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# The Distributive and Corrective Justice Concerns in the Debate over Employment At-Will: Some Preliminary Thoughts

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# THE DISTRIBUTIVE AND CORRECTIVE JUSTICE CONCERNS IN THE DEBATE OVER EMPLOYMENT AT-WILL: SOME PRELIMINARY THOUGHTS

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The traditional rule that employment contracts that do not expressly fix a duration are terminable at will by either party has come under assault in the past three decades. In its purest form, the rule precluded enforcement in contract of even the clearest express employer promise of job security unless the employee gave a corresponding promise not to quit in return.[1] It also precluded application of traditional tort claims to the workplace out of fear that such causes of action would weaken the employer's contractual right to terminate "for good cause, bad cause or no cause."[2]

In recent years, however, courts, legislatures and commentators have attacked the at-will rule to the point where an employer's legal right to discharge at will has been levelled to the status of a legal fiction. In contract law, courts have redefined the at-will rule from a rule of law to a rule of construction, opining that an employment contract of indefinite duration is presumed to be terminable at will but that the employee may rebut the presumption with evidence of promises of job security. Courts have also afforded employees contractual job security by implying a covenant of good faith into the employment agreement. In tort, courts have applied traditional torts such as intentional infliction of emotional distress and defamation to further restrict employment termination, even

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1. The Arkansas Supreme Court recently stated the rule in its purest form:

> Our own cases have adhered to this principle, that either party has an absolute right to terminate the relationship . . . . Moreover, we have held firmly to this view even where a contract of employment provides the employee will not be discharged except for good cause. We have said that where an employer and an employee agree the employee shall not be discharged without cause, the contract is not enforceable where there is no agreement by the employee to serve for any specified time.

Griffin v. Erickson, 642 S.W.2d 308, 310 (Ark. 1982).

2. *See, e.g.*, Murphy v. American Home Prod. Corp., 448 N.E.2d 86 (N.Y. 1983).

where the employer has a contractual right to discharge at will.[3] They have also developed a new tort of abusive discharge which affords employees a remedy for at-will terminations which violate public policy. Legislatures have defined numerous characteristics and activities which may not form the basis for discharge. Montana has statutorily imposed a requirement of cause for dismissal in most cases. The Commissioners on Uniform State Laws have recommended adoption of a Uniform Wrongful Termination Act. Law reviews are filled with pages of commentary calling for limiting or abandoning the at-will rule.

The at-will rule, however, refuses to die. Many courts which have recast the rule as one of contract interpretation have made rebuttal of the presumption of at-will employment difficult; they often require detailed evidence of very specific promises of job security and give effect to boilerplate disclaimers. Many courts which recognize the tort of abusive discharge have narrowly confined the circumstances where they will consider dismissal to be contrary to public policy. Courts which have severely limited their contractual and tort exceptions to the at-will rule have expressed concern that it not become too easy to override the benefits of the rule. Legislatures, also, continue to breath life into the at-will rule. Although the Montana Wrongful Discharge Act is four years old, no other jurisdiction has followed its lead. Furthermore, a substantial minority of commentators have risen to the defense of the at-will rule in the scholarly literature.

Numerous arguments have been put forth for and against the rule of at-will employment termination. My purpose in this Essay is to dissect some of the most forceful arguments to determine whether they appeal to considerations of corrective or distributive justice. For this purpose, I adopt Aristotle's distinctions between corrective and distributive justice as set forth in Book V of his *Nichomachean Ethics*. I do not regard this as a purely academic exercise. I suggest that it will better enable us to evaluate the merits of the arguments. Recognizing that certain arguments in the debate over at-will employment appeal to considerations of distributive justice will enable us to determine and critically evaluate the criteria the arguer is relying on for distributing goods within society. Recognizing that other arguments appeal to concerns of corrective justice will enable us to determine and critically evaluate the basis for the claim that under certain circumstances employment termination is morally wrong.

3. *See, e.g.*, Huber v. Standard Ins. Co., 841 F.2d 980 (9th Cir. 1988); Agis v. Howard Johnson Co., 355 N.E.2d 315 (Mass. 1976).

## I. DISTRIBUTIVE AND CORRECTIVE JUSTICE

Distributive and corrective justice share a goal of equality, which is the mean between excess and too little. A person is just who treats all others equally. The equality of distributive justice, however, is markedly different from the equality of corrective justice. Distributive justice requires proportional equality whereby each individual has a share in the distribution of goods in society in proportion to that individual's merit. Thus, distributive justice requires the distribution of goods among individuals in accordance with some mediated criteria of merit. Each individual with the same merit receives the same share and all individuals' shares are determined by the same criteria of merit. Corrective justice, in contrast, is based on what Aristotle termed an arithmetic equality, in which all individuals are treated as absolutely equal regardless of merit. Corrective justice provides for the rectification of wrongs committed by one individual that cause harm to another. Each individual who is harmed by a moral wrong committed by another has a right to rectification, regardless of distributive merit.

Some have argued that corrective justice serves only to correct moral wrongs which upset an otherwise just distribution.[4] This does not appear to be Aristotle's position. He writes:

> It makes no difference whether a decent man has defrauded a bad man or vice versa, or whether it was a decent or a bad man who committed adultery. The only difference the law considers is that brought about by the damage: it treats the parties as equals and asks only whether one has done and the other has suffered wrong and whether one has done and the other has suffered damage.[5]

Our legal system also does not view the function of corrective justice as the restoration of a just distribution. One who has obtained a good unjustly may still have a claim in corrective justice against another who damages that good unjustly. For example, a thief has a claim for replevin against a subsequent thief.[6] Generally, a claim based in distributive justice does not provide a defense to a claim for conversion or trespass.[7] The key purpose of corrective justice is to redress damage caused by a moral wrong in a particular transaction, and all individuals have an absolutely equal claim to such redress, regardless of the claimant's qualifications for a distributive share and whether the claimant's holdings are in proportion to her qualifications.

4. James W. Nickel, *Justice in Compensation*, 18 WM. & MARY L. REV. 379 (1976).
5. ARISTOTLE, NICHOMACHEAN ETHICS 120-21 (M. Ostwald trans., 1962).
6. *See, e.g.*, Anderson v. Gouldberg, 53 N.W. 636 (Minn. 1892).
7. *See, e.g.*, London Borough of Southwark v. Williams, 2 All E.R. 175 (C.A. 1971).

Thus, the key question in an appeal to corrective justice is to identify the transactional moral wrong which forms the basis for the claim. Claims of corrective justice are bi-polar and therefore particularly well-suited to judicial resolution. In contrast, the key question in an appeal to distributive justice is to identify the criteria of merit which form the bases for the distribution. The criteria must mediate the distribution among multiple groups of individuals. Consequently, courts, which operate through bi-polar litigation, often are not well-suited to resolve such claims. Courts may, however, be capable of resolving claims based in distributive justice when they involve distributions between two groups of individuals and each party typifies one of those groups.

The Vermont Supreme Court's decision in *Hilda v. St. Peter*,[8] recognizing an implied warranty of habitability in a residential lease, illustrates how elements of corrective and distributive justice may be present in a particular legal controversy. The court rejected the traditional view of a lease as a conveyance of real property under which the landlord's only obligation, absent express covenants to the contrary, was to deliver possession. Under the traditional view, as long as the tenant remained in possession, the tenant was obligated to pay rent and the landlord incurred no liability to the tenant regardless of the conditions of the premises.

The court reasoned that the traditional view had to give way to changes in the circumstances of residential tenants and landlords. The traditional approach arose in an agrarian society in which the tenant primarily sought arable land. In contrast, the residential tenant in modern urban society seeks safe, sanitary and comfortable housing. Furthermore, in the court's view, changes in the characteristics of modern tenants required abandoning the traditional view of a lease. Unlike the agrarian tenant, the urban tenant is not likely to have the ability to maintain and repair the premises, and, in light of urban housing shortages, is unable to bargain for an express promise by the landlord to undertake such obligations even though the landlord has superior knowledge and financial resources to do so. Consequently, the court held that every residential lease contains, as a matter of law, a non-waivable covenant of habitability.

