Court's decision is strewn with "what might have beens." What would have happened if the union had participated in the EEOC conciliation efforts? What would have happened if Award No. 1 had been presented for enforcement prior to the second arbitration? What would have happened if Award No. 1 had been viewed only as an exercise in the wide range of arbitral remedial authority? What would have happened if Award No. 2 had been, in fact, Award No. 1?

W.R. Grace should sound a loud warning bell to arbitrators, litigants, and courts. To recall the words of the poet, John Donne, for whom does that bell toll?

For the arbitral process and promise?

For the limits of judicial scrutiny of arbitration?

For the hopes of those who are required to submit to those processes?

Ten long years after a "lengthy investigation" posited an initial conclusion and almost five long years after an initial arbitral determination, the fish in this sea still found further legal nets.

We are dedicated to a process which, we boast, is to be swift, expert, inexpensive, and final.

Is it?

II. Reflections on Wrongful Discharge Litigation and Legislation*

William B. Gould IV**

Until the past decade, the idea of wrongful discharge legislation seemed entirely academic and remote from immediate consideration. The same characterization can be ascribed to the present situation—but the debate has emerged with a measure of intensity unknown a year or so ago. This change is attributable to one major development that has taken place since Professor Clyde Summers' seminal article[1] almost a decade ago which advocated unfair dismissal legislation of the kind which exists in Europe.

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*The author is grateful for valuable research and editorial assistance from Joseph Costello and Ed Attanasio, candidates for the J.D. degree, Stanford Law School, 1985.

**Charles A. Beardsley Professor of Law, Stanford Law School; Co-Chairman of the California State Bar Ad Hoc Committee on Termination at Will and Wrongful Discharge.

[1]Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481 (1976).

The courts in at least 29 jurisdictions[2] have recognized a number of exceptions to the American common law principle that an employee is terminable at will, i.e., absent discrimination for certain prohibited reasons,[3] he or she could be dismissed at any time for any reason. Until the past few years, the only other protection afforded employees derived either from collective bargaining agreements with just cause provisions which limit the employer's ability to dismiss employees or from civil service legislation. However, only approximately twenty percent of the work force is covered by such collective bargaining agreements and only another five or ten percent is covered by civil service legislation.[4]

Wrongful discharge litigation—the courts have not yet addressed the question of applicability of the new doctrines to wrongful discipline—has subjected employers to the unfamiliar terrain (for labor cases) of judges and juries and to the potential for compensatory and punitive damages. Sometimes, as in the Ninth Circuit case of *Cancellier v. Federated Department Stores*,[5] the liability has been substantial—in that case 1.9 million dollars for three employees. The substantial judgments imposed upon employers, and a number of rather expensive settlements negotiated in order to avoid juries (institutions ever sensitive to the imbalance in power between employee and employer) have caused considerable concern to the business community.

Nowhere has that been more true than in California where for the past four years, led by the California Supreme Court decision in *Tameny v. Atlantic Richfield Co.*,[6] which adumbrated a

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[2]*Wrongful Discharge: Employment at Will*, [Lab. Rel. Expediter] Lab. Rel. Rep. (BNA), at 839 (Aug. 1, 1983). *See, e.g., Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839 (1980); *Palmeteen v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Savodnite v. Korvetters*, 488 F. Supp. 822 (E.D.N.Y. 1980); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983).

[3]Such statutes include: the National Labor Relations Act, 29 U.S.C. §§ 151–169 (1976) (discrimination on the basis of union activity); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-16 (Supp. V 1981) (race, sex, national origin, and religion); and Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (1976) (age). Moreover, there are a number of analogous state statutes providing similar protection, as well as a large number of more specified state laws. *See, e.g.*, Mass. Gen. Laws Ann., ch. 56 §§33 (1975) (prohibiting discrimination in employment in order to influence an employee's vote); Conn. Stat. Ann. § 51–247a (West 1981) (prohibiting discrimination in employment for serving jury duty).

[4]U.S. Bureau of Labor Statistics, Directory of National Unions and Employee Associations (1979); Summers, *supra* note 1 at 498.

[5]672 F.2d 1312, 28 FEP 1151 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982).

[6]27 Cal. 3d 167, 164 Cal. Rptr. 839 (1980). Several other state courts have recognized such public policy exceptions. *See, e.g., Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471,

public policy exception for the terminable at will principle, judicial incursions upon employer dismissals have spawned a considerable amount of litigation and judicial authority. Indeed, it has been estimated that a wrongful discharge action is filed on one of California's courts every day!

In response to this crisis, the State Bar of California Labor and Employment Law Section appointed the Ad Hoc Committee on Termination at Will and Wrongful Discharge to suggest legislative alternatives.[7] The recommendations provided some framework for the debate about whether there should be legislation and, if so, what kind of legislation.[8] Most of the ideas advanced here have been addressed, albeit in different form, in the Committee's Report.

Until recently, there was no incentive for employers to support the type of legislation recommended by the California Bar Ad Hoc Committee or any other source. Ironically, this seemed particularly true in California where the Labor Code specifically provides that an employment contract, absent other specifications, is terminable at will with "notice."[9] Now the dynamics have changed substantially. Because of the judicially created exceptions and the flood tide of litigation which has besieged the courts, many employers are interested in legislation—albeit legislation that is sufficiently favorable to their interests to return them to the "good old days" when an employment contract was truly terminable at will.

