Chapter 10

IS IT TIME FOR A NATIONAL UNFAIR DISMISSAL STATUTE?

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Panelists: Jack Gallagher, Paul Hastings Janofsky & Walker LLP, Washington, DC
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I. Introduction

Symonette: Good afternoon, everyone. The employer–employee relationship in the United States is subject to a patchwork of laws that place certain limitations on the grounds upon which an employer may rely in order to sever that relationship. For example, an employee may not be terminated on the basis of race, gender, age, disability, or, indeed, for trying to organize a union. Depending on where you live, an employee may not be terminated in retaliation for whistle-blowing or filing certain claims. There are also a number of laws that regulate this relationship, including unemployment and workers' compensation. Yet, the vast majority of employees—those without the protections of collective bargaining—are subject to termination for any reason at all outside of these few exceptions. Such is the principle of employment at will. At the same time, the litigation of employment–related issues continues to increase. Employers, seeking to avoid the cost of such litigation, have at least explored the creation of their own dispute resolution systems. These systems have sparked issues concerning their basic fairness, but it's also created an industry

dedicated to employment dispute resolution. Indeed, the landscape of employment regulation and employment resolution has become ever more complex. Thus, this begs the question: Is it time for a national unfair dismissal statute? Our principal speaker will present a paper to address that question. We also have a panel of prominent practitioners to discuss the proposals raised in this paper.

Now, let me move on to our introductions. At the far end of our panel dais is Jack Gallagher. He is a partner in the firm of Paul Hastings. Mr. Gallagher's practice includes a wide range of litigation, negotiation, and counseling on virtually all aspects of the employment relationship with particular focus on federal court litigation affecting airline and railroad clients under the Railway Labor Act. Mr. Gallagher also has extensive experience in employment discrimination litigation, and in strategic planning for mergers, acquisitions, and bankruptcies. Mr. Gallagher received his B.S. degree in 1969 from the University of Scranton and his J.D. degree with distinction in 1972 from Cornell University. While at Cornell, he was a member of the Order of the Coif and the Cornell Law Review. He served as law clerk to U.S. District Judge Aubrey Robinson. And, Mr. Gallagher has served as a teaching fellow at Boston College Law School. He also has been an assistant professor at the Indiana University School of Law in Indianapolis and an adjunct professor at the Columbus School of Law, Catholic University of America. He is a fellow of the College of Labor and Employment Lawyers. And currently, he is the co-chair of the Committee on Railroad and Airline Labor Law of the Section of Labor and Employment of the American Bar Association.

Our next speaker is Attorney Hugh Beins, who is a partner in the firm of Beins, Axelrod, Gleason, and Gibson. His practice is devoted to areas of collective bargaining, labor, internal union affairs, and litigation. He represents unions and individual clients mostly in matters before the National Labor Relations Board (NLRB) and in arbitration. He has extensive litigation experience, including years as a trial attorney and general counsel for the Eastern Conference of Teamsters. He also teaches as an adjunct professor of labor law at Georgetown and is the recipient of the Charles Faye Distinguished Adjunct Professor Award and the Bicennial medal. Mr. Beins received both his B.A. and LLB degrees from Georgetown University.

Our next panel member is our own arbitrator and attorney, Jim Oldham. Jim, as you know, is the St. Thomas More Professor of Law and Legal History at Georgetown Law Center where he's been teaching since 1970. He graduated from Stanford Law School and has been active in the arbitration profession for more than 35 years. One thing I would like to mention about Jim is that for some time his research efforts have been directed to 18th century legal history, especially English history. And I'm happy to note that as of Monday, his book entitled, *Trial By Jury: The Seventh Amendment and Anglo-American Special Juries*, was published.

Our next panelist is Mr. Richard Seymour. Mr. Seymour is a solo practitioner and represents executives in negotiating hiring and severance agreements as well as plaintiffs in discrimination and wage and hour actions. He graduated from Harvard Law School in 1968, worked for the U.S. Commission on Civil Rights starting in 1968, and in recent years has spent most of his time representing employees in employment matters, frequently in class actions and Fair Labor Standards Act (FLSA) collective actions. He is a fellow and former governor of the College of Labor and Employment Lawyers, a member of the governing council of the Labor and Employment Law Section of the American Bar Association (ABA), and a member of the ABA Class Action task force where he served as past chair of the Employment Rights section. He has been active in the Association of Trial Lawyers of America and has published extensively.

Finally, let me introduce our principal speaker. Now, if you look into the book for George's bio, you notice that it has only three lines. And the three lines basically set forth that he graduated from the University of Michigan and from Columbia Law School, that he was the president of the Society of Professionals in Dispute Resolution, and that he was one of the presidents of the National Academy. Three lines. But, as a recent member told me yesterday, if you don't know who George Nicolau is, you're at the wrong convention. On a personal note, I would say that, in addition to the people we heard from at the fireside chat, George represents what I believe to be the heart and soul of the Academy. We are all indebted to him because of his professionalism and his grace. He has been a mentor to all of us as and also a good friend. So with that, I would like to introduce our presenter, George Nicolau.

II. PRESENTATION BY GEORGE NICOLAU*

The program brochure tells you that I will be presenting a paper addressing the pros and cons of a national unfair dismissal statute. I intend, as you might have surmised, to emphasize the "pros" and will leave it to the responders to highlight, if they wish, the "cons." My proposal is a relatively modest one. I am thus somewhat overwhelmed at the stature of those here on the dais with me, but then again perhaps they are actually here to agree.

First, if you will, I would like to trace the journey that has brought me to my present position. As some of you remember, back in other days, 1996 to 1997, I had the honor of being the President of this organization. I say back in other days because those were the times when the Academy did not let the President speak until virtually the last day of tenure.