The implied warranty of habitability as developed in *Hilda* is based in considerations of corrective and distributive justice. The court's concern with changes in the empirical reality of residential tenancies suggests that the implied covenant is based in corrective justice. That is,

8. 478 A.2d 202 (Vt. 1984).

because the modern residential tenancy is intended to provide a residence in which to live, rather than land to till, the reasonable expectations of the parties are that the dwelling is habitable and will be maintained in that condition. Thus, a landlord who breaches the warranty transfers to the tenant less than what the tenant purchased. The resulting transactional inequality must be remedied regardless of the relative merits of the particular landlord and tenant.

The warranty, however, is not waivable. Thus, the warranty is implied without regard for the real expectations of particular parties. It is implied because tenants need habitable housing and lack the ability to repair uninhabitable housing, whereas landlords have such ability. In other words, relying on the criteria of need and ability, the court determined that it is distributively just to impose on all landlords of residential property a duty to maintain their property in habitable condition.

It might be argued that the court's concerns with distributive criteria was not proper because the court had only one particular landlord and one particular tenant before it. The court's use of distributive criteria, however, is based on a generalized view of the relative merits of landlords and tenants with respect to a very base level standard—habitable, not luxurious, housing. At this base level, the court presumed that all tenants' needs were equal, as they are derived from the very purpose for which a modern tenant rents residential property. The court also treated all landlords' abilities to meet this base level standard as equally superior to their tenants' because, by virtue of being in the business of renting residential property, they hold themselves out as having the ability to maintain the property in habitable condition. Thus, the court regarded the immediate parties and their claims as representative of the classes that were subject to the court's redistribution.[9]

9. It has been argued that implied covenants of habitability actually reduce the supply of housing to low income tenants. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 445-47 (3d ed. 1986). Assuming that such arguments are correct, it remains appropriate for a court to resolve the distributive justice claims to warranties of habitability. The tenant remains representative of a class of all tenants, albeit making a choice on behalf of that class between a greater supply of uninhabitable housing and a smaller supply of habitable housing.

It might still be argued that the legislature, rather than the court, is in a better position to make these distributive judgments. Because the court has to treat the parties as representative of their general classes, *i.e.* landlords and tenants, the court is unable to allow for differences in merit among members of those classes. For example, wealthy tenants may not need the implied warranty because they have the financial ability to provide for maintenance and repairs independent of the landlord. Small landlords may not have the same level of ability to provide for repairs than large landlords.

The court's redistribution from landlords to tenants based on its view of their relative merit, however, does not preclude the legislature from further refining the distribution through means that are not available to courts. For example, the legislature could, if it concluded that such an action was merited, tax residential leases above a certain rental and use the proceeds to subsidize poorer landlords who need the subsidy to maintain their properties in habitable condition.

## II. EMPLOYMENT AT-WILL DEBATE

Dissecting the distributive and corrective justice elements in the employment at-will debate will enable us not only to evaluate the arguments, but also to determine whether the concerns are more appropriate for judicial or legislative resolution. The at-will rule permits termination for good cause, bad cause, or no cause. No one disputes the right to terminate for good cause. The controversy focuses on curtailing the ability to terminate for bad cause or no cause.

### *A. Termination for Bad Cause*

Most of the erosion of the at-will rule has focused on the employer's ability to terminate for bad cause. The key controversy focuses on how to define bad cause. The first and most specific limitations on employer ability to fire for bad cause have come from the legislature. Statutes define employee conduct or characteristics that, for reasons of social utility, the legislature has decided to protect from the employer's power to discharge. There are three types of statutes: labor relations and equal employment opportunity (EEO) statutes which protect certain employee characteristics, anti-retaliation statutes which protect employees who exercise rights guaranteed by the statutes, and whistleblower protection statutes which protect employees who assist in statutory enforcement.

### *B. Statutes Protecting Employee Characteristics*

The first major statute protecting employee characteristics was the National Labor Relations Act (NLRA), which prohibits discharge or other discrimination against employees to discourage membership in a labor organization.[10] This limitation of the employer's ability to terminate for bad cause is an intricate part of an overall statutory scheme designed to distribute power and wealth in the workplace. Two of the NLRA's primary purposes were to promote industrial democracy and to improve employee compensation and working conditions. It achieved the former by redistributing power in the workplace from unilateral employer decision-making to negotiation with the employees through their collective representative. It sought to achieve the latter by granting the union selected by a majority of the employees exclusive authority to represent all employees, thereby eliminating the competition among employees that drives wages and working conditions down.

10. The NLRA originally prohibited discrimination to discourage union membership. In 1947, the Taft-Hartley Act amended the statute to add a prohibition against discrimination to encourage union membership.

The EEO laws provide the other major source of statutory protection of employee characteristics. All such statutes are modeled on Title VII of the Civil Rights Act of 1964.[11] At first glance, Title VII would appear to be a declaration that employment decision-making based on race[12] is morally wrong. Consequently, whenever an employer undertakes an adverse employment action because of an individual's race, a transactional inequality arises which must be redressed as a matter of corrective justice.

Closer scrutiny, however, reveals that much of Title VII is distributive in nature, going beyond correcting the transactional inequalities that result from deliberately racist employment decisions. For example, Title VII prohibits an employer from segregating its sales force racially even though the employer might be able to prove that customers are more likely to buy from members of their own races. The statute also prohibits the use of neutral criteria if the criteria have an adverse impact on members of a racial minority and are not justified by a business necessity. Thus, the statute is not merely a command to avoid racial bigotry; rather, it imposes an affirmative obligation to consider racial impact, direct or derivative, when an employer distributes goods in the workplace.

### *C. Anti-retaliation Statutes*

Many employment statutes prohibit retaliation against employees who exercise statutory rights. These anti-retaliation provisions are an intricate part of the statutory schemes which confer those rights. The rights themselves are based in considerations of distributive justice, and the rights would not exist without the anti-retaliation provisions.

For example, Section 7 of the NLRA grants to employees the right to engage in concerted activity for mutual aid and protection. This right has its roots in distributive justice, *i.e.* the NLRA's goal of redistributing decision-making power and wealth in the workplace. The right, however, has no meaning that is independent of the employer's duty under Section 8(a)(1) to not interfere, restrain or coerce employee exercise of that right. Thus, protection against discharge in retaliation for the exercise of Section 7 rights is clearly part of the distributive scheme of the

11. For a discussion of the extent to which Title VII has served as a model, see Howard C. Eglit, *Title VII: A Statute of Wide-Ranging Influence*, *in* TITLE VII AT 25, at 10-12 (Martin H. Malin ed., 1989).

12. Title VII also prohibits discrimination on the basis of sex, national origin, and religion, but the primary concern of Congress was protecting African-Americans from racial discrimination. Therefore, in the text, I will discuss Title VII in the context of racial discrimination. The same points, however, apply with equal force to the other protected classes.

NLRA. Indeed, a key issue in many Section 8(a)(1) discharge cases is whether the employee's conduct merited Section 7 protection.[13]

The Employee Retirement Income Security Act (ERISA) prohibits employers from discharging or otherwise discriminating against employees for the purpose of interfering with employee rights under the statute or under an employee benefit plan established pursuant to the statute. At first glance, this anti-retaliation provision would appear to be designed to correct transactional inequalities resulting from employer attempts to give employees less compensation than agreed to by the parties. For example, if the parties agreed that an employee would be eligible to participate in the employer's pension plan after one year of service and would vest after five years of service, the employer would receive the employee's services for less than it bargained for if it were allowed to terminate the employee after four years and eleven months to prevent her from vesting.

