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## THE REVOLUTION THAT WASN'T: ON THE BUSINESS AS USUAL ASPECTS OF EMPLOYMENT AT WILL

*Sid L. Moller\**

With a pronouncement that has become quite familiar to those who follow employment law, a nineteenth century state court captured the employment at will rule in its pristine form: "An employer can fire an employee for good reason, bad reason or for a reason morally wrong, without incurring any liability."<sup>1</sup>

Until the 1970s, this rule was very easy to apply in all jurisdictions because most courts recognized virtually no exceptions. Consequently, in an employment law environment that had become anything but simple, it was easy to predict the outcome of those cases in which at will employees claimed that their firings were actionable — the employer always won. It is now old news, of course, but employers no longer win all of these cases. This development has understandably attracted a great deal of attention. However, there is less here than meets the eye.

Change of a conspicuous nature has diverted attention from that which has not changed. The many chronicles of the employment at will battles, carefully charting the shifting fortunes of employers and employees, tend to obscure the continued vitality of that which lies at the heart of the doctrine. The employment at will doctrine in its strictest form reflected society's view of the proper balance of power in the workplace. As suggested above, rigid adherence to the doctrine strongly favored employers, as a group, on the particular issue of the right to fire. In adopting exceptions to the rule, courts have not rejected the basic principle so as to significantly alter the balance of power. To the contrary, in most important aspects, new or modified employment at will rules reaffirm the

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1. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884), *rev'd on other grounds*, 179 S.W. 134 (Tenn. 1915).

doctrine. Writers who have focused on the technical workings of the modified rules and their effects on the employment law equilibrium have overstated the extent to which the new rules have empowered employees. Concentrating on the less obvious but more fundamentally important issue of the underlying balance of power reveals that these developments are superficial, if not deceptive, in nature.

This article will first address the employment relationship generally, with emphasis on the concept of power in the workplace and the manner in which the law reflects a differentiation of power between employers and employees. Before considering specific case law, I will identify the issues that arise in wrongful discharge cases that have a bearing on the balance of power. Next, I will discuss the challenge to the basic doctrine presented by the so-called "exceptions" to the employment at will rule. The concluding portions of this article will analyze the reasons why the presently recognized exceptions have not significantly altered the workplace power equilibrium.

## I. WORKPLACE REALITY: POWER AND ITS DIFFERENTIATION

The employer-employee relationship, that pervasive institution of modern society,<sup>2</sup> may be viewed from many different perspectives. For example, lawyers, sociologists, economists, organizational behavioralists, and, of course, the employers and employees themselves, have diverse focal points in their reflections on workplace issues. Regardless of viewpoint or purpose of analysis, however, it must be recognized that the organization of work inevitably splits the workforce into competing groups. This polarization derives from the power differential inherent in complex social organizations.

Dennis Wrong, a professor of sociology at New York University, notes in his book, *Power: Its Forms, Bases, and Uses*, that "there are hundreds, perhaps thousands, of . . . recent definitions of social power, or of the power of men over other men, in the literature of social science."<sup>3</sup> After considering several of these, he defines the concept in a straightforward manner: "[p]ower is the capacity

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2. "[A]pproximately 90 percent of the present labor force can be classified as wage or salary earners." Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 338 (1974) (citing SPECIAL TASK FORCE TO SECRETARY OF HEW, WORK IN AMERICA 20-23 (1972)).

3. DENNIS H. WRONG, *POWER: ITS FORMS, BASES, AND USES* 2 (1979).

of some persons to produce intended and foreseen effects on others."<sup>4</sup> Additional complexities are explored below, but for the time being this simple definition will suffice. In order to gain a more thorough understanding of the issues raised here, it is beneficial to consider the concept of power differentiation in the workplace from a loosely amalgamated political, economic, and sociological (but essentially non-legal) perspective.

Workplace actors are roughly divided between superiors and subordinates. Superiors give directives and decide upon the division of economic rewards in accordance with their responsibility for managing the organization. Subordinates, on the other hand, follow the directives of superiors and simply react to the division of spoils. Political or social orientations are often reflected in the labels used to characterize these groups. For example, those with power are "haves" and those without are "have nots." They are leaders and followers. Perhaps from a more sophisticated political perspective, they constitute different classes, "capitalist" and "labor" in Marxist terms, or the institutional entities of "management" and "labor" that come into being when a union represents the subordinate element and the two groups engage in collective bargaining. Historically, the human face of the superiors tends to be disregarded when so-called "property rights" conflict with the "individual rights" of subordinates.

Observations of social scientists who have studied one aspect or another of the unequal division of authority in industrial society may inform the discussion that follows and be valuable in focusing attention on the meaning of "power" in the workplace. For example, the following comments of a noted German sociologist, Ralf Dahrendorf, relate to the pervasiveness of a power differential:

[A hierarchical differentiation of status] is even more clearly the case with respect to relations of domination and subordination as they exist in social organizations of both capitalist and post-capitalist societies. The assertion that there still are authority relations in industry, in the state, and in many other forms of social organization does not go unchallenged in contemporary sociology . . . I would merely assert this: in post-capitalist as in capitalist industrial enterprises there are some whose task it is to control the actions of others

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4. *Id.* Wrong acknowledges that he is actually adopting "a modified version" of Bertrand Russell's definition of power, the heart of which is the notion that power is "the production of intended effects."

and issue commands, and others who have to allow themselves to be controlled and who have to obey . . . I would claim that relations of domination and subordination have persisted throughout the changes of the past century. Again, I believe that we can go even further. The authority exercised in both capitalist and post-capitalist society is of the same type; it is, in Weber's terms, "rational authority" based "on the belief in the legality of institutionalized norms and the right to command on the part of those invested with authority by these norms . . ." From this condition many others, including the necessity of bureaucratic administration, follow. But these are based above all on the fundamental social inequality of authority which may be mitigated by its "rational" character, but that nevertheless pervades the structure of all industrial societies and provides both the determinant and the substance of most conflicts and clashes.<sup>5</sup>

The ubiquitous nature of the power differential was also recognized by Charles Spencer in *Blue Collar: An Internal Examination of the Workplace*, which has as its focus the more specific topic of collective bargaining:

Collective bargaining has accomplished very little in altering the fundamental assumptions, attitudes and attachments of corporate employers concerning discipline in the workplace. The right to discipline its employees has been broadly conceded as an inalienable right of management, implicit in ownership of capital, a basic property of the productive process, a timeless relationship between worker and boss, and is solidly validated in most union contracts, in classical language stating that "the Company retains the exclusive rights to manage the business and the plants and to direct the working forces . . . including the right to hire, suspend or discharge for proper cause . . ." The quotes are from the Steelworkers Union contract, but it is substantially the same in most union contracts, and though it sounds innocent enough, it is under this contractual right that employees are given time off, sometimes up to a year, or are discharged from employment, without benefit of the rights citizens enjoy under the due process of our legal system.<sup>6</sup>

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5. RALF DAHRENDORF, CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY 71 (1959) (citation omitted).

6. CHARLES SPENCER, BLUE COLLAR: AN INTERNAL EXAMINATION OF THE WORKPLACE 92 (1977), quoted in JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 178 (1983).

Perhaps more significant than the mere existence of a power differential is the reason for its persistence. Again, commentary by Dahrendorf is illuminating:

One of the secrets of the increase in productivity by mechanized factory production lies in the subdivision of the total process of production into cooperative detail processes. Every one of these is equally indispensable for the accomplishment of the total process. From a strict functional point of view, the unskilled laborer, the foreman, and the executive stand on one level; the enterprise cannot function if one of these positions remains vacant. However, for purposes of the organization, coordination, and leadership of such subdivided detail processes a principle other than the division of labor is needed. A system of super — and subordination guarantees the frictionless operation of the total process of production — a system, in other words, which establishes authority relations between the various positions. The incumbents of certain positions are endowed with the right to make decisions as to who does what, when, and how; the incumbents of other positions have to submit to these decisions. Nor are the commands given and obeyed in the industrial enterprise confined to technical work tasks: hiring and firing, the fixing of wage rate and piecework systems, introduction and control of disciplinary regulations, and other modes of behavior are part of the role expectations of the incumbents of authority positions in the enterprise and give rise, therefore, to its scalar or authority structure.<sup>7</sup>

In his work, *The Legal Foundations of Capitalism*, economist John R. Commons argued that the superior-subordinate relationship is integral to employment because disparity of power is a principal component of the bargain struck by the parties. According to Commons, a worker accepts a position of subordination when accepting a job because “what he sells when he sells his labour is his *willingness* to use his faculties to a purpose that has been pointed out to him. He sells his promise to obey commands.”<sup>8</sup>

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7. DAHRENDORF, *supra* note 5, at 249.

8. JOHN R. COMMONS, *THE LEGAL FOUNDATIONS OF CAPITALISM* 284 (1932), *quoted in* ATLESON, *supra* note 6, at 13 n.23.

## II. LEGAL MANIFESTATIONS OF THE WORKPLACE POWER DIFFERENTIAL

In several fundamental aspects, the law of the workplace confirms that a differentiation of authority is intrinsic to the organization of work in the United States. For example, in determining whether the employment relationship exists, courts routinely consider factors such as the right to control the means and manner of performance, the control of the premises where the work is done, and the right of the employer to discharge.<sup>9</sup>

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9. *Jacobs v. Pickands Mather & Co.*, 933 F.2d 652, 658 (8th Cir. 1991); see generally 1B ARTHUR LARSON, *LARSON'S WORKMEN'S COMPENSATION LAW* § 43.10, at 8-1 to 8-4 (1992).

The definition of the term "employee," for purposes of vicarious liability, employers' liability, workmen's compensation, labor legislation, unemployment compensation, social security and miscellaneous enactments applicable to employees, has probably produced more reported cases than any definition of status in the modern history of law. Yet, oddly enough, there is little disagreement on the legal characteristics of employment or on the tests distinguishing employment from other relations. Since most compensation acts contain no definition of the term "employee," beyond some general phrase as "every person in the service of another under any contract of hire, express or implied," it has generally been taken for granted that the common-law definition of employee, or servant, worked out for vicarious tort liability purposes, was meant to be adopted. This "definition" usually consists largely of a listing of relevant characteristics or tests, coupled with the warning that all except the control test are merely indicia pointing one way or the other. A typical definition and summary of tests, and one on which practically every court in the Anglo-American world would agree, is that given in the *Restatement (Second) of Agency*.

1B ARTHUR LARSON, *LARSON'S WORKMEN'S COMPENSATION LAW* § 43.10, at 8-1 to 8-3 (1992). Larson specifically relies upon the following definition described in the *RESTATEMENT (SECOND) OF AGENCY* § 220 (1957):

- (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
- (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
  - (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
  - (b) whether or not the one employed is engaged in a distinct occupation or business;
  - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
  - (d) the skill required in the particular occupation;
  - (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
  - (f) the length of time for which the person is employed;
  - (g) the method of payment, whether by time or by the job;
  - (h) whether or not the work is part of the regular business of the employer;
  - (i) whether or not the parties believe they are creating the relation of master and servant; and

Statutory recognition of unions and of the right of employees to bargain collectively with employers has not abrogated employer power in any fundamental sense. To the contrary, such legislation reaffirms the power differential because it is predicated on certain inherent and exclusive managerial rights. Particularly apropos to this point are certain observations from James B. Atleson's book *Values and Assumptions in American Labor Law*:

[A]n analysis of American labor law would have to recognize the presence of status assumptions. Employees, clearly the junior partners in the labor-management partnership, owe a measure of respect and deference to their employers. This obligation of respect, involving both speech and nonverbal behavior, is employed to limit the scope of permissible concerted behavior. The Supreme Court has explicitly stated that the [National Labor Relations Act] was designed to strengthen loyalty to the "common enterprise." Despite such communitarian notions, judicial decisions clearly assume that employees are a relatively minor part of this entity. These status or class assumptions are derived from classical master-servant law, in which the servant's deference or respect need not be earned but, rather, was implicit in the employment relationship. Employer freedom of action, however, has generally not been circumscribed on the theory that the "common-enterprise" notion involves corresponding obligations of employers to their employees. Only the act defines those areas in which employers are restricted, but limits on employee statutory rights stem from their inferior status.<sup>10</sup>

If one accepts the views related above and concludes that a differentiation of power is inherent to the organization of work, then it should come as no surprise that the competition for control of the workplace is a long-lived struggle, not only in the United States but throughout the world. Such struggles have the potential to disrupt entire societies, by engaging large segments of the populace and involving political issues far more expansive than those traditionally associated with workplace disputes. The sometimes tumultuous history of unionism in this country, particularly the widespread social upheaval that immediately pre-dated the legitimization of collective bargaining with the passage of the National

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(j) whether the principal is or is not in business.

*Id.* at 8-4 (quoting 1 RESTATEMENT (SECOND) OF AGENCY § 220 (1958)).

10. ATLESON, *supra* note 6, at 8.

Labor Relations Act, is witness to the potentially grand scale of this conflict.

In comparison with broader struggles, wrongful discharge cases might appear distinguishable, more akin to one-on-one dueling than to disputes involving groups of combatants. On another level, however, the principles at stake in wrongful discharge cases are not dissimilar from what is at issue in the broader disputes. Conflict in both instances stems from the exercise of power by one group (employers) over another (employees).

Few would argue with the observation that employers enjoyed extensive power vis-a-vis their at will employees, at least prior to the changes that have occurred over the past couple of decades. While employer power may have been checked by increasingly detailed and burdensome governmental regulations, employers were largely unencumbered by the common law rights of employees.<sup>11</sup> The issue of immediate concern here is how this differentiation of power manifests itself in the legal realm, particularly with reference to the discharge of employees not covered by a collective bargaining agreement.

As is the case with many other subjects, Professor Wesley Hohfeld's classic work *Fundamental Legal Conceptions*<sup>12</sup> provides a useful classification for analyzing the balance of power in the workplace. From a Hohfeldian perspective, employers enjoy a legal "privilege" that enables them to manage their operations.<sup>13</sup> Measuring the power differential as it is manifested in the legal context from the employees' perspective means that employees possess "no-rights," which is the corollary of "privilege" in Hohfeldian

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11. See generally Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976); Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. J. 85 (1982).

12. WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (Walter W. Cook, ed., 1919).

13. There is insufficient space here to do justice to Professor Hohfeld's work. Much could be written regarding his prescribed terminology and the applicability of his system to the present inquiry. I therefore admit to being somewhat selective in sifting through the Hohfeldian system. That confession now aside, I find Hohfeld's use of the term "privilege" to be of particular relevance to this article. Hohfeld remarked that "[t]he closest synonym of legal 'privilege' seems to be legal 'liberty' or legal 'freedom.'" *Id.* at 47. "Liberty" and "freedom" are appropriate terms to describe the position employers enjoyed, at least with regard to common law constraints, when dealing with their at will employees up until the last two decades.

terms.<sup>14</sup> In light of the universal following of the employment at will rule in this country until a generation or so ago,<sup>15</sup> the employer's privilege in regard to the firing of personnel was absolute in the old (pre-1970s) order.<sup>16</sup>

Whichever point is emphasized, the recognition of employer privilege or the absence of employee rights, it follows that under the common law, at least before the 1970s, the authority to make personnel decisions resided with employers. The implications were clear for an inquiry relating to the fundamentals of power in the workplace: employers held all the cards and therefore controlled the workplace in their dealings with at will employees.

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14. "No-right" is the jural correlative of "privilege" in Hohfeld's scheme. See generally HOHFELD, *supra* note 12, at 38-50. Therefore, if employers possess even a modicum of privilege with regard to the management of the work force, it necessarily follows that employees are, to a greater or lesser extent, in possession of "no-rights," and lacking some attributes of power vis-a-vis their employers.

On the other hand, the jural opposite of privilege in Hohfeld's scheme is duty. *Id.* Therefore, to observe that employers lack privilege in regard to some aspect of directing the workforce is the equivalent of stating that the law imposes certain duties upon employers in this same area. In Hohfeld's analysis, the imposition of a duty on one party (the employer) is accompanied by its jural correlative, a right, for the other party (the employee).

Thus, we see that in regard to a particular area of decisionmaking, employer privilege means that employees are correspondingly without rights, or, conversely that employees possess rights only to the extent that employers are saddled with duties. The focus here will be on comparing the privileges of employers prior to widespread acceptance of exceptions to the employment at will rule with the duties imposed upon employers after these exceptions were adopted.

15. As to the social climate which gave rise to the universal acceptance of the rule, see Note, *supra* note 2, where the following observations were made:

[B]y the beginning of the 20th century [the employment-at-will rule] had become the primary doctrine governing employment duration . . . . Since the courts provided so little analysis, a rationale for the doctrine can be inferred only from the economic and social context in which it developed. At that time the prevalent ideology was *laissez faire* and its corollary, freedom of contract. A philosophy of freedom of contract cannot provide an explanation of the doctrine's development, however, because the commentators of that time were ordinarily not concerned with the freedom of the employee to bargain for job security in the employment relation. A more precise term for the philosophy that supported the doctrine is freedom of enterprise, which was considered to include the "fundamental right" of the employer to discharge employees as he or she pleased.

*Id.* at 342-43 (citations omitted).

16. Employees were correspondingly in possession of an almost absolute "no-right" status. See *supra* notes 13 and 14 and accompanying text.

### III. MEASURING THE BALANCE OF POWER IN THE WORKPLACE

Taken as a whole, commentary on the employment at will rule has been too extreme in concluding that the recently adopted exceptions have substantially weakened the position of employers and strengthened that of employees. Such miscalculation lies in the tendency to paint with too broad a brush in examining the passing of absolute employer discretion. The failure to engage in a more exacting scrutiny may be explained by several related factors.

First, there appears to be a lack of appreciation for the importance to employers of simply governing the workplace, as opposed to controlling the lives of their employees in a broader manner. A second, related factor is the apparent misperception of the practical impact that exceptions to the employment at will doctrine will have for employees. Finally, the lack of a more precise evaluation of the impact of employment at will developments is to some extent the natural result of working with a vocabulary that fails to provide an exacting terminology. Simply stated, the constraints of idiom tend to result in imprecise analysis. Hence, the following type of syllogism is flawed: employers once had unfettered discretion to dismiss employees; employers are now restrained on several fronts from acting as they once did because of exceptions to the employment at will rule; employers have therefore lost a great deal of the power or authority they formerly enjoyed.

My point is that we need to scrutinize more closely the specific elements of employer power that are at issue in these cases. Without a more exacting scrutiny, we cannot determine whether employer "losses" and employee "gains," if each can be so characterized, are of real consequence. In a battle between opposing sides, a combatant may yield vast tracts of territory to the opposition, and the loss and correlative gain may be of little or no significance to the outcome of the broader struggle because the territory in question is of marginal importance to the parties' ultimate objectives. More specifically, an employer may be deprived of a substantial amount of the discretion it previously enjoyed, and yet the change may affect critical aspects of its operations only slightly. The working lives of employees may be equally unaffected by these developments.

In mapping the territory already lost and in danger of being lost by employers, I will assess the strategic value of the provinces of employer power. Most important in this regard is establishing the

boundaries of the territory that is most prized because it is deemed necessary to the accomplishment of institutional objectives. Although courts do not appear to consciously consider these matters in their decisionmaking, such an analysis should enhance our ability to assess the significance of developments involving the employment at will cases.

As suggested earlier, while an employer may be able to "produce intended and foreseen effects on its employees"<sup>17</sup> in regard to a multitude of employee activities, from the employer's perspective certain of these spheres of influence are more important than others. The most significant of these spheres of influence relate to those employee activities that are of utmost significance to employers, encompassing matters that by anyone's definition directly relate to the governance of the workplace. In this group of activities, I would include such things as determining work schedules; selecting, promoting, transferring, disciplining, laying off and discharging employees; assigning job tasks and scheduling shifts; and establishing compensation. Theoretically, these could be concerns left to the discretion of employees. However, it is difficult to imagine employees, the "power subjects," determining these matters without any significant restraints — for example, employees setting their own wage rates or determining their own work schedules — which is in itself a reflection of how deeply ingrained is the belief that control of the workplace is properly a prerogative of employers. Insofar as the employer's control over such fundamental aspects of the workplace governance lies at the heart of managerial authority, the employer's discretion to make decisions in regard to these issues can be said to constitute a "critical privilege" of the employer.<sup>18</sup>

Other employee activities are of some relevance to the employer's agenda, but are not so fundamental to workplace governance. Some of these secondary or non-critical activities have a closer nexus to the employer's principal objectives than do others. But other such activities can become so distantly related to the employer's objectives, that they are all but irrelevant to the employer's institutional needs. Employers may nonetheless possess power to influence the choices or behavior of their employees in

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17. See *supra* note 3 and accompanying text.

18. For a discussion of the right to control as constituting the very core of an employer's legal status, see generally LARSON, *supra* note 9 and accompanying text.

regard to such non-critical activities. Specific illustrations of activities within each category of employer privilege follow.

Consider that an employer may, for any number of reasons, desire that its employees devote their spare time to high-profile civic affairs. Employee involvement in such matters may be perceived by an employer as a positive contribution to its public relations efforts or as an opportunity to cultivate promising business contacts. Although select employers might consider such involvement to be of crucial importance, what employees do when they are not working is generally not an issue of fundamental concern to employers. Such an activity is non-critical, and of only secondary importance to most employers.

In like fashion, an employer may have a slight preference for married employees because of a perception that such employees are more stable. While a stable workforce is of obvious importance to an employer, it is by no means clear, perhaps not even probable, that the particular marital status of an employee will contribute to such stability. Nonetheless, if an employer perceives a relationship between an employee's marital status and his or her stability on the job, the employer might elect to influence the decisions of its employees with regard to their marital status, for example, by threatening to discharge employees who seek a divorce. An employer with the ability to produce intended and foreseen effects on its employees' marital status possesses a privilege or power which is non-critical to the management function.<sup>19</sup>

Some employee activities are of virtually no consequence to the productivity or discipline of the workplace, or to other fundamental institutional objectives. For example, such matters as an employee's favorite color, preference for reading fiction over non-fiction, or the decision to send his or her children to a public university are extreme examples of matters which would generally qualify for inclusion in this category of activities. An employer's power over an employee in these matters is clearly a non-critical privilege, because it is obviously unrelated to the employer's prin-

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19. One might assert that an employer, or any power holder, necessarily strengthens its position when it asserts itself, regardless of the context within which the power is asserted. This is true to some extent, and it is therefore misleading to go too far in discounting the significance of an employer's exercise of authority in any realm. On the other hand, this does not negate the fact that the particular institutional objectives of an employer invariably give rise to a hierarchy of subject matters over which an employer will perceive the need to consistently exercise its authority.

cial objective of managing personnel so as to serve its institutional objectives.

Employers have diverse institutional objectives and, therefore, different concerns regarding employee activities. Consequently, a relatively insignificant employee activity for one employer may be much more important for another. For example, recall the earlier reference to an employee's choice regarding marital status, which would likely be only slightly relevant to the institutional objectives of most employers. Such generalizations notwithstanding, a private enterprise providing marriage counseling might reasonably conclude that married counselors are important to its mission. For such an employer, the right to terminate a divorced counselor may be a critical privilege because it is of the utmost importance to the institution's agenda.

That circumstances differ from one employer to the next does not defeat the usefulness of prioritizing employer privileges. It does mean, however, that one cannot abstractly determine the significance of all employee activities for all employers. Individual circumstances must be taken into account, with special attentiveness to particular institutional objectives, before one can accurately assess that employer's need to influence its employees' choices on certain matters.

In considering the weakening of absolute employer power over the past two decades, one should avoid a simplistic assessment that merely counts the number of jurisdictions which have altered the status quo in one way or another. A more precise analysis involves an assessment of the nature of the employer privileges that have been most affected by changes in the law. That is, the investigation will focus on the extent to which exceptions to the employment at will rule have actually restricted the exercise of the employer's critical as opposed to non-critical privileges.<sup>20</sup>

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20. Identifying and then charting the ebb and flow of the exercise of critical and non-critical privileges is but one way to measure employer power. Another perspective, which could complement this discussion, is one which analyzes the several "attributes" of power. For a discussion of this perspective see Professor Dennis Wrong's book entitled *Power: Its Forms, Bases, and Uses*. See *supra* text accompanying note 3. In one chapter of that book devoted to defining power, Professor Wrong notes the following:

Bertrand de Jouvenel has distinguished three variable attributes of all power relations, which, when specified, facilitate the comparison of different types of power relations and structures. "Power or authority," as de Jouvenel states, "has three dimensions: it is *extensive* if the complying Bs [the power subjects] are many; it is *comprehensive* if the variety of actions to which A [the power holder] can move the

#### IV. CHALLENGING EMPLOYER POWER: INITIALLY, A CALL TO LIMIT ONLY THE EXERCISE OF NON-CRITICAL PRIVILEGES

While one must be careful not to overstate the impact of scholarly commentary, it is fair to say that the beginning of the end of

Bs is considerable; finally it is *intensive* if the bidding of A can be pushed far without the loss of compliance."

WRONG, *supra* note 3, at 14 (quoting Bertrand de Jouvenel, *Authority: The Efficient Imperative*, in *AUTHORITY*, NOMOS I 160 (Carl J. Friedrich, ed., 1959)).

The first attribute of power, its "extensiveness," is of virtually no relevance to this article. Wrong condenses his definition of the second attribute, the "comprehensiveness" of power, by explaining it as "the number of scopes in which the power holder(s) controls the activities of the power subject(s)." WRONG, *supra* note 3, at 15. For the purpose of such analysis, Wrong states:

[O]ne may conceive of scopes as the different areas of choice and activity of the power subject. The comprehensiveness of a power relation, therefore, refers to the number of scopes over which the power holder holds power, or to the proportion or range of the power subject's total conduct and life-activity that is subject to control. At one extreme there is the power of a parent over an infant or young child, which is very nearly total in its comprehensiveness, extending to virtually everything the child does. At the other extreme is the very limited and specific power of the incumbents of highly specialized "situated roles," such as those of a taxi-dispatcher or a high-school student appointed to traffic safety patrol.

*Id.* at 15-16.

Wrong observes that the third attribute of power relations, the "intensity" of the relation, involves "the range of effective options open to the power holder *within* each and every scope of the power subject's conduct over which he wields power." *Id.* at 16.

The difference between the second and third attributes is illustrated as follows:

If a power holder tries to extend his power beyond a particular scope . . . in which it is seen as legitimate, as in [one scholar's] example of a teacher trying to influence his students' choice of wives, he will arouse resistance. One may conclude that his power is limited to a specific scope, such as the right to decide what will be covered in a lecture course, what reading will be required, what grades assigned on examinations, and a few details of classroom behavior. But if a teacher assigns five times as much reading as is customary, fails every student registered in the course, or spends the entire lecture period gazing silently out the window, his authority is also likely to be challenged. The first example of exceeding the "limit within which authority will be accepted" . . . reveals the comprehensiveness of the power relation; the second example indicates its intensity.

*Id.* at 17.

These attributes of power can be applied to the present inquiry in the following manner. Earlier we observed that under the traditional application of the employment at will rule, employers were "privileged" and employees had "no-rights," in the Hohfeldian sense, insofar as the law was essentially oblivious to the discharge of employees. Privileges of employers, being unlimited, allowed employers to control certain aspects of their employees' lives which had little to do with discipline or productivity in the workplace. An employer's control over such activities is essentially a non-critical privilege. Because the power of employers under the traditional application of the employment at will rule was absolute, in a sense, employers could be aptly described as possessing power in two of its most important dimensions. The employers' power was distinguished by both its "intensity" and "comprehensiveness." Professor Wrong opines that a combination of these two ingredients constitutes the recipe for total or absolute power:

the employment at will rule in its purest form can be traced to a 1967 law review article entitled *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*.<sup>21</sup> Professor Lawrence Blades, author of the article, presented a compelling case against an undiluted form of the employment at will rule. His reasoning greatly influenced courts and scholars alike, or at least proved to be a popular conceptualization of the interests at stake, as the article largely defined the parameters of the debate on the employment at will doctrine for a number of years.<sup>22</sup>

The portion of the article most relevant to this discussion concentrates on the type of employer power that was in need of judicial restraint. In a section captioned "Defining the Scope of the Employer's Appropriate Control," Blades writes:

Certainly, the employee can never expect to be completely free to do as he pleases. He must face the prospect of discharge for failing or refusing to do his work in accordance with his employer's directions; such control . . . is fundamental to the employment relationship. On the other hand, there are innumerable facets of the employee's life that have little or no relevance to the employment relationship, and over which the employer should not be allowed to exercise control. No certain line of demarcation can be drawn, however, between the reasonable demands of an employer and those which are overreaching, for some argument can . . . be made that the employer has an interest in whatever his employee does or believes. A salesman, for example, might be told to join certain social organizations and develop acquaintances upon which business relationships might be built. Such a requirement is not uncommonly accepted as affecting a matter of legitimate concern to the employer

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Although there are empirical instances of power relations that are high in comprehensiveness and low in intensity (which may itself vary within the different scopes covered by a power relation) and *vice-versa*, there are also power relations in which the two attributes vary together in the same direction. "Total" or "absolute" power usually means power that is high in both comprehensiveness and intensity.

