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Toward a Wrongful Termination Statute for California

by

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In California, as in most states, employment at-will is on its way out. This is true despite Labor Code Section 2922 and despite the California Supreme Court’s holding in Foley v. Interactive Data Corp. It is on its way out for the same reason that other legal rules wither and disappear: it is increasingly incongruous with the legal and social fabric of which it is a part.

The basic premise of the at-will rule—that workers have no rights except those they are able to extract through individual negotiation and agreement—is inconsistent with the regime of collective bargaining and with the pattern of legal regulation of the workplace that has

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1. California Labor Code section 2922 provides: “An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month.” CAL. LAB. CODE § 2922 (West 1989).

2. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988). The Foley court held, among other things, that tort damages are not available for breach of the covenant of good faith and fair dealing in an employment contract.


4. In Payne v. Western & Atl. R.R. Co., 81 Tenn. 507 (1884), the court put it this way: The sufficient and conclusive answer to the many plausible arguments to the contrary, portraying the evil to workmen and to others from the exercise of such authority by the great and strong, is: They have the right to discharge their employee[s]. The law cannot compel them to employ workmen, nor to keep them employed. If they break contracts with workmen they are answerable only to them; if in the act of discharging them, they break no contract, then no one can sue for loss suffered thereby. Trade is free; so is employment. The law leaves employer and employee[e] to make their own contracts; and these, when made, it will enforce; beyond this it does not go. Id. at 520.

emerged over the last quarter century. Moreover, the recent decline in union organization has created a vacuum that provides additional impetus for legal change. The rule itself has become so riddled with statutory and judicially-created exceptions that it can scarcely stand.

The at-will rule is also out of step with job protection systems adopted by other industrialized nations and with international norms. All of our European competitors, as well as our Canadian neighbors, have statutes that protect employees against wrongful discharge and establish tribunals in which such claims can be adjudicated. A con-


7. From the mid-1950s to the mid-1980s, the unionized share of the private sector work force declined from about 40% to about 15%. See Weiler, Milestone or Tombstone: The Wagner Act at Fifty, 23 HARV. J. ON LEGIS. 1, 3-12 (1986); see also Korn, Collective Rights and Individual Remedies: Rebalancing the Balance After Lingle v. Norge Division of Magic Chef, Inc., 41 HASTINGS L.J. 1149, 1174-78 (1990) (discussing the statistics and causal factors regarding declining unionization).


The courts also have recognized numerous judicial exceptions to the at-will rule. See Mauk, Wrongful Discharge: The Erosion of 100 Years of Employer Privilege, 21 IDAHO L. REV. 201, 226-45 (1985); St. Antoine, A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower, 67 NEB. L. REV. 56, 59-61 (1988).

vention of the International Labour Organization of the United Nations (ILO) calls upon all signatory countries to adopt such a statute; the United States, however, is the only country in the world whose official representative voted against that convention. The United States stands isolated within the international community.

At-will employment increasingly clashes with real life expectations in the work place. Tell modern workers that they can be fired for any reason or none at all, and they are likely to be surprised. Indeed, employers may be surprised as well since the modern corporate manager understands that fair treatment of workers yields productivity and most likely has implemented systems of performance evaluation, progressive discipline, and internal grievance machinery. The company

10. Convention No. 158: Termination of Employment, 65 ILO Official Bulletin Series A, No. 2, 72 (1982) (concerning termination at the initiative of the employer). The Convention calls on signatory countries to require a "valid reason" for terminating covered employees (Article Four), to prohibit discriminatory firings (Article Five), and to provide an appeal procedure before an impartial body (Article Eight).

The Convention leaves signatory countries flexibility in choosing the means of implementing these standards. Article One urges member countries to enact legislation to give effect to the provisions of the Convention's proposal "in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice."


12. A survey conducted in Nebraska found that the overwhelming majority of people polled did not know that in the absence of a contract, employers can terminate employees without giving a reason. Forbes & Jones, A Comparative, Attitudinal, and Analytical Study of Dismissal of At-Will Employees Without Cause, 37 Lab. L.J. 157, 165 (1986). My students, who comprise the staff at a Workers' Rights clinic in San Francisco, confirm this data: workers they interview are almost uniformly under the impression that the law protects them against arbitrary discharges. This impression is not surprising, given the modern prevalence of long-term employment. See Carey, Occupational Tenure in 1987, Monthly Lab. Rev., Oct. 1988, at 12; Hall, The Importance of Lifetime Jobs in the U.S. Economy, 72 Am. Econ. Rev. 716, 719-21 (1982).

13. In a survey of 222 companies including manufacturing and nonmanufacturing business as well as nonbusiness enterprises, the overwhelming majority maintained a system of progressive discipline (94% of union work forces, 93% of nonunion work forces). Employee Discipline and Discharge, BNA Personnel Policies F. Surv. No. 139 (Jan. 1985) [hereinafter Personnel Policies Survey]; see also D. Ewing, Justice on the Job: Resolving Grievances in the Nonunion Workplace (1989) (discussing various employer-instituted models of due
lawyer may advise adoption of express at-will provisions in employ-
ment documents as a prophylactic measure, but against this back-
ground even an employer would find such provisions artificial, if not hyp
critical.

Most significantly, employment at-will has become incongruous
with our social norms, with our views of who we are as a polity, and
with the kind of society in which we want to live. To put the matter
bluntly, employment at-will should be given notice and

That is not likely to occur, however, without legislative action.
California appears to be the only state that statutorily enshrin
employment at-will principle as a

14. The efficacy of at-will disclaimers, which are provisions in employment documents
designed to preserve at-will status, has been the subject of a number of lawsuits and of much
academic discussion. See Wilkerson v. Wells Fargo Bank, 212 Cal. App. 3d 1217, 261 Cal.
Rptr. 185 (1989); McClain v. Great Am. Ins. Co., 208 Cal. App. 3d 1476, 256 Cal. Rptr. 863
(1989); Bratton v. Menard, 438 N.W.2d 116 (Minn. Ct. App. 1989); M. McClain, EMPLOY
MENT TERMINATION LAW: A PRACTICAL GUIDE FOR EMPLOYERS 45-47 (rev. 1989); Witt & Goldman,
15. The BNA Personnel Policies Forum Survey found that 71% of the participating firms
had taken steps to protect against wrongful termination liability in the two years preceding
the survey. Of these, 53% had added at-will language to applications and handbooks; 49%
had removed language suggesting limits on management's right to terminate. Id. at 27. See
PERSONNEL POLICIES SURVEY, supra note 13, at 27.
16. My thoughts on this subject are by no means original. More than 20 years ago
Professor Laurence E. Blades published a critique of the at-will rule in which he advocated
modification through judicial creativity. Blades, Employment at Will vs. Individual Freedom:
then the volume of scholarly literature on the subject has been replete with articles critical of
the at-will principle and advocating judicial or legislative modification. See Mauk, supra note
8; Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 VA. L.
REV. 481 [hereinafter Summers, Individual Protection] (1976); Summers, Individual Rights in
the Workplace: The Employment-at-Will Issue: Introduction, 16 U. MICH. J. L. REv. 201
(1983); Note, Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate
Only in Good Faith, 93 HARV. L. REV. 1816 (1980). Not all of the literature, however, has
been critical of the rule. See Epstein, In Defense of the Contract at Will, 51 U. CHI. L. REV.
947 (1984) (support for the at-will rule based on economic efficiency); Harrison, The "New"
Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis, 69 IOWA
argument); St. Antoine, supra note 8, at 66-69 (same criticism); Wilborn, Individual Employ-
ment Rights and the Standard Economic Objection: Theory and Empiricism, 67 NEB. L. REV.
17. Advocacy of statutory change of the at-will rule is not original either. In fact,
numerous academics have also advocated this specific type of change. See, e.g., Summers,
Individual Protection, supra note 16, at 481; see also infra note 55.
mon law, precedent supports the view that those ancient provisions should not prevent the continuing development of the common law. It seems unlikely, however, that the California Supreme Court—as it is presently constituted—will accept that argument any time soon.

