From *Tameny* to *Foley:* Time for Constitutional Limitations on California's Employment at Will Doctrine?

Introduction

California presently limits the once unfettered right to discharge an employee—the employment at will doctrine—by use of three judicially-created exceptions. None provides the degree of protection commensurate with what should be recognized as a fundamental right to freedom from arbitrary employment termination decisions. This Note suggests that *Foley v. Interactive Data Corp.*[1] presents the California Supreme Court with the opportunity to base such protection squarely on the Equal Protection Clause of the California Constitution.[2]

In the two years that *Foley* has been pending before the California Supreme Court, hopes have grown that the decision will provide some definitive signposts leading out of the current morass in wrongful discharge law. The court may choose to construe narrowly the questions presented in *Foley* and simply address the scope of an actionable breach of the implied covenant of good faith and fair dealing. But such a limited approach will only leave a host of questions unanswered about the entire range of permissible employment termination decisions. California has uniquely based concerns to be safeguarded here, and they can best be protected by eliminating the outmoded at will rule completely and replacing it with a constitutionally premised alternative.

Part I of this Note details the evolution of the three exceptions to the at will rule—public policy, the implied-in-fact covenant, and the covenant of good faith and fair dealing. Part II examines the contradictory holdings of the courts of appeal and the need for a definitive resolution by the California Supreme Court. Part II then suggests that the patchwork of existing federal preemption concerns is the chief reason why continued judicial and legislative tinkering with the common law employment at will rule may leave California without adequate means to safeguard its special interests in this area. Finally, Part III establishes

1. 184 Cal. App. 3d 241, 219 Cal. Rptr. 866 (1985), *rev. granted*, 41 Cal. 3d 35, 712 P.2d 891, 222 Cal. Rptr. 740 (1986). *See infra* notes 77-84 and accompanying text.

2. "A person may not be . . . denied equal protection of the laws . . . ." CAL. CONST. art. I, § 7(a).

that, by virtue of California's Equal Protection Clause, the right to be discharged only for just cause is a constitutionally protected fundamental right.

I. The Common Law Evolutionary Process: Implied Restrictions on the Freedom to Discharge at Will

A. The Traditional Doctrine

The employment at will doctrine grew out of pre-industrial concepts of master and servant.[3] These theories included notions of personalized, reciprocal duties and obligations.[4] By the mid-1800s, however, the development of more sophisticated contract principles led to a broader reformulation of the employment relationship.[5] This shift in attitude was a product of the new value placed on the absolute freedom to contract. As expressed by an influential treatise writer of that era, the employment at will rule gave the employer the absolute right to discharge an employee at any time with or without cause.[6] The courts reasoned that since an employee could resign at any time, an employer should be entitled to discharge an employee with the same ease.[7]

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3. The term "master and servant" accurately describes the unequal status inherent in the employment relationship in the 18th century. *See* A. CORBIN, CONTRACTS 674 (1960), *cited in Foley*, 184 Cal. App. 3d at 246 n.1, 219 Cal. Rptr. at 868 n.1.

4. *See* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824 (1980); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1438-39 (1975).

5. The transmutation of the right to discharge one's personal servants into a comparable right in the factory or farmhouse setting was expressed as follows: "May I not refuse to trade with any one? May I not forbid my family to trade with any one? May I not dismiss my domestic servant for dealing, or even visiting, when I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster?" Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416 (1967) (quoting Payne v. Western & A.R.R., 8 Tenn. 507, 518 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915)).

6. "[T]he rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring . . . , 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." Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 601, 292 N.W.2d 880, 886 (1980) (quoting H. WOOD, THE LAW OF MASTER AND SERVANT § 134 (1877)). Various commentators have noted that none of the four authorities Wood cited supported his oft-quoted "rule." *See, e.g.*, Lopatka, *The Emerging Law of Wrongful Discharge*, 40 BUS. LAW. 1, 4 (1984) ("the employment-at-will doctrine has a shaky foundation").

7. Precisely as may the employee cease labor at his whim or pleasure, and, whatever be his reason, good, bad, or indifferent, leave no one a legal right to complain; so, upon the other hand, may the employer discharge, and, whatever his reason be, good, bad, or indifferent, no one has suffered a legal wrong.

Union Labor Hosp. Ass'n v. Vance Lumber Co., 158 Cal. 551, 554, 112 P.2d 886, 888 (1910). This reasoning assumed that the employee gave no independent consideration beyond render-

Although the rule was articulated in deceptively egalitarian terms, the historically unequal bargaining positions of labor and management during an era of industrial ferment[8] clearly affected application of the rule. The courts' strict use of the rule tended to disfavor labor. In *Adair v. United States*,[9] for example, a supervisory railroad employee who had fired a subordinate challenged a federal law criminalizing an interstate carrier's discharge of an employee for membership in a labor organization. The Supreme Court held that the challenged portion of the Railway Labor Act[10] was an unconstitutional interference with the parties' freedom to contract.

The Court in *Adair* reasoned that fifth amendment liberty and property rights included "the right to make contracts for the purchase of the labor of others . . . and for the sale of one's own labor . . . ."[11] Thus, the Court ruled that Congress lacked the power to "unreasonably interfere" with individuals' contracts.[12] The Court could have viewed the law as a reasonable exercise of the police power;[13] instead, the Court ruled that there was no real or substantial relation between labor union membership and interstate commerce that might justify this criminal penalty provi-

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ing services. Courts in this era relied heavily on formalistic rules of contract formation. *See infra* notes 15-17 and accompanying text.

8. Management countered the labor organizing efforts of the post-Civil War era with fierce resistance. The Chicago Pullman strike of 1894 was a notorious example, and precipitated a formal investigation followed by congressional action in 1898. *See infra* note 10 and accompanying text.

9. 208 U.S. 161 (1907).

10. Act of June 1, 1898, ch. 370, 30 Stat. 424 (repealed). Section 10 of the Act had provided:

> That any employer . . . and any officer, agent, or receiver of such employer, who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement . . . not to become or remain a member of any labor organization . . . or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor association . . . or who shall, after having discharged an employee, attempt or conspire to prevent such employee from obtaining employment . . . is hereby declared to be guilty of a misdemeanor, and, upon conviction . . . shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars.

Id. § 10, 30 Stat. at 428, *quoted in Adair*, 208 U.S. at 168-69 (emphasis omitted).

11. 208 U.S. at 172.

12. *Id.* at 174. The Court stated:

> It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern.

Id. at 173 (quoting T. COOLEY, COOLEY ON TORTS 278 (1879)).