*Id.*

21. Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967). This is not to say that there was no contradictory case law or other dissenting views prior to Blades' article. In fact, a 1959 decision, *Petermann v. Local 396, International Brotherhood of Teamsters*, is discussed at length later in this article. See *infra* note 63 and accompanying text. The pre-1967 exceptions, however, were just that — exceptional — and, more importantly, lacked the consistent or unifying theme which Blades' article provided.

22. A Shepard's search in August 1992 indicated that the Blades article had been cited in 136 different law review volumes and numerous state and federal court decisions.

and thus "part of the job." Then, too, depending on the employer's business and employee's position, an employer may well be legitimately concerned with many aspects of the "off hours" behavior of the employee. There may even be occasions when an employee's public utterances on controversial subjects can be considered incompatible with his professional position and the duty of loyalty he owes his employer.

Nevertheless, the impossibility of defining with precision the scope of the employer's appropriate control over the employee is insufficient reason for treating that control as boundless. In many instances the business interests of the employer and the personal rights of the employee will be delicately balanced. The difficulty in drawing a line might warrant conceding much that is arguable. But numerous demands an employer might make of his employee, when weighed against the interests of the employee as an individual, are clearly not justified by the employer's legitimate concerns. The employees in a free society ought to be protected at least from such unquestionably overreaching domination.<sup>23</sup>

Even after taking into account the absolutism of the employment at will doctrine that existed at the time his article was written, several premises of Blades' argument shed some light on why the subsequent debate and the development of the law in this area, have followed a conservative path.

First, that employees are subordinate in one broad and very important sphere of activities appears to be accepted as a given by Blades. Blades' reasoning proceeds from a premise of the legitimacy of the superior-subordinate relationship in the workplace, and the free exercise of employer discretion in the matter of workplace decisionmaking. In fact, the title of Blades' article reveals this fundamental assumption, insofar as it focuses only on the *abu-*

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23. Blades, *supra* note 21, at 1406-07. Dahrendorf, the German sociologist whose work has been previously alluded to (*see supra* text accompanying notes 5 and 7), made a similar observation on this point:

For the industrial worker, the labor contract implies acceptance of a role which is, *inter alia*, defined by the obligation to comply with the commands of given persons. Industrial authority does not, of course, involve the subordination of total persons under other persons; it is restricted to persons as incumbents of given, limited roles; but it is therefore no less authority, i.e., a "probability that a command with a specific given content will be obeyed by a given group of persons." Although, in other words, the foreman cannot legitimately command his workers to collect stamps in their leisure time, there exist in the industrial enterprise, within a definable range, authority relations in the strict sense of class theory.

DAHRENDORF, *supra* note 5, at 249-50.

*sive* exercise of employer power and thereby presupposes that the employer can exercise non-abusive powers.

Secondly, it is significant that the relationship between employers and employees is analyzed not so much from the perspective that employers have *more* power and employees less (simply a quantifiable differentiation), as from the viewpoint that *different* types of interests are at stake. Thus, Blades writes of the employer's "business interests," and the employee's "personal rights" or "interests . . . as an individual."<sup>24</sup> Implicit in this distinction is the concession of the legitimacy of employer power in governing the workplace. It is also vital to note, however, that employer and employee interests are, in one sense, different in kind, and are measured by Blades on different scales.

Under Blades' analysis, since different types of interests are at stake, the employer's right to control the workplace is necessarily checked only when the employer begins to interfere with the employee's personal interests *and* when the employer is pursuing non-business objectives:

It should be emphasized that . . . to limit the employer's right of discharge [for an employee's refusal to submit to the employer's attempt to coerce him in a way which bears no reasonable relationship to the employment] would not give blanket protection to the employee's interest in job security. There is a distinction between the right to employment and the right of the employee not to be obliged to his employer in ways bearing no legitimate connection to the employment.<sup>25</sup>

Blades concedes that employers should be entitled to exercise critical privileges, and that it is only the exercise of non-critical privileges by employers that should be limited by our legal system.<sup>26</sup> Fundamental premises of Blades' argument illuminate the following discussion of the case law.

24. See *supra* text accompanying note 23.

25. Blades, *supra* note 21, at 1414 (citation omitted).

26. Or, viewed from the perspective of de Jouvenel's attributes of power, see *supra* note 20, Blades called for a check on the *comprehensive* dimension of the power wielded by employers, by limiting the exertion of employer power in certain improper spheres regarding matters unrelated to workplace governance. He was not arguing for a check on the *intensity* dimension of employer power, by limiting the exertion of employer power within its proper sphere which encompasses matters related to workplace governance.

## V. THE CHALLENGE ANSWERED (AND THEN SOME): EXCEPTIONS TO THE EMPLOYMENT AT WILL RULE

Courts have recognized three categories of exceptions to the employment at will rule: (1) implied in fact contracts; (2) public policy torts; and, (3) covenants to exercise good faith and fair dealing.<sup>27</sup> Although broad readings of these theories could lead to extensive judicial intervention in employment decisions, all of them are susceptible to much narrower applications. A careful reading of the cases indicates that the courts have followed the latter approach. As presently applied, all three exceptions are clearly responsive to the concerns addressed by Professor Blades' article, insofar as the exceptions limit the exercise of employer power as it relates to non-critical privileges. Even those courts exhibiting the strongest pro-employee sympathies, however, tread lightly when asked to restrict employers in the exercise of their critical privileges.

Although some trends have emerged from the decisions of state courts, several factors have created a real patchwork of case law. Since the recognition of exceptions to the employment at will doctrine is a relatively recent phenomenon, important issues have not been decided in some jurisdictions. Also, some courts, perhaps reluctant to abandon a firmly entrenched principle, have proceeded more cautiously than others. Moreover, no federal law exacts uniformity. Thus, support can be garnered for widely disparate views about what the law is, or what it should be, and one must be wary

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27. The popular designation of these actions is not without its critics. For example, the California Court of Appeal has observed:

The opinions in a number of decisions addressing liability for "wrongful discharge" have evinced some ambivalence, if not confusion, as to the legal basis for recovery, often discussing in the same case theories of implied contract, violation of public policy and breach of the covenant of good faith and fair dealing. No doubt part of the confusion is attributable to the undifferentiated use of the term "wrongful discharge." That term is so broad it is inadequate to distinguish between the possible theories and has on occasion, we believe, been indiscriminately applied to situations involving only breach of contract, situations involving a discharge in violation of a fundamental public policy and situations involving breach of the implied covenant of good faith and fair dealing. It would be conducive to proper analysis if courts and lawyers used a different nomenclature to denominate these different situations in which liability is imposed after all on different legal theories. Appropriate nomenclature might be "breach of employment contract" for the true breach of contract cases, "tortious discharge" for the public policy cases and "bad faith discharge" for the cases involving breach of the implied covenant of good faith and fair dealing.

Koehrer v. Superior Ct., 226 Cal. Rptr. 820, 824 (Cal. Ct. App. 1986).

of commentary which purports to describe the *state of the law* instead of the *law of the state*.

Because of this diversity, analysis of employment at will case law in the aggregate is a challenge and generalizations can be of limited value. Mindful of these difficulties, for each of the three primary exceptions, I will focus on a single benchmark decision<sup>28</sup> that clearly marked the adoption of the relevant exception in a particular jurisdiction. Then, I will trace the subsequent development in the subject state of the case law relating to that exception. In selecting particular cases I used the following criteria: first, the decision was commonly recognized by commentators and other courts as one exemplifying the exception under consideration; second, only "vintage" decisions, relatively speaking, were selected, to insure a sufficient period of time for the maturation of the central case's progeny; finally, each of the cases was decided in a jurisdiction that has entertained a relatively substantial amount of litigation in the employment field over the past decade or so.

Before turning to the case law, it is beneficial to note a couple of points of reference by which we can determine judicial tendencies and better assess the significance of decisions. First, a principal indicator of a court's willingness to limit employers in the exercise of their critical privileges is its reaction to the notion that an employee should be discharged only for "cause" or "just cause."<sup>29</sup> The at will employment relationship of course imposes no such duty on employers, nor does it provide any such right to employees. Such a fundamental change in the parties' legal relationship could, however, be the logical outcome of any of the three exceptions, given the underlying rationale of each. A second important factor in evaluating these cases is the emphasis given to balancing "business related" concerns of the employer against the "private" or "personal" interests of employees. A court that recognizes the need to protect the private or personal interests of employees — matters unrelated or of little consequence to the employer's business — will likely be receptive to Professor Blades' arguments that the abusive exercise of employer power must be restrained.<sup>30</sup> But sen-

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28. For reasons noted in the text, not one but two important California decisions are considered in the introductory portion of the discussion relating to the public policy tort theory exception. See *infra* text accompanying notes 63-108.

29. See generally PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 55-56 (1990).

30. See *supra* text accompanying notes 22-26.

sitivity to the employer's legitimate, business related concerns should mean that there are inherent limits on how far the court will go in limiting employer discretion. A strong endorsement of the validity of the employer's interests in managing the business should signify a high regard for the critical privileges of the employer, even if the court is willing to restrict the employer's exercise of non-critical privileges. Keeping these factors in mind, we now turn to a discussion of the exceptions.

A. *The Implied Contract Theory in Michigan: Toussaint v. Blue Cross & Blue Shield*

The basic underlying rationale for the implied contract theory is not complex. As one commentator observed,

If an employer had presented itself to its workers as one which did not wield the authority to fire employees at will — whether these representations were made to recruit better workers, to enhance morale and productivity, or even to avoid a union contract — the employer should be required by the law to live up to those assurances on later occasions when it was tempted to ignore them.<sup>31</sup>

A leading decision following such reasoning and adopting the implied contract exception is *Toussaint v. Blue Cross and Blue Shield*.<sup>32</sup> In *Toussaint* the Michigan Supreme Court ruled on whether a contract for permanent employment was terminable at will where an employee reasonably believed, as a result of his employer's conduct and representations, that he would not be discharged except for cause.<sup>33</sup> Relying upon "settled Michigan law," the employer contended that "[a] promise by an employer to discharge only for an obviously determinable cause represents such a departure from firmly established doctrines of contract formation and the normal expectations accompanying an indefinite employment relationship that it would require separate and distinct consideration in order to be enforceable."<sup>34</sup> The employer also argued

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31. WEILER, *supra* note 29, at 53.

32. 292 N.W.2d 880 (Mich. 1980).

33. For example, the plaintiff in *Toussaint* testified that he was told he would be with the company as long as he was doing his job. Moreover, the personnel manual stated that the disciplinary procedures applied to all Blue Cross employees who had completed their probationary period and that the company's "policy" was to release employees "for just cause only." *Id.* at 884.

34. *Id.* at 885.

that there was no mutuality of obligation and therefore no consideration because the employee reserved the right to terminate the employment relationship at will.<sup>35</sup> The Supreme Court of Michigan rejected these defenses, emphasizing that the employer's actions had created a situation "instinct with an obligation"<sup>36</sup> which had given rise to the employee's legitimate expectations.

Professor Henry Perritt, a close follower of employment at will developments, notes that the implied in fact contract theory exception, as exemplified by the *Toussaint* decision, "permits a plaintiff to recover for breach of contract when the employer dismisses the employee in violation of promises of employment tenure made orally, or implied from a course of conduct or from employee policies or handbooks."<sup>37</sup> According to Professor Perritt, this implied in fact contract theory requires a plaintiff to plead and prove the following elements:

1. The employer made a promise of employment security.
2. The employee gave consideration for the promise, in the form of detrimental reliance by continuing employment or otherwise.
3. The employer breached the promise by dismissing the employee.
4. The employee suffered damages.<sup>38</sup>

A careful reading of *Toussaint* and its progeny reveals numerous factors that limit the impact of the implied contract exception on employer privileges. These factors support a "business as usual" appraisal of the situation. First, the endorsement of *Toussaint* contracts is merely an application of established contract principles. The Michigan Supreme Court stated as much in a 1984 case:

*Toussaint* makes employment contracts which provide that an employee will not be dismissed except for cause enforceable in the same manner as other contracts. It did not recognize employment as a fundamental right or create a new "special" right. The only right

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35. *Id.*

36. *Id.* at 892 (citing *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917); *McCall Co. v. Wright*, 117 N.Y.S. 775 (1909)).

37. Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397, 398 (1989).

38. *Id.*

held in *Toussaint* to be enforceable was the right that arose out of the promise not to terminate except for cause.<sup>39</sup>

If employer liability is to be decided under settled principles of law, then employers are not exposed to the perils of uncertainty that might accompany the application of more innovative theories. On the other hand, whatever its theoretical underpinnings, the implied contract exception could in practice be used by courts to impose some of their own notions of "fairness" on the employment relationship. The Supreme Court of Michigan recently established that it would not allow *Toussaint* to be stretched very far in this direction:

In *Toussaint* . . . this Court joined the forefront of a nationwide experiment in which, under varying theories, courts extended job security to nonunionized employees. In the vast outpouring of ensuing cases, there are indeed situations in which employers have in reality agreed to limit managerial discretion. However, the theory remains troubling because of those instances in which application of contract law is a transparent invitation to the factfinder to decide *not* what the "contract" was, but what "fairness" requires.

That courts have not been successful in unraveling the logic of the theory to produce principles that distinguish the first category of cases from the second, is not reason to abandon the experiment . . . . But unless the theory has some relation to the reality, calling something a contract that is in no sense a contract cannot advance respect for the law. Thus, we seek a resolution that is consistent with contract law relative to the employment setting while minimizing the possibility of abuse by either party to the employment relationship.<sup>40</sup>

It appears that the results in *Toussaint* are in fact consistent with traditional contract law. Employers have not had duties thrust upon them beyond those they have voluntarily assumed. This is evident in decisions that analyze the creation of an employer's contractual obligation to fire an employee only for good cause, as well as in those relating to the scope of such an obligation. It becomes even more apparent in those cases holding that the employer is entitled to altogether avoid the duty.