Considerable flexibility remains within the common law joints. The California Supreme Court in Foley v. Interactive Data Corp. reaffirmed the proposition that the at-will presumption can be negated by implied as well as express contractual provisions and left open the question of remedies available for contractual breach. While the court rejected tort damages for breach of the covenant of good faith and fair dealing, it left intact the premise that the covenant inheres in the employment contract as in other contracts. Thus freed from the burden of carrying differential remedial consequences, the covenant potentially can enjoy a broader interpretation in future cases. Moreover, the public policy exception to the at-will rule continues to provide the plaintiff with tort remedies, despite the fact that the exception itself is still largely undefined. From the perspective of lit-

20. In Li v. Yellow Cab, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975), the California Supreme Court abolished the defense of contributory negligence and replaced it with a system of comparative negligence, even though the rule of contributory negligence was then codified in California Civil Code section 1714. It held that section 1714 was not intended to and did not preclude judicial action in furtherance of the purposes underlying it. Id. at 832, 532 P.2d at 1239, 119 Cal. Rptr. at 871. The court based this holding in part on the nature of the Code, which as a continuation of the common law, must remain flexible. Id. at 814-17, 532 P.2d at 1233-34, 119 Cal. Rptr. at 865-66; cf. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (advocating the more radical position that courts should disregard ancient statutes so as to require legislatures to confront them anew).
22. Id. at 676-82, 700, 765 P.2d at 384-88, 401, 254 Cal. Rptr. at 221-27, 239.
23. Id. at 699, 765 P.2d at 401, 254 Cal. Rptr. at 239. Justice Broussard, dissenting as to the rejection of tort damages, suggested that contract damages could encompass recovery for emotional distress in some cases. Id. at 712, 765 P.2d at 410, 254 Cal. Rptr. at 248 (Broussard, J., concurring in part and dissenting in part). One post-Foley case has held that a plaintiff may recover contract damages for emotional distress when the emotional distress caused by the breach of an employment contract was foreseeable. Mosely v. Metropolitan Life Ins. Co., 1 DAILY LAB. REP. A-6, Jan. 2, 1990; cf. Carty, Contract Theory and Employment Reality, 49 MOD. L. REV. 240 (1986) (discussing the issue of contract damages for emotional distress caused by breach of an employment contract as handled under British law).
24. Foley, 47 Cal. 3d at 692-93, 765 P.2d at 396, 254 Cal. Rptr. at 234-35.
25. Id. at 683-84, 765 P.2d at 389, 254 Cal. Rptr. 227.
27. California courts, along with others, have held that an employee who is dismissed for reasons that offend public policy has a cause of action in tort against his employer. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (worker dismissed for refusing to participate in unlawful activities).
28. The precise contours of the exception, however, have not been delineated. The court
igation attorneys on both sides, there is still plenty of fruit on the trees.

From the perspective of public policy, however, abandoning the arena exclusively to common law development would be irresponsible for a number of reasons. The field is full of uncertainties that will take many years to resolve. Meanwhile, anomalies abound. Most of the current wrongful termination plaintiffs are managerial or professional employees who have suffered a salary loss of sufficient magnitude to make litigation worthwhile. Employers still are exposed to substantial risks in these cases, depending upon variables not easily predicted. At the lower end of the wage scale, however, dismissed workers who may have a good case are being turned away by attorneys who cannot afford to handle the case absent potential for tort recovery. Finally, a majority of workers are effectively without any protection at all: workers who are confronted with express at-will provisions or the absence of tenable grounds for establishing contractual limitations in their favor and who lack grounds for a public policy claim.

in Foley held that the public policy exception did not apply to protect an employee from dismissal for having reported to management that his supervisor was under investigation by the FBI for embezzlement on another job. Foley, 47 Cal. 3d at 670, 765 P.2d at 380, 254 Cal. Rptr. at 218. At the same time, the Foley court reaffirmed the existence of the exception and left open the question whether judicially declared policy sufficiently predicates its application. Id. at 669, 765 P.2d at 379, 254 Cal. Rptr. at 217.

Recently, two California district courts of appeal disagreed as to whether the state constitutional right to privacy, which both courts agreed applied to private employers, adequately predicated a public policy exception to the at-will doctrine. Compare Luck v. Southern Pac. Transp. Co., 218 Cal. App. 3d 1, 267 Cal. Rptr. 618 (1990) (inadequate for public policy exception because privacy is a “private” matter) with Semore v. Pool, 217 Cal. App. 3d 1087, 266 Cal. Rptr. 280 (1990) (holding adequate for public policy exception because the public has an interest in the assertion of privacy rights by individuals), reh'g denied, May 31, 1990 (LEXIS, States Library, Cal. file). Neither court, however, considered the possibility that the state constitutional provision itself might give rise to tort remedies. See Friesen, Should California’s Constitutional Guarantees of Individual Rights Apply Against Private Actors?, 17 Hastings Const. L.Q. 111, 114-15 (1989).


Moreover, even if courts could be relied on to provide additional protection for workers, legislation would be the preferable solution. This is not to suggest that courts should refrain from further progress in deference to the legislature. To the contrary, there are excellent reasons for courts to push ahead on the common law front pending legislative action. But the surgery required to effectuate an optimum solution to the wrongful termination problem lies outside the institutional competence of courts, or at least outside the normal common law expectations of what is appropriate for the judicial branch. For example, as Foley demonstrates, the categories of contract and tort and the remedies customarily associated with those categories considerably constrain the courts. The courts, therefore, have difficulty providing the most appropriate alternative remedial schemes. And, in all likelihood, intelligent minds could devise a better system for resolving termination disputes than traditional litigation, with its attendant costs and delays. Only the legislature can bring about those changes.

But if all this is true, why does the legislature remain silent? We have become accustomed to legislative inertia, and we no longer mistake it for evidence that problems requiring legislative attention do not exist. Legislators react to demand, and in Sacramento the felt demand for repeal of the at-will rule has not been great. Bills have been introduced, but none has made it to the floor of the legislature. The principal bills recently introduced include Senate Bill 282, introduced in 1989 by Senator Bill Greene and supported by the ACLU and the AFL-CIO, among others, and Senate Bill 222, also introduced in 1989 by Senator Beverly and supported by various groups of relatively enlightened employers. An earlier bill, authored by Assemblyman

32. See Leonard, A New Common Law of Employment Termination, 66 N.C.L. REV. 631 (1988) (arguing that there are ample grounds in existing doctrine to enable courts to do away with the presumption of at-will employment).
33. See supra notes 21-28 and accompanying text.
34. For example, courts cannot legitimately fashion limitations on the duration of front pay; nor can they award reinstatement as a remedy. See To Strike a New Balance: A Report of the Adhoc Committee on Termination at Will and Wrongful Discharge, 13 LAB. & EMPLOYMENT L. NEWS 1, 5-6 (special ed. Feb. 8, 1984) [hereinafter Gould Proposal].
35. In spite of large awards in some cases and a high success rate, "the typical plaintiff receives the equivalent of one-half year's severance pay." THE RAND STUDY, supra note 29, at 27-28. On the whole, far more is spent in litigation than successful plaintiffs actually recover. Id. at 25-26. Defense legal fees and expenses average about $80,000 per case (more when large firms represent the defendant); 66% of plaintiffs' attorneys charge a contingency fee of 40% or more of the final recovery. Id. In this study the average net payment to successful plaintiffs was $188,520 (median $74,500) while the average combined legal fees of both sides in these same cases amounted to $209,591. Id.
McAlister, 38 in its original form contained the proposal that was drafted with the leadership of Stanford Professor William B. Gould of the State Bar Section on Labor and Employment Law. 39 The bills vary considerably in their approach, and none has mustered widespread support. Trial lawyers, typically a potent force in Sacramento, are ambivalent about any statute, fearing it will deprive plaintiffs of the last vestiges of tort recovery. Most employers and their attorneys are seemingly content with the status quo after Foley and are not pressing for change.

