

At-Will Employment: The Arc of Justice Bends Towards the Doctrine's Rejection

By DONALD C. CARROLL*

Introduction

DR. MARTIN LUTHER KING WAS CONFIDENT that the arc of the moral universe bends towards justice.¹ The history of the at-will doctrine in employment law is an example of this arc, as the nationwide jurisprudence moves away from the doctrine and towards a more just social compact. This Article argues that the at-will doctrine is immoral and that it is time for the common law to reject it.

Part I examines the historical nature and the roots of the at-will doctrine, as many articles before have done. Part II looks at the economic and contractual foundation of the at-will doctrine. Part III describes the exceptions to the at-will doctrine, which demonstrate the movement towards its rejection. This movement has resulted from the recognition of the at-will doctrine's moral weakness. Part IV examines the immorality of the remaining vestiges of the doctrine. Part V demonstrates the ability of the common law to eliminate this doctrine.

This Article primarily utilizes the moral language of the 1986 Pastoral Letter of the American Catholic Bishops, *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy*, as a basis for critiquing the at-will doctrine.²

* J.D., University of San Francisco; LL.M., Georgetown University Law Center; President, Law Offices of Carroll & Scully, Inc.; Adjunct Professor of Law, University of San Francisco. The author gratefully acknowledges the valuable assistance of Professor Michelle Travis, reference librarian John C. Shafer, and Priya Dahanukar Brandes and Scott Ito of the Law Review.

1. Martin Luther King, Jr., Where Do We Go From Here? (Aug. 16, 1967), in *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* 165 (Clayborne Carson & Kris Shepard eds., 2001).

2. U.S. CONFERENCE OF CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY* (1986) [hereinafter *PASTORAL LETTER*].

I. The At-Will Rule: Its Nature and Legal Roots

The at-will doctrine (also referred to as the at-will rule) permits an employer to fire an employee at any time “for good cause, for no cause or even for cause morally wrong, without being . . . guilty of legal wrong.”³

A century later, the rule remained unchanged, “[a]bsent any contract, . . . the employment is ‘at will,’ and the employee can be fired with or without good cause.”⁴

The genesis of the at-will doctrine dates back to a treatise authored by Horace Gray Wood in 1877. The treatise provides that in America, “a general or indefinite hiring is *prima facie* a hiring atwill.”⁵ Therefore, “no presumption attaches” that a hiring is for any specific term.⁶

This purported statement of the American rule was in fact a misstatement. Until this definition announced by Wood, the American legal treatises relied on the English rule, which presumed that a hir-

3. *Payne v. W. & Atl. R.R.*, 81 Tenn. 507, 519–20 (1884), *overruled by* *Hutton v. Waters*, 179 S.W. 134, 138 (1915).

4. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 376 (Cal. 1988). The evolution of the at-will rule, through legislation and judicial decisions, is described more fully in many earlier articles. *E.g.*, Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416–19 (1967); Alfred W. Blumrosen, *Settlement of Disputes Concerning the Exercise of Employer Disciplinary Power: United States Report*, 18 RUTGERS L. REV. 428, 432–33 (1964); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824–28 (1980).

5. H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (William S. Hein & Co., 1981) (1877).

6. *Id.* The treatise furthered that:
[I]f the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.
Id. at 272.

ing for no fixed term was limited to one year.⁷ American courts uncritically accepted Wood's formulation of the rule.⁸

Subsequently, the at-will rule was codified in many states.⁹ The effect of such legislation made judicial change in the at-will rule either impossible or much more difficult.¹⁰ Each state that codified the at-will doctrine, with the exception of Montana, continues to follow it.¹¹ However, the doctrine is currently subject to various exceptions (described *infra* in Part III).

Over time, the rote application of the at-will rule has led to inequitable, immoral, and shocking applications. Some of these applications presaged the development of exceptions to the rule; others persist even after the exceptions developed. For example, in *Martin v. New York Life Insurance Co.*, the New York Court of Appeals applied the at-will doctrine to affirm the termination of an employee following ten

7. See generally Jay M. Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976). Feinman observes that Wood's scholarship was curiously deficient: First, the four American cases [Wood] cited in direct support of the rule were in fact far off the mark. Second, his scholarly disingenuity was extraordinary; he stated incorrectly that no American courts in recent years had approved the English rule, [and] that the employment at will rule was inflexibly applied in the United States Third, in the absence of valid legal support, Wood offered no policy grounds for the rule he proclaimed. *Id.* at 126 (footnotes omitted).

8. Perhaps the most striking example can be found in an opinion of the Supreme Court of Tennessee in *Payne v. Western & Atlantic Railroad*, 81 Tenn. 507.

9. ARIZ. REV. STAT. ANN. § 23-1501 (Supp. 2010) ("The employment relationship is severable at the pleasure of either the employee or the employer unless both the employee and the employer have signed a written contract to the contrary setting forth that the employment relationship shall remain in effect for a specified duration of time or otherwise expressly restricting the right of either party to terminate the employment relationship."); CAL. LAB. CODE § 2922 (West 2011) ("An employment, having no specified term, may be terminated at the will of either party on notice to the other."); GA. CODE ANN. § 34-7-1 (2008) ("If a contract of employment provides that wages are payable at a stipulated period, the presumption shall arise that the hiring is for such period, provided that, if anything else in the contract indicates that the hiring was for a longer term, the mere reservation of wages for a lesser time will not control. An indefinite hiring may be terminated at will by either party."); LA. CIV. CODE ANN. art. 2747 (2005) ("A man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing. The servant is also free to depart without assigning any cause."); N.D. CENT. CODE § 34-03-01 (2004) ("An employment having no specified term may be terminated at the will of either party on notice to the other, except when otherwise provided by this title."); S.D. CODIFIED LAWS § 60-4-4 (1993) ("An employment having no specified term may be terminated at the will of either party on notice to the other, except when otherwise provided by statute.");

10. See *infra* Part V.

11. Montana, in 1987, adopted a statute requiring an employer to have "cause" to terminate an employee. Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 39-2-901 to -915 (2011).

years of service (with no concern for the employee).¹² In this context, application of the at-will doctrine did not take into consideration the length or quality of the employee's service. The at-will doctrine has also privileged overt racial discrimination; in 1908, some 200 black stevedores were fired to make room for white stevedores.¹³

In this century, the at-will doctrine has been used to sustain firings for conduct that implicates public interest or rudimentary fairness. For example, a private security officer was lawfully terminated for his "cop mentality" subsequent to reporting that he saw a store manager take merchandise.¹⁴ Similarly, in *Lloyd v. Drake University*, a white campus security officer was lawfully fired after attempting to "forcibly subdue a black football player" who the security officer perceived to be assaulting a white female student.¹⁵ The termination was effected to dampen a serious public relations problem for the employer, which resulted from a video depicting the guard's actions.¹⁶ In *Porterfield v. Mascari II, Inc.*, the court upheld an employee termination that resulted from a claim that she was wrongfully discharged for asking to consult her attorney before signing a job performance reprimand.¹⁷

These examples demonstrate that ultimately, the potential for arbitrariness is inherent in the concept of a right to fire for any reason, no reason, or even a reason that is morally repugnant.

II. The At-Will Rule and Economic History

The at-will rule mirrored the dominant economic ethos of the time of Mr. Wood's treatise:

After 1860, the rich got richer and expanded their factories, mines and banks. The poor had children; and in addition, their relatives came over from the old country. The new industrial system created or exploited a huge pool of workers. Many were immigrants. . . .

12. 42 N.E. 416 (1895).

13. *Clarke v. Atl. Stevedoring Co.*, 163 F. 423 (C.C.E.D.N.Y. 1908).

14. *Wholey v. Sears Roebuck*, 803 A.2d 482 (Md. 2002) (holding that because the employee did not report the suspected criminal activity to official law enforcement, the employee had no protection based on Maryland's common law public policy exception to the at-will rule); *Sabetay v. Sterling Drug, Inc.*, 506 N.E.2d 919 (N.Y. 1987) (holding that an employee could be fired as an at-will employee even when he reported illegal financial activities to his supervisor as he believed he was required to do by written corporate policy).

15. 686 N.W.2d 225, 226 (Iowa 2004).

16. *Id.*

17. 823 A.2d 590 (Md. 2003).