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39. *Valentine v. General Am. Credit, Inc.*, 362 N.W.2d 628, 629 (Mich. 1984); *see also Kostello v. Rockwell Int'l Corp.*, 472 N.W.2d 71, 72 (Mich. Ct. App. 1991).

40. *Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268, 269 (Mich. 1991).

As to the creation of the contractual duty, employers clearly have the freedom, under *Toussaint*, to enter into employment contracts terminable at will, and to discharge employees without assigning cause.<sup>41</sup> In fact, the employee still has the burden to overcome<sup>42</sup> the presumption of employment at will.<sup>43</sup> The Michigan courts have consistently refused to recognize an alteration of the employment at will relationship based solely on an employee's "subjective expectations."<sup>44</sup>

That Michigan has not extended universal job security to employees as a result of *Toussaint* and its progeny is evident from the fact that firings need not be accompanied by a showing of cause in the post-*Toussaint* era. For example, the *Toussaint* court itself recognized the acceptability of a "satisfaction" clause, pursuant to which the employer might promise employment only so long as the employee's services were satisfactory to the employer.<sup>45</sup> Also, even when the contract requires cause for discharge, the employer's economic constraints will suffice, according to Michigan case law.<sup>46</sup>

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41. *Renny v. Port Huron Hosp.*, 398 N.W.2d 327, 334 (Mich. 1986).

42. In *Rasch v. City of East Jordan*, 367 N.W.2d 856, 858-59 (Mich. Ct. App. 1985), the Michigan Court of Appeals, in a well-reasoned analysis, addresses burden of proof issues in *Toussaint*-type cases.

43. In *Lynas v. Maxwell Farms*, 273 N.W. 315, 316 (Mich. 1937), the Michigan Supreme Court said that:

[c]ontracts for permanent employment or for life have been construed by the courts on many occasions. In general, it may be said that in the absence of distinguishing features or provisions or a consideration in addition to the services to be rendered, such contracts are indefinite hirings, terminable at the will of either party.

The *Toussaint* court held that *Lynas* indicated a rule of construction, and not a substantive limitation on the enforceability of employment contracts. *Toussaint v. Blue Cross & Blue Shield of Michigan*, 292 N.W.2d 880, 884 (Mich. 1980); see also *Bankey v. Storer Broadcasting Co.*, 443 N.W.2d 112, 114 (Mich. 1989) (confirming that *Toussaint* only modified the "presumptive" rule of employment at will).

44. *Schwartz v. Michigan Sugar Co.*, 308 N.W.2d 459, 462 (Mich. Ct. App. 1981).

45. See *Toussaint*, 292 N.W.2d at 897. According to the *Toussaint* court, whether such a clause has been breached is simply a question of whether the employer actually had standards of job performance and whether the employee was discharged for failing to meet them. *Id.*

46. See *McCart v. J. Walter Thompson USA, Inc.*, 469 N.W.2d 284, 287 (Mich. 1991) ("[B]ona fide economic reasons for discharge constitute 'just cause' under *Toussaint*."); *McDonald v. Stroh Brewery*, 478 N.W.2d 669, 674 (Mich. Ct. App. 1991) ("Although the economic reasons must be bona fide, there is no requirement that they rise to the level of a 'necessity.'"); *Reisman v. Regents of Wayne State Univ.*, 470 N.W.2d 678, 681 (Mich. Ct. App. 1991) ("[A]n employee who is discharged for reasons of budget cutbacks or economic necessity does not have grounds for a wrongful discharge claim, even if the employment contract expressly provides that the employee is subject to termination only for just cause."); *Ewers v. Stroh Brewery*, 443 N.W.2d 504, 507 (Mich. Ct. App. 1989) ("Certainly

Such rulings symbolize both an endorsement of the employer's right to manage the business and an implicit recognition that employees cannot legitimately entertain contradictory expectations. In addition, according to the *Toussaint* court, the right to be discharged for cause only does not include the right to be discharged only with the "concurrence of the communal judgment of the jury."<sup>47</sup> Employers maintain control insofar as they "are permitted to establish their own standards for job performance and to dismiss for non-adherence to those standards although another employer or the jury might have established lower standards."<sup>48</sup>

If "new or special rights" have not been created by the implied contract exception and established contract principles control, then employers by design should be able to control the extent of their duties under *Toussaint* contracts. Such a limited reach of the implied contract exception is confirmed by *Toussaint* and subsequent Michigan cases that have probed the bounds of the *Toussaint* decision. Thus, it has been held that employers can reserve the right to exercise broad discretion in tailoring disciplinary penalties to fit the circumstances, so long as some cause for discipline exists.<sup>49</sup> An employer can obligate itself to terminate an employee only for good cause, yet, at the same time, limit the remedy of the wrongfully discharged employee in the event that the obligation is breached.<sup>50</sup>

The *Toussaint* court reasoned that contractual obligations follow from the employer's words and deeds which create legitimate employee expectations.<sup>51</sup> However, *Toussaint* also provides that employers are entitled to modify *unilaterally* or revoke such contractual obligations, if such rights have been preserved: "An employer who establishes no personnel policies instills no reasonable expectations of performance. Employers can make known to their employees that personnel policies are subject to unilateral changes by

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employers have the right to adjust their work forces in response to market forces and business necessity.").

47. *Toussaint*, 292 N.W.2d at 896.

48. *Id.* at 897.

49. See *Struble v. Lacks Indus.*, 403 N.W.2d 71, 73 (Mich. Ct. App. 1986).

50. See *Jontig v. Bay Metro. Transp. Auth.*, 444 N.W.2d 178 (Mich. Ct. App. 1989) (holding that the plaintiff, who was fired approximately one year into a three-year employment contract, was entitled to only 60 days of severance pay per the terms of the contract).

51. See *Toussaint v. Blue Cross & Blue Shield of Michigan*, 292 N.W.2d 880, 892-94 (Mich. 1980).

the employer. Employees would then have no legitimate expectation that any particular policy will continue to remain in force."<sup>52</sup>

The employer's freedom to change its personnel policies was illustrated in *Ledl v. Quik Pik Foods*.<sup>53</sup> In *Ledl*, the plaintiff claimed that she was discharged in violation of promises allegedly made when she was hired that she would continue to be employed so long as her performance was satisfactory. Although the plaintiff had worked for over seven years under such contractual protections, the court gave effect to an employment agreement signed several months prior to the date she was fired, which allowed the defendant to terminate her employment with or without cause. In rejecting the plaintiff's argument that the agreement was an adhesion contract not supported by consideration, the court relied heavily upon the *Toussaint* court's recognition of the employer's freedom to contract.<sup>54</sup>

The employer's right to modify personnel practices extends to policies other than those involving employee terminations. For example, in *Engquist v. Livingston County*,<sup>55</sup> the trial court granted relief to several employees, based on its finding that the employer's practice of granting salary "step increases" over a fourteen-year period created rights enforceable in contract. This decision was reversed on appeal, however, because of the reviewing court's determination that employees could not entertain legitimate expectations of continued step increases when a reasonable person should have understood that personnel policies were subject to unilateral changes by the employer.<sup>56</sup>

More fundamental than the employer's ability to limit the scope of its contractual duty and the courts' sensitivity to the employer's need to manage its business, is the fact that an implied contract modifying an employment at will relationship is altogether avoidable by the employer. That the implied contract exception does not extend job security to employees is evidenced by the courts' recognition that, *Toussaint* notwithstanding, an employment contract remains a clean slate. In this spirit, note the *Toussaint* court's ob-

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52. *Id.* at 894-95.

53. 349 N.W.2d 529 (Mich. Ct. App. 1984).

54. *Id.* at 531.

55. 361 N.W.2d 794 (Mich. Ct. App. 1984).

56. *Id.* at 796.

servation that “[b]ecause the parties began with *complete freedom*, the court will presume that they intended to obligate themselves to a relationship at will.”<sup>57</sup> In support of the employer’s position, *amici curiae* argued in *Toussaint* that permitting the discharge for cause only of employees hired for an indefinite term would adversely affect the productivity and competency of the work force.<sup>58</sup> The *Toussaint* court’s response to this argument was: “Employers are most assuredly free to enter into employment contracts terminable at will without assigning cause.”<sup>59</sup> The court later drove the point home: “If Blue Cross . . . had desired, [it] could have established a company policy of requiring prospective employees to acknowledge that they served at the will or the pleasure of the company and, thus, have avoided the misunderstandings that generated this litigation.”<sup>60</sup>

Because the implied contract exception is an attack on the critical privilege of employers to terminate at will which *can* be repelled, employers might naturally respond by constructing defensive barricades. One noted commentator has observed that this strategy will be exactly the one that employers will adopt:

[O]nce employers learn from the courts that there is a real chance that their arrangements might be held contractually binding, they will take the steps necessary to remove any suggestion that their practices are intended to be legally enforceable. The employer may still give its employees a handbook that informs them of the internal procedure for reviewing dismissal decisions, a procedure that is designed to avoid unfair firings. However, the firm’s lawyers will carefully draft disclaimer clauses which make it explicit that no binding undertaking is being given to maintain such practices, nor that the procedures will be foolproof, nor that the handbook (or other representations) can serve as the legal basis for a lawsuit if the system does miscarry.<sup>61</sup>

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57. *Toussaint v. Blue Cross & Blue Shield of Michigan*, 292 N.W.2d, 880, 885 (Mich. 1980) (emphasis added).

58. *Id.* at 890. In other words, the court seemed to emphasize that the employer’s critical privileges were at stake.

59. *Id.*

60. *Id.* at 891.

61. WEILER, *supra* note 29, at 54. Weiler expands upon his thoughts in a note to the cited text:

Illustrations of scholarly legal advice to employers on reducing their exposure to unjust dismissal claims through, *inter alia*, appropriately drafted disclaimers are Sam Estreicher, “Unjust Dismissal: Preventive Measures,” in *Unjust Dismissal* 783 (New

To the extent that employees actually enjoy rights under an implied contract, there is a concomitant shift in the balance of power. Returning to the earlier discussion relating to the correlative interests at stake, once job security for employees is established by an implied contract, employers no longer possess the privileges they formerly had. Moreover, the employer's non-critical as well as critical privileges are at stake in these cases since the implied contracts typically involve a promise to discharge only for cause or just cause.<sup>62</sup> The employers retain ultimate control over their destiny, however, because the loss of privilege is of the employers' own doing, and not a transfer of power by the courts.

Since news of the judiciary's willingness to recognize implied contracts has been widely disseminated, it is not an exaggeration to predict that only the most unsophisticated employers will be caught in this particular snare in the future. Consequently, the implied contract exception has not profoundly altered the balance of power in the workplace because employers retain the ability to place themselves beyond its reach. One cannot be said to have truly lost his freedom when he has the key to the stockade. What, then, of the other exceptions? Do the public policy tort theory and the covenant theory restrict employers in the exercise of their critical privileges or otherwise significantly affect the balance of power?

B. *The Public Policy Tort Theory in California: Petermann v. Local 396, International Brotherhood of Teamsters and Tameny v. Atlantic Richfield Co.*

The public policy tort theory exception in California can be traced to two formative decisions. The first one, *Petermann v. Lo-*

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York: Practising Law Institute, 1984); and Kenneth T. Lopatka, "The Emerging Law of Wrongful Discharge: A Quadrennial Assessment of the Labor Law Issue of the 80's," 40 BUSINESS LAWYER 1, 26-32 (1984). Indeed, the American Society of Personnel Administration Foundation has drafted and announced a model disclaimer clause which reads as follows: "This is not a contract of employment. Any individual may voluntarily leave employment upon proper notice, and may be terminated by the employer at any time and for any reason. Any oral or written statements or promises to the contrary are hereby expressly disavowed and should not be relied upon by any prospective or existing employee. The contents of this handbook are subject to change any time at the discretion of the employer."

(Quoted in Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 WIS. L. REV. 733, 748-49.) WEILER, *supra* note 29, at 54 n.16.

62. Recall that a requirement that employees be discharged for cause only is a principal indicator that the employer's critical privileges are in jeopardy. See *supra* text accompanying note 29.

cal 396, *International Brotherhood of Teamsters*,<sup>63</sup> was decided in 1959. As such, it pre-dated by a number of years the widespread acceptance of the exceptions discussed in this article. It even preceded the onset of formidable opposition to the employment at will doctrine by almost a decade. Consequently, the *Petermann* court was not called upon to consider some fundamental questions relating to the exception because these issues had not yet been wholly formulated. *Petermann* did, however, lay the foundation for the public policy exception in California. *Tameny v. Atlantic Richfield Co.*,<sup>64</sup> decided in 1980, picked up where *Petermann* left off, and the two decisions provide foundational principles for this particular exception in California.

The plaintiff in *Petermann* was employed as a business agent by the defendant union and was allegedly instructed to testify falsely under oath before a legislative committee. The plaintiff instead testified truthfully; an act which he claimed resulted in his firing. In considering the plaintiff's wrongful discharge action against the union, the *Petermann* court recognized the broad discretion over personnel matters that employers then enjoyed. Nonetheless, the court concluded that the employer's conduct, as alleged in the complaint, was actionable. In support of its decision, the court reasoned:

The commission of perjury is unlawful . . . . It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute . . . . The public policy of this state as reflected in the penal code . . . would be seriously impaired if it were to be held that one could be discharged by reason of his refusal to commit perjury. To hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and the employer and serve to contaminate the honest administration of public affairs . . . .<sup>65</sup>

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63. 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

64. 610 P.2d 1330 (Cal. 1980).

65. *Petermann*, 344 P.2d at 27.