1997 was the 50th anniversary of the Academy's birth. On September 14, 1947, 43 arbitrators, many of whom were alumni of the War Labor Board, met in Chicago and the Academy was born. As I have had occasion to say before, that meeting and the first Annual Meeting that soon followed was an assembly of giants who, over the years, shaped arbitration. As former President and close friend the late Tony Sinicropi reminded us, these giants made the Academy the "conscience of the employment-related dispute resolution field."[1]

As I reflected on those past 50 years, I thought about what I should say in my Presidential Address. How should I honor the past while setting our sights on the future, particularly at a time when collective bargaining was suffering a decline and fair and unbiased arbitration was under fire on a number of fronts? I decided, while extolling the past and learning from it, that we should concentrate on the future; that we should be not only the "conscience" of the profession, but also its voice. I said then:

> Fairness is our business and the absence of fairness, wherever it occurs, should be our concern. We cannot ignore the fact that ours is a small world and that there are 100 million members of the workforce who have no access to arbitration and that many of those that are be-

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*Member, National Academy of Arbitrators, President, 1996–1997, New York, New York.

[1]Sinicropi, *Presidential Address: The Future of Labor Arbitration: Problems, Prospects and Opportunities*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993) at 1, 14.

ing given access or having such access forced upon them are being subjected to unfair and biased procedures."[2]

The Academy's response to those imposed, unfair, and biased procedures was the report of the "Beyond the Protocol" Committee, established by President-Elect Milton Rubin and I and chaired by Michel Picher. The Report, which was adopted by the Academy Governing Board, put us on record as "opposing mandatory arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights." Because it was apparent under then current case law (i.e., *Gilmer*[3]) that arbitrators could choose to hear such cases, the Report went further and set forth a series of detailed guidelines that arbitrators who considered taking those cases should use to evaluate the fairness of procedures under a particular employer-promulgated system and to seriously consider withdrawal if such procedures were unfair and not changed. Those Guidelines, incidentally, are currently being revised and expanded, a matter on which the Picher Committee soon expects to report.

The Guidelines, although helpful, did not stem the tide of employer-promulgated systems or their approval by the judiciary, which seemed to pay scant regard to those systems' critical procedural details.

In 1998, in the Edward B. Shils Lecture at the University of Pennsylvania, I joined others in predicting that *Gilmer*, which, as you know, did not deal with an employment agreement, but a securities registration agreement, would soon be extended to the employment arena; that the Court, driven by policy considerations, would ignore the legislative history of the Federal Arbitration Act (FAA) so painstakingly described by Professor Matthew Finkin[4] and select the narrow, "schlepper" rule interpretation of the FAA's "contract of employment" exclusion that had already been adopted by most of the overworked lower courts. Only three years later, 2001, we had *Circuit City v. Adams,*[5] the decision that

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[2]Nicolau, *Presidential Address: The Challenge and the Prize*, in Arbitration 1997: The Next Fifty Years, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1998) at 1, 17.

[3]*Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991).

[4]*See* Finkin, *"Workers Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification,* 17 Berkeley J. Emp. & Lab. L. 282, 289-90 (1996); Finkin, *Employment Contracts Under the FAA-Reconsidered*, 48 Lab. L.J. 329, 333 (1997).

[5]532 U.S. 105 (2001).

validated unilaterally designed and unilaterally imposed arbitration for the great majority of American workers.

But let me return for a moment to 1998. That was my first real first-hand exposure to a different system; one that encompassed virtually all workers and gave them a right to a fair and equitable conciliation and arbitration process. I speak of the Republic of South Africa. Through the efforts of that world traveler, Arnold Zack, a number of us in the Academy were chosen to go to South Africa to train arbitrators, called commissioners, who operated under the aegis of the relatively new Commission for Conciliation, Mediation and Arbitration, known as the CCMA. Under that country's Basic Employment Act and its 1995 Labor Relations Act, a wide range of employees, including domestic workers (because of which some had dubbed the legislation the "Maid's Act"), were provided protection against unfair dismissal, including procedures that had to be followed in retrenchment. Our experience there led many of us to conclude that if South Africa, hardly on an economic par with the United States, could protect virtually all workers, why couldn't we?

My next stop was Ireland. As some of you know, I had been going there for many years and now have a second home in that country. To those who ask why, my short answer is "With a wife named Siobhan, what do you expect?" In 2000 I was asked to give a paper at a Transatlantic Perspectives Conference on Labor and Employment Law at the University College, Dublin, that had been organized on this side of the Atlantic by Professor David Gregory of St. John's Law School. Knowing a bit about Irish labor law by this time, I chose as my topic "A Comparison of Union and Non-Union Employee Protections in Ireland and the United States." I was inspired, I might say driven, to choose that topic after reading remarks of then Fed Chairman Alan Greenspan before the National Governors Association. In those remarks, entitled "Structural Changes in the New Economy," Mr. Greenspan said that we were better off than either Europe and Japan because of our "significantly higher capacity for job dismissal." Those countries, he said, face "higher costs of displacing workers than we do"…while "here, labor displacement is more readily countenanced both by law and by culture." Although he paid some heed to what he described as the "evident insecurity felt by many workers" who had been displaced because of the relatively modest cost of doing so, he explained that it would all work out; that retraining, even of older workers, would take care of everything, that in this new age,

for a time or perhaps a bit longer, we just had to learn to live with insecurity. Those who still believe in this "it will all work out" myth should meet the Americans highlighted in Louis Uchitelle's recent book, *The Disposable American, Layoffs and Their Consequences*.[6] They will see what a devastating effect our "higher capacity for job dismissal" can have.