A second irony here is that the plaintiffs' bar has a vested interest in seeing that no legislation is enacted. They find the *status quo* to be quite satisfactory—particularly in California's

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427 A.2d 385 (1980) (employee dismissed for insisting that employer comply with state food labeling requirements); *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973) (employee dismissed for filing worker's compensation claim); *Kalman v. Grand Union Co.*, 183 N.J. Super. 153, 443 A.2d 728 (App. Div. 1982) (pharmacist dismissed for protesting an order from the employer that, he believed, would have required him to violate the state code of ethics); and *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. Ct. 28, 386 A.2d 119 (1978) (employee dismissed for serving jury duty).

[7]*To Strike a New Balance: A Report of the Ad Hoc Committee on Termination at Will and Wrongful Discharge* (Special Ed., *Labor and Employment Law News*, Feb. 8, 1984).

[8]*Compare Report of Committee on Labor and Employment Law, At Will Employment and the Problem of Unjust Dismissal*, 36 Record of the Bar of the City of New York 170 (1981). Persuasive cases for court annexed arbitration have been made in Stallworth and Christovich, "Court Annexed Arbitration of Title VII Suits: A Proposal to the Courts and the Bar," First National Conference on Resolving EEO Disputes Without Litigation, Washington, D.C., Jan. 26–27, 1984, and mediation in Bierman and Youngblood, "Employment-at-Will and the South Carolina Experiment" (unpublished, 1984).

[9]California Labor Code § 2922 (West 1971). *See Consolidated Theatres, Inc. v. Theatrical Stage Employees Union*, 69 Cal. 2d 713 (1968).

brave new world of wrongful discharge litigation. The obvious trade-off that would take place as part of any legislation would be limitations upon employer liability in exchange for a more informal and inexpensive process, such as arbitration or hearings before an administrative agency, where the employee would have easier access to the forum. Such a trade-off would be anathema to attorneys for plaintiffs since juries have fashioned substantial awards and the prospect of going before such juries has made employers pay some heed to even the most frivolous cases (and probably employ some inefficient employees in the process). From the perspective of the plaintiff's bar, the attorney's fees that can be reaped from a rich damage award on a contingency fee basis are infinitely preferable to more limited remedies that might be awarded by an arbitrator.

The unions have played a waiting game in this debate. One reason is the traditional argument, initially favored by the American Federation of Labor in the debate about social security and unemployment compensation legislation more than sixty years ago, that one should become a member of a labor organization before obtaining benefits. Up to a point, this has a certain appeal. The benefits associated with unions and collective bargaining agreements should be a major incentive to union organization. Quite obviously, protection against unfair dismissal is a basic provision of any collective bargaining agreement. Consequently, unions have become increasingly concerned that legislation might provide as much, let alone more, protection than that contained in some collective bargaining agreements.

Despite the ambivalence of the unions and the resistance of the plaintiffs' bar, there are several obvious reasons why legislative reform is needed. The present system favors primarily white collar, professional and managerial employees who have the economic resources to stay the course and to pay the monies that must be provided for the costs of discovery, motion arguments which will precede a trial, and the retainer agreement from an attorney who frequently cannot wait for the jury award which may be four to five years down the road. It is the middle class and average blue or white collar worker, let alone the impecunious, who have been screened out of the existing system. This ought to be of concern to those who desire an equitable system in which employees will be fairly treated.

A related problem is that the theories of public policy cases are generally only going to be available to high level employees

because they require knowledge of management practices which are perceived to be against the law or public policy, or the discretion of a senior position which could involve the employee not only in knowledge but in participation in unlawful conduct.

Moreover, given the frequency of litigation, the large damage awards, and the receptivity of the juries to plaintiffs, the judicial system has become besieged with wrongful discharge claims. Prior to the recent emergence of wrongful discharge litigation as a major portion of the state courts' dockets, many states, including California, were looking for alternatives to litigation—often in the form of arbitration—to reduce the caseloads. The flood tide of wrongful discharge cases has underscored the need for such alternatives.

In addition, while substantial damage remedies are indeed available, the courts at common law do not provide for reinstatement. Many of the employees bringing wrongful discharge actions are not interested in reinstatement and neither are their attorneys. Yet it seems anomalous that the one obvious remedy traditionally associated with modern labor law in the United States, and now in other portions of the world, is excluded. Is it not in society's interest to develop a swift, expeditious procedure which will restore a prevailing employee to the position from which he complains that he has been unlawfully removed?

There is another factor—one to which the Ad Hoc Committee did not allude in its report—which must be considered. This is the fact that employees not covered by collective bargaining agreements or civil service legislation are protected against dismissal for enumerated reasons and that most of the claims are not meritorious. But a goodly number of these cases are those in which, for instance, dismissals are instituted against union adherents because of union activity and against blacks and women because of race and sex, and where, in fact, employees have been mistreated—and yet the allegations are found to be unmeritorious because the unfair treatment is not attributable to race, sex, or union activity.