The plaintiff in *Tameny* alleged that he was discharged because he refused to participate in an illegal scheme to fix retail gasoline prices. He sought recovery from his former employer (Arco) on a number of theories, including a claim that "Arco's conduct in discharging him for refusing to commit a criminal act was tortious and subjected the employer to liability for compensatory and punitive damages under normal tort principles."<sup>66</sup> Arco contended that the employee's remedy in such a case sounded only in contract and not in tort.<sup>67</sup> Accepting Arco's argument, the trial court sustained a general demurrer to all of the plaintiff's tort claims. The judgment of the trial court was reversed on appeal by the Supreme Court of California. Relying in part upon its earlier reasoning in *Petermann*, the *Tameny* court noted that an employer's obligation to refrain from firing an employee for refusing to commit a criminal act did not depend upon promises set forth in the parties' contract, "but rather reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes."<sup>68</sup> Quoting Professor Prosser, the court explained why the wrongful discharge suit before it exhibited the "classic elements" of a tort cause of action:

[Whereas] [c]ontract actions are created to protect the interest in having promises performed, [t]ort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties . . . .<sup>69</sup>

The *Tameny* court rejected Arco's argument that a tort cause of action should not be permitted because the availability of punitive damages in such actions would allegedly "impair the employer-employee relationship."<sup>70</sup> The court rejected as well the defendant's contention that a tort action could lie only if the discharge were *specifically* barred by statute.<sup>71</sup>

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66. *Tameny*, 610 P.2d at 1331.

67. *Id.*

68. *Id.* at 1335.

69. *Id.* (quoting WILLIAM L. PROSSER, *LAW OF TORTS* 613 (4th ed. 1971)).

70. *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1335 n.10 (Cal. 1980).

71. *Id.* at 1336.

Since the early 1980s, adoption of the public policy tort theory exception, as exemplified by *Petermann* and *Tameny*, has become commonplace.<sup>72</sup> Professor Perritt has identified the essentials of the exception:

[The] *public policy tort theory* requires the plaintiff to plead and prove the following elements:

1. That a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the *clarity* element).
2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the *jeopardy* element).
3. The plaintiff's dismissal was motivated by conduct related to the public policy (the *causation* element).
4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).<sup>73</sup>

To evaluate the impact of this exception on the employer's exercise of its critical privileges, the key areas of inquiry are the first and fourth elements identified by Professor Perritt (the *clarity* and *overriding justification* elements, respectively).<sup>74</sup> In addressing the *clarity* element, a court will necessarily be engaged in defining or otherwise interpreting what is meant by the concept of public policy. The more broadly the concept is defined, the wider the door is for judicial oversight of an employer's exercise of its critical privileges. Likewise, with regard to the *overriding justification* element, a court exhibiting reluctance to recognize the legitimacy of business justifications for a dismissal will obviously have less regard for the employer's right to exercise its critical privileges.<sup>75</sup>

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72. One commentator reports that, as of July 1986, 33 states had adopted the public policy tort theory exception. David C. Hames, *The Current Status of the Doctrine of Employment-At-Will*, LAB. L.J., Jan. 1988, at 19, 19-20; see also Michael A. DiSabatino, Annotation, *Modern Status of Rule that Employer May Discharge At Will Employee for Any Reason*, 12 A.L.R. 4TH 544 (1982).

73. Perritt, *supra* note 37, at 398-99.

74. See *supra* note 73 and accompanying text.

75. On the other hand, either a relatively narrow definition of public policy or a relatively broad demarcation of an employer's business justifications, or both, tends to preserve employer privileges.

An often cited law review article entitled *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*<sup>76</sup> spotlights and harshly criticizes the "very limited scope of the protection" that the public policy exception affords to employees.<sup>77</sup> The most provocative aspect of this work is its recommendations for expanding the application of the public policy exception:

Lacking a principled basis for deciding which firings implicate the interests of the public, courts might do better to acknowledge that *all* employees (and thus the public) have a legitimate interest in ensuring that the exercise of employers' power to discharge their employees is limited to situations in which the employer has "just cause" for dismissal.<sup>78</sup>

Whether the author fully appreciated the sweeping implications of this argument, I do not know. The proposal is, in any case, relevant to the present inquiry insofar as it brings into focus the most intrusive position (from the employer's perspective) that could logically be pursued under this exception.<sup>79</sup> If this recommendation were widely adopted, and it became a violation of public policy for an employer to discharge an employee absent just cause, the implications for the employer-employee power equilibrium are obvious. Employers would be greatly restricted in exercising their critical privileges. Such a development would, by definition, be the end of at will employment.

No state, including California, has adopted the recommendation that public policy demands discharge for cause only. The issue has been directly addressed by the California courts in several cases, and in each instance, it has been held that public policy does not demand that employees be given such job security.<sup>80</sup> The Califor-

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76. Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983).

77. *Id.* at 1932.

78. *Id.* at 1950.

79. Perhaps a more intrusive position would be that public policy disallows employee terminations under any circumstances. Because this is not a realistic or reasonable option, however, it could not be logically pursued under this public policy exception.

80. See *Shoemaker v. Myers*, 4 Cal. Rptr.2d 203, 209 (Cal. Ct. App. 1992) (holding that "it is readily apparent [that this alleged public policy] is in fact private in nature, implicating rights existing between plaintiff and his employer alone"); *Newfield v. Insurance Company of the West*, 203 Cal. Rptr. 9, 11 (Cal. Ct. App. 1984) (holding that "[t]here is no public policy that people are or should be entitled to permanent employment or that an

nia judiciary perhaps has less choice in this matter than do courts in other jurisdictions because the state's Labor Code provides in relevant part that "[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other . . . ." <sup>81</sup> The reasoning of the California decisions, however, is consistent with that of courts in other jurisdictions that do not have any statute with which to contend.

Not only do California courts reject the premise that public policy permits discharge for cause only, they endorse the converse proposition that public policy *supports* the employer's right to maintain an at will relationship with its employees. As this principle shapes the results in these cases, it necessarily tends to neutralize the impact of the public policy exception on an employer's critical privileges. In this regard, note the following cautious posture of the California Court of Appeal:

These numerous statutory expressions of public policy limiting an employer's unfettered discretion in terminating employees provide further evidence of the legislative resolve to maintain the underlying policy of at-will termination found in section 2922. Certainly the judiciary must be circumspect and restrained in its treatment of the legislative product. Judicial exceptions to this underlying policy, when not based on statutory authority should be concerned with only the most egregious of employer misconduct, i.e., conduct which is "obnoxious to the interests of the state and contrary to public policy and sound morality . . . ." The implied covenant [of good faith and fair dealing] may not be construed as creating a right in the employee to be discharged only for cause in contradiction to the fundamental public policy expressed in section 2922. <sup>82</sup>

Because courts do not go so far as to require a good reason for discharge does not necessarily mean that there will be little or no encroachment upon the critical privileges of employers. The judiciary remains free to broadly define public policy, thus limiting the

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employer is not entitled to discharge an employee"); *Shapiro v. Wells Fargo Realty Advisors*, 199 Cal. Rptr. 613, 618 (Cal. Ct. App. 1984) (rejecting plaintiff's argument that it was the public policy of California "to promote job security and stability in the community," and that his employer had violated this public policy in dismissing plaintiff without cause).

81. CAL. LAB. CODE § 2922 (West 1954).

82. *Hejmadi v. AMFAC, Inc.*, 249 Cal. Rptr. 5, 16-17 (Cal. Ct. App. 1988) (citations omitted). As indicated, the quoted statement primarily relates to the plaintiff's good faith and fair dealing claim. The statement is nonetheless appropriate to the present discussion because of its public policy focus.

discretion of employers to terminate employees. A determinative factor in establishing the boundaries of public policy is the identification of the proper source or sources from which public policy is to be derived. More specifically, the question is "whether the violation of a statute or constitutional provision is invariably a prerequisite to the conclusion that a discharge violates public policy."<sup>83</sup> Until quite recently, courts in California were divided on this issue, as were courts across the nation.<sup>84</sup>

The California Supreme Court put the matter to rest in early 1992, when it decided *Gantt v. Sentry Insurance*.<sup>85</sup> There, the court noted that several intermediate appellate decisions had limited the *Tameny* holding in California to public policies derived from statutes.<sup>86</sup> Further, at least three other decisions had concluded "that public policy, as a basis for a wrongful discharge action, need not be policy rooted in a statute or constitutional provision."<sup>87</sup> The *Gantt* court observed that, "notwithstanding the lively theoretical debate over the sources of public policy which may support a wrongful discharge claim, with few exceptions courts have, in practice, relied to some extent on statutory or constitutional expressions of public policy as a basis of the employee's claim."<sup>88</sup> Moreover, the court stated,

it is generally agreed that "public policy" as a concept is notoriously resistant to precise definition, and that courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch, "lest they mistake their own predilections for public policy which deserves recognition at law."<sup>89</sup>

83. *Gantt v. Sentry Ins.*, 824 P.2d 680, 684 (Cal. 1992).

84. *See generally id.* at 684-90.

85. *Id.* The plaintiff in *Gantt* alleged that he was terminated in retaliation for supporting a co-worker's claim of sexual harassment, and that he had been pressured to testify untruthfully or to withhold testimony regarding a state governmental agency investigation. *Id.* at 683.

86. *Id.* at 686 (quoting *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988)). The court cites cases relied upon by the *Foley* court, namely, *Gray v. Superior Ct.*, 226 Cal. Rptr. 570 (Cal. Ct. App. 1986); *Tyco Indus., Inc. v. Superior Ct.*, 211 Cal. Rptr. 540 (Cal. Ct. App. 1985); and *Shapiro v. Wells Fargo Realty Advisors*, 199 Cal. Rptr. 613 (Cal. Ct. App. 1984).

87. *Gantt*, 824 P.2d at 686 (citing *Dabbs v. Cardiopulmonary Management Servs.*, 234 Cal. Rptr. 129, 133 (1987); *Garcia v. Rockwell Int'l Corp.*, 232 Cal. Rptr. 490, 492 (1986); *Koehrer v. Superior Ct.*, 226 Cal. Rptr. 820, 825-26 (1986)).

88. *Gantt v. Sentry Ins.*, 824 P.2d 680, 687 (Cal. 1992).

89. *Id.*

The *Gantt* court concluded that courts in wrongful discharge actions may declare public policy only based upon either the constitution or statutory provisions:

A public policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among the interests of employers, employees and the public. The employer is bound, at a minimum, to know the fundamental public policies of the state and nation expressed in their constitutions and statutes. So limited, the public policy exception presents no impediment to employers that operate within the bounds of law. Employees are protected against employer actions that contravene fundamental state policy. Society's interests are served through a more stable job market, in which its most important policies are safeguarded.<sup>90</sup>

The importance of the *Gantt* decision is evident. However imaginative a court, it is difficult to discover in state constitutions or statutes a policy which negates the right of employers to exercise their critical privileges. To the contrary, courts are more likely to find support for management prerogatives traditionally associated with the ownership of property or with freedom of contract principles, both of which uphold the employer's exercise of its critical privileges.

The restrictive view of public policy espoused by the *Gantt* court was not a surprise, given the relatively narrow boundaries of that concept developed by previous California court decisions. For example, prior to *Gantt*, it clearly had been established that to state a valid claim under the public policy exception, the employee's discharge must impact the public and not be merely a matter of fairness to the individual employee or otherwise serve only private interests. Thus, in *Foley v. Interactive Data Corp.*,<sup>91</sup> the Supreme Court of California held that no public policy was implicated when the plaintiff was discharged because he reported to his superiors that his immediate supervisor was the subject of an FBI investiga-

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90. *Id.* at 687-88. The *Gantt* court held that a public policy relating to prohibitions against perjury was present in California, and that the public policy had its source in the state's legislative scheme. Consequently, the plaintiff had stated an actionable claim. *Id.* at 689.

91. 765 P.2d 373 (Cal. 1988).

tion, focusing on allegations that the supervisor had embezzled from a former employer.<sup>92</sup> The court stated:

Whether or not there is a statutory duty requiring an employee to report information relevant to his employer's interest, we do not find a substantial public policy preventing an employer from discharging the employee for performing that duty. Past decisions recognizing a tort action for discharge in violation of public policy seek to protect the public, by protecting the employee who refuses to commit a crime, who reports criminal activity to proper authorities, or who discloses other illegal, unethical, or unsafe practices . . . . No equivalent public interest bars the discharge of the present plaintiff. When the duty of an employee to disclose information to his employer serves only the private interest of the employee, the rationale underlying the *Tameny* cause of action is not implicated.<sup>93</sup>

*Luck v. Southern Pacific Transportation Co.*<sup>94</sup> also imposed relatively narrow constraints on the public policy concept. The plaintiff in *Luck* alleged that her discharge for refusing to provide a urine sample for a random drug test violated public policy.<sup>95</sup> The court of appeal disagreed, emphasizing that "[t]he right to privacy is . . . a private right, not a public one."<sup>96</sup> In determining the extent of protection afforded employees by the public policy exception, the court relied heavily upon *Foley v. Interactive Data Corp.*,<sup>97</sup> holding that no public policy is implicated if an employee is fired due to some activity where the employer and employee could have established a lawful private agreement.<sup>98</sup> Measuring the plaintiff's claim against the *Foley* standard, the court reasoned that the parties could have lawfully agreed that the plaintiff would

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92. *Id.* at 401-02.

93. *Id.* The California Court of Appeal later held in *American Computer Corp. v. Superior Ct.*, 261 Cal. Rptr. 796 (Cal. Ct. App. 1989), that firing an employee for reporting that consultants were being paid without providing services to the employer failed to establish a wrongful termination claim:

The most that can connect [the plaintiff's] conduct with the public interest is the argument that by reporting his suspicions to his superiors he took action which might eventually prevent or uncover commission of a felony and thereby served the laudable goal of preventing a crime. However, the potential for such a public benefit is not a public interest weighty enough to give rise to a claim for wrongful discharge.

*Id.*

94. 267 Cal. Rptr. 618 (Cal. Ct. App. 1990).

95. *Id.*

96. *Id.* at 635.

97. 765 P.2d 373 (Cal. 1988). See text accompanying notes 91-93.

98. See *id.* at 380 n.12.

submit to urinalysis, without violating any public interest. Therefore, there was no public policy violation when the plaintiff was discharged for refusing to submit to such testing.<sup>99</sup> The court in *Luck* also found that the plaintiff failed to satisfy two other requirements set forth in *Foley*: 1) there must be widespread agreement among reasonable persons as to the existence of the public policy, and, 2) the public policy must be one that was firmly established at the time of termination.<sup>100</sup>

While the *Gantt* court's statement, that "the public policy exception presents no impediment to employers that operate within the bounds of the law,"<sup>101</sup> may be an overstatement, the California judiciary's resolve to confine the public policy concept signifies a refusal to usurp certain aspects of employer authority. Consequently, in light of the law interpreting and refining the principles of *Petermann* and *Tameny*, it is difficult to envision how the public policy exception will significantly curtail an employer's exercise of its critical privileges. This conclusion, supported by the holdings and pronouncements of the California courts already noted, communicates a distinct deference to the employer's right to manage its operations.