It seemed to me, even in the year 2000, long before that author's detailed exposure of the effect of layoffs, not just on those involuntarily displaced but also on those who try to do their job knowing that they might be next, that this "higher capacity" was nothing to crow about or to take pride in when we lacked the means to test the fairness of those dismissals or the real effect, if any, that protection against unfair dismissal would have on our economy. We had to look at the social costs and the moral implications of what we were doing, not just its asserted economic benefits, to see if we could determine whether a relatively swift, relatively inexpensive, and relatively predictable system of protection would be beneficial to all concerned or a clearly unacceptable deterrent to economic growth. Although our economy may lead the developed world, so does our poverty and inequality of income and wealth.

My reaction to the thesis that "little concern was best" led me to examine the Irish system to see if it treated workers with greater fairness and, if it did, whether that adversely affected its economy to an unacceptable degree. The answer was that the Irish system was fairer and that its fairness did not at all prevent the Celtic Tiger from growing and chugging along.

In that paper, subsequently reprinted in the *New York International Law Journal*, complete with some 200 student-supplied footnotes, for which, echoing Dave Feller, I refused to take credit or responsibility,[7] and in the 2001 update of that paper that I gave at the Dublin meeting of the ABA's International Labor Law Committee, I described the Irish system and compared it with what exists in the United States.

I won't attempt to reprise the Irish system in any detail. Somewhat like that in the United Kingdom, it is essentially an Employment Tribunal structure. To truly be Irish, I should say it's essentially an Employment Tribunal scheme; scheme being the common Irish word for plan, but I just can't be comfortable with

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[6]Alfred A. Knopf, 2006.

[7]Nicolau, *A Comparison of Union and Non-Union Employee Protections in Ireland and the United States*, 14 N.Y. Int. L.J. (2001).

that use of the word. In any event, the Tribunal, of which there are many, is made up of a government chair, a member chosen by industry, and the other designated by the Irish Congress of Trade Unions.

The first critical point here is that if you have been employed for at least a year, whether full-time or regular part-time, you are statutorily protected against what is called "unfair dismissal." Whether you are represented by a union or not, you can challenge a dismissal for incompetence, for asserted misconduct, or for what the employer considers other "substantial grounds." And if you do challenge that action, the employer must justify its decision. If it cannot, you are entitled to compensation, the prevalent remedy in Ireland, and, in some cases, reinstatement. Under Irish law, that protection is a basic right, nothing less than a basic right. A protected employee may elect to have his or her unfair dismissal case heard by a Rights Commissioner whose sole authority is to make recommendations, but that step is usually bypassed in favor of the Tribunal, members of which ride the circuit around the country.

That employee is also protected under 15 other statutes, over which the three-member Tribunal has either initial or appellate jurisdiction. Those include a number of European Union Directives, since enacted into law by the Irish Dail; as well as the Redundancy Payments Act, a nationwide system of severance pay based on length of service, which has been in existence for almost 40 years. Even if you have less than a year on the job, you still have statutory protection on specific grounds, such as pregnancy or adoptive leave.

The second critical point is that all of this is under the jurisdiction of one body, a body that is tripartite in nature.

Of course, over the last few decades we have undergone what some have called the Europeanization of the American workplace and now have an overlay of protective legislation that is relatively new; protections that largely did not exist before the 1960s. Those acts include the Civil Rights Act of 1964,[8] the Occupational Safety and Health Act (OSHA),[9] the Employee Retirement Security Act (ERISA),[10] the Americans with Disabilities Act (ADA),[11] the Age

[8] 42 U.S.C. §§2000e-1–2000e-17 (2000).
[9] 29 U.S.C. §§651–678 (2000)
[10] 29 U.S.C. §§1001–1461 (2000).
[11] 42v U.S.C. §§12101–12117 (2000).

Discrimination in Employment Act (ADEA),[12] and the Family and Medical Leave Act (FMLA),[13] all of which have added a measure of security that did not exist before their time.

But if you are not covered by a collective bargaining agreement and you have a complaint that those statutes have been violated, you, an individual litigant, have to go to one agency or another to enforce a public norm. Beyond that, none of those statutes protect you if the boss decides to let you go because he doesn't like you or for what he said you did last week or if he decides, ala Stanley Works, that he wants to change the nature of his business and doesn't need you or your skills anymore.

According to a 1983 study by Professor Jack Stieber of Michigan State University, more than million at-will employees were discharged each year in this country and a great number of them would have retained their jobs or had been awarded compensation if they had unfair dismissal protection.[14] Today, these figures of those without recourse have to be higher and it's appalling and inexcusable that this is the case.

So what can be done? I suggest we construct a system; one that provides a measure of protection long overdue in a society as rich as ours. It really isn't hard; only a few questions need to be answered. First, should it be federal or state? Most who have labored in this vineyard over the years, Clyde Summers and Jack Stieber excepted, have opted for the state approach. One person who has worked long and hard on this good cause issue, to whom I want to pay special tribute, is Ted St. Antoine. As early as 1981, he was advising this Academy that protection against unjust dismissal was an idea whose time has long since come.[15] Back then he was saying that in what he described as a period of national retrenchment, a federal approach seemed foredoomed. So, he thought we should go state-by-state. Starting in the late 1980s, as the Reporter and chief draftsman, he shepherded what came to be known as the Model Employment Termination Act through its ultimate adoption by the Uniform Law Commissioners in 1991.[16] Although Puerto Rico and the Virgin Inlands now give workers on

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[12] 29 U.S.C. §§621–634 (2000).

[13] 29 U.S.C. §§2601–2654 (2000).

[14] Stieber & Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. Mich. J.L. Ref. 319 (1983).

[15] St. Antoine, *Protection Against Unjust Discipline: An Idea Whose Time Has Long Since Come*, in Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1981) at 43–62.