These workers in industry were poor; work and life were hard. . . . Conditions in many factories and mines were appalling. Employers hired and fired at will; there was little or no job security, and the worker was trapped in a web of company rules. The business cycle added special miseries. Social services were weak; sickness, broken bones, or a downturn in business added new threats to the worker's security. Many employers were callous in fact; others adopted the detached, studied callousness of social Darwinism. That the workers should remain unorganized, that business should be free from control, that the health of enterprise was the way, the truth, the consummate social good: this was the faith of the dominant class.¹⁸

A. The Laissez-Faire Economics Ethos

Professor James Gross has aptly described the philosophy of laissez-faire economics as:

[A]n elaborate and interconnected set of values in which *freedom* is the economic freedom of the entrepreneur; *democracy* is a governmental system that gives maximum protection to property rights; *progress* is economic growth; *individualism* means the right to use one's property as one desires and to compete with others; and *society* is a market society that promotes and does nothing to interfere with the competition in which the fittest win out.¹⁹

It is not surprising that the courts adopted and enforced this ethos in the name of freedom, democracy, progress, individualism, and society. A good example is the oft-cited 1866 case of *Ryan v. New York Central Railroad*, where the court rejected any notion that a railroad was liable for damage—to property owners—resulting from a fire that the railroad's negligence caused.²⁰ Regarding *Ryan*, the legal commentator Francis Wharton fairly rhapsodized that protection of the individual must cede to the interest of the big business class:

But no corporation can be ruined without bringing ruin to some of the noblest and most meritorious classes of the land. . . . We hear sometimes of the cruelty of the eviction of laborers from their cottages at a landlord's caprice. But there are no evictions which approach in vastness and bitterness to those which are caused by the stoppage of railway improvements or of manufacturing corpora-

18. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 553–54 (2d ed. 1985) (footnote omitted).

19. JAMES A. GROSS, A SHAMEFUL BUSINESS: THE CASE FOR HUMAN RIGHTS IN THE AMERICAN WORKPLACE 49 (2010).

20. 35 N.Y. 210 (1866).

tions; in few cases is there such misery to the laboring classes worked, as when one of these great institutions is closed.²¹

In retrospect, few may be surprised that a young, growing industrial and commercial giant adopted economic values best characterized as “libertarian,” “laissez-faire,” or “free-market economy.” The at-will doctrine was most congenial to a sublimation of the individual worker’s interests.

B. Workers as Property & Contract Theory

With a laissez-faire system, inexpensive immigrant labor enabled a worker to be treated as a commodity like a wheel, a barrel, or any widget. Property rights were preeminent. Worker rights were in painful and often futile gestation. Individual rights and distributive justice could gain no recognition in this free-market ethos. There simply was no room for such rights in social Darwinism:

[The self-executing market economy] was the source of the pervasive view that justice required only equality of opportunity—that everyone be enabled to begin the competitive race equally—and that any requirement of equality of condition or results certainly was illegitimate. For it was well recognized that, given the unequal distribution of talent, energy, and luck, equality of opportunity inevitably resulted in organized inequality.²²

Because social Darwinism decreed that it was in the “nature” of things that workers have no workplace rights, it would be unjust to give workers job security to counter the at-will doctrine.²³

As a result of social Darwinism, it was simply in the “nature” of things that at-will employment contracts produced unfairness to workers. The U.S. Supreme Court in 1905 recognized and utilized this approach in the landmark decision of *Lochner v. New York*.²⁴ In *Lochner*, the Court struck down a New York statute setting the maximum hours that bakers could work. The Court held the statute to present an unconstitutional interference with an employer’s freedom of contract.

In *Adair v. United States*, the Court similarly upheld the validity of an at-will contract by finding unconstitutional a federal statute that prohibited employers from discharging railroad employees for mem-

21. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960* at 58 (1992) (quoting Francis Wharton, *Liability of Railroad Companies for Remote Fires*, 1 S. L. REV. (NEW SERIES) 729 (1876)).

22. *Id.* at 194 (citation omitted).

23. Social Darwinism means an evolutionary determinism not capable of being deflected or reshaped by legislation. *See id.* at 121.

24. 198 U.S. 45 (1905).

bership in a labor organization.²⁵ The infamous Yellow Dog contract gave employers the right to require employees to foreswear union membership as both a condition to being employed and a condition to remain employed.²⁶ The Court reasoned, “the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.”²⁷

Subsequently, in 1915 the Supreme Court applied *Adair* in the decision of *Coppage v. Kansas* to invalidate a state statute that imposed a criminal penalty for an employer that makes or enforces a Yellow Dog contract.²⁸ In reaffirming *Adair*, the Court stated that a worker’s lack of independence in contracting for his labor was one of the “inequalities of fortune,” which naturally occurs in all contracts.²⁹ The Fourteenth Amendment “recognizes ‘liberty’ and ‘property’ as co-existent human rights” with which the state could not interfere.³⁰ The opinion overruled the Kansas Supreme Court which stated, “employés, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making contracts of purchase thereof.”³¹ The Kansas court’s concern was disregarded.

The American law of contracts, operating through the freedom of contract, was the tool to perpetuate this free-market ethos. As Professor Gross stated, “[t]he freedom of contract doctrine as applied to the workplace in this country historically separated law from morals and ignored the power imbalance inherent in the employer-worker relationship.”³²

25. 208 U.S. 161 (1908), *abrogated in part by* *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963). The *Ferguson* Court held that “[t]he doctrine that prevailed in *Lochner*, *Coppage*, . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded.” *Ferguson*, 372 U.S. at 729.

26. *Adair*, 208 U.S. at 171. The term “yellow dog” is attributed to an editorial in a 1921 United Mine Workers’ Journal: “The agreement . . . reduces to the level of a yellow dog any man that signs it, for he signs away every right he possesses . . . and makes himself the truckling helpless slave of the employer.” JOEL I. SEIDMAN, *THE YELLOW DOG CONTRACT* 11–38 (1932).

27. *Adair*, 208 U.S. at 175. This statutory provision was also found to offend the Fifth Amendment’s guarantee of the right to property. *Id.* at 176.

28. *Coppage v. Kansas*, 236 U.S. 1 (1915).

29. *Id.* at 17.

30. *Id.*

31. *Id.*

32. GROSS, *supra* note 19, at 210.

Yet, in dissent Justice Holmes believed that there could not be real liberty of contract until there was some initial equality of bargaining position.³³ This notion presaged the evolution of this Nation's values.

C. The Great Depression and the Movement Away from the At-Will Doctrine

The most renowned contract law scholars of the late-nineteenth and early-twentieth century, such as Williston, Langdell, and Corbin, rooted the nature of contract in individual autonomy.³⁴ The result was that freedom of contract, as a concept, was the alter ego to the free market or to laissez-faire economics.³⁵ It was amoral in the sense of being largely unconcerned with the moral or justice values to be discussed later in this Article.³⁶ Critics of freedom to contract have since noted the illusory nature of this principle.³⁷

The break with this preference for a free-market economy (also referred to as laissez-faire economy) came as a result of the cataclysmic failure of these very free and unregulated markets, now known as "The Great Depression,"³⁸ not as a result of a sudden moral epiphany.

The days that placed near sacred regard for allowing the nation's best interests to be decided by unbridled industry and commerce were gone. The benefits of totally free markets proved to be illusory. The previous beliefs endorsed by courts—that interests of workers came secondary to that of the employers—were brutally shattered by bread lines, insurmountable unemployment rates, suicides, and other social maladies.

33. *Coppage*, 236 U.S. at 27 ("If that belief [that a worker needed a union], whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins.").

34. See Vincent D. Rougeau, *Just Contracts and Catholic Social Teaching: A Perspective from Anglo-American Law*, in *THE TRUE WEALTH OF NATIONS: CATHOLIC SOCIAL THOUGHT AND ECONOMIC LIFE* 117 (Daniel K. Finn ed., 2010).

35. *Id.*

36. *Id.*

37. Madelyn C. Squire, *The Prima Facie Tort Doctrine and a Social Justice Theory: Are They a Response to the Employment At-Will Rule?*, 51 U. PITT. L. REV. 641, 644-46 (1990).

38. GROSS, *supra* note 19, at 61-62 ("In the autumn of 1929 the mightiest of Americans were, for a brief time, revealed as human beings. Like most humans, most of the time, they did some very foolish things. On the whole, the greater the earlier reputation for omniscience, the more serene the previous idiocy, the greater the foolishness now exposed. Things that in other times were concealed by a heavy façade of dignity now stood exposed, for the panic suddenly, almost obscenely, snatched the façade away." (quoting JOHN KENNETH GALBRAITH, *THE GREAT CRASH* 3 (Houghton Mifflin 1961))).

The climate surrounding the Great Depression paved the way for Congress' passage of the Wagner Act in 1935 (also referred to as the National Labor Relations Act).³⁹ In its formal findings of fact, Congress expressly stated that employers and employees do not have equality of bargaining power.⁴⁰ Instead, the relevant inquiry is the "inequalities of fortune" that must be equalized through collective bargaining.⁴¹

The Wagner Act was motivated by Senator Robert Wagner's desire to enable workers and employers to bargain from levels of comparative strength and to achieve industrial peace through collective bargaining. The Senator observed that laissez-faire economics had caused "men [to become] the servile pawns of their masters in the factories."⁴² Today, the Senator's hopes have yet to be broadly and fully realized in organized places of employment, a subject beyond the present topic.

In *NLRB v. Jones & Laughlin Steel Corp.*, the constitutionality of the Act was upheld.⁴³ While *Jones & Laughlin* did not formally overrule *Adair*, it confirmed that an evolutionary rejection of the free-market gods had begun and that an arc towards a more just balance was at least becoming possible.