13. The Act included detailed provisions for arbitration of controversies between interstate carriers and their employees that threatened to interrupt the carriers' business. Congress clearly had drafted the Act to avert incidents of labor unrest such as the 1894 Chicago strike. *Id.* at 185 (McKenna, J., dissenting).

sion under the Commerce Clause.[14]

Adair and a related case, *Coppage v. Kansas*,[15] are two of the more startling examples of the courts' deference to liberty of contract principles in the early years of this century. Prevailing contractual theories provided for only one limitation on the employment at will doctrine: the "mutuality of obligation" rule.[16] However, the very premise of the mutuality of obligation rule is faulty. As commentators have since noted, the adequacy of consideration is generally a matter for the contracting parties to determine, and not one into which the courts ordinarily will inquire.[17]

Twenty-two years after *Coppage*, the United States Supreme Court changed its views, permitting broader judicial interference in employment contract relations.[18] In *N.L.R.B. v. Jones & Laughlin Steel Corp.*,[19] the Court upheld the constitutionality of the National Labor Relations Act (NLRA)[20] and ruled that labor relations in industries "affecting commerce"[21] are a proper subject of congressional action. The Court emphasized the helplessness of an employee who resists arbitrary and unfair treatment by an employer, upon whom the employee depends for "his daily wage for the maintenance of himself and family."[22] This rejec-

14. *Id.* at 174-80. The Commerce Clause gives Congress power "[t]o regulate commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3.

15. 236 U.S. 1 (1915). *Coppage* invalidated state legislation preventing employers from refusing to hire or discharge employees on the basis of union membership.

16. In the employment context, this rule required that an employee furnish additional consideration (beyond the mere performance of services) in order to bind an employer to a promise to discharge only for cause. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 484-85 (1976) ("reinforcing . . . [the] basic [at will] rule is a special rule of mutuality of obligation: if the employee is free to quit at any time, then the employer must be free to dismiss at any time"). *Cf.* Blades, *supra* note 5, at 1419-20 ("mutuality of obligation is not an inexorable requirement . . . [but] is simply . . . an imperfect way of referring to the real obstacle to enforcing any kind of contractual limitation on the employer's right of discharge—lack of consideration.").

17. Courts refuse to inquire into adequacy once satisfied that the consideration is not so minimal as to raise doubts that the contract was formed as a result of fraud or undue influence. But the mutuality of obligation rule has lost its force as a consideration requirement. *See* Summers, *supra* note 16; Blades, *supra* note 5; RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981) (rule has been abrogated).

18. The Court's shift may be traced to the "political, intellectual, and economic pressures of the 1930's" that led to the demise of the absolute freedom to contract as espoused in Lochner v. New York, 198 U.S. 45 (1905). L. TRIBE, AMERICAN CONSTITUTIONAL LAW 57-58 (1978). The defendant in *Lochner* had been convicted of the misdemeanor violation of a New York statute which prohibited work in factories for more than 60 hours per week or ten hours per day. The Supreme Court held that the statute was not a valid health and safety measure and exceeded the state's police power since it impermissibly interfered with an individual's freedom to enter into such labor contracts as he might deem appropriate. 198 U.S. at 56-58.

19. 301 U.S. 1 (1937).

20. 29 U.S.C. §§ 141-187 (1986).

21. 301 U.S. at 6.

22. *Id.* at 33.

tion of the laissez-faire attitudes of *Adair* and *Coppage*[23] marked the beginning of a trend which has led many modern courts to curtail the employment at will rule.[24] However, the rule has persisted unchanged in a minority of jurisdictions.[25]

California has codified the employment at will rule in its Labor Code section 2922.[26] The courts have interpreted the rule as a presumption rebuttable by evidence that the employment contract bound the parties to a specified term.[27] Until 1980, California courts recognized only two limitations on the employment at will rule: an aggrieved employee had to show (1) that his termination violated some public policy or statute;[28] or (2) that the terms of his contract expressly or impliedly provided for termination only for good cause.[29] Judicial evolution of the first of these two restrictions led to a frontal attack on the at will rule itself.

B. The Public Policy Exception

California initially recognized that various carefully delineated public policies (for example, permitting the filing of workers' compensation

23. Declining to overrule *Adair* and *Coppage* explicitly, the Court in *Jones & Laughlin* stated that those cases were "inapplicable to legislation" such as the NLRA, which, in the Court's view, did not interfere with the "normal exercise" of the employment at will rule. *Id.* at 45. Rather, the NLRA prohibited the use of the rule to "intimidate or coerce . . . employees with respect to their self-organization." *Id.* at 45-46.

24. Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984) (recognizing public policy exception to at will rule); Parnar v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625 (1982) (same).

25. Rose v. Allied Development Co., 34 Utah Advance Reports 29, 719 P.2d 83 (1986) (at will rule continues absent special consideration or express stipulation as to the duration of employment); Lampe v. Presbyterian Medical Center, 41 Colo. App. 465, 590 P.2d 513 (1978) (same).

26. Section 2922 provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month." CAL. LAB. CODE § 2922 (West 1986).

27. Hillsman v. Sutter Community Hosps., 153 Cal. App. 3d 743, 753, 200 Cal. Rptr. 605, 611 (1984).

28. Petermann v. Int'l Brotherhood of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), exemplifies this limitation. In *Petermann*, the court held that plaintiff stated a cause of action for wrongful discharge in violation of public policy, based on allegations that he was terminated for refusing to obey his employer's order to perjure himself when testifying before a state legislative committee.

The court emphasized the nefariousness of the employer's conduct and the existence of a statute, CAL. PENAL CODE § 118 (West 1970), proscribing perjury. It concluded that an employer's authority to discharge an at will employee could be limited by statute "or by considerations of public policy." 174 Cal. App. 2d at 188, 344 P.2d at 27. To permit an employer to condition continuing employment upon the commission of a felony "would be to encourage criminal conduct upon the part of both the employee and employer and serve to contaminate the honest administration of public affairs." *Id.* at 189, 344 P.2d at 27.

29. Rabago-Alvarez v. Dart Indus., Inc., 55 Cal. App. 3d 91, 96, 127 Cal. Rptr. 222, 225 (1976). A good cause limitation also would be found where the contract was supported by independent consideration. *Id.*

claims[30] and encouraging the associational freedoms of union membership[31]) properly limit the traditionally unfettered freedom of an employer to discharge an employee at will.[32] It took a number of years for the courts to develop a broader public policy rationale for such a limitation, however.

The first significant case in the development of California wrongful discharge law was *Tameny v. Atlantic Richfield Co.*[33] Gordon Tameny, a retail sales representative for Arco, alleged he was fired for refusing to insist that service station dealers in his territory cut their prices to a level designated by Arco. He alleged that Arco's conduct violated the antitrust laws, and appealed the trial court's dismissal of his tortious breach of contract claim. The California Supreme Court held that Tameny had stated a cause of action in tort for wrongful discharge in violation of the public policy[34] against price-fixing. The court explained that a discharge may contravene public policy without violating a specific statute.