[16] Model Employment Termination Act, 7A U.L.A. 421 (1999).

those islands some statutory protection, since 1991 not one state has adopted what has come to be known as META. Montana has a variant, adopted before 1991, but the total population of that state does not even reach the level of those regularly affected by unfair dismissals.[17]

Although most agree that the states have not acted because no organized bodies have pressed for this legislation, there is, in my estimation, another important reason. States reasonably fear that adoption may mean business exodus to jurisdictions where such protections do not exist.

I admit legislation of the nature I am proposing would not be an easy sell even on the federal level. Congress seems more concerned with bills to protect purchasers of used cars than the protection of workers. When Ted spoke of a period of retrenchment back in 1981, it was left to someone else at that meeting to mention that the Reagan administration was in office. I would suspect that the present administration as well would have little or no interest in such legislation, but years do move on. There is, of course, no reason why efforts cannot be made in state legislatures; different procedures in various states might be helpful. But I believe that the federal approach would be the best course.

Second question—who should be covered? Certainly, rank-and-file workers, and quite probably supervisors, foremen, and middle managers. Higher management, as we have recently seen from front-page articles about executive pay, can well take care of themselves. I have not tried to draw the dividing line between these classes, but, with reflection and further study, it can be done. Should the new legislation include those already covered by collective bargaining agreements or should they be excluded? My inclination is to include them, with the employee having an option to go either route, but not both.

As a threshold matter, an employee would have to have a minimum of time on the job in order to be protected. Although this can be and has been debated, I have no problem with a year or perhaps even less. Certainly a year will give an employee a sufficient amount of time to prove his worth while giving a reasonable employer time to assess the employee and the needs of the enterprise. Another part of this coverage question is the size of the enterprise. Should protection extend only to those employed

[17]The Montana Wrongful Termination of Employment Act, Ch. 641, L. 1987, §39-2-901 et. seq.

by large concerns or should we reach to what some call the mom-and-pop store? This, too, is a legitimate matter of debate. We don't want to reach too far down, yet, as many of us have seen in our work, smaller enterprises are often less sensitive to employee concerns and rights than larger ones. I would suggest as a fair compromise on this question, that the threshold, similar to Title VII, should be 15 employees.

What should be the standard against which dismissals are judged? Just cause, good cause? Either would be sufficient. Under such a standard, the fairness of incompetence, misconduct, and redundancy determinations could all be judged. It would be up to the decisionmakers, as they have in the unionized sector, to give greater and more specific meaning to those terms. There would also have to be a definition of constructive discharge so that an employer's unfair actions short of discharge, but adversely affecting an employee's conditions of employment, also would be subject to scrutiny.

Just what should the decisionmakers decide? By that I mean what if the allegation is one that is embraced by a statutory right, such as sex or race discrimination or a violation of the ADA? Should those allegations be determined under such a system or should they be left, as they are now, to governmental agencies? Let me combine that with another question; who should the decisionmakers be?

Some have suggested courts, as overburdened as they are and as unwelcome as such matters would be to most judges. Others have suggested administrative agencies, those that exist or a new one. Others have suggested arbitrators. My suggestion is the tripartite system that exists in Ireland and other parts of the world. I also suggest that those three-member tribunals decide all questions that might arise, whether they involve statutory rights or not. The person in the middle, a professional arbitrator or civil servant, would be versed in the law and I would think that his or her labor and management counterparts would not be far behind. And to the extent that the Chair is not as familiar with the shop floor, those on either side of him or her would be there with knowledge and advice.

The value of such a unified system, as opposed to the judiciary or another government agency, is that it will be relatively swift. With a sufficient number of tribunals, cases would not linger. I understand that this may sound optimistic. Even in a small country like Ireland, the time between the filing of a complaint to a

hearing date can be six months or more. That, however, is swift indeed when compared with the time it takes to get a final judicial determination or an administrative ruling.

As to remedies, unfair dismissal cases not involving statutory claims could include reinstatement, with or without back pay, or, if reinstatement is not feasible or wise, an award of severance pay such as prevails in most of Europe. As to cases involving statutory claims, the Panel should have the same authority as presently exists under each statute.

Someone, of course, will raise the question of review. Should review be limited, like it is now in the labor-management context as the Supreme Court repeatedly reminds often reluctant lower courts? Or should there be a different standard for those cases that involve existing statutory rights, such as "manifest disregard of the law," as opposed to those cases of unfair dismissal in which such statutory rights are not implicated? I am inclined to a limited review, but, for me, that question is still open and one on which I would like to hear other views.

Some, including those who have coined the term "Eurosclerosis," will say that a system such as I have described, one that protects the great majority of American workers, will inevitably and necessarily hinder economic growth; that the more expensive it is to terminate someone the more reluctant a company will be to hire, thus perhaps inducing paralysis. But I am not advocating a system such as exists in Italy, one so rigid that workers will not leave to seize better opportunities elsewhere in the European Union. Neither am I siding with the French who seem unable to live with even a small measure of insecurity. If an unfair dismissal system inevitably stifles economic growth, how does one explain Japan's recent decision to create a tripartite labor division of its judiciary to hear wrongful dismissal cases, thereby extending legal protections to the labor market as a whole heretofore granted to only 30 percent of the workforce protected by the so-called lifetime employment system? A decision had to have been made by the leaders of Japan that this new system of protection would not harm the ongoing revitalization of its economy. And how does one explain Ireland's continued economic growth even though a system of worker protection has long been in place?

What must honestly be compared are the costs of an unfair dismissal system, both economic and social, versus the costs, both economic and social, of what we have now. If one looks closely at the latter, one can't help but see the social costs. Neither can one

miss the economic cost to employers affected by the tort lottery; the expense of defending themselves in court, and the enmity they incur by unilaterally adopting biased procedures in an effort to avoid litigation.