Just as the Supreme Court's landmark decision in *Griggs v. Duke Power Co.*,[10] invalidating racially exclusionary examinations and educational qualifications, had a tendency to induce us to scrutinize a whole variety of arbitrary employment practices, such as those involving arrest records and conviction applicable

[10]401 U.S. 424, 3 FEP 175 (1971).

to all races, so also did fair employment practices legislation focus our attention upon a wide variety of actions in which employees have been treated unfairly but are unable to prove a Title VII violation under the disparate treatment or disparate impact standards enumerated by the judiciary. The obvious conclusion the employee draws is that unfair or arbitrary treatment is so improper that it must have been because of his or her race or sex. When the case is dismissed, resentment and acrimony may increase.

Another aspect of this "unfair treatment" point is that the male white employee who is younger than forty is left out from existing antidiscrimination law coverage.[11] It is difficult to say to what extent this has induced reverse discrimination litigation. The Age Discrimination Act itself, covering workers from 40 to 70, has been called the white man's revenge!

The virtue of having unfair dismissal legislation in this country is comprehensive coverage which would prohibit unfair treatment against all employees regardless of race, color, sex, age, religion, etc., thus resolving the foregoing problem. This would be a unitary approach, designed, albeit in the context of continued reliance upon antidiscrimination legislation, to bring our diverse people together so as to hasten an era when race, sex, and religion would be irrelevant to one's opportunity. It would also envelop new controversial questions relating to such issues as prohibitions against discrimination on the basis of homosexuality.[12]

The promulgation of unjust dismissal legislation would also bring this country into line with the rest of the industrialized Western nations. The United States has not ratified any Convention of the International Labor Organization of any consequence dealing with collective bargaining or the right to organize—particularly Conventions 87 and 98 which bear

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[11]Of course, discrimination against anyone on the basis of race, sex, religion, etc., is forbidden. *See, e.g., McDonald v. Sante Fe Transp. Co.*, 427 U.S. 273 (1976).

[12]The debate over the need for legislation precluding discrimination in employment on the basis of sexual orientation recently surfaced once again in California. The California Legislature passed Assembly Bill No. 1, prohibiting such discrimination, but Governor George Deukmajian vetoed the bill on March 13, 1984, citing deeply divided public opinion on the issue and a lack of evidence that such a law was needed. *San Francisco Chronicle*, Mar. 14, 1984, at 1, col. 6. Other states have struggled with the problem as well. At this point, only two states, Pennsylvania and Wisconsin, as well as the District of Columbia, prohibit such discrimination. In Pennsylvania, this policy was established by executive order and applies only to those state agencies under the Governor's jurisdiction. [Fair Empl. Prac. Man.] Lab. Rel. Rep. (BNA), at 453:1605, 457:831, 457:3210 (Mar. 1984).

directly upon these issues. It is significant that the International Labor Organization has promulgated Convention 158 in 1982, entitled "Termination of Employment at the Initiative of the Employer," which obliges employers to dismiss employees only for "valid" reasons. All of Europe and Japan have accepted the view that employees need to be protected against unfair dismissals. Surely it is time for the United States to do so in an effective manner.

As Professor Steiber has suggested,[13] the best approach would be federal labor legislation for all of the obvious reasons. But absent such legislative efforts, the burden is with the states.

Penultimately, even at the state level, there are a whole host of questions relating to the unjust dismissal area which are difficult for a legislature to resolve, let alone a judiciary responding to case by case legislation. Amongst these issues are the kind of employees who are to be protected, the standards to be applied to them, the size of employers to be covered, the statute of limitations, and the circumstances under which the rights given employees may be waived.

The most important consideration involved is the moral dimension that a civilized society must provide to unfair treatment where ever-increasing numbers of us see work as critical to our economic and psychological well-being. Along with family, marital relations, education, and religion, employment is the heart of modern life. The way in which we function in the labor market determines or shapes virtually all that is of consequence to us.

The Particulars of the Statutory Scheme

A. Employee Exclusions

There seems to be no reason why employees at any level should be excluded from legislation although, as the California Court of Appeals seems to have concluded in both the *Crosier*[14] and *Pugh*[15] decisions, management ought to be granted considerably greater deference in its dealings with managerial employ-

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[13]Stieber and Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. Mich. J.L. Ref. 314 (1983).

[14]*Crosier v. United Panel Serv., Inc.*, 150 Cal. App. 3d 1132, 198 Cal. Rptr. 917 (2d Dist. 1983).

[15]*Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1st Dist. 1981).

ees than in its treatment of the average worker. This is because of the subjective nature of the work and the trust and confidence involved in a closer relationship. While the concept of progressive discipline applicable to the unionized sector seems inappropriate for higher echelon employees, the fact is that some kind of notice and opportunity to correct deficiencies should be required. The applicability of unfair dismissal legislation to such employees signifies, of course, that even this group of employees must be dismissed only for a failure to perform work adequately—not simply because management wants a new team or wants "new blood."

It also seems that employees working under fixed-term contracts should be excluded. The Ad Hoc Committee recommended that this be done in California. Both Canada, under its legislation relating to employees covered under federal law, and Great Britain have permitted such an exclusion, which does not appear to have opened up an escape hatch employers are anxious to utilize. The justification is that management ought to be able to waive statutory standards for those in a special relationship to whom it is willing to provide job security in the form of compensation.

