. Arguably the whole system would collapse if all claims went to the final step. Most are settled or dropped along the way. It would seem highly desirable to have some comparable sieve in the statutory procedure. The most obvious would be a preliminary mediation stage of minimum duration. Howlett would have an official in the administering agency make a "reasonable cause" determination before a case could go to arbitration.

Another advantage of the arbitral model is that the award is final and binding, without the need for agency adoption or review as in the case of a hearing officer's report or decision. Since a statutory arbitrator is imposed on the employer, however, there may be considerable pressure to adopt the stiffer "substantial evidence" standard. Moreover, some state constitutions require that rulings by public agencies and officials be supported by "competent, material, and substantial evidence on the record considered as a whole."[33]

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

More specifically, remedies for unjust discharge in the United States have traditionally included reinstatement with or without back pay. In Europe reinstatement is the exception. Apparently it is felt that the lone, unwanted employee can seldom regain a comfortable position in his old work place, and it is better to award him severance pay and let him go. I think awarding severance pay in lieu of reinstatement is an option the arbitrator should have. But I see no reason for precluding reinstatement out of an exaggerated regard for the employee's psychic well-being. American workers are probably more transient than their European counterparts, and they are used to handling unfamiliar job situations. A reinstatement order also gives them extra bargaining leverage in working out any future adjustment with the employer. I would grant reinstatement when it seemed appropriate, and let the employee decide what use to make of the award.

Regarding costs, the arbitrator's fee and expenses under collectively bargained arrangements are normally shared, fifty-fifty, by the parties, although occasionally the loser pays all. Each side bears its own representation costs, if any.

(Please turn to page 53)

you're fired (continued from page 37)

In theory one cannot fault public funding. But there may be practical problems in implementing it. There is now a strong tradition in the collective bargaining sector that the parties shall pay the arbitrator. Although a few states, like Connecticut and Wisconsin, provide arbitrators at public expense, the trend has been, in a kind of reversal of Gresham's law, for privately paid arbitrators to replace publicly paid arbitrators.

Elite private arbitrators undoubtedly have a personal interest in this debate over costs. If the state pays the bill, the state will almost certainly, like Connecticut, set the rate. Obviously, statutory rates will be much lower than those which private arbitrators could obtain in an open market.

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

This is not "uncharted territory," as some timid courts have exclaimed. This is terrain that has been carefully mapped in thousands of arbitration decisions since the Second World War. That body of arbitral precedent and a large and potentially much larger body of arbitrators stand ready to be drawn upon in the forging of a new set of statutory guarantees. The debates that remain over this detail or that detail should not obscure one central fact. In the fifteen years or so since Blades enunciated his thesis, many other experts have joined the chorus. Not a single respected and disinterested voice has been heard to suggest there is any valid, substantial reason for opposing the requirement of just cause. No such reason has been suggested because, in my judgment, there is none.