The corrective nature of ERISA's anti-retaliation provision fades, however, when we consider the source of the employee's retirement compensation. That compensation did not result from the parties' negotiations; rather, it resulted from the distributive aspects of the statute itself. ERISA represents a determination that a portion of the common wealth shall be channeled toward retirement income. This is accomplished by giving "qualified" retirement plans very favorable treatment under the Internal Revenue Code. Furthermore, the criteria which may be used to distribute retirement wealth are tightly regulated to ensure a just distribution to all employees based on length of service. As a result, ERISA imposes minimum participation and vesting standards and prohibits discrimination in contribution and benefit formulas which would favor highly compensated employees. Thus, the employee who was able to participate in the retirement plan after one year of service did so because the statute prohibits employers from delaying participation for any employee for longer than one year of service. Similarly, the statute requires that employees vest after five years of service. These requirements are part of the distributive scheme enacted in ERISA. The prohibition on retaliation is also an intricate part of that scheme. The employee is protected from retaliation, not out of respect for her equal moral worth in the transaction with her employer, but because of her claim to pension benefits based on merit as detailed in the statute.

13. *See, e.g.*, NLRB v. City Disposal Sys., Inc., 465 U.S. 822 (1984); NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

### D. *Whistleblower Protection Statutes*

Many statutes protect employees against discharge or other retaliation for reporting, or, in some cases, otherwise opposing, employer statutory violations. I contend that these whistleblower protections are intricately tied to the nature of the statutory duty that the employee is helping to enforce. If the statutory duty's source is distributive, the statutory protection for the whistleblowing employee is also distributive. If the statutory duty's source is corrective, the whistleblower's protection is also corrective.

It could be argued that regardless of the distributive or corrective nature of the statutory duty, we engage in an act of corrective justice by redressing an employer's retaliation against an employee for requiring the employer to live up to that duty. Neither employer nor employee are above the law. Consequently, redressing retaliatory dismissals could be based on respect for the equal moral worth of the parties to the employment transaction.

Although it is possible to develop a corrective justice theory of whistleblower protection, the actual whistleblower protective statutes do not follow such a theory. They do not purport to respect the equal moral worth of employer and employee by providing that neither is above the law in the employment transaction. Rather, they distribute power in the workplace as tied to job security in accordance with a specific mediated criterion, *i.e.*, the employee's social utility in statutory enforcement.

Statutes which prohibit retaliation against employees who oppose or report statutory violations by their employers do so because of a need to rely on employees as a key element in enforcement. For example, the Fair Labor Standards Act (FLSA) prohibits discharging or otherwise discriminating against an employee for filing an FLSA complaint, instituting or causing to be instituted an FLSA proceeding, or testifying in an FLSA proceeding.[14] The Supreme Court has emphasized congressional reliance on employees as tools of statutory enforcement in interpreting the reach of the FLSA's whistleblower protection:

> For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.[15]

14. 29 U.S.C. § 215(a)(3) (1992).
15. Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 288, 292 (1960).

Similar reliance is found in the whistleblower protection provisions in statutes that do not regulate the workplace. A series of federal environmental statutes protect employee whistleblowers. These statutes also clearly protect employees because of their utility in enforcement. The first such protection appeared in the 1972 amendments to the Federal Water Pollution Control Act. Its purpose was to provide that "employees and union officials could help assure that employers do not contribute to the degradation of our environment."[16] Reliance on employees to help enforce environmental laws was recognized as common practice, and whistleblower protection was considered to be "standard employee protection" by 1976.[17]

Although employee whistleblower protection may be regarded as standard in environmental legislation, it remains the exception in legislation in general. The legislative decision to protect employees against retaliatory dismissal generally is based on a legislative determination of the employees' utility in the enforcement scheme. Indeed, that level of utility will also determine the scope of employee protection. For example, false and malicious charges are protected against retaliation under Title VII,[18] but not under the NLRA.[19]

Even general whistleblower protection laws are not rooted in corrective justice. The first such statute was enacted in Michigan. In a prior article, I have shown how the Michigan Whistleblower Protection Act protects employees because they are a significant source of law enforcement assistance.[20] The Act does not concern itself with whether the whistleblower resorted to reasonably available internal channels to correct the violation, with the employee's motive in blowing the whistle, or with whether the employee made any inquiries into the accuracy of her claim prior to blowing the whistle. Such concerns would be relevant in deciding whether the discharge of a whistleblower in any particular case was morally wrong. The statute, however, is not concerned with transactional moral wrongs. Instead, it distributes power in the workplace based on the social utility of protecting the employee from the employer's power to fire.

Erosion of the employer's traditional power to fire for bad cause has

16. S. REP. No. 414, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3748.

17. H.R. REP. No. 1491, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6245.

18. Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969).

19. NLRB v. Brake Parts Co., 447 F.2d 503 (7th Cir. 1971); Iowa Beef Packers, Inc. v. NLRB, 331 F.2d 176 (8th Cir. 1964).

20. Martin H. Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REF. 277, 304-07 (1984).

not been confined to the legislative branch of government. Courts in a majority of jurisdictions have recognized a tort cause of action for retaliatory discharge. Under this emerging tort, a plaintiff may recover when her discharge violates public policy. The tort's development has followed the statutory pattern. Courts discern employee conduct that they find worthy of protection for reasons of social utility and prohibit employers from discharging in retaliation against the exercise of such conduct.

Courts, however, are sharply divided over what employee conduct should be protected. Some jurisdictions protect only those employees who are fired for exercising statutory rights or for refusing to breach statutory duties. Even within this group, there is division concerning whether all statutory rights should be protected. For example, in *Campbell v. Ford Industries, Inc.*,[21] the Oregon Supreme Court held that an employee who was also a shareholder in the employer had no cause of action to redress his discharge which allegedly retaliated against his exercise of a statutory right to inspect the company's books and records. The court reasoned that the statute protected shareholders' private and proprietary rights and did not serve a sufficiently public purpose to provide a basis for a tort claim. The Virginia Supreme Court has rejected this view, holding that an employee discharged allegedly for refusing to vote his stock in accordance with the wishes of management states a claim for retaliatory discharge.[22]

A growing number of jurisdictions require a statutory basis for the public policy but do not strictly limit employee protection to their exercise of statutory rights or compliance with statutory duties. These states expand the tort to employees discharged for attempting to prevent their employers from violating statutes or for reporting violations to appropriate authorities.[23]

A few jurisdictions have gone beyond statutory declarations of public policy in finding discharges to be actionable. These courts often sweep broadly in their definitions of public policy, only to retreat in subsequent cases. For example, in *Palmateer v. International Harvester Co.*,[24] the Illinois Supreme Court declared that a public policy favoring citizen crime fighters protected an employee allegedly fired for reporting to police illegal activity of a coworker. The same court, however, has

21. 546 P.2d 141 (Or. 1976).

22. Bowman v. State Bank, 331 S.E.2d 797 (Va. 1985).

23. *See, e.g.*, Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980); Boyle v. Vista Eyeware, Inc., 700 S.W.2d 859 (Mo. Ct. App. 1988); Kalman v. Grand Union Co., 443 A.2d 728 (N.J. Super. Ct. App. Div. 1982); Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984); McQuary v. Bel Air Convalescent Home, Inc., 684 P.2d 21 (Wash. Ct. App. 1984).