In cases involving both the good faith and fair dealing and implied contract theories, courts have generally focused upon considerable employee longevity or seniority as a prerequisite to the theory of liability.[16] Nova Scotia and Quebec have enacted legislation which protects only employees who have been employed for ten years and five years respectively.[17] But whatever the common law in this country, it seems appropriate to enact legislation that covers employees who have been employed for considerably shorter durations. In essence, the attempt should be to establish a probationary period, albeit one that provides the employer with more flexibility than the 30 to 90 days generally provided under collective bargaining agreements. This approach has been taken in Europe, under unfair dismissal legislation; by the Ad Hoc Committee which recom-

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[16]*See* Miller and Estes, *Recent Judicial Limitations on the Right of Discharge: A California Trilogy*, 16 U.C. Davis L. Rev. 65 (1982).

[17]Simmons, "Unjust Dismissal of the Unorganized Workers in Canada" (unpublished manuscript which will be published in 1984 edition of Stan. J. of Int'l L.), 70, n.117; Trudeau, "The Effectiveness of Reinstatement as a Remedy Against Wrongful Dismissal in the Unorganized Work Force in Quebec," Paper Presented at the Annual Conference of the Canadian Industrial Relations Association, May 30, 1984, University of Guelph, Ontario.

mended a six months duration requirement; and by the McAlister bill, which, as originally drafted, provides for two years.[18] It is interesting to note that the experience in Canada, where employees need only be employed for one year in order to be eligible under the statute, is that at least during the past fiscal year, the employees who utilized the statute had been employed for an average of 5.45 years.[19]

B. Employer Coverage

The National Labor Relations Act covers all employers engaged in interstate commerce.[20] There is no logical reason why unfair dismissal legislation coverage should more closely resemble that of Title VII, i.e., 15 or more employees, than that of the NLRA, but practical politics may dictate that this be the legislative response. Again, there is no precise demarcation line between those employers who should or should not be covered. Certainly covering employers who employ somewhere between five and twenty-five employees is the permissible lower end of the range. The Ad Hoc Committee recommended that coverage be the same as under Title VII.

C. The Standard

The courts speak intermittently about just cause, good cause, and good faith. Sometimes they use these terms interchangeably. While disputes between managerial and some supervisory employees obviously necessitate more deference to managerial judgments, in part because the work is more subjective, there seems to be no good reason why just cause, which has worked perfectly well in the organized sector of the economy, could not be applied to the unorganized as well. This was the position

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[18]The McAlister Bill, Assembly Bill No. 3017, as originally drafted, essentially tracked the recommendations of the Ad Hoc Committee. Several amendments were offered by representatives in response to the pressures of the business community. One such amendment provided that only employees with five years of service with the employer would be covered by the statute. In response to this obvious attempt to dilute the protection offered by the original bill, the author, Chairman of the Ad Hoc Committee, wrote a letter to the Assembly Labor and Employment Committee opposing such actions. Letter from William B. Gould to California Assembly Labor and Employment Committee (May 2, 1984). On May 8, 1984, the amendments were rejected by the Labor and Employment Committee.

[19]Simmons, *supra* note 17.

[20]*NLRB v. Fainblatt*, 306 U.S. 601, 4 LRRM 535 (1939); *NLRB v. Polish Nat'l Alliance*, 322 U.S. 643, 4 LRRM 700 (1944).

taken by the Ad Hoc Committee.[21] Again, any legislation must also bear in mind that for higher echelon employees, progressive discipline takes on an entirely different meaning, i.e., some form of notice or advice rather than a series of warnings, suspensions, and so on.

D. Employee Representation

It is safe to assume that employers will be adequately represented under any system by corporate personnel and, in the event of a hearing, lawyers as well. While a number of employers that have instituted arbitration procedures for nonunion employees do not permit employees to be represented by anyone of their own choosing, it would seem that this right of representation would be a basic element in any statutory scheme. That is to say, employees protesting wrongful discharges or unfair dismissal should be able to utilize a lawyer or, should they choose, a union representative whom they designate. This was the Ad Hoc Committee's recommendation. Where a company requests a panel of arbitrators from the Federal Mediation and Conciliation Service, that agency insists that the "employee have a right to representation of his or her choice in the grievance and arbitration process."[22]

E. Limitations on Access

One of the difficulties with existing wrongful discharge litigation is that it is simply inaccessible to a very substantial portion of the work force. The cost and delay built into the discovery, and motion practice, which precedes what could be a lengthy trial, discourages all but the more affluent and less faint of heart. On the other hand, moving towards a system such as arbitration can have an effect which is too antithetical to be acceptable, i.e., the potential for an avalanche of cases filed by employees who have nothing to lose through protest.

The California Ad Hoc Committee approached this matter by attempting to build in a number of buffers that would stand between the employee and the arbitration process. First, media-

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[21]In my view the burden of proof issue is not nearly as important as the standard. The Ad Hoc Committee has imposed a *prima facie* burden of proof on the employee. The burden then shifts to the employer as under the NLRA.

[22]Communication from Jewell S. Meyers, Director, Division of Arbitration Services, Federal Mediation and Conciliation Service, May 9, 1984.

tion under the auspices of the California State Mediation and Conciliation Agency would be provided, along with an informal discovery process. This procedure is designed to facilitate negotiations on the basis of facts. Secondly, not only would costs be assumed by the employees and the employer but, should the matter proceed to arbitration, the employee and the employer each would be required to post a $500 down payment toward the arbitration process. This would tend to make most employees think twice before proceeding to arbitration.