D. The Modern Survival of the At-Will Doctrine

Although collective bargaining agreements now generally protect organized employees from the at-will rule, by permitting employers to terminate only for "cause," the at-will rule survives in unorganized

39. National Labor Relations Act, Pub. L. No. 74-198, § 1, 49 Stat. 449, 449-50 (1935). (codified as amended at 29 U.S.C. § 151 (2006)).

40. 29 U.S.C. § 151.

41. *Id.* ("The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . ."). The commerce power was utilized to balance what had been the unbalanced, free application of liberty and property in the Fifth and Fourteenth Amendments. It is worth noting that the Wagner Act arose as part of the New Deal of the Roosevelt Administration in direct reaction to the failure of American free enterprise, represented by the crash and Great Depression of the 1930s. TIMOTHY J. HEINSZ, DENNIS R. NOLAN & RICHARD A. BALES, *LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY* 101-02 (6th ed. 2009).

42. James A. Gross, *Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making*, 39 *INDUS. & LAB. REL. REV.* 7, 10 (1985) (quoting Sen. Robert Wagner) (internal quotation marks omitted).

43. 301 U.S. 1 (1937).

workplaces in the United States.⁴⁴ As long as support of a laissez-faire economy exists, employees will continue to be subjected to at-will employment. For example, the CEO of Massey Energy recently stated, “[w]e need to let businesses function as businesses Corporate business is what built America, in my opinion, and we need to let it thrive by, in a sense, leaving it alone.”⁴⁵ This statement followed an explosion in 2010 that killed twenty-nine miners.⁴⁶ The mentality that regrets government regulation of job place safety is the same mentality that believes workers may be fired at-will.

The tendency to associate the at-will rule with efficiency has contributed to its survival. Efficient markets and wealth maximization are modern notions endorsed by the Chicago School of Economics.⁴⁷ Markets are more “efficient” when employers are not weighed down by restrictions on their ability to terminate employees freely. The effect of this school of thought has been widely discussed⁴⁸ and criticized on both economic and moral bases.⁴⁹

This ideology is pervasive and limits the extent that jurisprudence bends towards justice. For example, in *First National Maintenance Corp. v. NLRB*, a divided Supreme Court held that management’s decision to partially close a business does not need to be bargained about with the workers’ certified bargaining representative—even though the decision directly affects workers’ lives.⁵⁰ The Court reasoned that “[m]anagement must be free from the constraints of the bargaining process to the extent essential for the running of a profitable busi-

44. Peter J. Strelitz, Arturo M. Aviles & David Walter, *Employment-At-Will: Has the Death Knell Officially Sounded?*, INT’L HR J., Summer 2008, at 16; see also James A. Sonne, *Firing Thoreau: Conscience and At-Will Employment*, 9 U. PA. J. LAB. & EMP. L. 235 (2007); *supra* notes 9–11.

45. Dana Milbank, *29 Dead, and a Coal CEO Blames Government*, WASH. POST, July 25, 2010, at A17 (quoting Don Blankenship, CEO of Massey Energy).

46. *Id.* The coal company had thousands of violations in recent years and is now facing a federal criminal investigation for negligent and reckless practices. *Id.*

47. This ideation was initially developed over thirty years ago in *Economic Analysis of Law* by now-Judge Richard Posner. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (8th ed. 2011).

48. See, e.g., Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025, 1038–96 (2003); Robin Paul Malloy, *Is Law & Economics Moral?—Humanistic Economics and a Classical Liberal Critique of Posner’s Economic Analysis*, 24 VAL. U. L. REV. 147 (1990).

49. See, e.g., Anne Marie Lofaso, *Toward a Foundational Theory of Workers’ Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1 (2007); Robin Paul Malloy, *Equating Human Rights and Property Rights—The Need for Moral Judgment in an Economic Analysis of Law and Social Policy*, 47 OHIO ST. L.J. 163 (1986).

50. 452 U.S. 666, 678–79 (1981).

ness.”⁵¹ Achieving a balance of bargaining power continues to be an elusive goal for those interested in a more just social compact for workers.

It remains to be seen whether the Great Recession of today—resulting from the greed and fraud of the financial market—will lead to a popular rejection of the at-will rule. Certainly, the Emergency Stabilization Act of 2008,⁵² which gave billions of dollars to save those companies deemed to be “too-big-to-fail,” proves that a faith in an unbridled market economy is a misplaced faith—a faith that is only embraced by some when it is convenient and profitable to do so. These economic disasters of extraordinary proportions have demonstrated that efficient markets and wealth maximization do not merit the advantage provided by the legally protected power to fire at-will.

As is next explained, U.S. law has evolved, providing greater worker security at the expense of a free or efficient market, or specifically, at the expense of the at-will rule.

III. The Exceptions

The libertarian laissez-faire milieu, which was so congenial to the at-will rule, has not worn well with an evolving moral conscience in the United States. Numerous exceptions to the at-will rule are present in both judicial decisions and statutes. These exceptions have undercut the Supreme Court’s recognition, in 1908, that purported “mutuality” of contract supported the at-will doctrine.⁵³ The at-will rule has itself become the exception.

A. Legislative Exceptions

Often overlooked as limiting, the at-will rule is the “philosophical” exception of the Clayton Antitrust Act of 1914.⁵⁴ Section 6 of the Clayton Act provides, “[t]he labor of a human being is not a commodity or article of commerce.”⁵⁵ This is in stark contrast to prior antitrust laws—specifically, the Sherman Antitrust Act—that rely on the notion that the labor of a human being is the same as any other com-

51. *Id.*

52. Emergency Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765.

53. *Adair v. United States*, 208 U.S. 161, 174–75 (1908) (“[T]he right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of the employé.”).

54. Clayton Antitrust Act of 1914, ch. 323, 38 Stat. 730 (current version at 15 U.S.C. §§ 12–27 (2006), 29 U.S.C. §§ 52–53 (2006)). The Clayton Act prohibits employers from obtaining an injunction to prevent employees from quitting. *Id.*

55. § 6, 38 Stat. at 731 (codified at 15 U.S.C. § 17).

modity.⁵⁶ This notion prevented collective action to achieve job security, better wages, and better working conditions.⁵⁷ The Clayton Act effectively facilitated collective action by restraining the ability of federal courts to issue restraining orders and injunctions in favor of employers.⁵⁸ Even though the Supreme Court later held that the Clayton Act did not give protection from the Sherman Act, the philosophical point remained: the labor of a human being may not be treated simply as any other fungible article in commerce. Section 6 of the Clayton Act admitted of the moral uniqueness of a “human being.”

The single largest exception to the ability of employers to fire at-will arose in the federal labor laws of this country. The first such law was the Railway Labor Act in 1926.⁵⁹ The Act made it possible for workers to organize and to reach agreements with employers that limit the employer’s ability to terminate its workers to instances with “for cause” justifications.⁶⁰ The Wagner Act extended this protection from the railroad industry to much of the private sector.⁶¹ Over the years, the issue of “cause” for discharge, or lesser forms of discipline, has been grist for the mill of arbitrators who by their decisions effectively define its meaning on a case-by-case basis.⁶²

56. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209, 209–10 (current version at 15 U.S.C. §§ 1–7).

57. The (in)famous *Danbury Hatters’* case was the first case in which the Supreme Court approved the application of the Sherman Act (at the request of an employer) to defeat collective action to unionize. *Loewe v. Lawlor*, 208 U.S. 274 (1908). Fourteen years of litigation, two jury trials, four reviews in the Circuit, and three reviews in the Supreme Court resulted in a judgment enforceable against the personal assets of the workers and their supporters who engaged in an alleged conspiracy. The nation’s laissez-faire public policy could not brook interference with free competition. See generally Daniel R. Ernst, *The Danbury Hatters’ Case*, in *LABOR LAW IN AMERICA* 180 (Christopher L. Tomlins & Andrew J. King eds., 1992). Thus, part of the corrective was to state bluntly that a human being is not a commodity. Senator Albert Cummins of Iowa said, “It is high time that we recognize the difference between the power of a man to produce something and the thing which he produces.” 51 CONG. REC. 14,585 (1914).

58. § 20, 38 Stat. at 738 (codified at 29 U.S.C. § 52); *United States v. Hutcheson*, 312 U.S. 219, 233 (1941).

59. Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (current version at 45 U.S.C. §§ 151–188 (2006)).

60. 45 U.S.C. §§ 151, 152 Fourth (referring specifically to the rights of organization, collective bargaining, and freedom from interference from railway carries).

61. National Labor Relations Act, 29 U.S.C. §§ 157, 301.

62. FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 923–1000 (Alan Miles Ruben et al. eds., 6th ed. 2003). As a result of these enactments, employers now must often defend dismissals of employees by showing “just cause” unrelated to the alleged discrimination. The result is that “just cause” is not unknown by American business, even outside the unionized context, and business has successfully lived with the need to show “just cause.” See Alfred W. Blumrosen, *Strangers No More: All Workers Are Entitled to “Just Cause” Protection Under Title VII*, 2 INDUS. REL. L.J. 519, 563–64 (1978).