24. 421 N.E.2d 876 (Ill. 1981).

refused to protect employees allegedly fired for filing health insurance claims[25] or for protesting employer violations of a municipal ordinance.[26] The Illinois Supreme Court's apparent retreat from *Palmateer* led that state's intermediate appellate court to characterize the case as setting "the outer limits for at will employees" and to deny a cause of action to an employee allegedly fired for reporting suspected criminal activity of coworkers to the employer, rather than to law enforcement authorities.[27]

Thus, the tort of retaliatory discharge appears to be dependent upon an ad hoc case-by-case and jurisdiction-by-jurisdiction analysis of the social utility of the employee's conduct. The Arizona Supreme Court candidly admitted as much in *Wagenseller v. Scottsdale Memorial Hospital*,[28] in holding actionable the discharge of an employee for refusing to "moon" others at a private camping party: "[W]e will look to the pronouncements of our founders, our legislature, and our courts to discern the public policy of this state. All such pronouncements, however, will not provide the basis for a claim of wrongful discharge. Only those which have a singularly *public* purpose will have such force."[29]

This ad hoc evaluation of the social utility of employee conduct has produced results that to a reasonable employer or employee must appear to be incomprehensible anomalies. For example, an Illinois employee is protected for protesting employer violations of state or federal safety statutes, but not for protesting employer violations of a municipal safety ordinance.[30] An Illinois employee is protected for filing a workers' compensation claim, but not for filing a health insurance claim.[31] A Pennsylvania employee is protected for investigating illegal self-dealing by his employer's president, but not for having an unsafe product removed from the market.[32] A Michigan employee is protected for refusing to make misrepresentations to the government, but not for trying to prevent misrepresentations by others.[33]

The hopelessly inconsistent results of judicial attempts to define the

25. Price v. Carmack Datsun, Inc., 485 N.E.2d 359 (Ill. 1985).

26. Gould v. Campbell's Ambulance Serv., Inc., 488 N.E.2d 993 (Ill. 1986).

27. Zaniecki v. P.A. Bergner & Co., 493 N.E.2d 419 (Ill. App. Ct. 1986).

28. 710 P.2d 1025 (Ariz. 1985).

29. *Id.* at 1034.

30. *Compare* Wheeler v. Caterpillar Tractor Co., 485 N.E.2d 372 (Ill. 1985), *cert. denied*, 475 U.S. 1122 (1986) *with* Gould v. Campbell's Ambulance Serv., Inc., 488 N.E.2d 993 (Ill. 1986).

31. *Compare* Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978) *with* Price v. Carmack Datsun, Inc., 485 N.E.2d 359 (Ill. 1985).

32. *Compare* Klayes v. Sperry Corp., 118 L.R.R.M. (BNA) 2463 (E.D.Pa. 1984) *with* Geary v. U.S. Steel Corp., 319 A.2d 174 (Pa. 1974).

33. *Compare* Trombetta v. Detroit, Toledo & Ironton R.R., N.W.2d 385 (Mich. Ct. App. 1978) *with* Suchodolski v. Michigan Consol. Gas Co., 316 N.W.2d 710 (Mich. 1982).

tort of retaliatory discharge lend credence to the minority of jurisdictions that have refused to recognize any common law claims for retaliatory discharge. These jurisdictions invariably reason that the determination of when a public policy should be backed by a prohibition on employee dismissal is an issue that is best left to the legislature.[34] Recognizing that the tort of retaliatory discharge has its roots in judicial distribution of power in the workplace based on the social utility of employee conduct enables us to evaluate the position of the minority of jurisdictions that it is inappropriate for courts to adjudicate these distributive claims.

I have previously observed that because claims based in distributive justice tend to involve multiple parties, courts, operating through bi-polar litigation, often will not be equipped to resolve them. I have also suggested, however, that a court may appropriately resolve a distributive claim where the distribution is between two classes and each party represents the interests of the class to which she belongs. Thus, it was appropriate for the court in *Hilda* to adjudicate the distributive justice claims of tenants to habitable housing because the claim involved a distribution between tenants and landlords and each party represented the relevant class interests.

At first glance it might appear that the distributive justice claims in retaliatory discharge tort actions are comparable to the distributive justice claims in warranty of habitability cases. In retaliatory discharge cases, the court seeks the appropriate distribution of power in the workplace between two classes: employers and employees. The parties to a retaliatory discharge action represent their respective classes.

In warranty of habitability cases, however, the criteria on which the distribution is based are need for and ability to provide habitable housing. These criteria relate exclusively to characteristics of members of the two classes. Thus, the claim is truly a bi-polar class claim in which the parties may adequately represent their classes.

In retaliatory discharge cases, the primary criterion for distributing power between employers and employees is social utility to society as a whole. The employee's interest is job security, but that interest is only incidentally related to the criteria for power distribution. The employee is forced to base her interest in job security on the collective interests in the utility of her conduct.

The often unstated second criterion for distributing workplace

34. Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130 (Ala. 1977); Hartley v. Ocean Reef Club, Inc., 476 So. 2d 1327 (Fla. Dist. Ct. App. 1985); Murphy v. American Home Prod. Corp., 448 N.E. 2d 86 (N.Y. 1983).

power in retaliatory discharge claims is employer need in running the enterprise. As the dissenting justice in *Palmateer* put it: "The courts must recognize that the allowance of a tort action for retaliatory discharge is a departure from, and an exception to, the general rule. The legitimate interest of the employer in guiding the policies and destination of his operation cannot be ignored."[35] Thus, in retaliatory discharge actions, courts are distributing workplace power in proportion to the employer's business needs and the social utility of the employee's conduct. These criteria do not lend themselves to evaluation in bipolar litigation between employer and employee. For example, the social utility of an employee's actions in enforcing a statute may only be fully evaluated in light of the distribution of benefits from that statute and the distribution of costs of statutory enforcement. Evaluation of the distribution of statutory benefits requires consideration of such factors as whether the statutory rights are proprietary in nature or truly beneficial to the public. Evaluation of the distribution of enforcement costs requires consideration of such factors as whether employee involvement contributes significantly to statutory enforcement or whether the costs of enforcement should be spread among the beneficiaries of the statute through taxation to support public enforcement efforts. The legislature is in a far better position to weigh the criteria and, thereby, determine the proportions which allocate workplace power.

Thus, the tort of retaliatory discharge has developed from an inappropriate judicial adjudication of claims based in distributive justice. This, however, does not compel the conclusion that tort law has no role to play in regulating employment termination. Rather, it suggests that to the extent tort claims arise from employment termination, they should be rooted in corrective justice, *i.e.*, they should be geared to correct transactional inequalities resulting from moral wrongs.

Such a formulation of the tort was initially advocated by Professor Lawrence Blades in his seminal 1967 article in the *Columbia Law Review*.[36] Blades argued that courts should temper the harsh effect of the at-will rule by recognizing a cause of action in tort for abusive discharge. Drawing upon traditional principles of tort law, he contended that a discharge should be actionable whenever it is unrelated to the employee's job. The tort's purpose was to protect the employee's freedom of action from the employer's power to discharge at will. Eighteen years later,

35. Palamateer v. International Harvester Co., 421 N.E.2d 876, 884 (Ill. 1981) (Ryan, J., dissenting).

36. Lawrence Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

Blades succinctly explained the basis for his proposal: "My central thesis in that *Columbia Law Review* article was that there should be legally enforceable limitations on an employer's power to control an employee's life and freedom as to matters which should be none of an employer's business."[37]

The tort, as formulated by Blades, recognizes an employee's right to privacy in those aspects of her life that have nothing to do with her job. This right finds its basis in the reasonable expectations of the parties. When an employee accepts employment she voluntarily accepts limitations on her freedom of action that are inherent in the job. For example, she agrees to report for work on time and in a condition that enables her to perform her duties. She does not, however, consent to limitations on her freedom that bear no relation to the job. By providing employment, the employer has not purchased total control over the employee's life. Thus, when an employer discharges an employee for reasons that are not related to the job, a transactional inequality arises which must be redressed regardless of the parties' distributive merit.

The tort, as formulated by Blades, is based in corrective justice and is bipolar in nature. Courts are the most appropriate branch of government to resolve such claims. Unfortunately, the courts have largely ignored this formulation of the tort, choosing instead to focus on the social utility of the employee's conduct. I suggest that courts have misplaced their analysis in deciding how to regulate employment termination.

### *E. Discharge for No Cause*

Although statutes and tort actions have obliterated much of the employer's legal ability to discharge for bad cause, most of the ability to discharge for no cause remains intact. The major assaults on the employer's ability to discharge without cause have come in the public sector, where civil service and tenure statutes require cause for dismissal and in collective bargaining where almost all contracts require cause for discipline or discharge. In the non-unionized private sector, only Montana has statutorily required cause for dismissal. In all other jurisdictions, employees seeking protection under a rule requiring cause for dismissal are at the mercy of the common law of contracts.