The British and Canadians have attempted to deal with this problem through other means—means which have not proved to be particularly satisfactory. The Canadian federal legislation, for instance, provides the Minister of Labor with full discretion to screen out frivolous complaints. Canadian commentators, while noting that there have been no difficulties during the six years that the legislation has been in force, have criticized this device as providing a potential for allegations of unfair treatment and discrimination, and creating an atmosphere of distrust between employees and the government.[23] Professor Simmons has noted that there is no available data on the number of occasions that the Minister has used this discretion to refuse to assign cases to arbitrators (or adjudicators as they are called in Canada), but he has been informed that such occasions have been "relatively few and have been restricted to cases that have no merit whatsoever and cases in which the precise issue has been decided by other adjudicators."[24]

The British, through the Conservative government's 1980 amendments to their unfair dismissal legislation, have provided for industrial tribunals which, on the basis of papers submitted, issue pre-hearing assessments on the merits of the case. The assessments serve as a warning to a party in that if the assessment proves correct after hearing, costs will be awarded against that party. Statistics compiled for 1982 by the British Department of Employment indicate that this approach accomplishes one of its objectives: in those cases where warning was given the applicant, only approximately 20 percent went forward from that stage. Where no warning is given, a majority of cases proceed.[25]

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[23]Simmons, *supra* note 17; England, *Unjust Dismissal in the Federal Jurisdiction: The First Three Years*, 12 Manitoba L.J. 9 (1982).

[24]Simmons, *supra* note 17 at 25-26.

[25]*Unfair Dismissal Cases in 1982*, Employment Gazette, Oct. 1983, at 449.

This assessment procedure does not, however, always produce the desired effect. In the first place, despite the above statistics, the costs tend to be so minimal that solicitors generally advise taking a risk even when a warning is given. Secondly, a substantial number of Chairmen of industrial tribunals do not wish to give opinions based solely upon papers without actually hearing the evidence. Lastly, many employees assume that a failure to warn means that they have a meritorious case. In 1982, for cases in which employees were warned, they lost in 223 cases and won in only 13. But where applicants were not warned, the win-loss ratio was still against them: 152 won and 417 lost.[26]

Accordingly, while the idea of imposing the arbitration costs upon employees is not accepted in Canada and Great Britain, the procedures undertaken in both countries to discourage frivolous complaints are hardly free from criticism. The imposition of costs, as suggested by the Ad Hoc Committee, is hardly ideal. But with the Committee's scheme, the indigent would be entitled to access without payment. Furthermore, other alternative approaches seem to possess their own deficiencies.

F. Remedies

The American employers' principal concern, of course, has been the unlimited nature of tort liability and damages that flow from intentional emotional distress actions and the like; it is punitive damages which have caused considerable concern under the present scheme. On the other side of the coin, reinstatement is not now available to the employees.

It is inevitable that the issues of reinstatement and damages are linked together. While it recommended that reinstatement be presumptively available, the Ad Hoc Committee simultaneously noted that the United States, in contrast to Europe, had come to provide reinstatement with undue automaticity—both under the National Labor Relations Act and arbitration proceedings. The Committee specifically noted that reinstatement might not be appropriate, for instance, where: (1) a confidential or executive type relationship is involved where the employer or employee relationship is both delicate and complex; (2) contact with the public, for instance, is involved in the employer's judgment that the employee presents an image which is not suitable;

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[26]*Id.*

(3) where evidence of serious misconduct is found to have taken place subsequent to the occurrences which have given rise to an invalid discharge. Although the Committee did not specifically so state, it should be evident that reinstatement should not be provided where the employee has no interest in it.

Where reinstatement is not provided, up to two years of lost wages would be substituted. An award of back pay with interest would be fashioned with deduction for either actual interim earnings or those that could have been obtained with reasonable diligence (except in connection with public policy or whistle blowing cases where no such deduction should be made). The California Committee did not address the question of whether employees' employment should continue under certain circumstances while the issue of dismissal is resolved. This is done infrequently under collective bargaining agreements in this country and the infrequency of the practice in the organized sector made the idea seem impractical as part of new legislation. But West Germany provides that dismissed employees be retained *pendente lite* in most instances. However, it does not appear that the actual practice in Germany comports with the language contained in the Works Constitution Act of 1952 as amended.[27]

As one might expect, given the considerable problems which have emerged with reinstatement where unions represent employees,[28] there have also been substantial problems with reinstatement in the unorganized sector in other countries. The British and Canadian experiences are particularly instructive. The British have experienced an ever declining rate of reinstate-

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[27]Aaron, "Dealing with the Problem of Wrongful Discharge," Paper presented to Los Angeles County Bar Labor Law Symposium, May 18, 1984, at 11, 18; Estreicher, "Unjust Dismissal Laws in Other Countries: Some Cautionary Notes," excerpt from Luncheon Address for Mid-Winter Meeting of the Committee on Developments of the Law of Individual Rights and Responsibilities in the Workplace, Section of Labor and Employment Law, American Bar Association, Scottsdale, Ariz., Mar. 2, 1984, at 8.