Still, legislation is in the wind. Workers comprise a significant majority of the California population, 40 and of these only a small fraction are represented by unions. 41 It would not take a great deal of acumen or foresight for a politician to realize that political gold (as well as justice) can be mined on this issue. Both Montana 42 and Puerto Rico 43 have adopted wrongful termination statutes. Bills are under consideration in other states, 44 and a committee of the Commission


39. See Gould Proposal, supra note 34. Generally, the proposal advocated a just cause standard, administered through mandatory arbitration, and included reinstatement, loss of pay, and fringe benefits for up to two years as potential remedies. Id. at 9-10 (summarizing committee recommendations).

40. In 1987, wage and salary workers comprised 87.3% of the civilian labor force (approximately 12 million wage and salary workers out of a civilian labor force of 13,747,000). CALIFORNIA DEPT. OF FINANCE, California Statistical Abstract 1988 Tables B-2, C-1, C-3, C-16 (1989).

41. In 1987 approximately 18.7% of the wage or salary workers in California were union members. Id. In actuality, the percentage of employees represented by unions is somewhat higher since—in the absence of a contract requiring membership as a condition of employment—not all union-represented employees are members of unions.

42. MONT. CODE ANN. §§ 39-2-904 to -914 (1989). The Montana statute makes it wrongful for an employer to discharge an employee who has completed his probationary period except for "good cause," or to discharge any employee either in violation of the employer's own personnel policy, or in retaliation for the employee's refusal to violate public policy, or for reporting a violation of public policy. Id. § 39-2-904. Unless the parties agree to arbitrate, the courts enforce the statute. Id. § 39-2-911(2). An employee found to have been wrongfully terminated may recover lost wages and fringe benefits for a period not to exceed four years, plus punitive damages if the employer is found by clear and convincing evidence to be guilty of "actual fraud or actual malice." Id. § 39-2-905; see Tompkins, Legislating the Employment Relationship: Montana's Wrongful Discharge Law, 14 EMPLOYEE REL. L.J. 387 (1989).

43. P.R. LAWS ANN. tit. 29, §§ 185a-191 (1985 & Supp. 1988). The Puerto Rico statute provides severance pay (one month's salary plus an additional week's pay for each completed year of service) for employees found to have been terminated without just cause. Id. § 185a; see Note, The Definition of Unjust Dismissal in Puerto Rico: Act No. 80 of May 30, 1976, 9 COMP. LAB. L.J. 320, 322 (1988) (authored by Teresa Chevres).

44. See e.g., N.J.S. 1291 (introduced Jan. 1, 1990 to Senate Committee on Labor and to
on Uniform State Laws has been at work for nearly two years on draft legislation.\textsuperscript{45} The time is ripe for the California Legislature to act.

But what kind of legislation? The ideal may not be attainable, but focusing on political obstacles accomplishes nothing. This Article purports to identify the issues that need to be resolved and to evaluate alternative ways of resolving them in a politically realistic manner. There are seven principal issues that must be resolved by any statutory proposal. The principal issues are:

(1) Statutory scope: what type of management decisions will the statute affect?

(2) Statutory standard: what limitation should the statute place on management decisions within the statutory scope?

(3) Employer coverage: which employers, if any, should be excluded from coverage?

(4) Employee coverage: which employees, if any, of otherwise covered employers should be excluded from coverage?

(5) Enforcement mechanism: what agency or tribunal should enforce the statute and what provisions for review should govern?

(6) Remedies; and

(7) Preemption: to what extent should the statutory enforcement mechanism and remedies preempt other theories of recovery?

To some degree all seven issues interrelate because the optimum—or politically achievable—solution to one issue depends on the others. Moreover, the politically achievable obviously is subject to modification as the political climate changes.

I. Statutory Scope

A wrongful termination statute's scope must cover at least discharge from employment. Furthermore, to refrain employers from evading the purpose of the statute, the statute should define "discharge" (or the equivalent operative term) to include "constructive" as well as actual discharges.\textsuperscript{46} More debatable, however, is whether the

\textsuperscript{45} National Conf. of Commissioners on Uniform State Laws, Draft Unif. Employment Termination Act (July 13, 1990 draft proposal) [hereinafter Draft Uniform Act].

\textsuperscript{46} The Montana statute defines a constructive discharge as:

The voluntary termination of employment by an employee because of a situation
statute should regulate in any way economic layoffs or forms of discipline that fall short of actual or constructive dismissal.

In American labor law a fairly clear traditional distinction exists between discharge and layoff. A collective bargaining agreement typically restricts discharges through a "just cause" requirement, while nothing comparable restricts layoffs. Occasionally an employer attempts to conceal a discharge in the guise of a layoff, but the National Labor Relations Board (NLRB) and labor arbitrators are alert to that possibility and when it occurs they treat the action as a discharge regardless of label. Presumably the decision maker under a wrongful termination statute will do the same, though there would be nothing lost if the statute contained language making that expectation clear.

Arguably, the law should provide a mechanism for reviewing an employer's decision to institute an economic layoff in order to ensure that sufficient justification exists. To do so, however, would go beyond current expectations under collective bargaining agreements (except as to layoffs that carry anti-union motivation) and could inject the decision maker into matters of business judgment. That seems a rather ambitious goal for a wrongful termination statute at this time.

Instead, the law should provide a mechanism for reviewing the employer's selection of employees for layoff and recall to ensure that the employer makes the selection objectively and nonarbitrarily and not as a subterfuge for dismissal. The accepted criterion with regard to layoffs is seniority, at least among employees who are relatively equally qualified to perform the jobs that remain. One study showed that workers expect and rely heavily upon the expectation that seniority will control. Seniority is usually easy to compute, but whether

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created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.


47. BUREAU OF NAT'L AFF., BASIC PATTERNS IN UNION CONTRACTS 7, 67 (12th ed. 1989) [hereinafter BASIC PATTERNS].


49. F. ELKOURI & E. ELKOURI, supra note 5, at 655.

50. Under "strict seniority" contracts, an employer may only consider seniority in the event of layoffs. "Modified seniority" systems take into account fitness and ability to do the job as well. Id. at 610-13. A minority of contracts treat seniority as a secondary factor, to be considered only when ability and fitness are equal. BASIC PATTERNS, supra note 47, at 67.

51. P. SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 202-11 (1969). Selznick's study found that attitudes towards seniority in the context of layoffs varied among different categories
one employee is superior to another to such an extent as to justify a junior selection is often deeply disputed in the union context. Applying such criteria through a wrongful termination statute laudably might check employer arbitrariness, but employers will resist it strongly. As a compromise, the statute should allow a worker to claim that he has been selected for layoff (or denied recall) arbitrarily, in bad faith, or for reasons that offend public policy.

The question remains whether the statute should apply to disciplinary actions, for example demotion or suspension, other than dismissal. Assuming a general statutory standard like “just cause,” there is a sound, principled argument that the standard should apply “across the board,” as it does under most collective bargaining agreements. To do that, however, not only would provoke increased employer opposition; it also would require a substantially greater commitment of public and private resources. With the exception of disciplinary action motivated by considerations contrary to public policy, protection against wrongful dismissal is a more realistic goal.