If, my friends, it makes economic sense to construct such a system, and I think it does, and if it is the correct thing to do from a moral standpoint, and I think it is, why don't we do it? Why does a nation that takes pride in its concept of fairness hesitate? In his remarks some six years ago, Chairman Greenspan said that it was not just the law that sanctioned our view of restraint-free labor displacement, but our culture as well. On this, he was dead right. Deep in our culture, as Professor Garry Wills has convincingly explained, is a powerful distrust of government, a belief that government is not an instrument of justice or well-being, but only a necessary evil.[18] And, an unfair dismissal statute would, no doubt, be "government" on a large scale. Such a system also intrudes on our "I can make it alone" principle, fostered, however mistakenly, by the asserted individualism of our pioneer days. And, of course, as Professor St. Antoine has pointed out, there is the "lack of support of organized interest groups."

It is this lack of strong support that is most puzzling. One would expect not just bewilderment and despair that such a system is not yet in place, but also anger that it has taken so long and that the level of interest among our lawmakers is so low.

Perhaps we should ask Apple or Intel or Lucent, or Medtronics, or, if not them, Microsoft, International Paper, Illinois Tool Works or Oracle, Pfizer, or Dell, or Hewlett Packard, or Google; at last count, 580 U.S. companies in all, employing 90,000 workers, as few as 20 and as many as 5000. Before settling in such towns as Kildare, Mallow, Limerick, Little Island, Dublin, Waterford, and Cork, all of these companies, which pour billions into the Irish economy every year, much more than any place else, looked at the tax rate and looked at the young and educated work force, then looked at the unfamiliarly high level of worker protection, and said, "We can live with that," and they have. If there, why not here?

Speaking of interest groups, each one of my four friends on the dais with me today represents or is a part of an important, identifiable interest group. Do they have no concern? Are they content with where we are in relation to the rest of the developed world?

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[18] *See* Wills, *A Necessary Evil: A History of American Distrust of Government* (Simon & Schuster 1999).

Professor Oldham, a distinguished member of the academic community; could he be against the concept of an unfair dismissal statute? Hardly. It appeals to his innate sense of justice, while also serving to put behind us, once and for all, the mistaken judicial foundations of the at-will doctrine.

And there is Rick Seymour, a long-time fighter against discrimination of all kinds. Could he be against an unfair dismissal statute? I think not. After all, Martin Luther King's call that, "Injustice anywhere is a threat to justice everywhere" is prominently displaced on the Web site of his law firm. I don't mean to be cavalier here. The plaintiff bar does earn fees, at least when claimants are successful in court actions, and an unfair dismissal statute that eliminates or curtails particular kinds of damages would affect those fees. Yet, only a relatively few claimants pursue their claims in our courts and by no means do all of them win, while many more would seek vindication if they had a less expensive and speedier means of doing so. Beyond this, more and more employers are imposing arbitration on their employees, also curtailing, by that means, the filing of judicial actions. Even though there is a profound difference between unilaterally imposed mandatory arbitration, arbitration that organizations such as the National Employment Lawyers Association vigorously oppose, and a fairly crafted, bias-free unfair dismissal statute, it will not be the easiest of tasks to convince the plaintiff bar that protecting the ordinary worker, whom they seldom see, is in their interest. It is, however, worth the effort to seek their support, for a steady stream of cases, many of which will be settled, may well counterbalance that occasional big judgment on which contingency fees are paid.

In my view, there is no such difficulty with respect to organized labor. As you know, Christy Hoffman, the European Representative of the Service Employees International Union (SEIU), who knows better than most how unfair dismissal statutes work and the protection they afford, was to be with us this afternoon, but could not come to add her voice. I'm sure, however, that Mr. Beins, who has represented labor for years, would agree.

Although an unfair dismissal statute has not been one of labor's legislative priorities, self-interest suggests that it should be. Despite the efforts of unions such as the SEIU, and the Teamsters, the percentage of workers protected by collective bargaining agreements in the private sector, now standing at 8 percent, continues to be on the wane. Representing non-union workers seeking to vindicate rights under an unfair dismissal statute could be a significant

organizing tool. A worker returned to the workplace through the efforts of a union is not going to forget that assistance; neither is he going to remain silent about it. He is going to tell his colleagues. Once that happens, the next question will arise; if that union can help him, do you think it might help the rest of us change some of the working conditions in this place? How do we find out? Well, you go to the union.

And my friend, Jack Gallagher. Jack, I know that some employers will oppose an unfair dismissal statute. But it's entirely possible that those employers you represent will not. That's because you will tell them that it's the right thing to do; that it will rid them of expensive law suits and the fear of so-called "runaway juries"; that it will not hurt their business, but help build a more loyal and cohesive work force. After all, workers who have a measure of protection, although by no means a guaranteed lifetime job, will be more secure. When they are, they are more likely to consider further skill training, to reach out and get even better, thus increasing productivity and reducing turnover and its resultant recruitment and training costs. In defending the at-will doctrine, companies rarely consider the overall costs of such a doctrine and rarely compare those with the costs and benefits of a different system. With a reasoned voice such as Jack Gallagher's urging that they do so, I am sure they will and that they will find in favor of what I propose.

With that kind of support, ladies and gentlemen, how could we fail? Former Academy President Walter Gershenfeld predicted in 2004 that there would be a national unfair dismissal statute by 2014. It is now 2006, so we don't have much more time. We might, as Professor Finkin has suggested, explore the possibility of an independent commission sponsored by the Academy, the Labor & Employment Research Association, the United States Branch of the International Society of Labor and Social Security, the Association of Social Economics, and any other organization that wishes to join in the effort. Or we could ask labor and management to form a partnership with us to examine the systems of other nations, to learn from and build upon those systems, and to then lead an effort in striking an appropriate balance between efficiency and justice so that what, in truth, should be fundamental protections are no longer sacrificed in the name of production and progress.