[28]*See* Smisek, *New Remedies for Discriminatory Discharges of Union Adherents During Organizing Campaigns*, 5 Indus. Rel. L.J. 564 (1983). Smisek contends that traditional remedies, such as reinstatement, do little to discourage employers from discharging union adherents. Reinstatement is a slow process, back pay awards are generally relatively small, and the employee is unlikely to stay on once reinstated anyway. While supporting many of the more commonly suggested remedies, such as the expanded use of 10(j) injunctions, increased back pay awards and criminal penalties, Smisek offers a new idea: temporarily suspending the employer's power to discharge. *See also*, Murphy, *Discriminatory Dismissal of Union Adherents During Organizational Campaigns: Suggested Remedial Amendments*, 4 Indus. Rel. L.J. 61 (1980); Nolan and Lehr, *Improving NLRB Unfair Labor Practice Procedures*, 57 Tex. L. Rev. 47 (1978); Stephens and Chaney, *A Study of the Reinstatement Remedy under the National Labor Relations Act*, 25 Lab. L.J. 31 (1974).

ment. In 1982, in only 0.8 percent of the cases in which employees claims were upheld, and in only 0.3 percent of all cases, was reinstatement provided. There is some debate about the reason for this phenomenon, and there has been considerable focus upon a number of factors.[29]

In the first place, when employees proceed to conciliation it is said that approximately 50 percent of them indicate that they desire reinstatement. It is thought that many simply use this as a vehicle to leverage more back pay. Secondly, perhaps ironically, employer resistance to reinstatement seems to have increased as more sophisticated internal procedures have been developed in response to the legislation. Reinstatement appears to threaten the credibility of these procedures more directly than compensation. Therefore, it is resisted by management with more intensity.

Third, and perhaps most important, is the level of compensation provided in the absence of reinstatement. The British statutory scheme provides for a basic award calculated on the basis of age and years of experience, with a 3,600 pound maximum where compliance with an additional compensatory award may be provided. Where compliance with a reinstatement order is not forthcoming, an additional award of between 13 to 26 weeks of wages may be imposed on top of the above. But the actual remedy in the form of a damage award is generally quite modest.[30]

Canada also seems to be experiencing some difficulties with reinstatement in the unorganized sector. Through the first four and one-half years that the legislation has been in effect, there have been 122 adjudication decisions handed down that have dealt with the merits of dismissal cases. Dismissals were upheld in one-fourth of the cases and, of the remaining cases, there were 30 in which employees prevailed and received some compensation without reinstatement. As Professor Simmons has noted: "This means that slightly over one-half of the complain-

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[29]*See* Lewis, *An Analysis of Why Legislation Has Failed to Provide Employment Protection for Unfairly Dismissed Employees*, 19 Brit. J. Indus. Rel. 316 (1981); Dickens, Hart, Jones, and Weeks, *Why Legislation Has Failed to Provide Employment Protection: A Note*, 20 Brit. J. Indus. Rel. 257 (1982); Lewis, *A Note on Applicants' Choice of Remedies in Unfair Dismissal Cases*, 21 Brit. J. Indus. Rel. 232 (1983); Lewis, *Interpretation of "Practicable" and "Just" in Relation to "Re-Employment" in Unfair Dismissal Cases*, 45 Mod. L. Rev. 384 (1982); Williams and Lewis, *The Aftermath of Tribunal Reinstatement and Re-Engagement*, Research Paper No. 23, Department of Employment, June 1981.

[30]Estreicher, *supra* note 27 at 7-8.

ants are remaining permanently dismissed. Reinstatement with compensation was ordered in 21 cases whereas another 6 were reinstated without compensation. Another 14 were reinstated and received some compensation because the complainants were found to be partly to blame for their misfortune."[31]

There has been a steady climb in the number of employees denied reinstatement either because they do not prevail or because the arbitrator chooses to exercise the discretion available to him under the statute not to provide this remedy. As in Britain, it appears as though nonunion employers in Canada are developing more sophisticated labor relations machinery and expertise, and are not dismissing employees without first resorting to measures such as progressive discipline.

Another consideration in this area is that the monetary remedies simply may not be sufficient to induce employers to accept reinstatement as a remedy. Compensation is sufficiently unburdensome that it is the more acceptable alternative. Of course it must also be kept in mind that there may be considerably less employee interest in reinstatement in countries other than the United States inasmuch as the remedy has not been available traditionally. This could also be attributable, at least in part, to the better established and broader social net in such countries which provides employees with a cushion against dismissal. But, in any event, it may be that the Ad Hoc Committee's recommendation of a limit of two years' front pay is insufficient to protect employees—particularly those in their fifties who would have difficulty finding alternative employment.

Attorneys' fees are, of course, a substantial portion of the cost that must be incurred by the employee. If an employer's liability is limited and the employee must in essence provide a down payment on the costs for the arbitration proceeding, it seems only appropriate that the employee be awarded attorneys' fees and costs in the event that he should in some sense prevail. (One recognizes that the problems involved in determining whether a party has "prevailed" are more difficult here, where arbitrators often find the employee culpable in part, and so frequently award reinstatement without back pay or with limited amount of back pay. Yet the determination of who is the prevailing party must be made.[32])

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[31]Simmons, *supra* note 17 at 46-48.