Arco had argued that breach of an employment contract could not give rise to tort damages. Writing for the majority, Justice Tobriner disagreed: "[A] wrongful act committed in the course of a contractual relationship may afford both tort and contractual relief, and in such circumstances the existence of the contractual relationship will not bar the injured party from pursuing redress in tort."[35] To underscore the state's interest in discouraging violations of public policy, the court held that compensatory and even punitive damages are available to redress tortious discharges in violation of public policy.[36]

Tameny paved the way for the development of two additional theories which limit the employment at will doctrine: the implied-in-fact covenant and the implied covenant of good faith and fair dealing. While the California courts continue to struggle with the ramifications of these two

30. Portillo v. G. T. Price Products, Inc., 131 Cal. App. 3d 285, 182 Cal. Rptr. 291 (1982). However, federal law may preempt claims of disability or physical injury in workers' compensation proceedings. *See infra* notes 102-135 and accompanying text.

31. *See* Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961).

32. Until 1980, it was not clear whether a public policy without any statutory basis might support a wrongful discharge claim. At least one pre-*Tameny* case stated that it could not. Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960). *See also* Tyco Indus., Inc. v. Superior Court, 164 Cal. App. 3d 148, 159, 211 Cal. Rptr. 540, 547 (1985) (more than "mere allegation of public policy violation of a statute" is required).

33. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

34. "Public policy" refers to "that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." Miller & Estes, *Recent Judicial Limitations on the Right to Discharge: A California Trilogy,* 16 U.C. DAVIS L. REV. 65, 72 n.33 (1982) (citing Safeway Stores, Inc. v. Retail Clerks Int'l Ass'n, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953)).

35. *Tameny*, 27 Cal. 3d at 174-75, 610 P.2d at 1334, 164 Cal. Rptr. at 843.

36. *Id.* at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 845.

theories,[37] courts find the public policy concept relatively straightforward.[38] One commentator has suggested that the public policy exception presents fewer evidentiary problems than the other exceptions to the employment at will rule.[39] The specific event alleged to be an "offense to public policy" is a relatively simple question of fact compared to the bad faith motives involved in implied covenants or the often-disputed oral provisions of an implied-in-fact covenant.[40]

C. The Implied-In-Fact Covenant

While the public policy exception is grounded in tort,[41] a second exception, the implied-in-fact covenant, is based on contract. The basis of the implied-in-fact covenant is an agreement to terminate only for cause. This exception was developed in *Pugh v. See's Candies, Inc.*[42] The plaintiff in *Pugh* had been employed for thirty-two years by See's Candies, and had risen from an entry level position as a dishwasher to become vice president of production. He was then terminated without explanation or notice.[43]

The court of appeal held that the evidence did not support a claim for tort damages based on the *Tameny* public policy exception.[44] How-

37. *See infra* notes 42-84 and accompanying text.

38. For example, in Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985), the Ninth Circuit held that the Labor Management Relations Act did not preempt plaintiff's claim that he was fired for reporting to local health authorities that the milk shipment he was delivering was spoiled, and that plaintiff stated a cause of action under *Tameny*. In *Garibaldi*, defendant had argued that under the collective bargaining agreement, plaintiff's resort to the arbitration process to challenge his termination constituted his exclusive recourse. The court disagreed, stating:

> A claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process; it does not alter the economic relationship between the employer and employee. The remedy is in *tort*, distinct from any contractual remedy an employee might have under the collective bargaining contract. It furthers the state's interest in protecting the general public—an interest which transcends the employment relationship.

Id. at 1375 (emphasis in original).

Cf. Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984), in which the Ninth Circuit held that the Federal Mine Safety & Health Act, 30 U.S.C. §§ 801-961 (1986), preempted the claim of a miner discharged for complaining about unsafe conditions. *See infra* notes 121-123 and accompanying text.

39. Power, *A Defense of the Employment At Will Rule*, 27 ST. LOUIS U.L.J. 881, 886 (1983).

40. *Id.*

41. *See supra* notes 33-36 and accompanying text.

42. 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981).

43. *Id.* at 316-17, 171 Cal. Rptr. at 918-19. When the plaintiff asked the reason for his termination, "he was told only that he should 'look deep within [him]self' to find the answer." *Id.* at 316, 171 Cal. Rptr. at 918.

44. Pugh alleged that his discharge was at the behest of the company's union employees, after he had made statements to company negotiators regarding his suspicions of a "sweetheart contract." A "sweetheart contract" is a collusion between a union and an employer "whereby

ever, the court found the evidence sufficient to rebut Labor Code section 2922's presumption of employment at will.[45] Writing for the court, Justice Grodin characterized the employment at will rule and its codification as a product of outdated nineteenth century judicial concerns.[46] He recounted the rise of organized labor in response to the "recognized inequality in bargaining power between employer and individual employee"[47] and the enactment of early limitations on the freedom to discharge at will.[48] The court avoided the "mutuality of obligation" rule[49] by stating that the

> "rule [which requires independent consideration] is a rule of construction, not of substance, and . . . a contract for permanent employment, whether or not it is based upon some consideration other than the employee's services, cannot be terminated at the will of the employer if it contains an express or implied condition to the contrary."[50]

Pugh outlined factors which demonstrate a prima facie case of wrongful termination based on an implied covenant: the length of employment, commendations and promotions received, lack of criticism of plaintiff's work, assurances of job security, and defendant's acknowledged personnel policies.[51] All of these factors fall within the purview of a traditional breach of contract action. Moreover, evidence of an express or implied condition in an unwritten contract such as the typical employ-

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one employer would get an unfair competitive advantage over a competitor by getting a lower wage rate." *Id.* at 319, 171 Cal. Rptr. at 910. Pugh testified that the company president had told him his future would be secure if he did good work, and that he had never received any formal or written criticisms. Pugh also presented evidence that See's Candies had a decades-long practice of not terminating administrative personnel except for cause.

45. *See supra* note 26 and accompanying text.

46. 116 Cal. App. 3d at 319-20, 171 Cal. Rptr. at 920-21. It is important to note that CAL. LABOR CODE § 2922 (West 1986) was derived from CAL. CIVIL CODE § 1999 (1872). The California Supreme Court has described the 1872 Code as a restatement of existing common law principles, and stated that the Code was never meant "to insulate the matters therein expressed from further judicial development." Li v. Yellow Cab Co., 13 Cal. 3d 804, 814, 532 P.2d. 1226, 1239, 119 Cal. Rptr. 858, 865 (1975) (adopting a comparative negligence rule). California takes the position that "[i]f the courts have created a bad rule or an outmoded one, the courts can change it." County Sanitation Dist. No. 2 v. Los Angeles County Employees' Ass'n, 38 Cal. 3d 564, 584, 699 P.2d. 835, 848, 214 Cal. Rptr. 424, 437 (1985).

47. 116 Cal. App. 3d at 320, 171 Cal. Rptr. at 921.

48. *Id.* at 320-21, 171 Cal. Rptr. at 921-22.