Many jurisdictions which have recognized tort claims for retaliatory discharge have retained the at-will rule in its purest form in their common law of contracts. Others have retained the at-will rule, but recast it

37. Lawrence Blades, *Foreword* to W. HOLLOWAY & M. LEECH, EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES (1985).

from a rule of law to a rule of construction. In these jurisdictions, employment contracts of indefinite duration are presumed to be terminable at will, but the employee may overcome the presumption with evidence of promises of job security. The key issue in these jurisdictions is what type of evidence will suffice to overcome the presumption of at-will termination.

Some courts have required very little. They have implied promises of job security from longevity of employment, an employer practice of dismissing only for cause, and even from the employer's failure to deny that its policy was to dismiss only for cause.[38] Others have required express specific promises of job security and found the presumption of at-will termination not to be overcome in situations where the clear, reasonable expectation of the parties was to the contrary. For example, in *Parker v. United Airlines*,[39] a 12-year employee was discharged for allegedly stealing employer funds. The Washington Court of Appeals held that the employee plaintiff was terminable at will, despite the following evidence: (1) employees were granted regular employment upon completion of a probationary period; (2) employees were told at an orientation session that after their probationary periods they would be discharged only for cause; (3) the employer had an internal grievance procedure through which the plaintiff had challenged her discharge and which focused on whether the plaintiff had in fact stolen employer funds; and, (4) the employer's president had assured employees of fair treatment. The court interpreted the employee's regular-employee status as merely providing that her employment was of indefinite duration. It viewed the grievance procedure as merely implementing company policy to treat all employees fairly. It concluded that the plaintiff's evidence only established her subjective understanding that she would be discharged only for cause and did not establish a contractual limitation on the employer's ability to terminate at will.

Some jurisdictions have swept broadly in their treatment of employer statements, actions, and policies as evidence which may rebut the presumption of at-will employment, only to retreat from their positions in subsequent decisions. Michigan provides a prime example.

In *Toussaint v. Blue Cross & Blue Shield of Michigan*,[40] the Michigan Supreme Court upheld jury verdicts which found that two employees

38. *See, e.g.*, Wiskotoni v. Michigan Nat'l Bank-West, 716 F.2d 378 (6th Cir. 1983); Frazier v. Colonial Williamsburg Found., 574 F. Supp. 318 (E.D. Va. 1983); Allegri v. Providence-St. Margaret Health Ctr., 684 P.2d 1031 (Kan. App. 1984).

39. 649 P.2d 181 (Wash. Ct. App. 1982).

40. 292 N.W.2d 880 (Mich. 1980).

had contracts that required just cause for termination. One employee had inquired about job security, was told that he would be with the company as long as he did his job, and was given a personnel policy manual which provided that employees who completed their probationary periods would only be terminated for cause. The second employee negotiated with his employer prior to his hiring and was told that he would not be discharged if he was doing his job. The court explained its rationale for enforcing implied contract rights to job security for both employees:

> [W]here an employer chooses to establish [personnel] policies and practices and makes them known to his employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No preemployment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee.[41]

Eleven years later the court retreated from *Toussaint*. In *Rowe v. Montgomery Ward & Co.*,[42] the court held that a commissioned appliance sales representative was terminable at will, even though she was told by the official who hired her that she would have a job as long her monthly sales performance equalled or exceeded her salary draw and she did not engage in serious misconduct.[43] The court held that these express provisions did not establish that the relationship was terminable only for cause. It distinguished *Toussaint* as follows:

41. *Id.* at 892 (footnote omitted).

42. 473 N.W.2d 268 (Mich. 1991).

43. The department manager who hired the plaintiff testified as follows:

"A. . . . Their main objective, the number one thing was that they must attain their draw of a hundred and twenty-six dollars a week, and generally; as long as they generated sales and were honest, why, they had a job at Wards, and that's the way we used to hire our people.

"Q. What did you tell Mary Rowe when you hired her?

"A. That was the prime purpose, to get sales and to attain that roughly $2,000 a week or more in sales."

In further discussing the conditions of employment, Harryman stated:

"A. . . . The conditions, again, number one was to attain those sales quotas and to be honest. . . . We had those sorts of things, but again, about the only way that you could be terminated would be if you failed to make your draw for two months in a row. . . .

"Q. Did you tell her any other reasons for which she may be terminated?

"A. Theft or, you know, obviously, murder, or something like that; theft of any company properties, or so on."

*Id.* at 274 n.6.

> Unlike Toussaint, plaintiff did not engage in pre-employment negotiations regarding security. She simply "stumbled" into the store one day and had one interview before being hired. Nor is there any testimony suggesting that plaintiff inquired about job security. Therefore, Harryman's statements could not have been addressed to any inquiry regarding job security. In short, no objective evidence exists that their minds met on the subject of continued employment. In addition, we note that in *Toussaint*, the plaintiffs were applying for singular, executive job positions. That the positions were unique supports the finding that the terms were specifically negotiated. Here, plaintiff was one of many departmental salespersons. The fact that plaintiff applied for one of several identical positions militates against the likelihood that the contract terms were negotiable and suggests that company policy was more likely to govern.[44]

Arguments over the continued validity of an employer's power to dismiss an employee without cause parallel the arguments over the implied warranty of habitability. At one level, attackers and defenders of the at-will rule appeal to concerns of corrective justice. Those who attack the at-will rule contend that, although it once reflected the typical employer-employee relationship, the nature of that relationship has changed, just as the nature of the residential tenancy has changed.[45] Defenders, in contrast, assert that the at-will rule continues to reflect the expectations of the parties to the typical employment relationship.[46]

Proponents and opponents of the at-will rule also appeal to concerns of distributive justice. Both sides appear to agree that the primary criterion for distributing the power to terminate the employment relationship is need, but disagree over how to evaluate the relative needs of employers and employees.

Two primary arguments have been advanced for replacing the at-will rule, regardless of whether it is a rule of law or construction, with a rule requiring just cause for dismissal. In many ways these arguments parallel those made in the warranty of habitability cases. One is based on the reasonable expectations of the parties. Just as advocates of a warranty of habitability argue that the empirical reality of why people rent residential property has changed, advocates of requiring just cause for dismissal contend that the at-will rule is inconsistent with the empirical reality of the workplace. A second is based on the employee's needs.

44. *Id.* at 274.

45. *See, e.g.*, Matthew W. Finkin, *The Bureaucratization of Work: Employee Policies and Contract Law*, 1986 WIS. L. REV. 733.

46. *See, e.g.*, Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984); Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097 (1989); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 306 (3d ed. 1986).

Just as advocates of a warranty of habitability contend that residential tenants need habitable housing, advocates of imposing a just cause standard for dismissal argue that employees need job security.

A primary argument against requiring just cause for dismissal is based on employer needs. It is argued that, although employers generally do not dismiss employees arbitrarily, they need the right to fire at will because of the transaction costs and proof difficulties that they would encounter under a just cause standard.

### *F. Corrective Justice and The Parties' Expectations*

Professor John Blackburn asserts, "Implying a right to reasonable, good cause, discharges would serve to reflect the probable intent of the parties to the employment relationship."[47] Professors Mayer Freed and Daniel Polsby maintain, "Although buyers and sellers of labor regularly dicker, at least implicitly, about wages, work assignments, fringe benefits, working conditions and many other variables, the employer usually keeps the unilateral power to terminate the employee's job tenure."[48] Whose assertions, Blackburn's or Freed and Polsby's, most closely reflect the empirical reality of the workplace?

The parties' expectations in the employment relationship cannot be understood in a vacuum. They must be considered in light of the modern workplace.