[32]Title 42 U.S.C. § 1988 provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the

Employees would not necessarily have to use counsel under an arbitration procedure. Yet the experience before both Canadian adjudicators and British industrial tribunals suggests that in fact, they will employ them. In Canada, for the fiscal year 1982–1983 employees represented themselves in only seven of forty cases. In the rest they were represented by counsel. In Britain, unions have expressed concern about the availability of legal services and legal aid to represent employees before the industrial tribunals.[33] However, there is no reason why union representatives in the United States, who, unlike their counterparts in Britain, have considerable experience in representing employees in grievance arbitration proceedings, cannot fill the void themselves when it suits their organizational purposes.[34]

G. Procedural and Substantive Standards Relating to Dismissals

The United States Supreme Court has found a limited procedural due process right to hearing upon termination of employment in the public sector.[35] To date, this has not been transposed to wrongful discharge actions in the private sector. In the *Crosier*[36] decision for instance, the California Court of Appeals specifically held that there was no procedural due proc-

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costs." The Supreme Court recognized the definition enumerated in *Nadeau v. Helgemue*, 581 F.2d 275 (1st Cir. 1978) that prevailing parties are those that "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Hensley v. Eckerhart*, 461 U.S. _____, 31 FEP 1169 (1983). The Court noted, however, that such fees must be reasonable. The Court emphasized, therefore, that where the plaintiff achieves only partial or limited success, the hours spent on unsuccessful unrelated claims should be excluded in considering the amount of a reasonable fee, since "The extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorneys' fees."

[33]*See* "Unfair Dismissal," Communication of Trades Union Congress, Circular No. 216 (1982–83), Mar. 24, 1983.

[34]For a discussion of the experience that Swedish unions have had with unfair dismissal legislation, *see* Fahlbeck, "Employment Protection Legislation and Labor Union Interests: A Union Battle for Survival?" (unpublished manuscript which will be published in 1984 edition of Stan. J. of Int'l L.); Simmons, *supra* note 17.

[35]This right to a hearing rests on whether the employee has a claim of entitlement, analogous to a property right, to which the due process protections of the fourteenth amendment can attach. Such an entitlement can arise from statutory law, formal contract terms or assurances made by the employer. In *Perry v. Sindermann*, 408 U.S. 593 (1972), such an entitlement was recognized where a college teacher in his tenth year of employment at a state college under a succession of one-year contracts, had been led to believe that he had a claim to reemployment under a "de facto tenure program." On three other occasions, *Board of Regents v. Roth*, 408 U.S. 564 (1972), *Arnett v. Kennedy*, 416 U.S. 134 (1974), and *Bishop v. Wood*, 426 U.S. 341 (1976), the Court refused to find such an entitlement on the facts. *Bishop* is particularly noteworthy since the Court held that a state could define the terms of employment so as to eliminate the need for a termination hearing. *See generally*, Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. Chi. L. Rev. 60 (1976).

[36]*Supra* note 14 at 1132.

ess right to hearing of any kind. The court said that justification for this holding as a matter of state constitutional law in California was to be found in its applicability to licenses in the public sector, the deprivation of which precluded the employee from pursuing a particular occupation altogether. Pursuing normal American labor market assumptions, the court reasoned that the employee in *Crosier*, a management official dismissed for violation of a nonfraternization policy, could find work elsewhere and thus was not in need of the protection afforded in the public sector.

In the leading California case dealing with good faith and fair dealing, *Cleary v. American Airlines*,[37] the court has indicated that good or just cause is the standard applicable to employee dismissals and that at least part of the just cause standard involves a determination as to whether the employer has adhered to its own procedures. Other California decisions have been considerably more vague about the standards, with some referring to both good faith and just cause.

Primarily out of concern that progressive discipline procedures be imposed, the Ad Hoc Committee recommended that a just cause standard be followed. It is of interest to note that a good deal of dissatisfaction has arisen in connection with the British statute because it has been interpreted as obliging an employer to act only in good faith and on the basis of honestly held belief.[38] Theoretically, the German labor law which prohibits "socially unwarranted dismissals" imposes a far more stringent standard.

H. Public Policy Issues

The only potential for opting out of the European and Canadian legislation is through a fixed-term contract as provided for in Britain and Canada. France and Germany have been sufficiently concerned about the potential for evasion of law through such procedures to eliminate the exception to statutory coverage. But apparently the first two countries have experienced no difficulty in connection with this opt out.

Under the Ad Hoc Committee's proposals, as noted above, similar provisions would be available so that top level employees

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[37]111 Cal. App. 3d 433, 168 Cal. Rptr. 722 (2d Dist. 1980).

[38]Ranninger, "Legal Remedies for Unfair Dismissal: The British Experience" (Apr. 20, 1984) (unpublished manuscript), at 29–30.

could be dealt with on a different basis, so long as they were advised that they were waiving their statutory rights.

The California Court of Appeals, in *Shapiro v. Wells Fargo Realty Advisors*,[39] concluded that a stock option agreement entered into with an employee employed for three and one-half years which stated that his status was at will, thus "expressly reserves Wells Fargo's right to discharge [him] at any time for any reason whatsoever, with or without 'good cause' . . . therefore the agreement defined the relationship as employment at will."[40]

The Court rejected the idea that such a contract was a contract of adhesion and, thus, against public policy. It may well be that this argument will be more difficult for employers to make when employees have more employment longevity than the employee involved in the *Shapiro* case or where the circumstances of distribution or circulation to that employee undercut the waiver proposition.

Here, also, it would seem perhaps more practical and rational to handle the problem of statutory exclusion and consequent issues of waiver through the legislature than the process of "elucidating litigation."[41] In the absence of legislation, this area, along with that of due process, promises to be one of the most heavily litigated in the near future.