These statutory exceptions are significant because they developed in response to the laissez-faire ideology that had dominated the American experience. In 1933, passage of the National Industrial Recovery Act provided that employees have the right to organize and to bargain for wage and hour protections.⁶³ However, this Act had no enforcement mechanism, and in the face of mounting and often strident demands by workers to be able to organize effectively, Senator Wagner was able to gain passage of the National Labor Relations Act, as described *supra*.⁶⁴

In 1938, Congress adopted the Fair Labor Standards Act that fixed minimum wages and hours.⁶⁵ It represented a moral judgment that free-market regulation failed to provide necessary minimum labor standards.

Subsequent legislation prohibiting the employer's right to discriminate further restricted the termination right of the at-will doctrine. In 1964, Congress passed Title VII of the Civil Rights Act that forbids discrimination—preventing discharge of an employee on the basis of race, color, national origin, gender, and religion.⁶⁶ In 1967, Congress passed the Age Discrimination in Employment Act, which protects employees from termination on the basis of age discrimination.⁶⁷ Later, the Americans with Disabilities Act similarly constricts the ability of employers to discharge on the basis of disabilities.⁶⁸

In 1970, the Occupational Safety and Health Act was enacted to provide statutory limits on termination⁶⁹ by prohibiting retaliation against workers seeking the enforcement of safety and health standards. In 1974, section 510 of the Employee Retirement Income and Security Act prohibited employers from terminating employees in order to deprive them of plan benefits that might soon vest or to which they might otherwise be entitled.⁷⁰ In 1993, the Family and Medical Leave Act⁷¹ prohibited employers from terminating employees seeking to use the leave benefits provided under the Act.

63. National Industrial Recovery Act, ch. 90, § 3, 48 Stat. 195, 196 (1933), *invalidated* by *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

64. 29 U.S.C. §§ 151–169.

65. Fair Labor Standards Act of 1938, ch. 676, § 15(a)(3), 52 Stat. 1060, 1068 (codified at 29 U.S.C. § 215(a)(3)).

66. 42 U.S.C. §§ 2000e to 2000e-17.

67. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621–634).

68. 42 U.S.C. § 12101.

69. 29 U.S.C. § 160(c).

70. *Id.* § 1140.

71. *Id.* § 2615.

These statutes represent a determination by Congress that the values inherent in them can only be asserted by limiting the free exercise of business judgment. The “business of business” is no longer morally unbridled business allowing for complete freedom to terminate.

In addition to the limitations on the at-will rule approved by Congress, any number of state statutes and local ordinances on the same subjects require similar constriction on an employer’s right to terminate an employee at-will. Judicial decisions in several states have also long evidenced discontent with the at-will rule and created significant exceptions further eroding the rule. The most widely accepted are (1) the public policy exception; (2) the implied contract exception; and (3) the covenant of good faith and fair dealing exception.

B. Judicial Exceptions

1. The Public Policy Exception

Courts have created a public policy exception to prevent employers exercising at-will termination. States were concerned that employers would use the threat of discharge to effectively coerce their employees into committing illegal acts or concealing matters inimical to public policy. In response to this concern, courts have found that contractual terms are irrelevant where an employer conducts its business in a manner contrary to fundamental public policy.

Some of the earliest cases arose in California. For example, in *Petermann v. International Brotherhood of Teamsters, Local 396*, the court refused to uphold a firing that violated public policy.⁷² Specifically, a union business agent was terminated for refusing to falsely testify to a committee of the Legislature. In *Tameny v. Atlantic Richfield Co.*, the court found that firing an employee for his refusal to engage in price fixing (a state law violation) was an impermissible firing.⁷³ The court stated, “the relevant authorities both in California and throughout the country establish that when an employer’s discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action” and recover compensatory and punitive damages.⁷⁴ The legal issues have subsequently revolved around what is a sufficient public policy to invoke the exception and how and where it may be found. California courts have found that public policy

72. 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

73. 610 P.2d 1330 (Cal. 1980).

74. *Id.* at 1331.

must be “firmly established,” “fundamental,” and “substantial,” as well as rooted in a constitution, statute, or regulation.⁷⁵

Forty states recognize this exception in some form.⁷⁶ This exception is an expensive erosion of an employer’s free exercise of employment decisions, bending the arc away from at-will firings. Because the action sounds in tort and may support punitive damages, this exception is a potentially costly erosion of an employer’s free exercise of employment decisions.

2. The Implied-in-Fact Contract Exception

One of the more widely recognized exceptions to the at-will doctrine is an implied-in-fact promise by an employer that he/she will not terminate a worker without good cause. Finding such an implied promise rebuts the common law presumption of the at-will doctrine.⁷⁷

The availability of this exception requires a highly individualized analysis of an employer’s course of conduct, which may create a reasonable expectation that an employee will only be terminated for good cause.⁷⁸ Through this exception, the employer is simply held to the implied consequences of their actions and statements.

Contractual promises may be inferred from a wide variety of sources: statements made in the employee handbook, the employee’s length of service, promotions, bonuses, and oral statements at the time of a promotion.⁷⁹ An employer who makes such implied promises, regardless of motivation, whether motivated by a desire to inspire employees to their best efforts or simply to deter employees

75. See, e.g., *Green v. Ralee Eng’g Co.*, 960 P.2d 1046, 1057 (Cal. 1998); *Gantt v. Sentry Ins.*, 824 P.2d 680, 693–94 (Cal. 1992); *Foley v. Interactive Data Corp.*, 765 P.2d 373, 380 n.11 (Cal. 1988).

76. JOHN F. BUCKLEY IV & RONALD M. GREEN, 2006 STATE BY STATE GUIDE TO HUMAN RESOURCES LAW § 5.01(B) (2006).

77. *Pugh v. See’s Candies, Inc.*, 171 Cal. Rptr. 917, 924–25 (Ct. App. 1981).

78. *Id.* at 925–26.

79. See, e.g., *id.* at 919 (finding that a dishwasher told thirty-two years earlier that “if you are loyal . . . and do a good job, your future is secure” was the promisee of a promise (internal quotation marks omitted)); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880 (Mich. 1980) (finding that representations in an employee manual created a legitimate expectation of job security for a manager that had been employed for five years); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1088 (Wash. 1984) (holding that if an employer “creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is induced thereby to remain on the job,” the court will find an implied promise); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 626–29 (Minn. 1983) (same); *Duldulao v. Saint Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 317 (Ill. 1987) (listing twenty-five jurisdictions that recognize the contractually binding nature of employee handbooks); *Foley*, 765 P.2d at 383–88 (same).

from looking for other employment, will not be able to assert the common law defense of the at-will rule.

This exception is less effective than the public policy exception because of the highly fact-sensitive analysis that is necessary to maintain this exception. For this reason, a plaintiff's attorney may be disinclined to take such a case because the potential for monetary success is not high. This exception, moreover, can be easily defeated. An employer can put language in a handbook to the effect that the at-will relationship remains despite any indication by a manager or supervisor to the contrary. In the face of such language, an employee has little likelihood of success in obtaining damages for wrongful termination.

About forty-five states have recognized some form of the implied-in-fact contract exception.⁸⁰ This exception further bends the arc of justice away from firings at-will because, as a matter of justice, consequences should exist for broken promises.

3. The Covenant of Good Faith and Fair Dealing Exception

This exception imports into the employment relationship an implied covenant, or promise of good faith and fair dealing, with an employee by an employer.

The exception was first judicially recognized in *Cleary v. American Airlines, Inc.*⁸¹ The intermediate California appellate court held that where an employee had eighteen years of satisfactory service with an employer that had "specific procedures for adjudicating employee disputes," there arose a legal covenant "to do nothing which would deprive plaintiff, the employee, of the benefits of the employment bargain"⁸² This covenant had the effect of "precluding any discharge of such an employee by the employer without good cause."⁸³ Damages, including punitive damages, could be sought, because a duty was imposed by law and did not arise from contract.⁸⁴ This holding provided a theory for litigating most terminations otherwise precluded by the at-will rule. Subsequently, employment law practices—both plaintiff and defendant—exploded with lucrative business.

In 1988, in response to employer complaints about jury verdicts, this exception was "corrected," in California, by a holding that the

80. BUCKLEY & GREEN, *supra* note 76, § 5.03 tbl.5-1.

81. 168 Cal. Rptr. 722 (Ct. App. 1980).

82. *Id.* at 729.

83. *Id.*

84. *Id.*

covenant was *ex contractu*—that it would not support anything more than contractual damages.⁸⁵ Yet, the court authored a passionate dissent in support of the right and duty of the courts to articulate the common law (in absence of an action on behalf of the legislature).⁸⁶ While it is beyond the scope of this Article to explore this result-oriented majority, suffice it to say the genie was stuffed back in the bottle, and the at-will rule regained significant protection.⁸⁷

The roots of this exception had emerged even before the court's ruling in *Cleary*.⁸⁸ In 1974, it was suggested that courts ought to imply a covenant of good faith and fair dealing and then proceed to “balance the employer's justification for dismissal against the employee's interest in job security,” a process currently referred to as “progressive discipline.”⁸⁹ The note is as timely today as it was in 1974. This Article will return to the topic of progressive discipline.⁹⁰

Some states recognize an exception using intentional infliction of emotional distress, interference with contractual relations, or defamation.⁹¹ Like any evolutionary process, new possible exceptions to the at-will doctrine continue to emerge. For example, some states have recently recognized, by statute, an exception where an employer cannot fire an employee for following his or her conscience, as it relates to health care. Illinois makes unlawful any discrimination resulting from a person's “conscientious refusal to receive, obtain, accept, perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care services contrary to his or her conscience.”⁹² Illinois defines conscience as a “sincerely held set of moral convictions.”⁹³ Similar protections for conscience exist in Mississippi and Washington.⁹⁴

85. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 398 (Cal. 1988) (stating that it was for the legislature to dictate otherwise).