II. Standards

A consensus, reflected not only in the legal literature but in otherwise variant statutory proposals, is growing that “just cause” (or “good cause”) is the most appropriate standard for a wrongful ter-
mination statute. The phrase has the combined virtues of a track record as the accepted standard in labor arbitration and of flexibility. Thus, a just cause standard is preferable to a catalogue of dismissals deemed improper for particular reasons. Some proposals provide examples of acceptable grounds for dismissal, such as insubordination and dishonesty, but since it is impossible to list all permissible grounds, and since the propriety of dismissal on any ground will depend upon the totality of circumstances, a listing has limited utility.

There are suggestions extant that the standard should differ for different categories of employees; for example, the courts should give greater deference to employers' decisions concerning managers or confidential employees, on the theory that the appropriate considerations are more subjective in such cases, and the employer needs greater leeway. The theory has merit, but I question the suggested solution. The term "good cause" or "just cause" is itself sufficiently flexible to allow consideration of such factors; what constitutes good cause for firing any worker obviously must depend upon the worker's duties and the criteria appropriate to evaluate his performance. Concern that the decision maker may not give adequate weight to the appropriate criteria in the case of managerial employees, for example, could be addressed by the addition of statutory language that draws attention to the distinctive factors relevant to application of the good cause standard.

There also have been suggestions for differential standards of protection based on factors of longevity and earnings. The Beverly Bill, for example, would reserve the broad just cause standard for employees who have worked for the employer for three years (two years


58. See, e.g., MONT. CODE ANN. § 39-2-903(5) (definition of "good cause" specifically includes list of specific acceptable reasons for dismissal); Greene Bill, *supra* note 36, § 2881(b) (same type of specific listing).

59. I confess to authoring an opinion that suggests the decision maker should be more deferential to the employer's judgment in the case of managerial or confidential employees. In *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981), the court suggested that "[t]he terms 'just cause' and 'good cause' . . . [are] 'largely relative in their connotation, depending upon the particular circumstances of each case.' [W]here . . . the employee occupies a sensitive managerial or confidential position, the employer must of necessity be allowed substantial scope for the exercise of subjective judgment." *Id.* at 330, 171 Cal. Rptr. at 927-28.

60. The Draft Uniform Act, in its comment on the definition of "good cause," addresses this concern: "[c]onsideration will also be given to the character of the employee's responsibilities, including the professional, scientific, or technical character of the work, the management level of the employee's position in the enterprise, and its importance to the success of the business." *Draft Uniform Act, supra* note 45, at 8.

in the case of those earning less than $20,000). While the exclusion of high-level personnel from a good cause requirement might be justified on the ground that they are able to fend for themselves, there is room for reasonable disagreement as to whether the exclusion should be stated in terms of salary amount or in terms of job function. The former is more precise, and thus less likely to lead to litigation; the latter is tuned better to the purpose of the exclusion. In any event, the exclusion probably should not extend to dismissals for reasons that offend public policy. Moreover, differential standards based upon length of service seem unnecessary. The decision maker can appropriately consider the longevity of the employee, subject to a probationary period, under the just cause standard.

None of the proposals addresses the question of the appropriate dismissal procedure. This accords with the pattern that has developed in labor arbitration cases: issues concerning the adequacy of notice and opportunity for response are considered part of the just cause question. Most European statutes, however, explicitly require pre-termination hearings before an employer dismisses an employee for misconduct, so as to provide the employee with the opportunity to confront and respond. Public employees who have job tenure in this country similarly are entitled to informal pre-termination hearings as a matter of constitutional due process. Consideration should be given to extending that protection to private employees under a just cause statute.

III. Employer Coverage

One question is whether the statute should apply only to the private sector, or whether it should apply to governmental employers as
well. Of course, many governmental employers have civil service systems that provide substantial job security, and there does not appear to be need for additional protection through statute as to employees covered by such systems. When employees are exempt from civil service systems it is usually because a policy decision has been made that the nature of their jobs requires their exemption. To draw the propriety of that decision into the battle over a wrongful termination statute seems problematic. But there are governmental entities, such as some of the special districts (irrigation districts, water districts, and the like), that have no civil service system and a legitimate question arises whether they should be covered. In principle, the answer is yes, but that may be trying to do too much at once.

A second question is whether small employers, for example, those employing fewer than a certain number of employees (five, ten, or fifteen, according to the proposals) should be exempt. The principal justifications for such an exemption are two-fold: the relationship of small employers to their employees is typically so personal that the law ought not intervene, and the costs of making the statute applicable to thousands of small employers would be too great. Combined with the practical consideration that such an exemption would diminish opposition to a proposed statute, I am inclined to go along with the proposal, but again with an exception for public policy claims.

IV. Employee Coverage

One of the trickiest questions in this arena is whether the statute should apply to employees who already are covered by collective bargaining agreements. The federal labor preemption doctrine complicates the answer to that question because there is some doubt regarding the extent to which a state is permitted to provide systems of job protection and adjudication independent of the collective agreement and its arbitration machinery. Recently, the United States Supreme Court shed some light on the murky preemption question. In *Lingle v. Norge Division of Magic Chef, Inc.* the Court held that a state’s appli-

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67. The Draft Uniform Act proposes two alternatives: include all employers or only those with five or more employees. *DRAFT UNIFORM ACT*, supra note 45, § 12. The Greene Bill and the Beverly Bill both would cover employers of five or more employees. Greene Bill, *supra* note 36, § 2880(b); Beverly Bill, *supra* note 37, § 2881(d). The Gould Proposal would have exempted employers of fewer than 15 employees, while the minority report would have drawn the line at 50 employees. Gould Proposal, *supra* note 34, at 23, 43. Clyde Summers’s 1976 proposal suggested including employers of 10 or more employees at the outset, with the expectation of increasing coverage within a short time. Summers, *Individual Protection, supra* note 16, at 526.

cation of public policy protection to collective bargaining employees (in that case, against dismissal for filing a workers' compensation claim) did not offend federal labor policy. The Court held that the standard for determining federal preemption was whether interpretation of the collective agreement is required in order to resolve the state claim. By that test, a statutory "just cause" standard should pass muster, even though the collective agreement also protects against dismissal without cause, because theoretically the criteria are distinct and independent of one another. One court has so held.

Assuming that a state could make its wrongful termination machinery available to collective bargaining employees, the question is whether it should do so. Certainly the statute should avoid exposing employers to cumulative procedures, at least when no public policy violation is asserted. That could be done in one of two ways: either by exempting employees covered by collective agreement except when the agreement fails to provide for just cause limitation subject to arbitration, or by requiring such employees to make a binding election between state and private procedures. The first alternative would exempt few current agreements, but some unions possibly would choose to renegotiate their agreements to exclude arbitration of discharge claims and to represent their members through the state machinery. The second alternative parallels some civil service systems that allow union-represented employees to opt between union-provided arbitration and civil service adjudication. Such an option potentially deprives employers of the insulation provided by union screening of grievances, but employers confront that problem with unorganized workers as well. The statute might address that issue by providing for screening of claims for probable cause, or it might seek to deter frivolous claims through the requirement of filing fees. In any event, optimum resolution of the collective bargaining coverage issue requires that both management and labor participate in some creative negotiation.