Conclusion

Legislation seems to be in the public interest. It would benefit both employees and employers if it were drafted with a view toward establishing a careful balance. It would also benefit the public by relieving the ever-increasing burden on an already hard-worked judiciary.

A principal argument against such legislation is that the political process could produce a statute which would provide virtual immunity for employers. This is a recent lesson of California where amendments to Assembly Bill 3017 were introduced that were designed to provide considerable employer latitude, to relegate all cases to the courts without compensatory and punitive damages (thus eliminating the average worker), and to exclude from coverage those employees who make $100,000 or

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[39]152 Cal. App. 3d 467; ____ Cal. Rptr. ____ (1984).
[40]*Id.* at 474–76.
[41]*Cf.* Gould, *The Garmon Case: Decline and Threshold of Litigating Elucidation*, 39 Univ. of Det. L.J. 539 (1962).

more—thus eliminating access to those few individuals who would have been able to obtain access to the courts.

Another concern is the impartiality and integrity of the arbitrators. Judge Hays notwithstanding,[42] where large institutions like labor and management are the only parties involved, the problem is inconsiderable. But as I noted a few years ago,[43] the dynamics are different when third parties and their separate interests are involved. The same is true when lone individuals are arrayed against corporations. Only the latter are likely to have contact with the arbitrator again.

The Ad Hoc Committee nevertheless reposed confidence in the arbitral process, an act of faith criticized sharply by Professor Aaron.[44] Yet Canada, with whom we share much that permits more telling comparative judgments than can be generally made (including arbitration itself!), does not seem to have had difficulties with the impartiality and independence of the arbitrators during the six years of its legislation.

Again, the fundamental obstacle is that no institution speaks for the public interest in the political process. The plaintiff's bar represents itself.

Organized labor is the only counterbalance. Only its entry into the fray can produce balanced legislation and occupy the vacuum into which business interests otherwise move.

Why would labor want to become involved? There are considerations which may attract union support for such proposals. For instance, as the Ninth Circuit has recently made clear, wrongful discharge litigation has applicability to the unionized sector, as well as the nonunion sector and thus threatens the finality and stability of arbitration awards rendered under collective bargaining agreements.[45] Furthermore, since damage awards fashioned by juries are substantially higher than the back pay to which unionized employees are limited, lack of uniformity may harm union prestige. To the extent that union represented employees are in a better position, employers may be encouraged to resist unionization. Finally, employees who do not need lawyers in arbitration may look to those who know

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[42]Hays, Labor Arbitration: A Dissenting View (New Haven: Yale University Press, 1966).

[43]Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. Pa. L. Rev. 40 (1969).

[44]Aaron, *supra* note 27 at 25–26.

[45]*See Garibaldi v. Lucky Food Stores*, 115 LRRM 3089 (9th Cir. 1984) (employee may pursue wrongful discharge claim in state court despite losing in arbitration). *See generally* Note, *Preemption of State Wrongful Discharge Claims*, 24 Hastings L.J. 635 (1983).

something about it, i.e., union representatives. Unions can use the process selectively as an organizing tool.

Whatever the political realities, the Ad Hoc Committee's recommendations provide a framework for debate. Whatever legislative formula emerges, it is time that all workers, unionized or not, be protected against arbitrary and unfair discharge.[46]

III. NLRB DEFERRAL TO THE ARBITRATION PROCESS: THE ARBITRATOR'S AWESOME RESPONSIBILITY

CHARLES J. MORRIS*

Eighteen years ago, speaking before the 20th Annual Meeting of this Academy, Bernie Meltzer and Bob Howlett launched the great debate about the role which external law should play in the arbitrator's decision-making process. Bernie Meltzer espoused a restrictive view that "where there appears to be an irrepressible conflict between a labor agreement and the law, an arbitrator whose authority is typically limited to applying or interpreting the agreement should follow the agreement and ignore the law."[1] Rejecting such a confining approach, Bob Howlett boldly championed the role of external law, asserting that "arbitrators should render decisions . . . based on both contract language and law [because] a separation of contract interpretation and . . . law is impossible in many arbitrations."[2] This debate raged fiercely—though always politely—for a decade. Among the participants were Dick Mittenthal,[3] Harry Platt,[4] Mike Sovern,[5] Bill

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[46]Other countries which have provided more substantial job security do not seem to have been placed at a competitive disadvantage. *See* W. Gould, *Japan's Reshaping of American Labor Law* (MIT Press, 1984).

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[1]Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration* in The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 16. *See also* Meltzer, *The Role of Law in Arbitration: A Rejoinder*, in Developments in American and Foreign Arbitration, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968), 58.

[2]Howlett, in The Arbitrator, the NLRB, and the Courts, *supra* note 1 at 67. "All contracts are subject to statute and common law; and each contract includes all applicable law." *Id.* at 83.

[3]Mittenthal, *The Role of Law in Arbitration*, in Developments in American and Foreign Arbitration, *supra* note 1 at 42.

[4]Platt, *The Relations Between Arbitration and Title VII of the Civil Rights Act of 1964*, 3 Ga. L. Rev. 398 (1969).

[5]Sovern, *When Should Arbitrators Follow Federal Law?* in Arbitration and the Expanding Role of Neutrals, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 29.