86. *Id.* at 415–17 (Kaufman, J., dissenting). Justice Kaufman was a devout member of the conservative bloc of the Court, so his dissent is noteworthy. *See infra* Part V.

87. *Foley* reversed the boom in business for both plaintiff and defense counsel. One defense firm, just a month prior to judgment, had taken out a million dollar lease on an additional floor for new attorneys who would now be let go and/or not hired.

88. J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 368 (1974).

89. *Id.*

90. *See infra* Part V.

91. BUCKLEY & GREEN, *supra* note 76.

92. 745 ILL. COMP. STAT. 70/5 (2010).

93. *Id.* 70/3(e) (2010).

94. MISS. CODE ANN. § 41-107-5(3) (2009); WASH. REV. CODE ANN. § 70.47.160(2)(a) (West 2011).

This conscience exception is not limited to public sector employment, where constitutional issues might be anticipated. In addition, unlike statutes excusing employer compliance (where such compliance creates an “undue hardship” for an employer), these exceptions to the at-will doctrine provide no such relief.⁹⁵ A critical review questions whether this newest exception is sufficiently justified to become another accepted exception in view of the need of employers in this industry to perform health services without the complication of conscience.⁹⁶ Time will tell.

The sum total of all these exceptions to the at-will rule reflect a deep-seated dissatisfaction with the at-will rule and with the economic free play of the liberty of contract. The dissatisfaction is moral in nature, implicating a piecemeal evolution of a moral consensus that the at-will rule does not serve our deepest values as a people. Unless one of these exceptions apply, some seventy-five million American workers remain subject to the at-will rule.⁹⁷

IV. The Immorality of the At-Will Doctrine

The at-will doctrine is immoral.

In 1986, the American Catholic Bishops declared that a worker is morally entitled to “reasonable security against arbitrary dismissal.”⁹⁸ This application of morality to employment law directly contradicted the premise of the at-will doctrine.

First, morality must act in conjunction with legal theory and practice. Unlike those who contend that morality is irrelevant and should not stand in the way of free markets, some concede that it is relevant but should depend on a change of heart (a metanoia), which builds from the bottom of society to accomplish moral change. As Professor Robert Vischer has said, “[p]ushing moral ideals upward through employment and consumer transactions fosters social ties in ways that the top-down enforcement of state-enshrined rules cannot.”⁹⁹ That may well be true because a change of heart may indeed make any law unnecessary. The proposition, however, that morality should be laissez-faire and that laissez-faire morality should itself be left to compete with laissez-faire economics, is an abdication of the very roots of law.

95. See MISS. CODE ANN. § 41-107-5(3); WASH. REV. CODE ANN. § 70.47.160(2)(a).

96. Sonne, *supra* note 44.

97. See *id.* at 249.

98. PASTORAL LETTER, *supra* note 2, para. 103.

99. Robert K. Vischer, *Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace*, 17 STAN. L. & POL'Y REV. 83, 95 (2006).

It is an abdication because morality lies at the very heart of law, even though its presence is not always explicit or acknowledged. “The basic foundation of law, whether made by legislators or judges, is moral choice.”¹⁰⁰ The choices of an economic or labor policy:

[A]re choices of values: about justice and human and civil rights; about the worth of individuals . . . ; about how and on what basis the benefits and burdens of work and business will be apportioned; and about how power, freedom, and equality are or are not harmonized with justice at workplaces.¹⁰¹

Both religious and non-religious persons, as well as liberal and conservative parties, insist upon the guidance from a moral compass. The late historian Tony Judt wrote:

What’s missing from public conversation and public policy conversation is precisely a sort of moral underpinning, a sense of the moral purposes that bind people together in functional societies. And part of the attraction of someone who otherwise didn’t appeal to me in the least—like, say, Pope John Paul II—was how he managed to connect with young people. . . . [H]is was the sense of an absolutely, unambiguously, morally, noncompromising view about what is right and what is wrong. . . . We need to reintroduce confidently and unashamedly that kind of language into the public realm.¹⁰²

The current Pope, Benedict XVI, followed:

The worldwide financial breakdown has, as we know, demonstrated the fragility of the present economic system and the institutions linked to it. . . . It has also shown the error of the assumption that the market is capable of regulating itself, apart from public intervention and the support of internalized moral standards. This assumption is based on an impoverished notion of economic life as a sort of self-calibrating mechanism driven by self-interest and profit-seeking. As such, it overlooks the essentially ethical nature of economics as an activity of and for human beings.¹⁰³

Then, it is self-deception or an illusion to pretend that economics should be free of such moral evaluation.¹⁰⁴ Legislators and courts have already denied sanctuary from value judgments.¹⁰⁵ Free-market economists who refuse to accommodate moral values will continuously face rejection. Reluctance to accept a role for moral values prevents a vitally important dialogue concerning the application of such

100. GROSS, *supra* note 19, at 50.

101. *Id.*

102. Christine Smallwood, *Talking With Tony Judt*, NATION, May 17, 2010, at 18.

103. Thomas J. Reese, *Faith in God, Not the Market*, WASH. POST (May 20, 2010, 12:57 PM), http://newsweek.washingtonpost.com/onfaith/georgetown/2010/05/faith_in_god_not_the_market.html (quoting Pope Benedict XVI).

104. GROSS, *supra* note 19, at 44.

105. *See supra* Part III.

values. It unintentionally denies economics its rightful and, indeed, vitally important place in the dialogue concerning such values.¹⁰⁶

As noted earlier, the at-will doctrine has been sustained on the principles of a “property” right and a “contract” right. The values assigned to property and contracts are undeniably “moral” values. They are not, however, the only moral values, nor are they the most important. A property right is a human right.¹⁰⁷ It exists to assist the liberty of a person.¹⁰⁸ It does not exist to suppress the right of a person to job security, free from unjust termination. The contract right, based on the amiable fiction that all workers have a meaningful freedom to contract for employment, “epitomize[s] a separation of law and morals.”¹⁰⁹

It is urgently necessary to reassess the importance of property and contract law in America’s understanding of its moral values. We must determine whether they are given undue prominence in the legal system. For some, such reassessment would take the form of giving workers a property right of their own.¹¹⁰ Yet, it should not be necessary to give workers a property right in order to recognize their moral right to job security.

The theme of this Article is that the direct application of a moral right to be free from the at-will doctrine is preferable to giving a property right as a proxy for a moral right. Moral assessment depends on human dignity, whether founded on that which is God-given or premised upon Immanuel Kant’s theory of a rational being.¹¹¹

“*Human rights are the minimum conditions for life in community. . . . [H]uman rights include not only civil and political rights but also economic rights. . . . [including] employment.*”¹¹² As Professor Sandel concludes, “politics of moral engagement is not only a more inspiring ideal than a politics of avoidance. It is also a more promising basis for a just society.”¹¹³

106. See Malloy, *supra* note 49.

107. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 17 (Dec. 10, 1948) (“Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.”).

108. Malloy, *supra* note 49, at 170–71.

109. GROSS, *supra* note 19, at 55.

110. Lofaso, *supra* note 49.

111. MICHAEL J. SANDEL, JUSTICE: WHAT’S THE RIGHT THING TO DO? 104–05 (2009).

112. PASTORAL LETTER, *supra* note 2, at viii (internal quotation mark omitted).

113. SANDEL, *supra* note 111, at 269.

R

R

R

R

R

R

This Article will now directly address that moral engagement. Thereafter, it will address the practical implications for legislators and lawyers in terms of the common law.

A. The Pastoral Letter and Its Reception

In 1986, the American Catholic Bishops issued a pastoral letter entitled *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy* (“*Pastoral Letter*”).¹¹⁴ First authorized in 1980, the *Pastoral Letter* developed through a multi-year process involving national consultations and formal hearings. It invited input from a multiplicity of interest groups and disciplines of all religions and none from across the nation.¹¹⁵ The *Pastoral Letter* was finally adopted at a plenary session of the American Bishops in November 1986.¹¹⁶

In the ensuing weeks and months, the *Pastoral Letter* was widely discussed, welcomed, and harshly critiqued in the national media, in business schools, and in other academic venues across the country. This author was an emcee for a two-night symposium featuring several nobel laureates at the University of California, Berkeley. At this symposium, the *Pastoral Letter* was criticized by Milton Friedman and lauded by John Kenneth Galbraith.