Less controversial is the exclusion of probationary employees, for example, employees during a probationary period established by the

69. Id. at 408-10.
70. Id. at 413.
71. Santoni Roig v. Iberia Lineas Aéreas de España, 688 F. Supp. 810 (D.P.R. 1988); see also Challenger Caribbean Corp. v. Union Gen. de Trabajadores de Puerto Rico, 903 F.2d 857, 867-68 (1st Cir. 1990) (Puerto Rico's "Rule 80" simply establishes a "minimum employment standard" and need not be interpreted to conflict with the Labor Management Relations Act).
72. In Oakland, California, for example, the memorandum of understanding between the City and the Police Officers Association contains a provision allowing such a choice. Conversation with Duane B. Reno, attorney.
employer, not to exceed some statutory maximum—perhaps six months as a standard period, with a longer period permitted when required for adequate evaluation.\textsuperscript{73} It is generally accepted in our industrial system that an employer has the right to give an employment applicant a chance at the job without having to explain the reasons for termination if the trial period does not work out. An exception should probably be made, however, for those cases in which an employer terminates a probationary employee for reasons that offend public policy.

Those employees who have express written contracts for a specified term constitute a special category. They have no need for the substantive protection of the statute (again, perhaps subject to public policy claims), but they may find the statutory procedure useful for the enforcement of their contracts as an alternative to litigation.\textsuperscript{74}

\section*{V. Enforcement Mechanism}

There are three general categories of enforcement systems: court, administrative agency, and arbitration. Of the three, the court system is the least attractive. For the employee, trials require time and money, acceptable only if the potential for payoff is very large—an unlikely result of any statute. For the employer, there is the additional disadvantage that juries are perceived to be more easily swayed by emotional appeal and, in any event, less likely to be sympathetic to the employer’s arguments than either of the other two alternative systems. Further, public policy does not support any addition to the congestion of courts.

Allocating enforcement of the statute to an administrative agency would be the easiest alternative, particularly if the agency were one

\textsuperscript{73} The Gould Proposal, the Draft Uniform Act, and the Greene Bill all propose a six-month probationary period for all employees. \textit{See Draft Uniform Act, supra} note 45, at § 1(1); Gould Proposal, \textit{supra} note 34, at 22; Greene Bill, \textit{supra} note 36, § 2880 (a)(1). The Beverly Bill would exclude employees who had worked for the employer for less than three years (two years for those earning less than $20,000 per year), though these exclusions would not apply to terminations that violated public policy. Beverly Bill, \textit{supra} note 37, § 2882. Summers has suggested that flexible application of the just cause standard “could give weight to the employer’s practical need and ability to judge the suitability of the employee for the particular job involved.” Summers, \textit{Individual Protection, supra} note 16, at 525.

\textsuperscript{74} The Gould Proposal would exempt individuals covered by a written contract of a year’s duration and a minimum of four months’ notice provision. Gould Proposal, \textit{supra} note 34, at 23. The Draft Uniform Act would allow written agreements waiving the good cause protection if the contract provides for severance pay (a minimum of one month's pay for each year of service for the first five years, with amounts increasing with longer service). \textit{Draft Uniform Act, supra} note 45, § 4(b).
already in existence—the Unemployment Insurance Appeals Board,\textsuperscript{75} for example, or the Fair Employment and Housing Commission. Such agencies have an infrastructure in place; they have some institutional experience in handling cognate matters; and they have procedures for hearing, determination, and appeal that are known to the legal profession. Funding would be a matter of adding to an existing agency budget, presumably a politically easier course than the creation of a new enforcement entity.

There are, however, drawbacks to the agency alternative. One is the potential for delay. The traditional agency model—investigation, mediation, administrative hearing, internal agency review, followed by the prospect of judicial review—is not suited to speedy final determination even under the best of conditions. When the agency is understaffed as well, as has been the case with many California agencies in recent years, the problem is exacerbated. Attorneys who have represented employees before such agencies often have become frustrated with delays, and employer attorneys have been heard to complain that the agency staffs are lacking in professionalism and impartiality. For these reasons, presumably, enthusiasm for the agency alternative has not been great within the relevant constituencies.

Numerous academicians advocate arbitration as the optimum alternative solution.\textsuperscript{76} Almost all the statutory proposals made to date integrate arbitration in one form or another. The reasons are fairly obvious. Arbitration holds the potential for low-cost, relatively speedy determinations by individuals having a certain relevant expertise and understanding and requires minimum judicial review.\textsuperscript{77} Its wide acceptance and long history within the context of collective bargaining, and most attorneys’ familiarity with it, make it a natural choice.\textsuperscript{78}

Transplanting the institution of arbitration from the collective bargaining arena and harnessing it to the enforcement of a wrongful termination statute poses some difficulties that need to be confronted.\textsuperscript{79} Collective bargaining arbitration is the product of agreement between the parties. The arbitrator’s task is primarily to interpret and apply that contractual agreement within the framework of the parties’ own relationship.\textsuperscript{80} The parties themselves select and pay the arbitra-

\textsuperscript{75} See Bellace, \textit{supra} note 11, at 207 (advocating use of the unemployment machinery).
\textsuperscript{76} See, \textit{e.g.}, Gould Proposal, \textit{supra} note 34, at 405; St. Antoine, \textit{supra} note 8, at 77-78; Summers, \textit{Individual Protection, supra} note 5, at 521.
\textsuperscript{77} F. ELKOURI & E. ELKOURI, \textit{supra} note 5, at 7-9.
\textsuperscript{78} Id. at 2-3.
\textsuperscript{80} Of course, the parties can authorize an arbitrator to resolve statutory questions as
tor, and the union screens the cases that go to arbitration. Arbitration under a wrongful termination statute, however, is likely to be a different sort of animal.

One difference is the manner in which arbitrators are selected. Most proposals assume that those who serve as arbitrators will have labor arbitration experience, and that the parties will select the arbitrator (as under many labor agreements) from lists of suitable persons maintained by some public agency. That process may take on a different color, however, when an employer and an individual employee (rather than his union) selects the arbitrator. Since any given employer is likely to be involved in the selection process more frequently than any given employee, there may develop an information gap in which employers, with greater knowledge of the propensities of particular arbitrators, have an unfair advantage in that process. Moreover, arbitrators may, consciously or otherwise, slant their opinions to favor employers, knowing that they play a more substantial role in the selection process. Both risks could be minimized, however, if an organization (such as the Employment Law Center of San Francisco, a union, or the Central Labor Council) acted as a source of information, and perhaps assistance, in the selection of arbitrators. Furthermore, a source of published arbitration decisions would also help to minimize the risks, by enabling parties to assess an arbitrator’s ability and inclinations. Alternatively, a public agency, such as the State Conciliation Service, could appoint the arbitrator; but experience with arbitration generally teaches us that the process and its results are more likely to be accepted by the parties if both of the parties participate in the selection.

Some proposals for arbitration under a wrongful termination statute would make the process mandatory. In several significant respects, that would be preferable: it would remove any advantage either party might have, or might think it has, over the other through the exercise of a veto; it would avoid the public costs of litigation; and it would more readily justify the expenditure of public funds to finance the process. These advantages, however, must be balanced against two disadvantages. One is political: at present, a substantial segment of

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well as questions of contract interpretation. See, e.g., Challenger Caribbean Corp. v. Union Gen. de Trabajadores de Puerto Rico, 903 F.2d 857 (1st Cir. 1990).

81. See, e.g., DRAFT UNIFORM ACT, supra note 45, § 5; Gould Proposal, supra note 34, at 12; Greene Bill, supra note 36, § 2888(b).

82. The State Conciliation Service is an agency that is authorized to mediate labor disputes. See, e.g., CAL. LAB. CODE § 1137.1(d) (West 1989).