All of us, management, labor, academics, rights advocates, union leaders, arbitrators, and mediators, spend a great deal of

time, all of it worthwhile, on important issues. But, this is more than an important issue, it is a basic issue; a right that should no longer be denied.

I am pleased to be able to offer my contribution as to where this country should be heading, particularly in these Proceedings, the apt title of which is "Taking Stock in a New Century." I thank you for your attention and welcome your support.

III. PANEL DISCUSSION

Symonette: I guess, now that Arbitrator Nicolau has presented such a persuasive paper, our next session will begin in a few minutes. But seriously, our goal here is to allow our panelists a few minutes to respond and then provide Arbitrator Nicolau a few minutes in rebuttal. Hopefully, we also will have time for a couple of questions.

I am going to start at the far end of the table with Mr. Gallagher.

Gallagher: Thank you, very much. It was only after I accepted the invitation to participate in this panel that I realized I would be the only representative of management among the group. And I did, indeed, begin to worry that I would be severely outnumbered.

I'm always reluctant to disagree with a preeminent arbitrator such as George Nicolau. I'm even more reluctant to disagree with him when he frames the issues as having both fairness and morality on his side of the proposition. Nonetheless, I accepted the invitation with the thought that our purpose was not to debate firmly held positions but to encourage critical thought and discussion. It is in that vein that I respond.

I have some basic concerns about the objectives of the proposed statute as well as the proposal's decisional standard. It would surely guarantee full employment for arbitrators. And pragmatically, I must acknowledge, for employment lawyers as well. But we can't mistake our own interests as coextensive with the common good.

When new laws and new rights are proposed in our society, it is customary that the proponents have the obligation to demonstrate that the proposed change is the right thing to do, that it's an appropriate and necessary response to a demonstrated need. So, the essence of my response to George Nicolau's proposal is that he has failed to carry the burden of proof. He's failed to show necessity. I'm sure that we could develop a lengthy list of other consid-

erations that might come into play; but in my view, this change will require a showing that it's necessary and appropriate before it will make much headway in our legislatures. And, in particular, that it will not cause more harm than good in the American workplace.

Quite frankly, I was surprised by the ease with which George moved past this fundamental first question. He acknowledged that there has been a model statute since 1991, but no state has adopted it. Why is that? Obviously, there is no groundswell of support. Why not? I would submit because there's no documented evidence of need. There are stories, there are anecdotes, there are suggestions of data; but there is not the body of evidence that any of you would deem probative as the basis for such an important change in public policy across our nation. Where is the hard evidence that shows the abuse, that shows the nature of the problem and the appropriateness of the solution? I submit that they haven't been shown yet. And, of course, in those industries where employees do want further protection for their rights, they are free to organize and bargain for a very standard "just cause" termination provision; and yet, there hasn't been a great movement toward unionization in our society in recent years. Quite the contrary. We've changed from the industrial workplace to a service economy. And there does not seem to be a great outcry of American workers seeking the right to arbitrate their termination decisions.

So, those are some of the problems I see with justification. I won't go into the burden that I think this would place on employers because I think the proper burden to talk about is the burden on the proponents to justify what would be sought and what would be imposed on our economy.

I would like to make one observation about unintended consequences and that concerns the subject of layoffs. Terminations for cause are one set of problems; but economic layoffs—layoffs when a factory is closed, layoffs when line of business is shut down or a shift is curtailed—are fundamental business decisions with obvious, critical economic consequences. As I understand it, the proposal is to include layoffs within the rubric of this statute. I think that is incredibly mischievous and highly unlikely to generate any support within the employer community. With respect to some other aspects of termination for cause, there might well be employer support at some point if it's part of a package where a group of employment remedies are put in one forum that offers speed and efficiency over the current system.

But, the creation of a right to permanent employment would be a very novel thought in our economy. It is not the American tradition. I am not at all persuaded by the example of other nations because the American workplace has always been far more entrepreneurial than those in Europe and Japan. Their social systems and their employment standards have always been different than ours. The fact that they have a standard that we do not does not compel me for the proposition that we should move in that direction. I submit that our society has moved forward in an evolutionary way in our employment laws to date, that this process will continue, but that the case has not been made for a nationwide unfair dismissal statute.

Thank you.

Symonette: Thank you. We'll now hear from Mr. Beins.

Beins: Well, to me, George's proposal is like motherhood—who can be against it? But, obviously, the answer is very simple. Every corporation in America would be against it. And, as we look at the landscape today, we have to examine where we are. In West Virginia, coal is king. So miners 2,000 feet under the ground die from lightning, not from malfeasance. That's what we're hearing from the employer. In the federal system, corporations are king. Corporations write their own laws, as we have seen with the drug war that came in for senior citizens. The result has been that every agency in our government with a social purpose has been effectively destroyed. And that's the context we're working in today. And, if you want some more proof, you look at the NLRB experience and I commend your reading to the *UniFirst* decision.[1] The Board reversed the administrative law judge on the findings of fact. And, the Board made a decision contrary to more than 30 years of law, not by overruling it, but by ignoring it. Fortunately, we have Wilma Liebman to dissent and point out the problems. So that's the context we're living in.

Fairness is really not the issue because I think we all understand that there's no major social legislation in this country without anarchy or the real threat of anarchy. That's how the NLRB was created. That's how the civil rights movement as law was created. So fairness is wonderful; but there has to be a power that is respected. And right now, there is no power. In terms of workers, I disagree strongly with Jack. I don't think the issue is that employees don't like unions. The issue is very simply one of fear. The employers

[1]346 NLRB No. 52 (Feb. 28, 2006).

have done a very good brainwashing job of scaring the hell out of employees. Fear is the problem.