Of particular interest to this Article is Dr. Milton Friedman’s criticism of the *Pastoral Letter*. Dr. Friedman was unable to reconcile the relationship between morality and economics, unable to perceive a connection. He feared that the application of moral norms to economic activity would ruin the free-market economy. In his view, the free-market economy had already benefited the world, and it still had the capacity to do so much more. Ironically, Dr. Friedman did not see that his embrace of the free market was itself a moral choice.

Dr. Friedman is not alone in his beliefs. Prominent Catholics, barons of finance and industry, ironically some even knighted by the Church for their philanthropy, excoriated the Bishops for having left their pulpits to suggest where the American economy was failing morally and where corrections could be made.¹¹⁷

114. See PASTORAL LETTER, *supra* note 2.

115. See *id.*

116. See *id.*

117. E.g., James Kilpatrick, *Piety, Politics a Gassy Combination for Bishops*, ORLANDO SENTINEL (Nov. 25, 1986), http://articles.orlandosentinel.com/1986-11-25/news/0270370232_1_bishops-letter-politics (“The National Conference of Catholic Bishops recently voted 225 to 9 in favor of a 115-page pastoral letter called Economic Justice for All. . . . It wound up as a gassy combination of piety and politics. Let us hear a round of applause for the nine who

B. The Moral Analysis

This Article will now describe the moral analysis that leads to the conclusion that the at-will doctrine is immoral. The *Pastoral Letter* reflects the Judeo-Christian tradition. It provides a language to discuss a moral issue. The *Pastoral Letter* does not hide moral values behind concepts of property or contract.

The Judeo-Christian moral analysis begins with the inherent dignity of the human person.¹¹⁸ “[E]very human being possesses an inalienable dignity that stamps human existence prior to any division into races or nations and prior to human labor and human achievement”¹¹⁹ This God-given dignity has broad consequences for economic policy and for the law that reflects such policy:

- “Every economic decision and institution must be judged in light of whether it protects or undermines the dignity of the human person. . . . We judge any economic system by what it does *for* and *to* people and by how it permits all to *participate* in it. The economy should serve people, not the other way around.”¹²⁰
- “All people have a right to participate in the economic life of society. . . . For, it is through employment that most individuals and families meet their material needs, exercise their talents, and have an opportunity to contribute to the larger community.”¹²¹
- “Human rights are the minimum conditions for life in community. . . . [H]uman rights include not only civil and political rights but also economic rights[,] . . . [including] employment.”¹²²
- “[A]ll persons have a right to earn a living”¹²³
- “Society as a whole, acting through public and private institutions, has the moral responsibility to enhance human dignity and protect human rights.”¹²⁴

voted ‘nay.’ For the most part, the bishops’ letter read like a platform of the national Democratic Party.”).

118. *Genesis* 1:26–27; PASTORAL LETTER, *supra* note 2, para. 32.

119. PASTORAL LETTER, *supra* note 2, para. 32.

120. *Id.* at viii (italics omitted) (emphasis added).

121. *Id.* at viii (italics omitted).

122. *Id.* at viii (italics omitted).

123. *Id.* para. 80.

124. *Id.* at ix (italics omitted).

- “Productivity, however, cannot be measured solely by its output in goods and services” but must also be measured by its “impact on the fulfillment of basic needs”¹²⁵
- “[The Church’s teaching] also rejects the notion that a free market automatically produces justice.”¹²⁶ It embraces neither the argument “that an unfettered free-market economy, where [their] owners, workers, and consumers pursue their enlightened self-interest” is best; nor the argument “that the capitalist system is inherently inequitable and must be replaced by a radically different system that abolishes private property, the profit motive, and the free market.”¹²⁷ Rather, the teaching looks at any system and asks “[w]hat is the impact of the system on people? Does it support or threaten human dignity?”¹²⁸
- “[P]eople have a right to employment” with “wages and other benefits sufficient to support a family in dignity.” Similarly, “[t]he dignity of workers also requires adequate health care, security for old age or disability, unemployment compensation . . . and *reasonable security against arbitrary dismissal*.”¹²⁹

In answer to Friedman, “[e]conomic questions are, thus, seen as a part of a larger vision of the human person and the human family, the value of this created earth, and the duties and responsibilities that all have toward each other and toward this universe.”¹³⁰

Duties and responsibilities towards one another arise from the individual’s role as a part of a larger community. This Article speaks of an individual worker’s moral right to be free from the arbitrary dismissal that the at-will rule allows. Yet, the worker alone does not suffer. The worker lives in community, and when fired wrongfully, a spouse, partner, or dependent suffers as well. It is for this reason that the modern heresy of Individualism, as explained by the noted sociologist Robert Bellah, is implicated.¹³¹ It is implicated because Individualism says the interest of the individual alone is of primary importance and that we have no responsibilities for each other—the very thing that the at-will rule allows employers to say with respect to their workers. Thus, the fact that men and women do live in mutual interdepen-

125. *Id.* para. 71.

126. *Id.* para. 115.

127. *Id.* paras. 128–29.

128. *Id.* para. 130.

129. *Id.* para. 103 (emphasis added).

130. *Id.* para. 341.

131. ROBERT BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 275–96 (1985).

dence requires a more searching analysis of what is just, than a simple analysis of what is legal, as a matter of an employment contract. This Article now turns to the application of these principles to the at-will rule.

C. The Moral Analysis Applied

The *Pastoral Letter* creates a more searching analysis by recalling that Catholic social teaching has insisted upon three dimensions of justice: distributive, commutative, and social justice.¹³²

Distributive justice is concerned with the “effects” on persons whose basic needs as human beings are unmet or are in jeopardy:

Distributive justice requires that the allocation of income, wealth, and power in society be evaluated in light of its effects on persons whose basic material needs are unmet. The Second Vatican Council stated: “The right to have a share of earthly goods sufficient for oneself and one’s family belongs to everyone.”¹³³

Certainly, as the *Pastoral Letter* dictates that an economic system must be judged by what it does “for” and “to” people, the economic justification for the at-will doctrine fails the test.¹³⁴

The at-will doctrine deprives individual workers of “the right to participate in the economic life of society” by preventing them from exercising the right to meet his/her material needs (including accounting for the worker’s family).¹³⁵ If the scope of human rights includes such economic rights, then the at-will doctrine deprives a worker of the right to earn a living without any showing of “fault.”¹³⁶ Society retains the “moral responsibility to enhance human dignity and protect human rights.”¹³⁷ Thus, society’s continuation of the at-will doctrine represents a moral failure of our legal system. The free-market ideology cannot support such a deprivation of human rights and human dignity.¹³⁸ “The economy should serve people, not the other way around.”¹³⁹

As to commutative justice, the *Pastoral Letter* states:

Commutative justice calls for fundamental fairness in all agreements and exchanges between individuals or private social groups. It demands respect for the equal human dignity of all persons in

132. PASTORAL LETTER, *supra* note 2, para. 68.

133. *Id.* para. 70 (italics omitted).

134. *Id.* at viii.

135. *Id.* at viii (italics omitted).

136. *Id.* at viii and para. 80.

137. *Id.* at ix.

138. *Id.* paras. 115, 127–29, 130.

139. *Id.* at viii.

economic transactions, contracts, or promises. . . . Employers are obligated to treat their employees as persons, paying them fair wages in exchange for the work done and establishing conditions and patterns of work that are truly human.¹⁴⁰

American contract law arguably satisfies commutative justice to some extent but fails in distributive and social justice. Indeed, it contributes to injustice.¹⁴¹ Contract law is preoccupied with enforcing the intent of the bargain. Admittedly, it does recognize the need for some fundamental fairness through recognition of defenses, such as undue influence, fraud, duress, mistake, impossibility, and unconscionability. None of these defenses, however, assist workers that are hired into at-will environments to avoid unjust termination from at-will employment.

As to social justice, the *Pastoral Letter* states:

Social justice implies that persons have an obligation to be active and productive participants in the life of society and that society has a duty to enable them to participate in this way. This form of justice can also be called “contributive,” for it stresses the duty of all who are able to help create the goods, services, and other non-material or spiritual values necessary for the welfare of the whole community. . . . Productivity is essential if the community is to have the resources to serve the well-being of all. Productivity, however, cannot be measured solely by its output in goods and services.¹⁴²

Social or contributive justice is concerned with the good of the community.¹⁴³ An arbitrary firing harms the worker’s family but also the larger community in which that family seeks to live and contribute. As Professor Rougeau says, contract law’s understanding of the individual is “rather feeble[,] . . . a shell without internal substance,” when compared to the concepts of the individual in distributive and social justice.¹⁴⁴

The moral analysis of the *Pastoral Letter* is usefully accomplished by a comparison to one of the defenses of the at-will doctrine. In 1984, Professor Richard Epstein defended the at-will doctrine.¹⁴⁵ To counter a groundswell of opposition to the at-will doctrine, Professor Epstein advanced two primary arguments for why it has not outlived its usefulness. First, “freedom of contract . . . advance[s] individual autonomy and . . . promote[s] the efficient operation of labor mar-

140. *Id.* para. 69.