49. *See supra* note 16 and accompanying text.

50. 116 Cal. App. 3d at 326, 171 Cal. Rptr. at 925 (quoting Drzewiecki v. H & R Block, Inc., 24 Cal. App. 3d 695, 754, 101 Cal. Rptr. 169, 174 (1972)).

51. The defendant would have the burden of producing evidence to show an acceptable reason for plaintiff's discharge, which the latter could attack as pretextual. If defendant met this burden, and plaintiff failed to demonstrate that defendant's evidence was pretext, defendant would prevail. *Id.* at 329-30, 171 Cal. Rptr. at 927. The allocation of the burden of proof in *Pugh* resembles the *Burdine-McDonnell Douglas* standard for Title VII employment discrimination cases. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

ment relationship is generally admissible to show the terms of the unwritten contract.[52] *Pugh* thus offers the possibility of traditional contract relief in some cases where a plaintiff fails to meet the *Tameny* requirements for the more expansive tort remedies.

However, even *Pugh* leaves some wrongfully discharged plaintiffs without a remedy. Later cases have held that the existence of a written contract may bar admission of evidence to show an implied in fact covenant,[53] and that even an implied-in-fact promise to terminate only for cause is not breached by termination of an employee for a legitimate business reason.[54] Moreover, the existence of an implied-in-fact covenant is a question for the trier of fact, whose finding is rarely disturbed on appeal.[55] For these reasons, the search continues for a more flexible theory which will further curtail the employment at will rule.[56]

D. The Implied Covenant of Good Faith and Fair Dealing

Cleary v. American Airlines, Inc.[57] first set out the requirements for an action based on the implied covenant of good faith and fair dealing.[58] After 18 years of employment, American Airlines suspended and then terminated Cleary, allegedly for violating various work regulations.[59]

The Second District Court of Appeal held that Cleary had stated a cause of action for breach of an implied-in-law covenant.[60] Justice Jefferson, writing for the court, explained:

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52. 116 Cal. App. 3d at 324, 171 Cal. Rptr. at 924.

53. Crain v. Burroughs Corp., 560 F. Supp. 849 (C.D. Cal. 1983) (plaintiff was employed less than two years and had a poor work record; written contract in effect at time of termination superseded any prior implied contractual agreement).

54. Clutterham v. Coachmen Industries, Inc., 169 Cal. App. 3d 1223, 215 Cal. Rptr. 795 (1985) (defendant's relocation of operations due to depressed industry conditions constituted "good cause" termination of plaintiff's employment).

55. *See* Walker v. Northern San Diego County Hosp. Dist., 135 Cal. App. 3d 896, 185 Cal. Rptr. 617 (1982).

56. A recent court of appeal decision has suggested that the chief reason this implied-in-fact covenant is less popular with plaintiffs is that recovery under this theory is considerably more limited than under the other exceptions to the employment at will rule. Koehrer v. Superior Court, 181 Cal. App. 3d 1155, 1166-67, 226 Cal. Rptr. 820, 826 (1986).

57. 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

58. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) explains: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Good faith and fair dealing "requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement." Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 818, 620 P.2d. 141, 145, 169 Cal. Rptr. 691, 695 (1979).

59. Cleary charged that these reasons were pretextual and that he had actually been terminated for his union organizing activities. The trial court dismissed all of his causes of action at the pleadings stage. 111 Cal. App. 3d at 446, 168 Cal. Rptr. at 724.

60. The court also held that plaintiff's cause of action alleging discharge for his union activities stated a public policy claim within the meaning of *Tameny*. *Id.* at 455, 168 Cal. Rptr. at 729.

> There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement. . . . The duty which arises . . . is *unconditional* and *independent* in nature; it is not controlled by events in the same manner as conditions precedent or subsequent.[61]

The court held that two elements in the *Cleary* fact pattern—the longevity of service and the existence of an express employer policy adopting certain procedures to adjudicate employee disputes—created an implied covenant of good faith and fair dealing.[62] These factors, the court stated, prevented the employer from discharging Cleary without good cause. However, the court in *Cleary* did not clarify whether the presence of both factors was essential to recover under this theory, or whether the factors were simply illustrative of what might suffice. Justice Jefferson concluded that if the plaintiff proved on remand that his termination was without good cause and that American Airlines had not exercised "good faith and fair dealing" towards him, compensatory and even punitive damages would be available.[63]

An examination of subsequent decisions reveals sharp differences among the district courts of appeal regarding the application of *Cleary*. Some courts have held that recovery in tort does not depend on the two elements enunciated in *Cleary*, but requires a showing of unequal bargaining positions. In these cases, the stronger party is held to a heightened duty not to act unreasonably in breaching the contract.[64] Other courts have interpreted the scope of the implied covenant as dependent upon the bargain struck and the legitimate expectations of the parties to the contract.[65]

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61. *Id.* at 453, 168 Cal. Rptr. at 728 (emphasis in original).

62. *Id.* at 455, 168 Cal. Rptr. at 729.

63. *Id.* at 456, 168 Cal. Rptr. at 729. This cause of action sounds both in contract and in tort. A *Cleary* plaintiff, therefore, is not limited to a contractual measure of damages, whereas the *Pugh* plaintiff may sue only in contract.

64. Wallis v. Superior Court, 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123 (1984) exemplifies this approach. In *Wallis*, plaintiff was laid off after 32 years of service, ten years short of becoming eligible for pension benefits. Two months before his layoff, he contracted with the defendant, his employer, for monthly payments over the next ten years in exchange for agreeing not to compete with defendant's furniture manufacturing business. Defendant ceased making payments after three years, claiming economic difficulties. The court held that plaintiff had stated a cause of action not merely for breach of contract but for tortious breach. *See also* Bert G. Gianelli Distributing Co. v. Beck & Co., 172 Cal. App. 3d 1020, 219 Cal. Rptr. 203 (1985).

65. Thus, an employer's refusal to award performance bonuses which were within its absolute discretion to confer or deny did not create a claim under *Cleary*. Brandt v. Lockheed Missiles & Space Co., 154 Cal. App. 3d 1124, 201 Cal. Rptr. 746 (1984). The *Brandt* court held that Lockheed had no legal duty to make invention award payments under express contractual language reserving to its Invention Awards Committee the discretion to decide how much, if any, payment would be made. Under such contract terms, there was no breach of duty.