Having said all that, the idea of an unfair dismissal statute is wonderful. The problem is that there is no natural advocate for the proposition. Who is going to push forward this proposition? I don't see any group, obviously, pushing for this. In terms of a federal versus state law, obviously, I would prefer a federal statute. With this present atmosphere, that's impossible. In terms of states, none have adopted what was put forward since 1991, so we don't see any push even in pro-labor states.

All in all, I hate to say it, but this is dead on arrival. I think it more important at this point that we focus and enforce the laws that we have and then go forward, because if you destroy basic rights, you're going to have an awful reaction down the road.

Oldham: Thanks, Alan. As George Nicolau says, it would be hard not to favor, in principle, universal "just cause." And surely we could favor it in fact as long as some conditions could be met. Conditions such as:

- if it could be done, as George hopes, in a way that would work to the advantage of the unions instead of further marginalizing the unions in the private sector;
- if it could be done, as George suggests, without imposing destabilizing costs upon employers; and
- if it could be done so that the federal statute would supersede the private ordering presently endorsed by the Supreme Court in the form of employer-mandated employment arbitration.

But I want to give a different perspective. George fairly and squarely bears down on the employment-at-will anomaly in American law and the vulnerable plight of the unorganized worker. With George, I would ask the simple question: Why should this country preserve and protect the right of employers to treat employees like chattels, discardable at-will? Unions are obliged to represent their members without arbitrariness, discrimination, or bad faith. Why should not employers be under a similar obligation to their employees?

Specifically with regard to George's proposal, here is what concerns me: How are the employees, who would have newly created protection under the federal law that George envisions, going to get representation to help them realize that protection? How will

that representation get paid for? The best model, here, of course, is the National Labor Relations Act (NLRA). Whatever one may think about the oscillations in philosophy that accompany changes in the politics at the NLRB, and whatever one may think about the remedial weaknesses of that statute, the General Counsel side of the Board has been a real advantage to the worker, because that side of the Board ensures that an unfair labor practice charge with merit will be carried forward by the General Counsel as the worker's representative. In passing, we might note that the NLRB model does not live up to its full potential. As most of you in this room know, the NLRA protects unorganized workers from being retaliated against by employers for having engaged in protected, concerted activities. Yet, how many unorganized workers across the land know that if their employer takes action against them because they were trying to improve working conditions, that this may be an unfair labor practice and that the NLRB stands ready to evaluate their situation and, if their claims have merit, to carry the case forward?

Apart from the NLRA, Congress has not been willing to provide this type of protection to workers in subsequent worker protection statutes, such as Title VII and the Americans with Disabilities Act (ADA). This resembles the classic legislative ploy of passing a statute with the realization that funds to make the statute effective may not be appropriated. In fairness, Title VII and the ADA have hardly been impotent. The private bar was ready and willing to help given the process attributes of the class action, contingency fees, and the jury trial. These process attributes will not, I take it, attend the federal "just cause" statute envisioned by George; and if that is right, I pose again the question of who will represent these newly protected employees? Can these employees afford to hire attorneys at even modest hourly rates? If not, to whom should these employees turn? Perhaps the answer is the unions. Perhaps, as George suggests, this could be a real opportunity. Unions could establish ways to communicate to unorganized employees the fact that unions can help them if they are discharged or disciplined unfairly and that unions can do this effectively, economically, and with a deep reservoir of experience in representing employees in such situations. Also, employees would not have to join the unions to take advantage of this representation; although, naturally, employees might along the way see the advantage of union membership.

Finally, what about the Supreme Court's endorsement of mandatory arbitration procedures that encompass statutory rights? These procedures are reportedly proliferating, although, the degree to which this is true is unclear. To the extent that these procedures are being imposed, they will be enforceable if not unconscionable according to state contract law. And under state law, the doctrine of unconscionability does not require employees to be provided representation. Thus, under these schemes, employees are on their own and will have to cough up representation fees and possibly even some of the arbitrator's fee. Perhaps, as with George's proposed statute, these private employer arbitration cases are another opportunity for unions, and unions may be responding by representing employees in some such cases. But how these contractual arrangements might interact with George's proposed statute would require sorting out.

To conclude, the devil may be in the details, but we are never brought to face those devilish details until an idea is advanced to make the effort worthwhile. George and his comrades-in-arms from prior years have advanced such an idea, and foot soldiers will be needed to make the idea a reality. At the present moment, the prospect that this could happen seems remote. But, as George says, the years do move on and things change.

Symonette: Finally, we have Attorney Seymour.

Seymour: I think that George has raised some very difficult problems. And I think that the panelists have addressed some of the difficulty of the problems. To my mind—and I'm speaking as a person who's been representing employees in the 37 years since I left the government—there's absolutely no question that there has been a huge decline in employee senses of loyalty to their employers because they have perceived a huge decline in the employer's loyalty to employees. When the shareholders receive a penny additional per-share profit if you cut a thousand jobs here and send them offshore, employees know that they are not even regarded as chattel, they're simply regarded as disposable. An employee who regards himself as disposable and knows that individual contributions are not valued or respected by the employer is not going to give the last bit of effort for the benefit of the employer. That is a hidden cancerous cost on all of us.

Is this a national problem that rises above the interests of particular employers? Absolutely. How the heck are we going to earn a living in this country? We're at the end of the age of oil. We don't

have the natural resources going into the next century that we had for the past one. We're sending all our manufacturing overseas. We think we're going to make a living consulting and sharing information, but we're not going to have the knowledge necessary to provide the basis for anybody to want our consultation. And just sharing information back and forth and selling video games is not a way you can make a gross national product.