141. Rougeau, *supra* note 34, at 118, 136.

142. PASTORAL LETTER, *supra* note 2, para. 71.

143. DAVID HOLLENBACH, THE COMMON GOOD & CHRISTIAN ETHICS 79–80 (2002).

144. Rougeau, *supra* note 34, at 133.

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

R

R

R

kets.”¹⁴⁶ Second, the doctrine serves as a “rule of construction” to clarify issues, such as what should be the duration of employment, or the grounds for its termination, in lieu of an explicit employment contract on such points.¹⁴⁷ Neither of these rationales contains a moral analysis. Indeed, both defenses of the doctrine are made as a reaction to what Professor Epstein characterizes as “the movement for public control of labor markets.”¹⁴⁸

The growing exceptions to the at-will doctrine described in Part III *supra*, however, did not spring unbidden from “public control,” or “regulation,” as today’s polemic would call it. Rather, they came about because of a moral consensus that arose against various applications of the at-will rule. This consensus enabled legislatures, Congress, and the courts to recognize its immorality. Epstein’s arguments deserve a brief, further analysis.

First, Professor Epstein contends, “[t]he first way to argue for the contract at will is to insist upon the importance of freedom of contract as an end in itself.”¹⁴⁹ A moral analysis does not deny value to freedom of contract, but it would not elevate freedom of contract to an absolute value without qualifications. If every economic decision was “judged in light of whether it protects or undermines the dignity of the human person,”¹⁵⁰ then freedom of contract cannot, morally, be a freedom to deny human dignity. The law is familiar with the notion that parties cannot contract to evade public policy. This applies equally to the freedom to contract. If a worker has a moral right to reasonable security against arbitrary dismissal, then supporting an employer’s freedom to deny that right begs the question of whose freedom is protected by the at-will rule. The freedom to contract is it not a freedom to arbitrarily remove another from a job—the very action that deprives a worker of her self-esteem or “dignity.”

Professor Epstein insists that this alleged freedom of contract also confers benefits to employees, which makes the contract of more than ephemeral value. First, the employee is also “free to withdraw for good reason, bad reason, or no reason at all.”¹⁵¹ While the ability to quit a job may benefit employees in highly competitive positions and fields, it is an amiable fiction for the vast majority of American workers who

146. *Id.* at 951.

147. *Id.*

148. *Id.* at 948.

149. *Id.* at 953.

150. PASTORAL LETTER, *supra* note 2, at viii (emphasis omitted).

151. Epstein, *supra* note 145, at 966.

must compete against one another in a depressed and largely service-oriented job market.

Second, Epstein contends that severance pay, a “feature common to contracts,” provides protection against arbitrary discharges.¹⁵² This contention attempts to sell an illusion, where there is no indication that such benefits are either required by law, which is seldom true,¹⁵³ or widespread by custom. In fact, this contention is an implicit recognition that an employer should have to pay something in order to make an at-will discharge, a practice that employers will resist as an unnecessary condition to their right to terminate at-will.

Third, Epstein asserts that employers suffer adverse reputational damages when a discharged employee’s co-workers perceive the decision to be arbitrary.¹⁵⁴ While this potential exists, his point seems to be that savvy employers are loath to discharge arbitrarily. It is unclear how this protects the human dignity of employees of (1) not-so-smart employers; and/or of (2) employers who have a readily available deep pool of unemployed workers with which to replace any worker who feels she can actually afford to quit because she has come to dislike an employer’s reputation for fairness.

Fourth, Professor Epstein makes the point that the at-will rule actually “helps workers deal with the problem of risk diversification.”¹⁵⁵ That is, an employee is not “locked into an unfortunate contract if he finds better opportunities elsewhere or if he detects some weakness in the internal structure of the firm.”¹⁵⁶ This point is underwhelming: at issue is whether an employer can use at-will practices to fire an employee for immoral reasons, not whether an employee’s contract is one of a fixed term. An employer can always offer a fixed term or not; that choice does not logically mean that in either case an employer can fire for an immoral reason.

Finally, the argument that the at-will doctrine works well as a rule of construction, where employment contracts fail to address grounds

152. *Id.* at 967.

153. There is some statutory law that provides a form of severance. For example, the State of Maine requires a one-time payment to employees upon the closure of a plant in order to cushion the impact of mass layoffs. The statute has survived attacks by employers who do not want to provide the benefit. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Also, the Worker Adjustment & Retraining Notification Act (“WARN”), 29 U.S.C. §§ 2101–2109 (2006), requires employers to pay up to sixty days of wages if adequate, advance notice of certain layoffs or plant closings is not given to workers. § 2104(a)(1)(B). There are state law counterparts. *See, e.g.*, CAL. LAB. CODE §§ 1400–1408 (West 2011).

154. Epstein, *supra* note 145, at 968.

155. *Id.* at 968–69.

156. *Id.* at 969.

for termination, fares no better. According to Epstein, the at-will rule “tends to lend predictability to litigation” and is “the efficient solution” to the employment relationship.¹⁵⁷ This argument focuses on the monetary benefits of the doctrine: “The lower cost of both firing and quitting, therefore, helps account for the very widespread popularity of employment-at-will contracts.”¹⁵⁸ It is true that a fear of the costs of potential litigation perpetuates the at-will rule.¹⁵⁹ Morality is not determined, however, solely by a cost-benefit analysis.

Financial considerations perpetuate the at-will rule, even amongst the Catholic bishops to whom the *Pastoral Letter* belongs as part of their magisterial teaching. I spoke at a Catholic colloquium dedicated to the tenth anniversary of the *Pastoral Letter*. In my remarks, I argued that the at-will rule was rampant in Church personnel manuals, and that the *Pastoral Letter* said that all the principles it laid out for the American economy must also be applied to the Church itself as an employer.¹⁶⁰ I urged the abandonment of the at-will rule in favor of progressive discipline. Immediately thereafter, one bishop of the local diocese told me he would get rid of the at-will rule when I got rid of lawyers. I later learned that he had just received a letter from a lawyer after the bishop dismissed a clerical worker. Moral principles unfortunately can become expendable under financial and tactical demands. The incentive to act contrary to the Church’s own norm is, indeed, quite strong even for those to whom the *Pastoral Letter* belongs.

The moral analysis made in this Article is not concerned with control or cost. The moral right to be free from arbitrary dismissal and the moral right to work to support one’s self and one’s dependents, should not be conditioned upon there first being no loss of control or no risk of cost. It is precisely at this juncture that the argument for retaining the at-will rule is laid bare: the risk of diminished control and a potential for greater cost is pitted against the moral demand. Such “cost” is but a variant of the proposition that economics should not be subject to moral principle.

This Article turns next to the question of whether that fear or risk can be sufficiently reduced in order to entice the common law to reject any further status for the at-will rule.

157. *Id.* at 951.

158. *Id.* at 965.

159. The legal costs of presenting a motion to dismiss or a motion for summary judgment are far less than the costs of a jury trial.

160. PASTORAL LETTER, *supra* note 2, paras. 347–58.

V. The Common Law Can Change to a More Moral Rule That Also Protects Employer Prerogatives

This Part examines how the common law can evolve toward a rejection of the at-will doctrine. Before the courts will be free to consider the moral unconscionability of the at-will doctrine, statutes favoring the at-will doctrine will have to change.¹⁶¹ Whether the change occurs through the legislative or judicial branch, a threshold issue of whether the law should mandate an alternative rule, as a condition to the rejection of the at-will doctrine, remains. This Part first addresses this threshold issue.

The initial inquiry has a simple answer grounded in moral analysis: if the at-will doctrine is deemed to be immoral, then there is no moral justification in continuing it indefinitely until a political or legal consensus builds around one or more alternatives. Alternatives, however, are not without their own problems.

Consider the first alternative, a statute requiring employers to demonstrate just cause for discharge, for example, the Montana Wrongful Discharge from Employment Act.¹⁶² In these times, it would be difficult for such an alternative to be adopted legislatively. There are substantive issues of how to define “good cause,” the nature of the remedies, and the process that ought to be followed for adjudication. Some criticism for this alternative suggests that this substitute for the at-will doctrine should be resisted because it affords workers insufficient protection.¹⁶³ The problems here are too varied and subject to too many different resolutions across the country to require the moral demise of the at-will doctrine to wait for their resolution.

Consider the second alternative, the expansion of contract law to embrace all forms of justice, not merely the commutative.¹⁶⁴ Such a change would require a revised notion of the human person “rooted in community and strengthened by solidarity, sacrifice[,] and sharing.”¹⁶⁵ Rougeau sees some hope in Ian McNeil’s relational theory that attempts to have contract law take seriously the role of relationships, fairness, and cooperation.¹⁶⁶ To wait on an uncertain evolution

161. See *supra* note 9 and accompanying text.

162. Wrongful Discharge from Employment Act, MONT. CODE ANN. §§ 39-2-901 to -915 (2011).

163. Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment At Will*, 58 UCLA L. REV. 1 (2010).

164. Rougeau, *supra* note 34, at 136–38.

165. *Id.* at 136.