For example, the exception has been of no help to fired employees who claim their discharges were against public policy because their former employers violated internal procedures or personnel policies,<sup>102</sup> or because the employee's layoff was alleged to have been pretextual and based really on a supervisor's dislike of the employee and failure to communicate well with her.<sup>103</sup> Likewise, in regard to a fired employee's claim that her employer "used erratic, volatile and unpredictable methods of management, with the result that chaos among City departments and employees resulted," a California appellate court found no cause of action:

What this amounts to is an admission that [the plaintiff] did not like the city manager's management approach. Such is her preroga-

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99. *Id.*; *But cf.* *Semore v. Pool*, 266 Cal. Rptr. 280 (Cal. Ct. App. 1990) (holding that when a private employee is terminated for refusing to take a random drug test, he may invoke the public policy exception to the at will doctrine).

100. *Luck v. Southern Pac. Transp. Co.*, 267 Cal. Rptr. 618, 635-36 (Cal. Ct. App. 1990).

101. *See Gantt v. Sentry Ins.*, 824 P.2d 680, 688 (Cal. Ct. App. 1992).

102. *See, e.g., Burton v. Pacific Nat'l Sec. Bank*, 244 Cal. Rptr. 277, 280 n.3 (Cal. Ct. App. 1988); *Gray v. Superior Ct.*, 226 Cal. Rptr. 570, 572 (Cal. App. 1986).

103. *See Slivinsky v. Watkins-Johnson Co.*, 270 Cal. Rptr. 585, 587-89 (Cal. Ct. App. 1990).

tive. However, nowhere does she plead that any statute or public policy prevents termination of a probationary employee who voices his or her dissatisfaction with a superior's management style.<sup>104</sup>

Similarly, in *Fowler v. Varian Associates, Inc.*,<sup>105</sup> an action brought by an employee who had been fired because his employer believed he was assisting a competitor, the court summarily dismissed the plaintiff's claim that his discharge violated public policy: "We state the obvious in observing that no 'firmly established principle of public policy' . . . authorizes an employee to assist his employer's competitors."<sup>106</sup>

A rather clear example of judicial deference to employer decisionmaking is *Sherriff v. Revell, Inc.*<sup>107</sup> The plaintiff in *Sherriff* reluctantly had accepted a promotion requiring a move from Massachusetts to California.<sup>108</sup> The transfer took place in September or shortly thereafter, and the plaintiff was fired the following February, when his employer decided to consolidate certain jobs.<sup>109</sup> Affirming a summary judgment for the employer, the court rejected the claims of the plaintiff, noting that "[t]he function of the trial court in a wrongful termination action is not to review by trial the business judgment of private employers."<sup>110</sup> Considering whether the employer had fired the plaintiff for an improper cause, the court observed that "[a] management decision that two people can perform executive functions previously performed by three is not an improper cause for termination. Consolidation or elimination of positions, especially management positions, is plainly legitimate management prerogative."<sup>111</sup>

Explicit recognition of a "plainly legitimate management prerogative" is most significant. Public policy may demand that certain protections be extended to employees, but the countervailing force of employer privilege — the "overriding justification" element in Professor Peritt's explanation of the public policy exception<sup>112</sup> — necessarily curbs an employee's rights to job security. If the

104. See *Read v. City of Linwood*, 219 Cal. Rptr. 26, 30 (Cal. App. 1985).

105. 241 Cal. Rptr. 539 (Cal. Ct. App. 1988).

106. *Id.* at 545 (citing *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980)).

107. 211 Cal. Rptr. 465 (Cal. Ct. App. 1985).

108. *Id.* at 468.

109. *Id.* at 469.

110. *Id.* at 471.

111. *Id.* at 472.

112. See *supra* text accompanying notes 71-72.

choices range from holding that public policy requires that discharges be for just cause only, to a deferential approval of employer justification in regard to personnel matters, it is undeniable that the courts have favored the latter. This hardly is surprising, and is indeed the only possible outcome, once courts recognize a strong public policy *supporting* the employer's right to manage its operations.

The upshot is that the public policy tort exception has a relatively insignificant impact upon the employer's exercise of its critical privileges. If there is to be any dramatic impediment to employers in the exercise of their critical privileges, the only remaining prospect is the good faith and fair dealing exception, also known as the covenant theory.

C. *The Covenant Theory (Good Faith and Fair Dealing) in Massachusetts: Fortune v. National Cash Register Co.*

One of the country's most important decisions regarding the development of exceptions to the employment at will rule is *Fortune v. National Cash Register Co.*<sup>113</sup> That case pitted Orville E. Fortune, a salesman, against his former employer, the National Cash Register Co. ("NCR"). Prior to his termination, Fortune was employed by NCR under a written "sales contract" which was terminable at will, without cause, by either party on written notice.<sup>114</sup> His contract provided for a fixed weekly salary plus commissions for sales made within the territory assigned to him for "coverage or supervision," whether the sale was made by him or someone else. The amount of a commission or bonus that a salesman might earn varied, depending upon whether the territory was assigned to the salesman at the date of the order, the date of delivery of the equipment, or both.<sup>115</sup>

In 1968 and for many years prior, Fortune's territory included First National Stores, Inc., a volume buyer of NCR's products. After receiving sales pitches from Fortune and other NCR employees, First National signed an order on November 29, 1968, to purchase approximately \$5,000,000 worth of NCR cash registers, to be delivered over a four-year period. Fortune was identified as the "sales-

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113. 364 N.E.2d 1251 (Mass. 1977).

114. *Id.* at 1253.

115. *Id.*

man credited" on the order form, which also indicated that he was to be paid commissions in the amount of \$92,079.99.<sup>116</sup>

On the first working day of the new year, January 6, 1969, Fortune was told he was being fired.<sup>117</sup> Because of the company's desire to handle the First National order smoothly, Fortune actually was not terminated at that time, and he remained in a "sales support" position. Fortune worked at NCR for approximately another year-and-a-half, during which time he received some, but not all, of the bonus commissions from the First National order.<sup>118</sup> Approximately eighteen months after receiving the termination order, Fortune was asked to retire. When he refused, he was fired in June of 1970. He did not receive any commissions on machines delivered to First National after the date of his discharge.<sup>119</sup>

The trial judge ruled that Fortune could recover if the firing were in "bad faith." Responding to a request for special verdicts on two questions, the jury determined that NCR had acted in bad faith when it terminated Fortune's contract as a salesman in late 1968 and also when it terminated his employment in June of 1970.<sup>120</sup> Judgment for \$45,649.62 was entered, which "apparently represented 25% of the commission due during the eighteen months the machines were delivered to First National, and which was paid [to another NCR employee], and 100% of the commissions on the machines delivered after Fortune was fired."<sup>121</sup>

The central issue on appeal was whether the bad faith termination constituted a breach of the employment at will contract.<sup>122</sup> Holding that the plaintiff had stated a cause of action, the Supreme Judicial Court of Massachusetts consciously departed from

116. *Id.* at 1254.

117. The termination notice was addressed to his home and was dated December 2, 1968. *Id.*

118. NCR paid Fortune seventy-five percent of the bonus credit, apparently relying on the contractual formula which provided that a salesman would receive all of the bonus only if the territory were assigned to the salesman both when the order was placed and when the equipment was delivered to the customer. If the salesman were assigned the territory when the order was placed but not when it was delivered, the salesman was entitled to only seventy-five percent of the bonus. *Id.* at 1253.

119. *Id.* at 1255.

120. *Id.* The case was sent to the jury for special verdict on these questions: "1. Did the Defendant act in bad faith . . . when it decided to terminate the Plaintiff's contract as a salesman by letter dated December 2, 1968, delivered on January 6, 1969? 2. Did the Defendant act in bad faith . . . when the Defendant let the Plaintiff go on June 5, 1970?" *Id.*

121. *Id.* at 1255 n.6.

122. *Id.* at 1255.

earlier state court decisions. Recognizing that the contract at issue was a "classic" terminable at will contract, and that traditionally at will contracts were terminated by either side without reason, the court nonetheless agreed that the plaintiff was entitled to a jury determination of his former employer's motives for terminating his salesman's duties and ultimately discharging him.<sup>123</sup> The court's rationale was "that NCR's written contract contain[ed] an implied covenant of good faith and fair dealing, and a termination not made in good faith constitute[d] a breach of the contract."<sup>124</sup>

"[R]ecognizing the general requirement in this Commonwealth that parties to contracts and commercial transactions must act in good faith toward one another,"<sup>125</sup> the *Fortune* court appeared to be laying the groundwork for substantial change. Likewise, the approving quotations from the New Hampshire Supreme Court's *Monge v. Beebe Rubber Co.*<sup>126</sup> decision seemed to foreshadow a rather dramatic alteration of the status quo in Massachusetts.<sup>127</sup> Yet, there remained some uncertainty as to how far the Massachusetts court would extend its holding. For example, the court noted that it did not need to pronounce adherence to policies so broad as those underlying the *Monge* decision, nor was it necessary to "speculate as to whether the good faith requirement is implicit in every contract for employment at will."<sup>128</sup> Only future litigation would reveal the extent to which the former equilibrium had been altered by the *Fortune* decision, but clearly the employment at will doctrine was destined for change.

Before turning to an analysis of the case law which created this exception, note Professor Perritt's synopsis of the exception:

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123. *Id.*

124. *Id.* at 1255-56.

125. *Id.* at 1256.

126. 316 A.2d 549 (N.H. 1974).

127. For example, the *Fortune* decision quoted the *Monge* court's observation that:

[i]n all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two . . . . We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice . . . . constitutes a breach of the employment contract . . . .

*Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1257 (Mass. 1977) (quoting *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 552 (N.H. 1974)).

128. *Id.*

The third common law doctrine enables an employee to recover for breach of contract when the employer has violated a "covenant of good faith and fair dealing," implied in all contracts as a matter of law. Conceptually, the *covenant theory* requires that contract rights be exercised in a manner that does not violate the covenant. Thus, even though an employer has the right to terminate an at will contract for any reason, good or bad, or for no reason at all, the employer also has a duty not to exercise this right in bad faith or unfairly.

Under the broadest view of this theory, a dismissed employee need only show:

1. An employment relationship existed.
2. The employment was terminated.
3. Some aspect of the termination was unfair or in bad faith.

Upon such showing, a jury is entitled to decide, with only the most general instructions, whether the termination was fair and in good faith.<sup>129</sup>

Significant parallels between the covenant theory and the public policy tort theory make the two mirror images of one another in important aspects. One sounds in contract, the other in tort, but both present courts with nearly identical issues of policy determination. Recall that most extreme application of the public policy exception requires employers to have just cause to discharge employees in order not to violate public policy. Similarly, the employer can be said to have violated its covenant of good faith and fair dealing unless a discharge was for just cause. Adopting the most radical stance under either exception would effectively eliminate at will employment.<sup>130</sup>

On the other hand, assuming adoption of the covenant theory exception, the exception will remain relatively unobtrusive provided there is a narrow demarcation of the duties imposed on an employer by the implied covenant. Again, courts encounter very nearly the same type of choice with the public policy exception. If public policy, narrowly defined, diminishes the likelihood of intrusions upon the employer's critical privileges, so does a narrow definition of the duty of good faith and fair dealing. In short, although both exceptions provide the theoretical justification to eviscerate

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129. Perritt, *supra* note 37, at 399.

130. *See supra* notes 73-76 and accompanying text.

the employment at will doctrine, both also can be implemented to disallow only the most egregious actions of employers.

For several years after the *Fortune* decision, there was insufficient litigation to measure the impact it would have on privileges previously enjoyed by employers. In 1979, two authors, who seemingly applauded the apparent direction of the Supreme Judicial Court of Massachusetts, concluded the change would be dramatic. In their article,<sup>131</sup> the authors acknowledged that *Fortune* did not hold that a good faith requirement is implicit in every contract for employment at will. The writers nonetheless concluded that the case stood as "a clear signal to employers, at least in Massachusetts, that to terminate an employee for reasons that a jury may find to be unacceptable may bring about a retroactive liability of such proportions as to warrant a prudent decision not to terminate at all."<sup>132</sup> The authors also observed that "[i]mposing a standard of good faith and fair dealing in termination cases is tantamount to a requirement of good cause."<sup>133</sup> Although this latter prediction might make perfect sense from a theoretical perspective, in practice the Massachusetts courts have not begun to require good cause for employment terminations in the at will context.

The first hint at what was on the horizon in these cases arose in 1979 in a non-employment case, *A. John Cohen Insurance Agency, Inc. v. Middlesex Insurance Co.*<sup>134</sup> In that case, an insurance agency brought an action against two insurance companies. Relying in part upon *Fortune*, the agency claimed the companies had terminated the insurance agency contract in bad faith. Summary judgment for the defendant companies was affirmed on appeal.<sup>135</sup> The appeals court held that, even assuming, without deciding, that *Fortune* applied to the agency contract, the plaintiff had not alleged "conduct of the type found indicative of bad faith in *Fortune*, termination to avoid payment of bonus credits," and that the plaintiff had not put forth evidence "as to any act by the companies which constitutes an aspect of fraud, deceit, or misrepresentation."<sup>136</sup> Such a narrow reading of the implied covenant of good

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131. Mary A. Glendon & Edward R. Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C. L. REV. 457 (1979).

132. *Id.* at 472.

133. *Id.* (citing Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 368 (1974)).

134. 392 N.E.2d 862 (Mass. App. Ct. 1979).

135. *Id.* at 864 (citations omitted).

136. *Id.*

faith and fair dealing hardly comported with a discharge for cause only standard.