83. DRAFT UNIFORM ACT, supra note 45, § 5; Gould Proposal, supra note 34, at 8-11; Greene Bill, supra note 36, § 2888(b).
the employer community opposes the idea of mandatory arbitration. The other is legal: mandatory arbitration possibly would violate the provisions of the California Constitution that allocate judicial power to the courts and guarantee the right to trial by jury.\textsuperscript{84}

Most state constitutions contain similar allocation provisions,\textsuperscript{85} as does the federal Constitution,\textsuperscript{86} but interpretation of these provisions varies.\textsuperscript{87} In McHugh v. Santa Monica Rent Control Board,\textsuperscript{88} the California Supreme Court held that the allocation of authority to an administrative agency to make restitutive money awards is permissible under the “judicial powers” clause of the California Constitution only if two tests are met. The first is a “substantive” test: the remedial authority must be “reasonably necessary to effectuate the administrative agency’s primary, legitimate regulatory purposes.”\textsuperscript{89} The second is the “principle of check”: the “essential” judicial power must “remain ultimately in the courts through review of agency determinations.”\textsuperscript{90} If those two conditions are met, the state constitutional requirement for jury trial will be deemed satisfied as well.\textsuperscript{91} Applying these criteria, the McHugh court upheld (against attack under both the “judicial powers” and “jury trial” clauses) a grant of authority to a local rent control board to hear and determine tenants’ claims that they were charged rents in excess of the maximum established by the board pursuant to the local charter. Though “judicial in nature,”\textsuperscript{92} such actions were both authorized by the charter and reasonably necessary to the agency’s primary and legitimate purpose of setting and regulating maximum rents in the local housing market; hence, the substantive test was met.\textsuperscript{93} The charter also provided for judicial review

84. Article VI, section 1 of the California Constitution vests judicial power in the courts. The Constitution grants the Legislature the power to confer judicial power to certain agencies for specified purposes. See, e.g., CAL. CONST. art. I, § 16 (guarantees the right to trial by jury); CAL. CONST. art. XII, § 5 (Public Utilities Commission); CAL. CONST. art. XIV, § 1 (labor relations); CAL. CONST. art. XIV, § 4 (workers’ compensation).


86. U.S. CONST. art. III (judicial power); id. amend VII.

87. See Golann, supra note 85; cf. H. Perritt, CONSTITUTIONAL, POLITICAL, AND ATTITUdINAL BARRIERS TO REFORMING WRONGFUL DISMISSAL LAW, PROCEEDINGS OF NEW YORK UNIVERSITY FORTY-SECOND ANNUAL NATIONAL CONFERENCE ON LABOR § 3.05[2] (B. Stein ed. 1989).


89. Id. at 372, 777 P.2d at 106, 261 Cal. Rptr. at 333.

90. Id.

91. Id. at 380, 777 P.2d at 112, 261 Cal. Rptr. at 339.

92. Id. at 375, 777 P.2d at 108, 261 Cal. Rptr. at 336.

93. Id.
of the board's decision through petition for administrative mandate. Two other provisions of the charter did not fare so well. A grant of power to the board to award treble damages in addition to "restitutive" excess rent amounts was found to violate the judicial powers clause, primarily on the ground that such power "in the present context poses a risk of producing arbitrary, disproportionate results that magnify, beyond acceptable risks, the possibility of arbitrariness inherent in any scheme of administrative adjudication."94 Furthermore, a provision that purported to authorize a tenant to withhold rental amounts that the board determined to be overpayments was held to violate the "principle of check" because it gave legal effect to the board's order prior to judicial review.95

For purposes of deciding whether McHugh applies to a particular grant of authority, there appears to be no substantive distinction between an entity called an "administrative agency" and an entity called an "arbitrator." Consequently, we must assume that a statute that mandates arbitration of wrongful termination claims would have to meet the McHugh criteria. Presumably a statute that simply authorized an arbitrator to determine whether a discharge met statutory standards and to order reinstatement and lost pay if not, would have no trouble meeting the "reasonable necessity/legitimate regulatory purpose" requirement. Furthermore, the McHugh court, in striking down the provision for treble damages, was careful to note that it was not passing upon the constitutional propriety of administrative imposition of penalties in general.96 Indeed, the court cited with no apparent disagreement both state and federal authorities that approved such authority in principle.97 The court even qualified its negative comments about the authority to award treble damages by positing its comments in "the present context."98 Thus, McHugh apparently leaves ample room for a variety of remedies under a wrongful termination statute.

The "principle of check" enunciated in McHugh poses a potentially more difficult obstacle depending upon what kind of judicial review that principle requires. The court did not purport to lay down a general rule. Rather, it acknowledged that the procedures and scope of review "necessary to fulfill the goal of reserving to the courts this essential attribute of judicial power" might vary from one category of case to another, and it did not undertake to decide those questions

94. Id. at 379, 777 P.2d at 111, 261 Cal. Rptr. at 338.
95. Id. at 376-77, 777 P.2d at 109-10, 261 Cal. Rptr. at 337.
96. Id. at 378, 777 P.2d at 110, 261 Cal. Rptr. at 338.
97. Id. at 378 n.45, 777 P.2d at 110 n.45, 261 Cal. Rptr. at 338 n.45.
98. Id. at 379, 777 P.2d at 111, 261 Cal. Rptr. at 338.
beyond the case at hand.\textsuperscript{99} Considerable flexibility is required, however, in order to embrace within the "principle of check" the truncated review commonly associated with arbitration awards.\textsuperscript{100} In \textit{McHugh} the court assumed that because a private party had a "direct pecuniary interest" in the agency's determination, a court would be called upon in an administrative mandamus proceeding (as a matter of California law) to exercise its "independent judgment" on the record, rather than to determine merely whether substantial evidence supported the agency's findings.\textsuperscript{101} Either level of review, of course, would be wholly at odds with the general principle accepted in both labor and commercial arbitration that a court must not concern itself with the merits of the award, but should confine its scrutiny to assuring minimal propriety in the process.\textsuperscript{102}

If arbitration is to be mandatory, a strong policy argument also supports some judicial review for errors of law. A labor arbitrator's award is final as long as it draws its "essence" from the agreement of the parties.\textsuperscript{103} An arbitrator is likely to get into trouble with the courts only to the extent he invokes "external" law as the basis for his decision.\textsuperscript{104} The courts do not worry about inconsistencies among arbitral decisions because no principle requires one agreement to be interpreted like another and because the agreement can always be changed through negotiation. But any decision of an arbitrator under a statutory "just cause" provision would be based upon "external

\textsuperscript{99} Id. at 373, 777 P.2d at 107, 261 Cal. Rptr. at 334-35.

\textsuperscript{100} Under federal labor law, the arbitrator must interpret the agreement, and the arbitrator's decision will be upheld as long as it draws its essence from the agreement. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). Generally, the scope of review is limited to verifying procedural fairness and the impartiality of the arbitrator. An arbitrator's decision will be overturned only if the award does not draw its essence from the agreement; if the arbitrator exceeded his authority; for prejudicial exclusion of evidence; for bias or corruption; and for similar reasons. F. ELKOURI & E. ELKOURI, \textit{supra} note 5, at 28-31.

The Federal Arbitration Act provides that a court may vacate an arbitrator's award when an award is tainted by corruption, fraud, or undue influence, in cases of prejudicial misconduct by the arbitrator, and when arbitrators exceed their powers. 9 U.S.C. § 10 (1988). The scope of review under California law is substantially the same. \textit{See} \textit{CAL. CIV. PROC. CODE, § 1286.2} (West 1982).

\textsuperscript{101} \textit{McHugh}, 49 Cal. 3d at 375 n.36, 777 P.2d at 108 n.36, 261 Cal. Rptr. at 336 n.36.

\textsuperscript{102} \textit{See generally Steelworkers}, 363 U.S. 593 (labor arbitration); M. Domke, \textit{Domke on Commercial Arbitration} (Supp. 1989) (commercial arbitration).