The modern workplace has been subject to a barrage of private and public regulation. The primary source of private regulation has been collective bargaining. Just cause protection is a standard provision of almost all collective bargaining agreements. The effects of collectively bargained just cause protection go well beyond the dwindling percentage of American workers covered by such contracts. Many non-unionized employees were covered by collective bargaining agreements in the past and many others have worked for employers where at least some portion of the workforce was covered by collectively bargained just cause protection. Moreover, supervisors and managers of unionized employees are quite familiar with the just cause standard because they are forced to live under it when disciplining their subordinates. The impact of collective bargaining has gone well beyond unionized bargaining units and has regularized employment practices generally, regardless of whether the em-

47. John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment At Will*, 17 AM. BUS. L.J. 467, 482 (1980).

48. Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1098-99 (1989).

ployer is organized.[49]

The extensive public regulation of the workplace has also affected the expectations of employers and employees. The myriad of statutes and potential common law claims which have precluded bad-cause discharges have stripped the claim that the parties intend the employment relationship to be terminable at-will of any connection to reality. Indeed, forceful arguments have been made that the EEO laws alone have imposed a de facto just cause limitation on dismissals.[50] Almost ten years ago, Professor Clyde Summers astutely criticized continued adherence to the at-will rule, observing, "[T]he underlying principle has long been dead and the doctrine was but a shell."[51]

The available empirical evidence suggests that the intuitive inferences drawn from extensive workplace regulation are correct. Surveys of employers reveal that nonunionized employers dismiss employees only for cause and practice progressive discipline almost to the same extent as exists under collective bargaining agreements.[52]

The view that a just cause requirement accurately reflects the probable intention of the parties also is consistent with what labor economists tell us about how employers and workers actually interact. Although most jobs are short-term, most employment takes place in long-term jobs. It appears that most employees work in several short-term jobs before settling into a long-term career with the same employer. This phenomenon reflects the common pattern in unionized and non-unionized environments, although unionized employees are more likely to find their career-length jobs sooner than their nonunionized colleagues.[53]

Employee compensation also reflects the pattern of most employ-

49. *See generally* SUMMER H. SLICHTER ET AL., THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT (1960).

50. Alfred Blumrosen, *Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII*, 2 INDUS. REL. L.J. 519 (1978); Cornelius J. Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 19-21 (1979).

51. Clyde W. Summers, *Individual Rights in the Workplace: The Employment-At-Will Issue: Introduction* 16 U. MICH. J.L. REF. 201, 203 (1983).

52. *See* BNA Personnel Policies Forum, PPF Survey No. 139 Employee Discipline and Discharge (January 1985) (85% of unionized employers and 79% of nonunionized have written expectations for employees; 94% of unionized and 93% of nonunionized employers require progressive discipline; 98% of unionized and 99% nonunionized employers require consultation with at least one other official before a supervisor may suspend or discharge an employee). BNA Personnel Policies Forum, PPF Survey No. 125, Policies for Unorganized Employees (April 1979) (82% of companies have written rules of conduct for nonunion employees and 80 percent have complaint procedures whereby employees may appeal disciplinary action).

53. *See, e.g.*, John T. Addison & Alberto C. Castro, *The Importance of Lifetime Jobs: Differences Between Union and Nonunion Workers*, 40 INDUS. & LAB. REL. REV. 393 (1987); George A. Akerloff & Brian G. M. Main, *An Experience-Weighted Measure of Employment and Unemployment Durations*, 71 AM. ECON. REV. 1003 (1981); Robert E. Hall, *The Importance of Lifetime Jobs in the U.S. Economy*, 72 AM. ECON. REV. 716 (1982).

ment taking place in long-term jobs. A good portion of the employee's compensation is deferred until later years. Not only does salary increase with seniority, but fringe benefits often are tied directly to length of service, with eligibility for some fringe benefits delayed until completion of a minimum period of employment.

Economists disagree over how and why compensation increases with length of service. Some argue that increased compensation reflects increased productivity which comes with increased tenure.[54] Others contend that employees' compensation does not reflect their marginal products while offering a variety of explanations as to why longer term employees are paid more than their junior colleagues.[55] The employment contract as it exists in the labor economist's view of reality is a long term relational contract.[56]

The assumption which underlies the long term relational contract with deferred compensation is that employment will continue as long as performance is satisfactory. Limiting dismissal to just cause thus more accurately reflects the unstated expectations of the parties than does permitting dismissal at will.

The argument that just cause protection reflects the probable intent of the parties appeals to considerations of corrective justice. If employers induce employees to work for them, not only with wages and fringe benefits, but also with expectations of job security, an employer who terminates an employee without cause has paid the employee less than called for by the original bargain. The resulting transactional inequality must be remedied as a matter of corrective justice.

### *G. Distributive Justice and The Relative Needs of Employers and Employees*

If a just cause limitation is imposed on employment termination be-

54. *See, e.g.*, James N. Brown, *Why Do Wages Increase with Tenure? On-the -Job Training and Life-Cycle Wage Growth Observed Within Firms*, 79 AM. ECON. REV. 971 (1989).

55. *See, e.g.*, Katherine G. Abraham & James L. Medoff, *Length of Service and the Operation of Internal Labor Markets*, PROC. 35TH ANN. MTG., INDUS. REL. RES. ASS'N 308 (1982); Robert H. Frank, *Are Workers Paid Their Marginal Products?*, 74 AM. ECON. REV. 549 (1984) (suggesting that the most productive workers in a firm are paid less than their marginal products and the least productive are paid more because the highest paid workers also receive compensation in the form of the status of being the highest paid, while the lowest paid are also compensated for the status penalty they endure by being the lowest paid); Note, *Employer Opportunism and the Need For A Just Cause Standard*, 103 HARV. L. REV. 510 (1989) (presenting one labor economics theory that workers' compensation is deferred to police against shirking). *See generally* Robert M. Hutchens, *Seniority, Wages and Productivity: A Turbulent Decade* 3 J. ECON. PERSP. 49 (1989) (collecting various theories).

56. *See generally* Sherwin Rosen, *Implicit Contracts: A Survey*, 23 J. ECON. LITERATURE 1144 (1985).

cause it reflects the probable intent of the parties, the implied covenant to terminate only for just cause will be waivable. If the parties clearly express their intent to have a relationship that is terminable at will, no transactional inequality will result from a termination without cause,[57] and principles of corrective justice will not require imposing a requirement of just cause. Just as the tenant's needs relative to the landlord's ability have resulted in some jurisdictions providing that the implied warranty of habitability is not waivable, some have argued that a just cause standard for discharge is supported by considerations of the employee's needs and the employer's ability. A consequence of such arguments is that the just cause standard would not be waivable.

Several employee needs have been advanced to support a non-waivable just cause standard. Most involve the employee's need for the job itself. The job is a source of income to the employee, but it is also a source of social status and self-identity.[58] Job loss is one of the most stressful experiences a person can suffer. It often stifles the moral, mental and material development of the terminated employee and has severe mental and social consequences for her family as well.[59] Some have observed that for many employees, their jobs are the only "property" they have and the loss of that property can be devastating.[60]

Other arguments focus on the employee's need for just cause protection, apart from her need for the job itself. Professor Cornelius Peck argues that the consequences of dismissal on an employee's ability to find other employment require that the employee have a forum in which to challenge the cause for the dismissal. If the employer refuses to give the employee a reason for dismissal, the employee faces a dilemma of falsifying applications for new jobs or telling the truth, leading to the inference that the employee was terminated for cause. If the employer tells the employee that she has been dismissed for cause, the employee will be forced to disclose that fact in searching for a new job, regardless of whether the reason is mistaken or maliciously motivated.[61] Without a

57. A transactional inequality may result from a termination for bad cause, however. *See supra* notes 9 and 36-37 and accompanying text.

58. *See generally* Work in America, Report of a Special Task Force to the Secretary of Health, Education & Welfare (1973).

59. Arguments for greater employee protection based on employee needs have been advanced, among others, by John D. Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment At Will*, 17 AM. BUS. L.J. 467, 481 n.64 (1980); and Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 67 (1988).

60. *See* Comment, *Towards a Property Right in Employment*, 22 BUFF. L. REV. 1081 (1973); Ruth Weyland, *Present Status of Individual Employee Rights*, *in* N.Y.U. 22D CONF. ON LABOR 171, 215 (1970).

61. Cornelius J. Peck, *Unjust Discharges: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 4-6 (1979).

just cause standard and a forum in which to test her dismissal, the employee not only has suffered the loss of her employment but has been seriously disadvantaged in searching for a new job.