A third and more expansive view was adopted by the First District Court of Appeal when it affirmed the trial court judgment for plaintiff in *Rulon-Miller v. International Business Machines Corp.*[66] Plaintiff's supervisor had fired her after confronting her with allegations that her romantic involvement with a competitor's employee created a conflict of interest. Although Rulon-Miller was able to meet both of the *Cleary* factors,[67] the trial judge instructed the jury instead to consider seven factors which comprised a factual analysis far more extensive and detailed than *Cleary*'s.[68]

The Second District Court of Appeal has taken a more limited approach and has dismissed this type of cause of action on demurrer when the two *Cleary* factors are absent.[69] In *Shapiro v. Wells Fargo Realty Advisors*,[70] plaintiff had worked for the defendant for less than four years, and alleged no facts to show that his discharge violated any employer policy or procedures. In *Newfield v. Insurance Co. of the West*,[71] plaintiff was employed for less than two years, and failed to allege violation of any personnel policies.[72] In *Shapiro*, the court suggested in dicta that a *Cleary* claim could consist of allegations of "bad faith action extraneous to the contract, combined with the obligor's intent to frustrate the obli-

66. 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984).

67. *See supra* text accompanying note 62. Plaintiff, a marketing manager and an IBM employee for more than ten years, was terminated despite a formal company policy of respecting employee privacy insofar as private "behavior" did not conflict with job performance. 162 Cal. App. 3d at 249, 208 Cal. Rptr. at 530.

68. The factors approved by the Court of Appeal were: (1) whether the employee was discharged for legitimate business and employment reasons; (2) whether the employee was discharged on a pretext; (3) whether the employee was engaged in a sensitive or confidential management position; (4) whether the employee had a conflict of interest in performing the job; (5) whether the employee's "personal, private or social relationships endangered, injured or jeopardized the employer's legitimate business interests;" (6) whether the employer violated, invaded, or infringed upon the employee's personal privacy and personal, private, and social relationships; and (7) whether there was employment discrimination based on sex. 162 Cal. App. 3d at 252 n.6, 208 Cal. Rptr. at 532 n.6.

69. Even in the presence of both *Cleary* factors, an employer may successfully defend by showing good faith discharge which does not breach the implied covenant of good faith and fair dealing. See Crosier v. United Parcel Serv., Inc., 150 Cal. App. 3d 1132, 198 Cal. Rptr. 361 (1983), in which a management level employee was discharged for violating an unwritten company rule against fraternizing with non-management employees. The employee, who had been counseled regarding the purpose of the rule and defendant's intent to enforce it strictly, had lied to his supervisors in response to questions concerning his relationship with a subordinate. The *Crosier* court concluded that defendant United Parcel Service had in fact exercised "good faith and fair dealing." *Id.* at 1140, 198 Cal. Rptr. at 366.

70. 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984).

71. 156 Cal. App. 3d 440, 203 Cal. Rptr. 9 (1984).

72. *Newfield* also raised a statute of frauds argument. The court suggested that either an oral contract must be terminable at will by both of the parties, or, if it is not terminable at will (and there is therefore a reasonable expectation of employment for more than one year), the statute of frauds will bar an action. *Id.* at 446, 203 Cal. Rptr. at 12-13.

gee's enjoyment of contract rights."[73] However, the Second District Court of Appeal dismissed both *Shapiro* and *Newfield* since neither plaintiff had met both the longevity and the express employer policy elements of *Cleary*.

II. Assessing the Proper Scope of *Cleary*

A. Dissension in the Courts of Appeal

1. The Khanna *Alternative*

The First District Court of Appeal recently held in *Khanna v. Microdata Corp.*[74] that neither of the *Cleary* factors is necessary to state a claim for breach of an implied covenant of good faith and fair dealing. In *Khanna*, plaintiff was enticed to work for Microdata Corporation as a computer salesperson. The company promised Khanna a specific rate of commission on an especially lucrative sales account. After starting work, plaintiff was taken off the account and denied the agreed-upon compensation. Upon filing suit for commissions on the account, he was terminated for disloyalty.

Despite plaintiff's mere two and a half years on the job and the absence of any formal employer dispute resolution procedures, the court of appeal upheld the jury award of compensatory damages. The court explained:

> We cannot agree . . . that the factors relied on . . . in *Cleary* are the *sine qua non* to establishing a breach of the covenant . . . . [T]he theory of recovery articulated in *Cleary* is not dependent on the particular factors identified in that case. . . . The facts in *Cleary* establish only one manner among many by which an employer might violate this covenant.[75]

Khanna represents one extreme of the two basic approaches taken since *Cleary*. Under *Khanna*, the longevity and employer policy factors have merely evidentiary significance, indicating examples of "bad faith action extraneous to the contract" and showing the employer's intent to frustrate the employee's contract rights.[76] Hence, neither of the two *Cleary* factors is essential for recovery.

2. The Court of Appeal's Analysis in Foley

In *Foley v. Interactive Data Corp.*,[77] the Second District interpreted *Cleary* more narrowly. The plaintiff had worked for the defendant for

73. 152 Cal. App. 3d at 478-79, 199 Cal. Rptr. at 619.

74. 170 Cal. App. 3d 250, 215 Cal. Rptr. 860 (1985).

75. *Id.* at 262, 215 Cal. Rptr. at 867.

76. *Id.* at 263, 215 Cal. Rptr. at 868.

77. 184 Cal. App. 3d 241, 219 Cal. Rptr. 866 (1985), *rev. granted*, 41 Cal. 3d 35, 712 P.2d 891, 222 Cal. Rptr. 740 (1986).

seven years, and alleged that the company's employee policies included "termination guidelines."[78] Plaintiff alleged that he was dismissed for reporting to his superiors that the F.B.I. was investigating defendant's new company manager for suspected embezzlement at a previous job.

The court of appeal sustained the dismissal of the *Cleary* cause of action, holding that the plaintiff had not met the longevity and employer policy requirements.[79] In strident dicta, the court criticized the three exceptions to the employment at will doctrine as unfair, since the employee is free to walk away from a job while an employer attempting to end employment relationships at will is subject to tort and/or contract liability.[80] The court rejected Foley's *Tameny* claim, asserting that protecting plaintiff for "report[ing] on fellow employees"[81] served no public policy. The court then held that the *Pugh* claim was barred by the statute of frauds, and rejected the *Cleary* claim.[82]

On appeal, the California Supreme Court heard oral argument in June 1986[83] on whether, *inter alia*, longevity of service is "a *sine qua non*" for a *Cleary* cause of action.[84]

B. The Current Prospects: Searching for a Better Mousetrap

Both the judiciary and the legislature have attempted to modify the employment at will doctrine. This section explores the ad hoc development of judicial exceptions and legislative attempts to fashion alternatives to this doctrine.

1. Judicial Options

The *Foley* appeal provides an opportunity for the California Supreme Court to determine the scope of the employment at will doctrine. *Tameny*'s "tortious discharge", *Pugh*'s "breach of employment contract", and *Cleary*'s "bad faith discharge" theories[85] have chipped away at a rule which is generally considered to be unacceptably harsh on

78. *Id.* at 244-45, 219 Cal. Rptr. at 867.

79. *Id.* at 250, 219 Cal. Rptr. at 871.

80. *Id.* at 248-50, 219 Cal. Rptr. at 868-71.

81. *Id.* at 248, 219 Cal. Rptr. at 870.