We have to have some kind of different model to earn a national living, and I don't think we can do that if employees are regarded as disposable.

What is the biggest concern on the part of an employee? That they're going to be dealt with arbitrarily. They may love their current manager, but a new manager comes in and that manager has the power of a despot over them. The manager can choose to get rid of them for any reason under our at-will system. And, if you do anything that irritates the manager, bang, the employee is gone and there is no recourse unless you have some solid, substantial basis for saying that there was an impermissible motive. Well, guess what? Most people cannot show that solid, substantial basis even if there was an impermissible motive. The Equal Employment Opportunity Commission (EEOC) currently finds cause or resolves the case with benefits for employees in fewer than 20 percent of the charges that are filed. This cause finding actually occurs in only 2.5 to 3 percent of filings.

Why do people go to the EEOC if they don't have slam-dunk evidence? Because they don't know the true facts. They want a government agency to take a look at it. There's a possibility that something is out there. If they don't, they lose their rights; so there's a strong incentive to go to the EEOC. But most people who go there don't wind up any better for the process.

If you set up an administrative agency to resolve the propriety of terminations without having to show an impermissible motive, will it do a good job? I'm not sure whether you have in this room a first-hand experience of how well the EEOC and the state agencies operate, but from the perspective of those on both sides who do, it's not encouraging. Take a look at what has happened since 1980 when Ronald Reagan came into office. The EEOC has lost 25 percent of its workforce, 1,000 employees. Between those two periods of time, Congress has passed the Older Workers Benefit Protection Act, the Americans with Disabilities Act, the Civil Rights Act of 1991, putting a lot of additional responsibilities on the EEOC,

and has also decreed that a substantial percentage of the EEOC's appropriation be sent to state agencies. With this understaffing, you don't get a real determination on the merits. You get a quick look-see where the agency picks up the carpet over behind the table to see if there's any dust underneath, and that's basically it.

So, where does somebody go that thinks that his or her rights have been violated? You're not going to get anybody really to look at that unless you've got some kind of effective large-scale system, which may or may not look like what George has postulated. But, the cancerous effect on society of people feeling that they can be disposed of without accountability is very, very large.

Now, George, my friend, is a victim of propaganda. He referred to the "tort lottery" in his paper. Where does this phrase come from? Over the last 10 years, big industry has spent more than $100 million a year brainwashing the American public that there's a huge problem with the civil justice system. Do you see such a problem when organizations like the Rand Institute look at the size of verdicts? No. Do you see a huge increase in the number of plaintiff verdicts? No. In fact, the amounts haven't even kept pace with inflation. The public dispute all stems from industry promoting the fear factor in order to escape accountability.

When there are large awards, it tends to mean the same today that it did decades ago: that people have been harmed very severely or—on the punitive damage front—that what the employer did was very, very bad: suppressing evidence, putting in falsified evidence, and the rest of it. Such awards are the main disincentive to employers to be unfair to employees and to ride roughshod over them.

What would it look like if employees had more protection; enough, say, to begin to rebuild a sense of loyalty? Well, some employers have set things up that have had this kind of effect. Raytheon, for one example, has set up a system of internal dispute resolution in which people can challenge decisions of their managers that they think are unfounded or unfair. It is handled in-house, a mediator is sometimes involved, employees are given an amount of money to enable them to obtain counsel to deal more effectively within the system, and the result is that external litigation against Raytheon by employees has declined to virtually zero. They simply don't have the problems. Employees again have a stake in their careers. And, when they have a stake in the company, employees are more willing to give that last bit of themselves

to make the company succeed. They see their interests more like their parents saw their interests before companies abandoned the loyalty that they formerly felt toward employees.

I do not see much happening in terms of adopting an unfair dismissal statute unless employers feel that they're going to be advantaged by this. As employers become aware that there is a cancerous effect on their productivity by disloyalty to employees and by employees not feeling the occasion to feel loyal to them, then employers may see that this is in their interest. However, I suspect that the kind of thing that employers would be interested in, and the kind of thing that legislators and the public will be interested in, is something that does not look like a sharp departure from what has gone before.

In any event, the process under such a statute must be very quick, which means that the stakes cannot be terrifically large. When you represent executives with severance agreements, it is very, very common for a severance agreement to provide for six months or less of compensation. With a lot of people, this is enough. They're more concerned about the terms than they are the amount of the compensation. You have to make the amount of compensation for getting rid of the employee large enough to give employers an incentive to make sure that they're not making mistakes (i.e., that they're not simply honoring an arbitrary whim of a manager), but small enough that it does not interfere with the engine of job creation. Because at the end of the day, if you make it very difficult to get rid of an employee, you also make employers reluctant to take on employees on the margin, such as racial minorities, ethnic minorities, women in nontraditional jobs, older employees, and disabled employees. These are people that we want to have part of the American dream. We want employers to take a chance on them. So you can't have the cost of dismissal too high.

Symonette: Thank you, very much. Now, I'm going to give George just a couple of minutes.

Nicolau: Oh, I don't even need a couple of minutes. You know, I want to thank all of the commentators. They've raised some interesting issues. I know Rick has talked about a system comparable to the unemployment insurance system. All I am saying is that there has to be a way to deal with these problems. Jack says there's no hard evidence of need. That is not true. There's hard evidence all over the place. And, if all employers did as Raytheon does; adopted fair, unbiased procedures, then I wouldn't even be talking about this subject. Jack asked if we were going to give the right

to make these judgments to people who have no accountability to us? It sounds like he was describing the arbitration system he lives with every day. We are not talking about permanent employment. We are talking about the right to be dismissed fairly, nothing more than that.

Thank you, again.