A year later in *Richey v. American Automobile Ass'n, Inc.*,<sup>137</sup> the Supreme Judicial Court of Massachusetts decided a case brought by a former employee against his employer, which included a claim of outrageous conduct causing severe emotional distress.<sup>138</sup> Holding that the complaint failed to state a cause of action for outrageous conduct, the court observed that the trier of fact could infer that by dismissing the plaintiff, the employer made "a bad, unjust, and unkind decision."<sup>139</sup> More significantly, the court noted that even though the plaintiff had not pressed his wrongful termination claims, the considerations which led to a qualification of the employment at will relationship in *Fortune* were not "remotely applicable" to the plaintiff's case.<sup>140</sup> Thus, according to *Richey*, whatever the implied covenant of good faith and fair dealing required, it obviously did not subject an employer to liability for terminating employees based on "bad, unjust, and unkind decisions."

*Wilson v. Brookline Housing Authority*<sup>141</sup> was decided in 1981. The plaintiff in *Wilson* claimed his former employer acted in bad faith when it discharged him from his job as assistant executive director. In a one page opinion, the court held that the plaintiff had not stated a *Fortune* claim, in part because "[t]he general rule is that courts do not sit in judgment on the motives of administrative officers, acting in purely administrative matters, and overturn action found to have been taken in 'bad faith.'"<sup>142</sup> The court also discounted the plaintiff's claim that certain individuals with decisionmaking power were prejudiced against him: "Bias on the part of members of the appointing authority does not prevent the authority from exercising its power to remove an employee."<sup>143</sup>

137. 406 N.E.2d 675 (Mass. 1980).

138. The plaintiff in *Richey* experienced health problems which caused him to miss work. He claimed the defendant caused him to believe that his continued employment was assured if his treating physicians confirmed the existence of the medical problems. He was fired, notwithstanding his production of the requested documentation. *Id.* at 677-78.

139. *Id.* at 678.

140. *Id.*

141. 420 N.E.2d 314 (Mass. 1981).

142. *Id.* at 315 (citation omitted).

143. *Id.* The significance of *Wilson* could be diminished somewhat by the fact that the case involved a public employer; on the other hand, the *Wilson* court did not indicate that its deference to employer authority was limited to public employers.

Later in 1981, the appeals court decided *Maddaloni v. Western Massachusetts Bus Lines, Inc.*<sup>144</sup> In *Maddaloni*, the plaintiff's initial hiring was due partly to his experience in dealing with the Interstate Commerce Commission (ICC), which served the defendant bus company's objective of obtaining a grant of interstate charter rights from the ICC. In fact, the plaintiff's compensation was directly tied to the employer's acquisition of ICC rights. Shortly after obtaining the ICC rights, the plaintiff was terminated. A judgment awarding money damages to the plaintiff was affirmed on appeal, based upon the appellate court's reasoning that the case was indistinguishable from *Fortune*. As stated by the *Maddaloni* court, "The plaintiff knew, of course, when he entered into the contract, that his employment could be terminated. He had a right to assume, however, that the employer would not exercise his prerogative 'to avoid the payment of compensation attributable to past services.'"<sup>145</sup>

The relatively narrow reading of the implied covenant of good faith and fair dealing in these early cases after *Fortune* established the pattern for a limited oversight of employer decisionmaking by the Massachusetts courts. In fact, it is probably safe to say that the covenant of good faith and fair dealing in Massachusetts, as it relates to the employment at will context, is now little more than a mechanism to prevent the deprivation of earned compensation. The possibility that the covenant could impose considerably greater limitations on employers was emphatically rejected by a pair of Supreme Judicial Court of Massachusetts decisions, the first decided in late 1981 and the second in early 1982.

In *Gram v. Liberty Mutual Insurance Co.*,<sup>146</sup> a discharged insurance agent sought damages from his former employer, alleging a bad faith breach of his terminable at will employment contract.<sup>147</sup> The trial court entered judgment on the jury's verdict against the employer in the amount of \$100,000. On appeal, the Supreme Judi-

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144. 422 N.E.2d 1379 (Mass. App. Ct. 1981).

145. *Id.* at 1382 (quoting *Cheney v. Automatic Sprinkler Corp.*, 385 N.E.2d 961 (Mass. 1979)). The Supreme Judicial Court of Massachusetts later affirmed the decision of the appeals court, with very similar reasoning, in *Maddaloni v. Western Mass. Bus Lines, Inc.*, 438 N.E.2d 351 (Mass. 1982).

146. 429 N.E.2d 21 (Mass. 1981).

147. The plaintiff in *Gram* had an acceptable, nearly exemplary career with his employer, except for certain minor violations of company rules regarding the use of company mail. The plaintiff claimed the reasons given to support his discharge, the alleged violations of company policies, were a pretext for the malice his superiors harbored toward him. *Id.* at 23-25.

cial Court of Massachusetts considered whether the facts supported the plaintiff's entitlement to damages. The court observed that the plaintiff, an employee of the defendant for seven years, was the most productive salesman in his office.<sup>148</sup> Further, the court held that the jury was warranted in finding he was discharged for an infraction that did not violate any policy of the company, and he was in fact discharged without good cause.<sup>149</sup> The question, then, was squarely presented: is the implied covenant of good faith and fair dealing violated when there is no good cause for the employee's discharge?

The *Gram* court noted it had not previously equated the absence of good cause with the absence of good faith, citing *Richey v. American Automobile Ass'n, Inc.*,<sup>150</sup>

where we assumed that the decision to discharge an employee was "bad, unjust, and unkind" (thus without good cause) and contrary to the employee's expectations, we said "if the present facts should be held to qualify a discharged employee for relief, then a new practical definition might have to be given to employments theoretically terminable at will."<sup>151</sup>

The court then delineated more directly the scope of the implied covenant of good faith and fair dealing:

What we have is a case in which the jury were warranted in concluding that [the plaintiff's] discharge was "bad, unjust, and unkind". . . contrary to [the plaintiff's] reasonable expectations, and the product of inadequate investigation.

The question, then, is whether we should allow recovery for breach of contract of employment at will where an employee is discharged without cause by an employer who had no proper motive for discharging the employee, unless one regards the absence of good cause itself or the mistaken belief that there is good cause as conclusively demonstrative of bad faith. A forceful argument could be made that job security should be assured by a common law rule protecting a person in [the plaintiff's] position . . . . We could, of course, adopt a rule extending a common law right to an at will employee to recover damages for breach of an imposed condition of his

148. *Id.* at 28.

149. *Id.* at 24.

150. 406 N.E.2d 675 (Mass. 1980).

151. *Gram v. Liberty Mutual Ins. Co.*, 429 N.E.2d 21, 26 (Mass. 1981) (citing *Richey*, 406 N.E.2d at 675; *Agis v. Howard Johnson Co.*, 355 N.E.2d 315 (Mass. 1976)).

or her employment contract that he or she not be discharged except for good cause . . . . We decline at this time to adopt a general rule that the discharge of an at will employee without cause is alone a violation of good faith and fair dealing. We are aware of no case that has gone so far.<sup>152</sup>

Several months later, the Supreme Judicial Court of Massachusetts decided *Cort v. Bristol-Myers Co.*,<sup>153</sup> relying in part upon the reasoning of *Gram*. *Cort* involved three plaintiffs, former employees of the defendant, who allegedly were fired because of their refusal to provide information to their employer which they regarded as confidential or personal.<sup>154</sup> The trial judge entered judgments for the defendant notwithstanding the jury's verdicts for the plaintiffs on claims that their former employer discharged them in bad faith. The trial judge instructed the jury that each plaintiff could recover for the bad faith termination of his contract if the employer "had no good business or other legitimate reason for the termination and if [the employer] was motivated solely or primarily by 'bad faith, malice, ill-will, spite, personal hostility, or retaliation.'"<sup>155</sup> The Supreme Judicial Court of Massachusetts noted that this instruction "extended the concept of bad faith well beyond the limits expressed in our holding in the *Fortune* case."<sup>156</sup>

The court distinguished the *Cort* plaintiffs from the plaintiff in *Fortune*, who was discharged "to deprive him of commissions already earned but not yet payable," and the plaintiff in *Gram*, who "lost reasonably ascertainable future compensation based on past

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152. *Id.* at 28 (citations omitted). It should be noted that the *Gram* court did hold that the plaintiff was entitled to some money damages, measured by the amount of renewal commissions he could reasonably expect to receive based on his past service to the employer. *Id.* at 29.

153. 431 N.E.2d 908 (Mass. 1982).

154. In 1974, Bristol-Myers, employer of the *Cort* plaintiffs, determined that the performance of its Boston sales division had been the worst of any of its sales divisions. The Boston district sales manager was instructed to send a questionnaire to each salesman in the Boston district. *Id.* at 909. The information sought included subjects such as business experience, education, family, home ownership, physical data, activities and aims. The questions concerning "AIMS" asked each respondent to state "his qualifications for his job, his principal strengths, his principal weaknesses, activities in which he preferred not to engage, the income he would need to live the way he would like to live, and his plans for the future." *Id.* at 913. There was evidence that answers to the questionnaires could be used as a type of psychiatric test, but no evidence that the answers were so used or were intended to be so used. *Id.* at 909.

155. *Id.* at 910 (quoting the trial judge's instruction).

156. *Id.*

services.”<sup>157</sup> Moreover, the court noted it rejected the general concept of job security as a basis for recovery for termination without cause of an at will employee.<sup>158</sup> Prior to being discharged, the plaintiffs were advised that their job performances were unsatisfactory. Each plaintiff claimed the defendant employer gave the poor work performance reason merely as a pretext, and the real reason for termination related to their refusal to provide the requested information. In response to these claims, the court held:

We decline to impose liability on an employer simply because it gave a false reason or a pretext for the discharge of an employee at will. Such an employer has no duty to give any reason at the time of discharging an employee at will. Where no reason need be given, we impose no liability on an employer for concealing the real reason for an employee's discharge or for giving a reason that is factually unsupported.<sup>159</sup>

Once the Supreme Judicial Court of Massachusetts had spoken in *Gram* and *Cort*, it was clear that the covenant theory exception would not seriously curtail the employer's exercise of its critical privileges. For example, it had become apparent that Massachusetts would not require good cause for dismissals. Subsequent decisions bore this out. In *McCone v. New England Telephone and Telegraph Co.*,<sup>160</sup> the appeals court stated that “arbitrary, bad faith performance evaluations,” which had allegedly resulted in the plaintiffs' dismissals, did not constitute a breach of the implied covenant of good faith and fair dealing in an at will employment contract.<sup>161</sup> Similarly, in *Tenedios v. Wm. Filene's Sons Co., Inc.*,<sup>162</sup> it was held “[t]hat the plaintiff was fired arbitrarily and was injured in her expectations of future wages or other future emoluments does not, without more, encompass the *Fortune*-type of liability, however meretricious we may consider the dismissal to have been.”<sup>163</sup>

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157. *Id.* at 911. See *supra* note 149 (regarding the partial recovery of damages by the plaintiff in *Gram*).

158. *Id.* (citation omitted).

159. *Id.*

160. 471 N.E.2d 47 (Mass. 1984).

161. *Id.* at 49-50.

162. 479 N.E.2d 723 (Mass. App. Ct. 1985).

163. *Id.* at 726.

*Siles v. Travenol Laboratories, Inc.*,<sup>164</sup> decided only a short time after *Gram* and *Cort*, also confirms that, in practice, the covenant theory would only narrowly circumscribe employer power. The plaintiff in *Siles* was a salesman who was fired after he and his supervisor had an acrimonious encounter with one of the employer's customers. The plaintiff alleged that his supervisor lied about the incident to protect his own self-interest.<sup>165</sup> After trial, the jury returned a verdict in favor of the plaintiff and assessed damages in the amount of \$250,000, but the trial judge sustained the defendant's motion for judgment notwithstanding the verdict. The trial court was affirmed on appeal, based on the following rationale:

[T]he mere absence of good cause to discharge an employee, while tending to negate the existence of good faith, does not by itself give rise to an enforceable claim for breach of a condition of good faith and fair dealing . . . . Rather, our cases indicate that a plaintiff generally does not have an enforceable claim for "bad faith" termination of an at will employment contract unless he can show that: (1) the discharge involved an intent of the defendant to benefit financially at the plaintiff's expense, such as for the purpose of retaining for itself sales commissions or pension benefits which would otherwise be due to the plaintiff . . . , or (2) that the employer's reason for discharge was contrary to public policy . . . .<sup>166</sup>

The *Siles* court clearly stated the limits of the covenant theory in Massachusetts. In fact, Massachusetts employment cases decided in the post-*Gram/Cort* era (since 1982), show that plaintiffs' claims relying upon this exception frequently are rejected with remarks that the employer was not the beneficiary of any financial windfall resulting from the denial to the employee of compensation for past services.<sup>167</sup> As noted above, the implied covenant of good faith and fair dealing as it relates to employment at will contracts in Massachusetts, is now little more than a protective device for those who have been deprived of already earned compensation, primarily salesmen and others who receive commissions or bo-

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164. 433 N.E.2d 103 (Mass. App. Ct. 1982).

165. *Id.* at 104-05.

166. *Id.* at 106 (citations omitted).

167. In addition to the cases already cited on this point, see, e.g., *Smith-Pfeefter v. Superintendent of the Walter E. Fernald State Sch.*, 533 N.E.2d 1368, 1371 n.4 (Mass. 1989); *Yovino v. Fish*, 539 N.E.2d 548, 550 (Mass. App. Ct. 1989); and *Glaz v. Ralston Purina Co.*, 509 N.E.2d 297, 299 (Mass. App. Ct. 1987).

nuses.<sup>168</sup> In any event, simply preventing an employer from “over-reaching for his financial gain”<sup>169</sup> (a perspective similar to the narrow confinement of “public policy” with regard to the public policy tort theory exception)<sup>170</sup> is hardly the type of restriction that will restrict an employer in the exercise of its critical privileges.

Although the Massachusetts judiciary, like its California and Michigan counterparts, does not speak of “critical privileges,” one recognizes a healthy regard in these cases for the right of employers to exercise such fundamental privileges without undue restraint. A careful reading of the decisions which define the covenant theory exception reveals that the employer’s power to manage its business has, for the most part, been carefully preserved. Consequently, the covenant theory, like the implied contract and public policy tort theories, does not significantly alter the status quo.<sup>171</sup>

## VI. A RETROSPECTIVE AND SECOND CHALLENGE

In military jargon, the term “bracketing” describes the process of firing two rounds of artillery, the first aimed short of a target and the second beyond it, to determine range. Bracketing of a different sort will be valuable in analyzing the ramifications of developments in the employment at will doctrine. The target or objec-

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168. An example of a “non salesman” who successfully stated a *Fortune*-type claim is the plaintiff in *Cataldo v. Zuckerman*, 482 N.E.2d 849 (Mass. App. Ct. 1985), who was a supervisor of construction operations. The plaintiff in *Cataldo* alleged that his firing was wrongful, and, moreover, that he had been deprived of certain ownership equities that he had been promised by his employer, a real estate developer. The court agreed that this plaintiff had stated a claim under the teaching of *Fortune*.