82. *Id.*

83. The Court heard oral argument a second time in April, 1987, following the arrival of its three new members—Justices Arguelles, Eagleson and Kaufman.

In January 1986, the California Supreme Court had also granted hearing in Santa Monica Hosp. v. Superior Court, 192 Cal. App. 3d 138, 218 Cal. Rptr. 543 (1985), *rev. granted*, 711 P.2d 520, 222 Cal. Rptr. 224 (1986). In *Santa Monica Hosp.*, the Second District Court of Appeal sustained the dismissal of plaintiff's *Cleary* cause of action on the statute of frauds grounds enunciated in *Newfield*. *See supra* note 72.

84. Appellant's Petition for Review to the California Supreme Court at 2 (LA32148).

85. These three terms are the shorthand employed by the court in Koehrer v. Superior Court, 181 Cal. App. 3d 1155, 226 Cal. Rptr. 820 (1986), to describe California's three common law theories.

employees.[86] The question is whether this piecemeal approach should continue, or whether the rule itself has outlived its usefulness.[87]

By affirming the Second District Court of Appeal's rationale in *Foley*, the Supreme Court would severely limit bad faith discharge actions. Furthermore, *Foley* did not define the parameters of the two *Cleary* factors. How much "longevity" is required? If eighteen years was enough in *Cleary* and yet seven years was not enough in *Foley*, where should the line be drawn?[88] Should the courts analyze longevity on a case by case basis? Will an employer's formal termination policy and procedure, as described in an "official employee manual", offset a shorter duration of employment? Or should the second *Cleary* factor stand on its own? If so, must employer liability depend on individually addressed termination policy and procedure guidelines, as *Newfield* seems to imply?[89] Or should internal memoranda addressed only to supervisory personnel and not distributed to other employees suffice?

In the alternative, the Supreme Court could reverse *Foley*, perhaps endorsing *Khanna*.[90] Under the latter approach, plaintiffs will have a smorgasbord of factors on which to base an action for bad faith breach. However, this type of untrammelled approach poses serious problems. Employers and employees will be unable to predict what range of conduct is acceptable. Unscrupulous employers may be tempted to test the boundaries of acceptable termination procedures, and employees may be prompted to file lawsuits almost reflexively if they are terminated. The courts subsequently should brace themselves for a deluge of employment litigation.

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86. *See, e.g., Tameny,* 27 Cal. 3d 167, 172 n.7, 610 P.2d 1330, 1333 n.7, 164 Cal. Rptr. 839, 842 n.7 (1980) (citing Blades, *supra* note 5, and Summers, *supra* note 16).

87. As suggested below, *infra* notes 137-143 and accompanying text, the prevailing hopscotch of judicial common law exceptions ill-serves the policy goal of fashioning fair and consistent standards for terminating employment. A more effective policy would enable employers and employees alike to improve relations, harmonize their needs, and avoid litigation.

88. Even if a line between these two is drawn, it is questionable whether the courts can do so in a rationally defensible manner. Line-drawing is generally considered properly to fall within the legislative province.

89. Compare the termination procedures in Santa Monica Hosp. v. Superior Court, 192 Cal. App. 3d 138, 218 Cal. Rptr. 543 (1985), *rev. granted*, 711 P.2d 520, 222 Cal. Rptr. 224 (1986), in which an internal investigation was followed by disciplinary action taken without resort to any formal grievance process, with those in Shapiro v. Wells Fargo Realty Advisers, 152 Cal. App. 3d 467, 199 Cal Rptr. 613 (1984), in which an executive level employee had signed a stock option agreement which expressly stated that he could be terminated at any time, with or without cause. The Supreme Court's decision in *Foley* might profitably discuss the effects of differences in personnel procedures among employees at different levels of responsibility.

90. *See supra* notes 74-76 and accompanying text.

2. *The Legislative Option*

The California Legislature unsuccessfully attempted in its 1985-1986 session to devise alternatives to the employment at will doctrine and its ambiguous exceptions. Two bills would have altered both the employment at will rule and its judicially-created exceptions for those employees who are neither in the public sector nor protected by collective bargaining provisions.

Senate Bill 1348,[91] as proposed by Senator Bill Greene,[92] would have repealed Labor Code section 2922 and added a new Article 3.7 to the Code.[93] The bill provided that discharges could be made only for "just cause",[94] and required an employer to furnish an employee with "notice of intent to discharge" prior to termination. The employee could then file a complaint with the Department of Industrial Relations, which would appoint a mediator to confer with the parties. If mediation failed, the parties could proceed to binding arbitration. The employer would need to establish by clear and convincing evidence a just cause for discharge. These protections would apply to all employees with three or more months of service.

Assembly Bill 2800,[95] as introduced by former Assemblyman Alister McAlister,[96] was management's response to the union-backed Greene bill. The Assembly bill would have retained section 2922 but changed the three common law modifications.[97] The bill allowed an employee to retain her job during mediation, as did S.B. 1348, and during what was intended to be a speedy arbitration process, if arbitration was necessary. Under A.B. 2800, however, the employee carried the burden of proving by clear and convincing evidence that the discharge was "wrongful", *i.e.*, not for a legitimate business reason. These termination procedures would be available only to employees with five or more years of service.[98]

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91. S.B. 1348 was introduced in the California Legislature's 1985-1986 Regular Session. It failed to win enactment. A copy of the bill is on file at the offices of the *Hastings Constitutional Law Quarterly.*

92. D-Los Angeles.

93. S.B. 1348, *supra* note 91, at 2-4.

94. S.B. 1348 contained no explicit definition of this critical term, referring only to "just cause" standards developed in labor arbitration proceedings under collective bargaining agreements. *See* proposed CAL. LAB. CODE § 2881(a), S.B. 1348, *supra* note 91, at 4.

95. A.B. 2800 was introduced in the California Legislature's 1985-1986 Regular Session, but failed to become law. A copy of the bill is on file at the offices of the *Hastings Constitutional Law Quarterly.*

96. D-Alameda/Santa Clara

97. Proposed CAL. LAB. CODE § 2882, A.B. 2800 *supra* note 95, at 3-4.

98. *Id.*

Both bills would have eliminated tort damages[99] by limiting relief to reinstatement, back pay and/or front pay,[100] and, in certain circumstances, costs and attorney's fees.[101] The Legislature was unable to agree on a compromise during the 1985-1986 session and hence, both bills failed.