\textsuperscript{103} \textit{See supra} note 100.

\textsuperscript{104} Under federal labor law principles, the Supreme Court has declared that the arbitral decision, to warrant enforcement, must "dra[w] its essence from the collective bargaining agreement," \textit{Steelworkers}, 363 U.S. at 597, and that it is the arbitrator's task "to effectuate the intent of the parties" rather than the requirements of enacted legislation. Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974).
law" by definition in the sense that the decision exists outside the agreement. While the arbitrator might be well advised or even statute-ually ordered to rely on the decisions of labor arbitrators for guidance, he is, after all, applying a public statute and a public norm, and inconsistencies in the application of public norms offend our traditional notions of equal protection and the rule of law. Most discharge cases are highly fact specific, but inevitably some will require applying general standards of "just cause," the scope of public policy contained in other statutes, or constitutional provisions. To establish a system in which inconsistencies may develop without providing a means for reconciling them is problematic.105

To open the door to judicial review on any ground, however, threatens to deprive arbitration of one of its most valuable attributes: fast and inexpensive dispute resolution. If there is to be limited review for errors of law, some creative thinking should be directed toward compensating for and deterring delay, perhaps through a system of liquidated damages recoverable when judicial review fails to produce vacation or modification of an award.

Current California law provides two models of what might be called "quasi-mandatory arbitration." Under the Uninsured Motorists' Statute, policies containing uninsured motorists coverage must contain a provision for arbitration of claims.106 As far as it appears from the reported cases, that statute never has been challenged on jury trial or judicial powers grounds. A corollary model under a wrongful termination statute would mandate the adoption of an employment contract containing a provision for arbitration of termination disputes in accordance with statutory standards. I doubt, however, that the California Supreme Court could be persuaded to exempt that arrangement from the McHugh requirements.107

The other current model, the judicial arbitration statute, requires that the parties submit disputes under a stipulated amount to arbitration but allows either party to seek a trial de novo, subject to sanctions if the party fails in litigation to improve the results he obtained in arbitration.108 No doubt that model would satisfy McHugh, but at

105. Such a system apparently exists in Canada. Under an amendment to the Canada Labor Code, "adjudicators" hear claims of wrongful dismissal and the adjudicator's order "is final and shall not be questioned or reviewed in any court." Act of April 20, 1978, ch. 27, 1977-1978 Can. Stat. 617, § 61.5(10). The question posed by the text seems not to have been raised. See Simmons, Unjust Dismissal of the Unorganized Workers in Canada, 20 STAN. J. INT. L. 4739 (examining practice under the statute).
107. See supra notes 88-102 and accompanying text.
the same time, it would present the unattractive potential for dual litigation.

The *McHugh* problem could be avoided, and the policy concerns over the absence of judicial review minimized, if arbitration were voluntary rather than mandatory. There would then be the risk, of course, that the values of arbitration would be sacrificed to the self interest of the party who, for one reason or another, finds it advantageous to opt for litigation. An employer—and it appears to be employers who presently oppose mandatory arbitration—may be motivated to submit a legal defense to a judge rather than an arbitrator. Plaintiffs, conversely, most likely prefer a jury in cases in which the damage potential is relatively high.

Some proposals for voluntary arbitration seek to minimize that risk by providing both parties with incentive to accept an offer to arbitrate. The Montana statute provides that a party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in litigation is entitled to reasonable attorney’s fees from the date of the offer.\(^1\) The Beverly Bill also would have awarded attorney’s fees to a prevailing employee whose arbitration offer is rejected by an employer;\(^2\) but as to employer offers, the Bill provided that the employee who rejects the offer forfeits back and front pay from the date of the offer, even if he otherwise succeeds in litigation.\(^3\) The Montana solution is unrealistic in its expectation that an employee will be able to pay the employer's attorney’s fees, and the Beverly solution inequitably impacts employees. If, as I suggest, a successful employee ought to be allowed reasonable attorney’s fees in arbitration, disallowance of such fees in litigation (except when the employee has offered to arbitrate and the employer refuses) may in itself effectively motivate the employee to bypass litigation. Additional incentive may be helpful. And, on the employer side, some amount of liquidated damages can be added to attorney’s fees as a deterrent.

Whether the statute mandates or allows arbitration, it must address how the arbitrator is paid. In most arbitrations, including labor arbitrations, the parties equally share the arbitrator’s fee. Some of the legislative proposals retain that formula,\(^4\) but it seems singularly inappropriate to the enforcement of rights under a public statute. Traditionally public forums are publicly financed; we do not ask litigants (even wealthy corporations) to pay for the time of the judge who hears

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110. Beverly Bill, supra note 37, § 2887(b)(1).
111. Id. § 2887(c)(1).
112. See, e.g., Gould Proposal, supra note 34, at 17.
the case. To tell workers that for the first time they may enjoy legal protection against wrongful dismissal only if they have the money to pay for it would be anomalous and unfair. Certainly that would be true if arbitration was mandatory and thus constituted the only means of enforcing the statute. But even if we make arbitration voluntary, as long as we seek at the same time to induce its use, charging employees anything more than a nominal filing fee seems counterproductive. Either the public should fund arbitration directly, fostering the purposes of the statute and avoiding further clogging of the courts, or arbitration should be funded through an assessment on employers, perhaps through a tax on payroll.

Whatever the remedial scheme, it is desirable to provide preliminary mediation through the State Conciliation Service. Furthermore, if an employer offers reasonable grievance procedures, employees should be required to exhaust them up to some statutory maximum period.

VI. Remedies

Reinstatement with back pay is the traditional labor-employment law remedy for wrongful discharge under most of the federal and state statutes that prohibit dismissal for particular reasons and under labor arbitration. Back pay, in this context, includes loss of monetary benefits, such as medical benefits or retirement benefits, attributable to the dismissal. Persuasive arguments, however, support modifying that pattern under a wrongful termination statute.

A reinstatement order, which has been shown to have questionable long-range value to the employee under existing schemes, is likely to be even less valuable under a scheme in which there is no labor organization to provide continuing protection against retaliations.

113. The Greene and Beverly Bills provide for mandatory mediation before arbitration. Beverly Bill, supra note 37, § 2888(a)(1); Greene Bill, supra note 36, § 2887(a). Neither the Draft Uniform Act, nor the Montana statute has such provisions.

114. The Montana statute requires employees to exhaust internal procedures; state or federal law provides another remedy, as in the case of employment discrimination statutes. MONT. CODE ANN. § 39-2-911(2) (1989). The Draft Uniform Act allows an extension of the time for filing of up to 60 days if the employee pursues internal grievance procedures, but does not require the employee to exhaust such procedures. DRAFT UNIFORM ACT, supra note 45, § 7b(3).


116. See F. ELKOURI & E. ELKOURI, supra note 5, at 688-90.

tion. An employee should have this protection available as an alternative, perhaps with a back-up provision for additional penalties if the employer dismisses the employee a second time without cause. The decision maker also should have discretion to consider other alternatives.

The most likely alternative is front pay: an award of money representing a prediction of what the employee will lose in the post-judgment future as a result of the wrongful dismissal, taking into consideration earning potential in other jobs. Some of the proposals that provide for front pay would limit compensation to one or two years, apparently on the theory that prediction beyond such a period is highly conjectural, and that most employees can find comparable employment within such a period. In other contexts, however, such as workers' compensation, disability retirement, and the tort system generally—in which wage loss is projected on a lifetime basis—we do not seem overly concerned about the difficulties of computation. Moreover, even though in those cases the employee usually has some disability that hinders future employment, comparable situations may exist in wrongful termination cases as well. The dismissed employee, for example, may be in an undesirable age bracket, in a narrow labor market, or subject to potential discrimination because of his dismissal and the litigation over it, so as to make reemployment within one or two years unlikely. I am inclined to think that the decision maker should have authority to award front pay for longer periods upon a proper showing that such factors are present. Alternatively, older workers could receive front pay without deduction for mitigation, as the Gould draft proposed.