166. *Id.*

of contract law, however, seems like an excuse to delay facing directly the immorality of the at-will rule.

Consider the third alternative, the legislation of process or procedural protections, as opposed to substantive legal protections. There are serious voices for process-rights to be legislated, at least in certain occupations.¹⁶⁷ The attractiveness to this approach lies in the recognition of the right of employers to manage their workplace cultures and needs, which are not always amenable to one-size-fits-all substantive protections. The idea is to require the use of a process or procedure in personnel decisions that incentivize employers to meet the legitimate needs and expectations of their workers.¹⁶⁸

Consider the fourth alternative, replacing both the at-will and just cause doctrines by requiring employers to provide employees with notice of termination and income replacement¹⁶⁹ for a fixed period.¹⁷⁰ This proposal builds upon existing statutes such as the Worker Adjustment Retraining and Notification Act (“WARN”) as well as the continuation of health coverage under federal acts, like the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”) and the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”).¹⁷¹ Again, awaiting such fundamental statutory change should not justifiably delay the demise of the at-will doctrine if that doctrine is truly immoral.

Employers do not have to sacrifice their control of the right to hire, fire, and to direct business for a change in common law to occur. What would be the response of the employers to the loss of the at-will doctrine? The simple answer is that it will be up to the employers to continue to comply within the existing federal, state, and local laws and ordinances. Where laws and ordinances do not constrain an employer, an employer may do nothing. In the alternative, an employer

167. Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25; Rachel Arnow-Richman, *Incenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081 (2010).

168. These ideas are worthy of discussion, but their legislative implementation is uncertain. Therefore, there is no reason to delay the rejection of the at-will doctrine until they have gained further traction.

169. Including wages and benefits.

170. See Arnow-Richman, *supra* note 163.

171. WARN, 29 U.S.C. §§ 2101–2109 (2006); Consolidated Omnibus Budget Reconciliation Act (“COBRA”), 29 U.S.C. §§ 1161–1168; Health Insurance Portability and Accountability Act (“HIPAA”), 29 U.S.C. §§ 1181–1183.

can adopt some procedures to regulate terminations, at least disciplinary ones. This is so-called “progressive discipline.”¹⁷²

Progressive discipline¹⁷³ is practiced in this country and is expected of American employers doing business in many foreign countries. Non-union employers frequently use progressive discipline. In the unionized workplace, labor arbitrators expect it routinely.¹⁷⁴ Progressive discipline satisfies an employer’s right to control, and it also has the potential to satisfy the worker’s moral right to be free from discharge for any reason, no reason, or even for an immoral but legal reason.

The purpose of progressive discipline makes it congenial to the moral principles discussed above:

The purpose of a progressive discipline system is to ensure that discipline is imposed consistently and equitably, with an eye toward correcting deficient performance and securing compliance with working rules, not toward punishing employees. The philosophy of corrective discipline requires that discipline not be unduly severe (i.e., disproportionate to the offense) and that employees be afforded at least a measure of industrial due process. By the same token, the discipline must be severe enough to effect correction. Accordingly, the procedures cannot be so cumbersome that the essential purpose of discipline (i.e., to modify unacceptable behavior) cannot be achieved.¹⁷⁵

Warnings are singularly important.¹⁷⁶ Warnings apprise an employee of what is wanted and serve to put an employee on notice that work performance needs to improve or conduct needs to change. However, warnings are a form of fundamental fairness that the at-will doctrine finds too costly or too risky.

The use of progressive discipline actually can help an employer discourage wrongful discharge lawsuits or prevail in them if they com-

172. ABA SECTION OF LABOR & EMP’T LAW, DISCIPLINE AND DISCHARGE IN ARBITRATION 34 (Norman Brand et al. eds., 1998).

173. A progressive discipline system typically starts with a verbal or written warning, followed by a disciplinary suspension, and ultimately ends with discharge. A more sophisticated system may begin with verbal counseling, often considered non-disciplinary, and thereafter provide a verbal or written warning. However, many offenses are not suitable for progressive discipline and may justify immediate discharge. The writing and dissemination of an employment policy to employees can be easily tailored to a particular employer’s business by human resources professionals, especially by management members of the employment labor bar.

174. Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 51.

175. STEVEN C. KAHN & BARBARA BERISH BROWN, LEGAL GUIDE TO HUMAN RESOURCES § 9.33 (2010).

176. ELKOURI & ELKOURI, *supra* note 62, at 992–93.

mence. An employer who follows established fair procedures could proffer such compliance as a defense to a wrongful discharge claim.¹⁷⁷

The availability of progressive discipline should hasten the day when the common law recognizes that the at-will doctrine is morally unacceptable. That is its true significance. It need not be mandated by statute. After all, it is not a panacea because while it stresses “process,” it may be misused to elevate process over substantive fairness. Clearly, it is quite possible for human resources persons to serve their employer’s interests by using progressive discipline as wallpaper to hide what is really an at-will termination.

In such a case, a court, in theory, should be allowed to unpaper the true situation. Indeed, courts may come to expect progressive discipline of employers defending wrongful termination suits, just as labor arbitrators have. Seriously administered, progressive discipline can allow employers to manage their business and help workers to receive something better than the immoral arbitrariness of at-will status.

Although frequently misunderstood by non-lawyers, the common law does evolve. Ever since *Marbury v. Madison*, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”¹⁷⁸

In California as in other jurisdictions of Anglo-American heritage, the common law “is not a codification of exact or inflexible rules for human conduct . . . but is rather the embodiment of broad and comprehensive unwritten principles, inspired by natural reason and an innate sense of justice, and adopted by common consent for the regulation and government of the affairs of men. . . .”

The inherent capacity of the common law for growth and change is its most significant feature. . . . It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society”¹⁷⁹

“This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.”¹⁸⁰

177. Epstein, *supra* note 145, at 966.

178. 5 U.S. (1 Cranch) 137, 177 (1803).

179. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 415–16 (Cal. 1988) (first, second, and last omissions in original) (quoting *Rodriquez v. Bethlehem Steel Corp.*, 525 P.2d 669, 676 (Cal. 1974)) (internal quotation marks omitted).

180. *Id.* (quoting *Hurtado v. California*, 110 U.S. 516, 530 (1884)) (internal quotation marks omitted).

Conclusion

The common law should recognize that the at-will rule is not morally sustainable. Such recognition is not an Olympic-size long jump. As shown in Part III *supra*, the courts and legislative bodies across this country have already rejected the at-will doctrine because it does not fit with our moral consensus on issues that implicate public policy. To be sure, one of the tenets of the common law, at least in commercial affairs, is predictability.

American employers are already familiar with the need to articulate lawful reasons to support terminations of employees in order to defend against claims of race, gender, age, and other discrimination (or to establish that a particular discharge was not a pretext for an unprotected reason). Indeed, United States multinationals long ago accepted that they cannot export the at-will rule abroad; rather, they must accept the social compacts of host countries, the vast majority of whom, both in the developed and developing worlds, exact a greater respect for employee rights.¹⁸¹

To eliminate the at-will doctrine would foster predictable uniformity. It would recognize the evolutionary development to date and provide equal treatment for employees—allowing only termination based on work performance, work unavailability, or work conduct. The well-developed concept of progressive discipline gives employers a ready tool for a cogent, fair human resources process. The cost and risk to employers of having to forego the at-will rule is more than equitably counterbalanced. A concern for cost and risk is not a morally acceptable basis for a continuation of the at-will doctrine. Its rejection as a legal basis for continuing the doctrine, in the face of all the exceptions that have evolved to date, is an idea whose time has come. Natural reason and an innate sense of justice would so dictate.

It will be objected that such final denouement should be left to a legislature. As former California Supreme Court Justice Marcus Kaufman once said in reply to the same contention: “The *courts* are the custodians of the common law—not the economists, or the legislators, or even the law professors. We abdicate that duty when we abjure decision of common law questions under the guise of ‘deference’ to the political branches.”¹⁸²

181. Donald C. Dowling, Jr., *U.S.-Based Multinational Employers and the “Social Contract” Outside the United States*, 43 INT’L LAW. 1237 (2009).

182. *Foley*, 765 P.2d at 417.

It will be objected that some state statutes preclude a change in the common law. That may be so but legislative bodies can remove these offending statutes. Where there is no clear statutory obstacle, the fact alone that prior state decisional law has supported the at-will rule is no obstacle to change, for “[o]ur cases have clearly established that ‘[a] person has no property, no vested interest, in any rule of the common law.’”¹⁸³

The “arc of the moral universe is long, but it bends towards justice.”¹⁸⁴ With respect to the at-will doctrine, it needs to bend further.

183. *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 88 n.32 (1978).

184. An expression often used by Dr. Martin Luther King, Jr. and perhaps originating in nineteenth century Unitarian minister Theodore Parker. Arthur Howe, *The Arc of the Universe Is Long But It Bends Towards Justice*, OPEN SALON (Jan. 19, 2009), http://open.salon.com/blog/arthur_howe/2009/01/18/the_arc_of_the_universe_is_long_but_it_bends_towards_justice.