3. *The Preemption Problem*

The judicial and legislative restrictions on the employment at will rule share the potential for federal preemption. Since Congress may expressly or impliedly preempt state law under authority of the Supremacy Clause,[102] federal legislation such as the National Labor Relations Act (NLRA)[103] preempts many aspects of state law. Congress has not acted to occupy the entire field of labor relations,[104] however, and many questions of employment law are left to the states.[105] But where Congress has acted, courts must discern whether a local regulation "conflicts with federal law or would frustrate the federal scheme."[106] The *Tameny*, *Pugh*, and *Cleary* theories interrelate with, and in part may be preempted by,

99. Proposed CAL. LAB. CODE §§ 2886-2891, S.B. 1348, *supra* note 91, at 5-9; proposed CAL. LAB. CODE § 2884, A.B. 2800, *supra* note 95, at 4-5. Both *Tameny* and *Cleary* presently allow tort damages. *See supra* notes 33-36, 63 and accompanying text.

100. S.B. 1348 would have allowed back pay for a period of two years from the date the mediator or arbitrator determined that reinstatement was not an appropriate remedy. Proposed CAL. LAB. CODE § 2890(b)(2), S.B. 1348, *supra* note 91, at 8. "Front pay" is defined in A.B. 2800 as part or all of the employee's predischarge earnings for a period not to exceed one year from the original trial. Proposed CAL. LAB. CODE § 2884(c), A.B. 2800, *supra* note 95, at 5.

101. S.B. 1348 authorized the arbitrator to award attorney's fees and costs to a prevailing employee, or to an employer upon a determination that the employee's appeal of the discharge was frivolous or vexatious. Proposed CAL. LAB. CODE § 2890(c), S.B. 1348, *supra* note 91, at 8. A.B. 2800 allowed attorney's fees to an employee only if her offer to arbitrate was rejected by the employer and the employee later prevailed in a wrongful discharge suit. Proposed CAL. LAB. CODE § 2887(b), A.B. 2800, *supra* note 95, at 7-8.

102. U.S. CONST., art. VI ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

103. 29 U.S.C. §§ 141-187 (1986). The NLRA attempts (if not always successfully) to foster the peaceful interaction of management and labor representatives through the collective bargaining process. The Act is designed to safeguard the rights of workers to organize and select bargaining representatives of their own choosing, as well as to refrain from such activity. *Id.* § 158. Its avowed legislative goal is to allow workers to assume a more active role in setting the terms and conditions of employment. *Id.* § 151.

104. In the NLRA context, for example, the states are preempted from regulating conduct which is actually or arguably protected or prohibited under the Act. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). *Tameny* public policy claims are particularly susceptible to preemption challenges. *See supra* notes 33-36 and accompanying text.

105. *See* Motor Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971).

106. Malone v. White Motor Corp., 435 U.S. 497, 504 (1978).

federal statutes governing numerous facets of employment.[107] In *Foley*, the California Supreme Court should consider possible preemption problems in deciding whether a new approach is warranted to preserve California's particular interests[108] in regulating employment termination practices.

a. Employee Retirement Income Security Act

One example of an interrelating federal legislative scheme is the Employee Retirement Income Security Act (ERISA),[109] which expressly preempts all claims relating to employee benefits governed by its provisions.[110] In *Russell v. Massachusetts Mutual Life Insurance Co.*,[111] plaintiff brought suit in a California court alleging mishandling of her disability benefits.[112] Relying on language in ERISA stating that the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan,"[113] the Ninth Circuit held that the Act preempts any cause of action under state law for improper handling of claims under benefit plans.[114]

In *Baker v. Kaiser Aluminum & Chemical Corp.*,[115] plaintiff claimed he had been wrongfully discharged[116] by an employer seeking to avoid the obligation to pay him his maximum pension benefits. The district court held that ERISA preempted the state law cause of action, observing that section 510 of ERISA[117] makes unlawful the discharge of an

107. *See, e.g.*, Wheeler & Browne, *Federal Preemption of State Wrongful Discharge Actions*, 8 INDUS. REL. L.J. 1 (1986).

108. In *Garmon*, the Court conceded that preemption may not be inferred "where the regulated conduct touch[es] interests . . . deeply rooted in local feeling and responsibility." 359 U.S. at 244.

109. 29 U.S.C. §§ 1001-1461 (1986). ERISA was enacted in 1974 as a detailed regulatory scheme intended to ensure the fiscal soundness and equitable administration of private employee benefit plans. Russell v. Massachusetts Mut. Life Ins. Co., 722 F.2d 482, 487 (9th Cir. 1983), *rev'd on other grounds*, 473 U.S. 134 (1985).

110. 29 U.S.C. § 1144(a) (1986).

111. 722 F.2d 482 (9th Cir. 1983), *rev'd on other grounds*, 473 U.S. 134 (1985).

112. Plaintiff alleged breaches of her employment contract and of the implied covenant of good faith and fair dealing. Defendant removed the action to federal court, where it won summary judgment. *Id.* at 484-85.

113. 29 U.S.C. § 1144 (1986).

114. 722 F.2d at 487-88. The court noted that ERISA specifically requires that a fiduciary process claims "in good faith, and in a fair and diligent manner." *Id.* at 488.

115. 608 F. Supp. 1315 (D.C. Cal. 1984).

116. The plaintiff in *Baker* alleged all three wrongful discharge theories. *Id.* at 1317. The court held that the absence of employer policy or procedure regarding discharge precluded a cause of action under *Cleary* regardless of preemption concerns. The court rejected the plaintiff's claim under *Pugh* because of the existence of an employment agreement signed by the plaintiff upon his most recent promotion. The agreement stated that employment would continue for the "length of time as shall be mutually agreeable." The district court treated this document as evidence of an express employment at will arrangement. *Id.* at 1320-21.

117. 29 U.S.C. § 1140 (1986).

employee "for the purpose of interfering with the attainment of any right to which such participant may become entitled" under a pension plan.[118] Thus, a wrongfully discharged employee who seeks recovery related to her ERISA-regulated benefits may not pursue such claims under California's common law exceptions to the at will rule.

b. Public Policy (*Tameny*) Claims

Courts have also rejected some *Tameny* claims as conflicting with federal law.[119] If federal legislation provides the exclusive means of furthering a specific public policy, state courts may not authorize additional relief.[120]

Plaintiffs most likely to encounter preemption defenses are those covered by a collective bargaining agreement, since collective bargaining is heavily regulated by federal law. In *Olguin v. Inspiration Consolidated Copper Co.*,[121] plaintiff allegedly was discharged for complaining about unsafe mining conditions and for engaging in concerted labor activity. The district court held that the NLRA and the Federal Mine Safety and Health Act[122] preempted plaintiff's claims. Although the plaintiff had filed prior grievances, he did not submit a claim for arbitration as required under the collective bargaining agreement. The Ninth Circuit held that Olguin could not seek protection under state law because he had not acted on behalf of any state law or policy.[123] *Tameny* relief thus appears to be unavailable to plaintiffs from a unionized workforce when the alleged reasons for their discharge fall within the grievance and arbitration provisions of their collective bargaining agreements.

c. Implied-in-Fact Covenant Claims

As with a public policy claim, plaintiffs covered by a collective bargaining agreement are apt to run afoul of the preemption doctrine in trying to assert a state law claim under the implied-in-fact covenant. The courts have held consistently that the existence of a collective bargaining agreement bars suits based on common law claims of an implied-in-fact

118. 607 F. Supp. at 1318.