Another area that departs from the traditional model involves the costs of representation. The traditional model was established in a context in which the worker could have free representation by the National Labor Relations Board or by a union. When such representation is not available, as in the case of Title VII litigation, for example, the statute typically provides for an award of attorney's fees to the prevailing employee. Unless the wrongful termination statute provides

120. The Greene Bill limits front pay to two years from the time reinstatement is determined inappropriate. Greene Bill, supra note 36, § 2884(c)(2). The Beverly Bill does not specify a limit to front pay but would cut it off entirely if an employee refuses a reasonable offer of reinstatement. Beverly Bill, supra note 37, § 2887(c)(2). West proposes an award of two months' pay for each year of service with the employer, in addition to any back pay due, in lieu of reinstatement and tort damages. West, supra note 118, at 56-57.
remedies of such magnitude as to make contingent fee arrangements realistic, it would seem essential for the statute's efficacy that it provide for effective representation in some such fashion. To avoid extensive litigation over fees, a base formula for fee recovery can be included, as in the English system.\textsuperscript{123}

Finally, there is the question whether the statute should provide for monetary compensation beyond back (or front) pay and the reasonable costs of representation, either by way of compensation or by way of deterrence. Undoubtedly, a worker who is terminated from employment suffers damages that are not adequately compensated by reimbursement of employment-connected wages and benefits. There may be ancillary economic damages (such as the loss of a house for failure to make mortgage payments) as well as emotional trauma. Such damages, however, also are not compensable under the traditional labor law model. The justification commonly asserted for that shortfall is that such damages would overburden a system designed to provide efficient remedy at low cost. One may question that justification, but whether a stand for a new remedial structure should be made in a wrongful termination statute is another (and primarily political) question.

There is, I think, substantial justification for considering awards of additional amounts for the purpose of deterring particularly egregious conduct by employers, such as dismissal for a reason that offends public policy or dismissal undertaken by an employer who knowingly lacks good cause. Precedent supports the proposition in California's Fair Employment and Housing Act\textsuperscript{124} that allows the award of punitive damages in judicial proceedings.\textsuperscript{125} The Montana statute provides for punitive damages in cases of "actual fraud or actual malice."\textsuperscript{126}

\textbf{VII. Preemption and Preclusion}

We come now to the most difficult part of this puzzle: to what extent should the procedures and remedies provided by the statute be

\begin{itemize}
  \item such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security" (emphasis added). \textit{See also} 29 U.S.C § 2005(c) (1988) (employee or prospective employee may bring private action under Employee Polygraph Protection Act of 1988).
  \item \textsuperscript{124} \textit{Cal. Gov't Code} § 12987(2) (West Supp. 1989).
  \item \textsuperscript{125} \\textit{Commodore Home Sys. Inc. v. Superior Court}, 32 Cal. 3d 211, 215, 185 Cal. Rptr. 270, 272 (1982).
  \item \textsuperscript{126} \textit{Mont. Code Ann.} § 39-2-905(2) (1989).
\end{itemize}
exclusive, and to what extent should plaintiffs be permitted to pursue remedies under other state statutes and currently available common law theories. This part is difficult not because it is particularly complicated, but because it is highly charged. Employees and their lawyers presumably would prefer a world in which everything is cumulative and not exclusive, so that they would be free to pursue their rights under the statute in addition to and independent of any other rights that they presently have. Plaintiffs' trial lawyers, who collectively constitute a formidable political force, will likely resist any attempt to do away with a presently lucrative potential for litigation. Employers, in principle, would obviously prefer that the statute preempt everything. To the extent that employers' cooperation may be necessary in order to get the statute passed, they are hardly likely to cooperate in establishing a scheme that preempts nothing. I will not attempt to answer whether a statute could be passed over the opposition of either trial lawyer or employer lobbies. What I will attempt is to explore what kind of compromise might be fair.

Clearly, the availability of remedies under a wrongful termination statute should not preclude an employee from pursuing remedies for race, sex, or other forms of discrimination available under the California Fair Employment and Housing Act (FEHA). The more difficult question arises with overlapping claims, when the employee says she believes she was discharged because she is female, but asserts that in any event her dismissal was without just cause. If the statute were to provide for enforcement through normal court procedure, the problem could be resolved easily: the employee could assert separate causes of action under both statutes that would be resolved by the same tribunal. If the wrongful termination statute were administered through arbitration, however, or through an administrative agency, some rule of priority would have to be established. The discrimination claim would not be heard by the wrongful termination tribunal, or it would be heard by the wrongful termination panel and its decision would be binding on the discrimination claim, or it would be heard by the wrongful termination tribunal without prejudice to the right of the employee to pursue remedies under the FEHA if she is not satisfied with the result.

The first alternative would require the employee to pursue and the employer to defend related theories before different tribunals. That hardly seems sensible. The second alternative would protect employers against repetitive claims, but that protection would not extend to Title 127. CAL. GOV'T CODE §§ 12900-12995 (Deering Supp. 1990).
VII claims, and it would take away the employee's presently held opportunity for punitive damages under the state statute. The third alternative follows the present model for the relationship between labor arbitration and Title VII,¹²⁸ but employers are unlikely to perceive it as fair. Perhaps the better course would be to follow the model that exists under the California Code of Civil Procedure,¹²⁹ and stay arbitration of the wrongful termination claim pending adjudication of the discrimination claim, or vice versa. Of course, the statute could not limit the assertion of rights under federal statutes.

As to common law theories, consider the models at the two extremes: the statute preempts nothing, or it preempts everything. The difference between the two models would have its impact primarily upon those employees who would find it worthwhile to maintain litigation now, despite Foley, since employees who would not find litigation worthwhile presumably would utilize the statute regardless of the preemption rules. Under the first model, employees in that litigation-prone category would acquire an option they presently do not have; under the second model, they would be forced to give up their litigation option. Under the first model, employers collectively would have considerably greater exposure to monetary liability; under the second model, their current exposure to liability in litigation would be offset by exposure under the statute. It would be useful to know what the total cost difference might be; I do not believe we have sufficient data to compute that difference at present.

It might make sense, in terms of both good government and practical politics, to consider a middle ground. Since the statute would protect covered employees against and (under my suggestion) provide them with additional compensation for terminations in violation of public policy, the statute can be made the exclusive remedy for wrongful termination per se. On the other hand, a compelling justification does not appear to exist for using the statute to cut off independent tort claims that an employee might otherwise maintain, and could have maintained even if common law wrongful termination principles had never developed as they did, as a means of remedying injuries that the statute would not address. This would include a claim for defamation or invasion of privacy independent of the termination itself. In all likelihood, the California Supreme Court will soon answer

¹²⁸. Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974), held that the remedies available under grievance arbitration and Title VII of the Civil Rights Act are cumulative. The employee in that case had separable rights under both the collective bargaining agreement and Title VII that could be enforced separately. Id.

¹²⁹. CAL. CIV. PROC. CODE § 1281.4 (West 1982).
whether a claim for intentional infliction of emotional distress can survive the preemptive effect of the Workers Compensation Act.

**Conclusion**

As with any legal reform that cuts across existing interests and expectations, the drafting and passage of a wrongful termination statute will not be easy. This process requires creativity, compromise, and leadership on the part of the drafters. It is every bit as important, however, as were the reforms in anti-discrimination law, consumer law, and environmental law of the past decades. And, it is every bit as inevitable.