Those who focus on the employee's need for just cause protection usually argue that the employer has the ability to provide it. They frequently point to employers who already provide just cause protection under collective bargaining agreements and find that retaining the power to terminate at will is not necessary to the orderly functioning of the employer.[62]

Thus, the argument for a non-waivable just cause standard for employee dismissal derives from an evaluation of employee needs and employer abilities concerning employment termination. It allocates the power to terminate employment based on the criteria of need and ability. Thus, it is based in concerns of distributive justice.

Recognizing the distributive nature of the argument for a non-waivable just cause restriction on employment termination enables us to focus the debate. Such a rule enables distributive justice claims to trump corrective justice claims by mandating just cause for termination when the parties have expressly bargained for termination at will. For the distributive concerns to win out, we must be confident that their advocates are using the proper criteria of merit for the distribution of the power to terminate and that they have properly applied those criteria. It is on the latter point that the defenders of the at-will rule take on the just cause advocates.

Professor Richard Epstein is the leading academic advocate of the at-will rule.[63] He argues that employers need the power to terminate at will more than employees need just cause protection for job security. He observes that in the employment relationship, the employer is the sole claimant of the firm's profits, while the employee is paid a fixed wage. Consequently, employers face problems of monitoring behavior. Professor Epstein fears,

> In all too many cases, the firm must contend with the recurrent problem of employee theft and with the related problems of unauthorized use of firm equipment and employee kickback arrangements. . . . The employee on a fixed wage can, at the margin, capture only a portion of the gain from his labor, and therefore has a tendency to reduce output.[64]

62. *See, e.g.*, Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 520 (1976).

63. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

64. *Id.* at 953.

The ability to fire at will provides the employer with a much needed form of social control to resolve the problems that result from the "mismatch between benefits received and . . . labor contributed . . ."[65] Thus, to protect themselves against willful employee misconduct, employee shirking and other opportunistic employee behavior, employers need the power which comes with the ability to discharge at will. Epstein writes:

> In order to maintain internal discipline, the firm may have to resort to sanctions against individual employees. It is far easier to use those powers that can be unilaterally exercised: to fire, to demote, to withhold wages, or to reprimand. These devices can visit very powerful losses upon individual employees without the need to resort to legal action, and they permit the firm to monitor employee performance continually in order to identify both strong and weak workers and to compensate them accordingly.[66]

In Epstein's view, the employee's need for job security is protected adequately under the at-will rule. First, the employer who discharges without cause faces substantial reputational losses. Remaining employees are likely to reevaluate their futures because they will no longer be assured that good performance will guarantee job security. The best workers will be the ones most able to change jobs and, therefore, most likely to leave.

Furthermore, in Epstein's view, the at-will rule enables employees to diversify their risks of working for poor employers over time. Employee ability to quit at will enables them to respond when an employer acts in an arbitrary way. Thus, the at-will relationship is a sensible response on the part of employer and employee to the problem of imperfect information. Each party is able to try the other one out for as long as the relationship proves to be satisfactory and may leave at any time if the relationship sours.

It might be argued that a rule requiring cause for termination would nevertheless satisfy the employer's legitimate needs to control employee opportunistic behavior. Professor Epstein responds that the at-will rule is superior because it avoids the administrative costs involved in litigating the merits of the employer's reasons for termination. In his view, because the reputational disadvantages already adequately protect the employee from opportunistic employer behavior, employers' needs for protection from employee advantage-taking outweigh those of employees. He elaborates:

> The chances of finding an innocent employee wronged by a firm ven-

65. *Id.* at 964.
66. *Id.* at 965.

> detta are quite remote. By the same token, jury sympathy with aggrieved plaintiffs may result in a very large number of erroneous verdicts for employees. In principle it might be proper to tolerate the high error rate if the consequences of erroneous dismissal to the innocent employee were more severe than the consequences of erroneous reinstatement to the innocent employer. But quite the opposite is apt to be the case. Able employees are the very persons who have the greatest opportunity of obtaining alternate employment in the marketplace and who can therefore best mitigate their losses.[67]

Professor Epstein's view of the relative needs of employers and employees appears to underlie the continued judicial adherence to the at-will rule in contract. Courts which adhere to at-will termination as a rule of law express concern that deviations will interfere with the employer's ability to manage the enterprise.[68] Courts which, although recasting the at-will rule as a rule of construction, place a heavy burden on the employee to rebut the presumption of at-will employment similarly express concern for the employer's needs in managing the workforce. They recognize that when employees are hired, both parties express expectations of a long-term mutually satisfactory relationship, but refuse to give contractual effect to those expectations out of fear of impeding the employer's ability to manage the workforce.[69]

These distributive concerns with the employer's relatively greater need for power in the workplace go a long way to explaining the otherwise incomprehensible ways in which the *Rowe* court distinguished *Toussaint*. The court held that statements by Rowe's manager that she would have a job as long as she sold enough appliances to meet her draw against commissions did not establish a promise of job security, even though it had previously held that statements to Toussaint, that he would have a position as long as he performed his job, did. The court reasoned that unlike Toussaint, Rowe did not negotiate for job security and that unlike Toussaint, who occupied a unique executive position, Rowe was one of many sales representatives. Thus, in *Rowe* the court was very sensitive to the employer's needs to control the behavior of its mass workforce, needs that were not as strong with employees occupying unique executive positions.

The modern employment relationship is a long term relational con-

67. *Id.* at 970.

68. "There must be protection from substantial impairment of the very legitimate interests of an employer in hiring and retaining the most qualified personnel available or the very foundation of the free enterprise system could be jeopardized." Whittaker v. Care-More, Inc., 621 S.W.2d 395, 396 (Tenn. App. 1981).

69. *See, e.g.*, Broussard v. Caci Inc.-Fed., 780 F.2d 162, 163 (1st Cir. 1986); Rowe v. Montgomery Ward & Co. Inc., 473 N.W.2d 268, 273 (Mich. 1991).

tract replete with express and implied promises of job security. As a matter of corrective justice, courts should give effect to the reasonable expectations of the parties and require just cause for dismissal. Instead, courts use the at-will rule in contract to distribute workplace power based on the mediated criteria of employer and employee needs for such power, and rely on these distributive concerns to trump the corrective justice claims of employees. The courts' underlying evaluation of the relative needs of the parties is highly problematic.

Defenders of the at-will rule contend that the rule efficiently mediates the distribution of power in the workplace between employers and employees; *i.e.* that power cannot be redistributed without making at least one of the two groups worse off. They premise this on the prevalence of at-will employment in the nonunionized private sector. They reject arguments that enforceable promises of job security may actually improve productivity by reducing turnover and encouraging cooperation among employees. For example, Judge Richard Posner asks, "why if grievance machinery and job security reduce costly turnover and enhance worker efficiency, employers do not adopt these devices without waiting for a union to come on the scene."[70]

The short answer to Judge Posner and others is that employers do adopt these devices without waiting for unions to come on the scene. Most employers follow policies of disciplining and discharging only for cause, follow progressive disciplinary systems and provide internal procedures for employees to appeal disciplinary actions.[71] The primary difference between job security in unionized and nonunionized employment is that it is only in the former that promises of job security are legally enforceable. Indeed, the general prevalence of job security devices in nonunionized workplaces substantially undermines the contention that the at-will rule efficiently allocates workplace power between employers and employees.

The view that employers need power to terminate at will more than employees need just cause protection overemphasizes non-legal deterrents to wrongful dismissal. The deferral of much employee compensation provides employers with a major incentive to engage in opportunistic behavior because senior employees receiving high salaries and many fringe benefits may be replaced by much cheaper new hires. Even where the senior employee is performing satisfactorily, the employer may conclude that the money saved by replacing her with a

70. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 306 (3d ed. 1986).
71. *See supra* note 52.

cheaper new hire outweighs the risk that the new hire will not perform as well.