169. See *Glaz*, 509 N.E.2d at 299.

170. Although the courts are rather conservative in applying the public policy exception, they seem to be most amenable to adopting it. The covenant theory, on the other hand, is not only applied narrowly, it is also rejected outright much more often than the public policy exception.

171. Recall the analytical framework set out in note 20 and the suggestion that it was complementary to the principal methodology followed herein. In this alternative scheme, the extent to which employers have retained the ability to control employee choices *within* each particular sphere of either critical or non-critical activities is a measure of the power *intensity* retained by employers in regard to that particular realm of activities. Whether employers have altogether lost their power to control non-critical employee activities presents a different issue, relating more to the *comprehensiveness* of employer power.

The ultimate conclusion of this article is that exceptions to the employment at will rule have had only a limited impact on the employer’s critical privileges. Therefore, the *intensity* attribute of employer power, as it operates in this particular sphere, remains intact. The *comprehensiveness* of employer power has been altered, though, insofar as the exceptions have placed significant restrictions on an employer’s exercise of its non-critical privileges.

tive is an accurate assessment of the law of wrongful discharge, with particular emphasis on the significance of the exceptions to the employment at will rule. A pair of scholarly commentaries serve as bracketing rounds to determine the range of the decisions to date. These works are significant to this inquiry primarily due to their substantive content, but also due to the timing of their publication.

The first piece, written by Professor Lawrence Blades, has been discussed.<sup>172</sup> Published in 1967, Blades' article pre-dated the widespread judicial recognition of exceptions to the employment at will rule and even helped to usher in those changes.<sup>173</sup> Professor Paul Weiler, the author of the second commentary, published in 1990,<sup>174</sup> had the historical perspective from which to survey the major developments relevant to this article. Although Blades' article may be considered ambitious for its time, subsequent events make it appear to have presented a limited agenda for change, at least insofar as it addresses power in the workplace. Hence, it may be characterized as being short of the target. Weiler's book, which is more comprehensive in its treatment of employment law issues than Blades' article, includes a critique of employment at will developments over the past two decades and argues for systemic changes which would constitute a fundamental shift in the status quo. Arguably, this latter work is a round beyond the target, a view which should become clearer as the contents of Weiler's book are discussed.

Recall the observation regarding the significance of the title of Blades' article, and specifically its limitation to only the *abusive* exercise of employer power.<sup>175</sup> As already explained, Blades' article was not a call for employers to share their power with employees. Note the contrast implicit in the title of Weiler's book, focusing on workplace governance and the promise of a broader agenda. It becomes apparent early in Weiler's book that a more profound challenge to the present system is intended. In the preface to his book Weiler writes: "I set out in these pages to cover much of the vast terrain encompassed within the law of the workplace. The story of how this book came to be written will, I hope, orient the reader to

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172. See *supra* text accompanying notes 21-26.

173. See *supra* note 22 and accompanying text.

174. Weiler, *supra* note 29.

175. See *supra* text accompanying notes 21-26.

the particular trail that my argument will follow."<sup>176</sup> Weiler then notes that, although he expected the project to be an article on wrongful dismissal, it soon evolved into a broader treatment of workplace issues, with specific focus on the need for more effective representation of the interests of employees. In this vein, Weiler writes:

If we do want to guarantee to employees in a firm anything like the kind of representation now enjoyed as a matter of course by the firm's shareholders, we will have to take seriously the European experience in the workplace . . . . In particular, we shall have to establish a new basic employment right that will guarantee meaningful participation and representation for employees in every sizable office and plant in this country.<sup>177</sup>

As promised, Weiler does indeed cover much of the vast terrain encompassed within the law of the workplace. In the process, he convincingly argues that the "serious vacuum" in the effective representation of employee interests is not being filled by current institutional alternatives, namely, the competitive labor market, our system of labor law and collective bargaining, sophisticated human resource management efforts, etc. Much of his commentary and critique is by way of introduction to the heart of the book, which consists of proposals for "wide-ranging legal reforms both within and beyond our current labor law model."<sup>178</sup> In a general sense, Weiler's entire book is pertinent to the thesis of this article, but of primary relevance is his perspective on employment at will.

In the second chapter of his book, Weiler summarizes the opposing positions on employment at will. He begins with a perspective on the "Legal Inroads on Employment at Will," focusing on arguments which support the current "conventional wisdom" that there should be a general protection against any unfair dismissal.<sup>179</sup> Then, he impartially summarizes the positions of the defenders of employment at will.<sup>180</sup> Although Weiler is forthright in

176. Weiler, *supra* note 29, at vii.

177. *Id.* at ix.

178. *Id.*

179. *Id.* at 49. Given the thesis of this article, one might well question just how "conventional" is the wisdom that there should be protection against all unfair dismissals. In any event, Weiler seems to have been limiting his statement on this point to the dialogue among academics. See *id.* at 49 n.6.

180. The first defense addressed is that of mutuality, which is grounded in the proposition that in light of the bilateral arrangement between employer and employee, "[i]f free-

recognizing the validity and even the strength of the defenders' arguments,<sup>181</sup> he counters them with a methodical exposition of what he perceives to be the faulty premises of employment at will's defenders.<sup>182</sup> Next, Weiler considers alternative institutional forms of legal intervention which might be used to police wrongful dismissals and maintain employee rights. In addition to common law litigation, Weiler considers the pros and cons of statutory solutions, arbitration and collective bargaining.<sup>183</sup> Finally, he concludes the chapter with a program of governmental regulation<sup>184</sup> for the "dismissal problem," which he characterizes as second-best to collective bargaining.<sup>185</sup>

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dom of one side to terminate the relationship at will is necessary to protect its interests, then it is only fair to provide a similar freedom for protection of the interests of the other side." A second defense proceeds from an economic perspective and presents a "more plausible" defense, according to Weiler. Simply stated, the principal claim is that the efficient operation of the labor market makes it necessary that employers enjoy the broad prerogative to terminate the employment relationship. *Id.* at 56-63.

181. For example, Weiler observes that once it is recognized that a mandatory right to tenure is the natural outcome of the standard critique of employment at will,

it becomes easier to appreciate the vigorous criticism it has recently provoked from the defenders of employment at will: from those who believe that the historic virtues of mutual freedom in the standard employment contract, the mutual freedom about how to make and remake that employment contract, have much more contemporary value than is supposed in the conventional argument for liberal reform.

*Id.* at 56-57.

182. Some of Weiler's points in this portion of the book are particularly noteworthy to me because I believe they support the premises of this paper regarding the allocation of power in the workplace. For example, Weiler explains that employees lack actual bargaining power in the marketplace, primarily because employees, especially long-term employees, stand to lose a great deal by changing employers. *Id.* at 75-76. Secondly, although the market might dictate contractual undertakings about unjust dismissal between employees and owners (shareholders), Weiler points out that the managers of a firm have interests not necessarily aligned with those of the shareholders. Thus, Weiler calls attention to the freedom of management to engage in "self-regarding" decisions, a power jealously guarded which would naturally result in resistance to change: "They would have to take much greater care in investigating and documenting the case for dismissal, they would have to defend their decisions and policies against challenges in an outside forum, and they would lose the felt benefit that comes from wielding unreviewable power over their subordinates." *Id.* at 77.

183. *Id.* at 78-94.

184. Weiler's proposal would include a limited role for common law litigation, restricted to those instances of wrongful dismissal that contravene public policy

in the stronger sense of that term. This tort action should be available whenever an employer has exercised its contractual prerogative to terminate the worker's employment and in the process has flouted some value that has been authoritatively declared by the legislature or the judiciary to be in the best interest of the community.

*Id.* at 100.

185. *Id.* at 94-104. Although Weiler favors the collective bargaining alternative, he does not see this as a viable solution for reasons much too intricate to expound upon here. The interested reader is directed to pages 87-94 in Chapter 2 of *GOVERNING THE WORKPLACE*, and Chapter 3 in its entirety.

The dominant theme of Weiler's book as noted, is his perception of the need to establish rights guaranteeing employees meaningful participation and representation in the workplace.<sup>186</sup> The obvious implication is that employees are currently somewhat precluded from such participation and representation. Most pertinent to this article are Weiler's "skeptical appraisal of the operation of the wrongful dismissal litigation,"<sup>187</sup> his assessment of the exceptions to the employment at will rule and, more particularly, his explanation of why these exceptions fail to empower employees. Weiler makes the following general observations regarding common law litigation:

To this point, the standard American response has been through the judicial process: lawsuits are brought by discharged workers against their former employers, and, if successful, they produce monetary rewards. As we have seen, the substantive scope of the law is quite narrow. Most states now agree that discharges for bad reasons — that is, for reasons that contravene public policy — are actionable in tort. A growing number of states will entertain contract suits for dismissals in violation of some representation or undertaking to the employee. However, in the reported cases there is as yet only a bare hint of a mandatory requirement of good reason for the dismissal of any long-service employee (as an aspect, perhaps, of a non-waivable duty of good faith in the employment relationship). The third generation of cases to emerge in the next decade will face the last crucial test of how far the law will go in constraining the employer's dismissal prerogative.<sup>188</sup>

Weiler rejects outright the notion that common law litigation, even with the benefit of currently recognized exceptions to the employment at will rule, can fill the "representation gap" effectively. Instead, he champions a power-sharing arrangement. Whether or not one agrees with Weiler's position on the merits of empowering employees, one must concede the underlying premise of his work, that unorganized employees do not have a significant role in workplace decisionmaking. In fact, Weiler's book makes sense only because exceptions to the employment at will rule have not resulted in a profound change in the workplace's balance of power. Instead, core principles relating to the employer's exercise of its critical

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186. See *supra* text accompanying note 163.

187. Weiler, *supra* note 29, at 101.

188. *Id.* at 79.

privileges have been carefully preserved. Thus, Blades' article was our first bracketing round, proposing changes to the employment at will rule but essentially calling for restrictions only on the exercise of employers' non-critical privileges. As the law has evolved, it seems that Blades fired short of the target, since the rulings of some courts have even impacted employers' exercise of their critical privileges. But such limitations are imposed by the judiciary, using the public policy tort and covenant theories, only in narrowly circumscribed circumstances, more often than not requiring an employer violation of the most explicit public policies. Weiler's book, on the other hand, provides the second bracketing round, fired beyond the target, and calling for a rein on the exercise of employers' critical privileges by sharing of this power.

## VII. CONCLUSION

Relying on hindsight, it is no wonder that the employment at will rule came under fire in the late 1960s and 1970s. Consider the historical context. Absolute freedom of contract notions had been out of place in the employment law field for quite some time. Most other aspects of the employment relationship were subject to legislative restrictions of one type or another, requiring employers and employees to deal with one another within relatively narrow confines.<sup>189</sup> In the midst of this heavily regulated environment was a

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189. See generally Willard Wirtz, *Human Rights and Responsibilities at the Workplace*, 28 SAN DIEGO L. REV. 159 (1991).

So many of you here know so much of the story of the development of the employment rights and responsibilities concept over the past sixty-five years, that only the briefest summary of what has been accomplished is an appropriate preface to a consideration of what has not been. [In the year 1925] employees had virtually no rights. [A decade later], all American employment related to interstate commerce was brought within the rule, previously applicable only to the railway industry, giving employees the right to organize unions and obligating employers to bargain with them. Over the next twenty-five years, about forty percent of American workers were covered by collectively bargained provisions — seniority clauses giving them job rights, compensation clauses that included broad “fringe benefits,” guarantees against unjust discharge, grievance and arbitration clauses — that gave meaning to the concept of human rights and responsibilities in the workplace.

Another branch of this law also started developing in the 1930s. Almost all employees were guaranteed by federal and state statutes minimum wages, time and a half for overtime, limited recovery if they were injured on the job, restricted unemployment compensation, and a degree of financial security in their retirement.

Starting again in the 1960s, these statutory protections have been significantly widened. In addition to a variety of other provisions (covering medical and safety protection and limited guarantees regarding health care and retirement plans), these most recent enactments have been concentrated primarily on prohibiting employer dis-

relic — employment at will — with its sprawling, untrimmed branches. The oddity is not so much that the rule has been modified, that this “free market tree” has been pruned; more surprising is the fact that it survived so long in its wild state. In any event, a pruning of employer discretion undeniably has taken place. Our objective here has been to render an accounting, and evaluate not only what employers have lost, but also to focus on what they have retained.

All of the clamor regarding the demise of the employment at will doctrine suggests that this tree has been cut off at the base. In fact, the much heralded fall is nothing more than an overdue pruning, a limitation on the exercise of only the grosser abuses of power. The employer's right to exercise its critical privileges remains unimpaired. The pruning has been performed with surgical precision, and the trunk has been carefully maintained.

This article is titled, in part, as “The Revolution That Wasn't.” It has been said that “[r]evolution brings on the speaking of a new, unheard of language, another logic, a revaluation of all values.”<sup>190</sup> That has not occurred with reference to the present subject. The courts have not rejected the old values. In fact, they have very carefully worked within the confines of the old values, thereby preserving them. There is no “new, unheard of language” in these decisions; instead, there is much of the old and familiar deference to privilege and the prerogatives of property. One court, recognizing an exception to the employment at will rule, observed that “the employer is not so absolute a sovereign of the job that there are not limits to his prerogative.”<sup>191</sup> Perhaps not, but a sovereign he remains.

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crimination among employees. The Equal Pay Act of 1963 requires that women be paid the same rate for equal (though not necessarily comparable) work. The Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. [Older citizens] . . . are protected . . . by the Age Discrimination in Employment Act of 1967.

*Id.* at 160-61 (citations omitted).

190. Carl J. Friedrich, *An Introductory Note on Revolution*, 1966 Y.B. AMER. SOC. POL. & LEGAL PHIL. 4 (quoting EUGEN ROSENSTOCK-HUESSY, *DIE EUROPÄISCHEN REVOLUTIONEN* [OUT OF REVOLUTION] (rev. ed. 1938)).

191. *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1336 (Cal. 1980).