The negative reputational effects of dismissal without cause are not likely to deter employer opportunistic behavior. The likelihood that unjust dismissals will induce the employees who remain to quit is small. Those employees' investments in firm-specific human capital, coupled with the general practice of deferring employee compensation, make it very unlikely that they will be able to obtain as much compensation in the marketplace as they are receiving from their current employer. Moreover, the employer undoubtedly will portray the dismissal as justified. Remaining employees are not likely to have sufficient information to determine whether the dismissal was justified. Instead of quitting, current employees are far more likely to react to a controversial dismissal by hoping that their employer is right, or if their employer is wrong, hoping that the same thing will not happen to them.

Nevertheless, it might be argued that negative reputational effects of unjust dismissals will deter potential new hires from working for the employer. Unfortunately, the deterrent effect is undermined by the absence of information in the marketplace. Indeed, employer personnel practices, such as deferring compensation and assuring prospective employees of fair treatment and a bright future, lead employees to believe that they have just cause protection or will never need it. Even when such practices are absent, there is little opportunity to obtain information about the employer's record in dismissing employees. There is no *Consumers Reports* rating employer dismissal practices. Indeed, concern over lack of information about terminations led the Federal Trade Commission to require franchisors to provide such data to prospective franchisees.[72] Prospective employees have no similar rule to protect them. One commentator has observed that when employees are unionized, they have greater access to information and consequently, almost invariably, they demand and receive just cause protection.[73]

Defenders of the at-will rule not only overstate the deterrents to unjust dismissals, they understate the negative effects of unjust dismissal on the employee. It is far easier for a wrongfully discharged employee to obtain comparable other employment in the fertile imagination of Professor Epstein than it is in reality. First, the likelihood of unjust dismissal is greatest in periods of high unemployment. During such times, the mar-

72. 16 C.F.R. § 436.1.

73. Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

ket contains many qualified employees, thereby reducing the risks to the employer of replacing a satisfactory senior employee with a cheaper new hire of unknown ability. Thus, the wrongfully discharged employee may find alternative opportunities to be few and far between.

Even if there are jobs available, the odds are against the wrongfully discharged employee obtaining one. Because employers face the same problem of inadequate information in evaluating potential new hires as employees face in evaluating potential new jobs, an employer is likely to regard a dismissal, even when the employee maintains it was a wrongful dismissal, as a negative in evaluating an applicant. Finally, if the employee defies the odds and obtains comparable other employment, she still will have suffered considerable harm. In her new job, she will start from scratch. She will have lost the higher salary, ability to accrue pension, vacation and other fringe benefits, and, in many cases, protection against reductions in force that came with her seniority in her former job.

Thus, employee needs for just cause protection are far greater than envisioned by defenders of the at-will rule. Moreover, employer needs for the power to terminate without cause are far less than suggested by at-will rule advocates.

Employers do need disciplinary tools to ensure that employees refrain from shirking their duties or other types of employee opportunistic behavior. The power to terminate without cause, however, is not one of those tools. Indeed, employers generally induce their employees to believe that all discipline and dismissals will be for cause. Even Professor Epstein argues that concern for their reputations will lead almost all employers to discharge only for cause, even though the law does not impose such limitations. Thus, it is not the threat of unfair dismissal that deters employee opportunistic behavior; it is the threat of discipline or discharge for cause that employers rely on to deter such misconduct.

The other source of employer need is the need to avoid the administrative costs of having to defend a dismissal in litigation and the risk of a factually inaccurate outcome in the litigation. For purposes of analysis, we may disregard the bias which seethes from Professor Epstein's unsubstantiated assertion that employers rarely dismiss employees unjustly but employees frequently sue to contest justified dismissals. Even assuming a substantial likelihood that factfinders reviewing employer dismissals will make mistakes, the costs to employers are greatly exaggerated.

There have been several studies of employees reinstated by arbitrators pursuant to the just cause provisions of collective bargaining agreements. These studies survey the employers years after reinstatement.

They find that most employees who actually return to their jobs remain on the job and, in the view of their employers, make satisfactory progress on the job. Despite these employees' satisfactory post-reinstatement progress, their employers maintain in most cases that they still believe that the dismissals were just and that the arbitrator erred in ordering reinstatement.[74] Thus, even if we assume that the factfinder reached the wrong result in every case, the negative consequences to the employer have been minimal.[75]

In conclusion, courts that continue to cling to the at-will rule, either as a rule of law or a rule of construction, are relying on distributive concerns of employer and employee needs that are faulty to override corrective justice concerns of giving effect to the parties' reasonable expectations. Such action is inappropriate. To rectify the situation, courts should give effect to the reasonable expectations of the parties to the employment relationship and presume that contracts of indefinite employment are terminable only for just cause.

## III. CONCLUSION

As the title indicates, this paper presents some preliminary thoughts on the corrective and distributive justice concerns in the debate over employment at-will. These thoughts may be summarized as follows.

Control over employment termination is a major determinant of workplace power. The debate over employment at-will focuses on the appropriate approach to the legal regulation of this power. The tort of retaliatory discharge contrary to public policy is a judicial exercise in distributive justice, whereby courts distribute power in the workplace according to the mediating criteria of employer need and social utility of employee conduct. Bipolar litigation, however, is a forum that is not well suited to evaluate the social utility of immunizing particular employee conduct from employer control over job security. The distributive

74. *See, e.g.*, Chalmer E. Labig et al., *Discipline History, Seniority and Reasons for Discharge as Predictors of Post-Reinstatement Job Performance*, 40 ARB. J. 44 (Sept. 1985); Arthur A. Malinowski, *An Empirical Analysis of Discharge Cases and the Work History of Employees Reinstated by Labor Arbitrators*, 36 ARB. J. 31 (Mar. 1981); Thomas J. McDermott & Thomas H. Newhams, *Discharge Reinstatement: What Happens Thereafter*, 24 INDUS. & LAB. REL. REV. 526 (1971); Arthur Ross, *The Arbitration of Discharge Cases: What Happens After Reinstatement*, 10 N.A.A. PROC. 35 (1957).

75. Although the studies reached inconsistent results concerning some factors, such as seniority, as predictors of successful post reinstatement performance, they generally agree that employees discharged for absenteeism have a strong likelihood of poor performance following reinstatement. Absenteeism, however, is probably the employee performance deficiency that is easiest to document. The transaction costs in establishing absenteeism as a dischargeable offense are likely to be lower than the transaction costs for other offenses.

justice issues involved in balancing employer need against social utility are best left to the legislature.

Corrective justice concerns, however, call for limitations on employer power to discharge to protect the reasonable expectations of the parties. The tort of abusive discharge, as originally advocated by Lawrence Blades, protects employees from discharge for reasons that are not legitimately related to the employer's business. As such, the tort seeks to redress transactional moral wrongs in accordance with corrective justice principles and has been improperly overlooked by the courts in favor of the public policy-based retaliatory discharge tort.

The empirical reality of the modern workplace is marked by long-term employment relationships in which compensation increases with job tenure. The working assumption of these long-term relational contracts is that employees shall not be discharged except for just cause. Considerations of corrective justice require that the law give effect to the probable intention of the parties and presume that employment contracts are terminable only for just cause.

Courts have uniformly adhered to the at-will rule in contract law, either as an absolute rule of law or as a very strong presumption in contract interpretation. In so doing, these courts are redistributing power in the workplace from employees to employers based on the mediating criteria of employer and employee need. The redistribution is inappropriate as it generally understates the employee's need for job security and overstates the employer's need for power to fire at-will. Advocates of a mandatory just cause standard, on the other hand, view employee needs as substantially outweighing employer needs regarding job termination. Although the distributive justice claims for retaining the at-will rule overstate employer needs and understate employee needs, they do provide reason to question whether the balance of needs is so tilted toward employees to mandate just cause protection even when the parties have expressly bargained for an at-will relationship. Before mandating just cause protection, rather than presuming it and allowing parties to expressly contract around the presumption, we should carefully evaluate the distributive criteria to determine whether we can generalize as to the relative needs of employers and employees for all or at least most control over employment termination.