119. *See, e.g., supra* note 38.

120. *See supra* notes 104-107 and accompanying text (preemption in the NLRA context); *supra* notes 109-118 and accompanying text (preemption in the ERISA context).

121. 740 F.2d 1468 (9th Cir. 1984).

122. 30 U.S.C. §§ 801-962 (1986).

123. 740 F.2d at 1475. The court distinguished Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985), by explaining that California's interest in enforcing local health regulations justified the availability of a private tort action as a means of enforcement and did not interfere with federal labor policy. 740 F.2d at 1475. *See supra* note 38.

covenant.[124] In *Buscemi v. McDonnell Douglas Corp.*,[125] the court held that the NLRA, as amended by the Labor Management Relations Act (LMRA),[126] preempted plaintiff's wrongful discharge claims under *Tameny* and *Pugh*. The court stated that the NLRA's exclusive protection of an employee's "concerted labor activities"[127] encompassed plaintiff's allegations that he was discharged for passing out petitions and voicing employee complaints. Since plaintiff's claims constituted an alleged breach of his collective bargaining agreement, they fell within the preemptive scope of the LMRA.

Collective bargaining agreements generally contain provisions permitting discharge only for "just cause."[128] As the creation and administration of collective bargaining agreements is extensively regulated by the NLRA, federal law provides the proper tools for interpreting and enforcing the terms of such agreements, and thus preempts any conflicting state law under which a claimant seeks to vary the terms of a collective bargaining agreement. Only if the state confers rights which arise independent of the collective bargaining instrument or other formal contract terms will a common law cause of action withstand a preemption attack at the pleadings stage.[129]

d. Covenant of Good Faith and Fair Dealing

A *Cleary* cause of action is also subject to attack on preemption grounds when a collective bargaining agreement or relevant statute controls. In an effort to avoid the LMRA's preemptive effect, the plaintiff in *Allis-Chalmers Corp. v. Lueck*[130] framed his allegation of bad faith handling of his insurance claims by his employer as a tortious breach of Wisconsin's common law duty of good faith and fair dealing. The Wisconsin Supreme Court ruled that the LMRA's requirement of exhaustion of administrative remedies applied only to violations of labor contracts.[131] The court concluded that Lueck's bad faith tort claim was independent

124. The remedy in such instances lies in a federal court action under section 301 of the Labor Management Relations Act, ch. 120, § 301(a), 61 Stat. 136, 156 (1947) (codified at 29 U.S.C. § 185(a) (1986)), based on the alleged violation of the collective bargaining agreement. *See infra* note 134; *see also* Harper v. San Diego Transit Corp., 764 F.2d 663 (9th Cir. 1985); Buscemi v. McDonnell Douglas Corp., 736 F.2d 1348 (9th Cir. 1984).

125. 736 F.2d 1348 (9th Cir. 1984).

126. 29 U.S.C. §§ 141-197 (1986). The LMRA was enacted in part to empower the federal courts "to fashion a body of federal common law to be used to address disputes arising out of labor contracts." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 221 (1985).

127. *See* 29 U.S.C. § 157 (1986).

128. "[A]pproximately 80 percent of . . . [collective bargaining] agreements specifically require just cause for discharge." Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 320-21 n.5, 171 Cal. Rptr. 917, 921 n.5 (1981).

129. *See Harper*, 764 F.2d 663 (9th Cir. 1985).

130. 471 U.S. 202 (1985).

131. *Id.* at 215.

of the contract (despite its dependence on the contractual relationship) and hence, was not preempted by the LMRA.[132]

The United States Supreme Court reversed. The Court explained that federal law must determine the interpretation of terms in collective bargaining agreements. To hold otherwise, the Court reasoned, would weaken the reliability of these agreements by subjecting them to the possibility of different interpretations by state and federal courts.[133] Moreover:

> questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of Section 301 [of the LMRA] by re-labeling their contract claims as claims for tortious breach of contract.[134]

The Court also observed that although the LMRA does not control private labor contracts negotiated outside the collective bargaining context, neither could state tort law define the meaning of a contractual relationship that fell within the LMRA. Because Wisconsin tort theory was based on a duty of good faith and fair dealing derived "from the rights and obligations established by the contract,"[135] the Court held that the LMRA must preempt state law.[136]

4. The Need For A Different Approach

Although federal or state[137] statutory schemes do not preempt all wrongful discharge claims, the inconsistency of current approaches leaves different groups of employees with markedly dissimilar legal protections. Roughly twenty-eight percent of the workforce[138] is covered by

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132. *Id.* at 216-17.

133. *Id.* at 209-10.

134. *Id.* at 211. Section 301 of the Act provides that suits for violations of contracts between an employer and a labor organization may be brought in federal court. 29 U.S.C. § 185(a) (1986). This statute does not simply vest jurisdiction in the general sense; it authorizes the judicial development of federal labor law concepts for the resolution of such disputes. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

135. 471 U.S. at 217.

136. The Court stated as an additional basis for its holding the need to ensure that grievance and arbitration procedures would not be circumvented by a plaintiff's headlong rush to state court. *Id.* at 219 ("[O]nly that result [preemption] preserves the central role of arbitration in our 'system of industrial self-government.' ").

137. The California Fair Employment and Housing Act, CAL. GOV'T CODE §§ 12900-12926 (West 1980 & Supp. 1988), may also preempt certain wrongful discharge claims. *See* Strauss v. A.L. Randall Co., 144 Cal. App. 3d 514, 194 Cal. Rptr. 520 (1983); *see also infra* notes 156-157 and accompanying text.

138. Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8 (1979).

collective bargaining agreements that offer the employees grievance and arbitration procedures. Arguably, these procedures compensate for the loss of state tort remedies, including punitive damages.[139] Public sector employees may also enjoy the benefits of union representation.[140] Even if they do not, civil service provisions premised on the notion that employees may be discharged only for cause provide for notice and hearing and various appeal procedures.[141]

Non-unionized employees in the private sector have the most to lose under current California law. As discussed earlier, ERISA may protect some claims based on interference with pension and related benefits.[142] Most of the wrongful discharge claims for this group of workers, however, turn on the "California Trilogy"[143] of exceptions to the employment at will rule for protection from arbitrary action by employers.

By considering bills which attempt to provide remedies for wrongful discharge, the California Legislature has already indicated its interest in closing the gap for unprotected workers. But the preemption doctrine makes clear that this may not be enough. If Congress decides to legislate further in this area, unprotected California workers may rely only on such remedies as are provided by federal largesse. *Foley* presents an important opportunity to invoke state constitutional principles to anchor more securely California's interests in protecting employees from wrongful discharge.

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139. Breach of the covenant of good faith and fair dealing subjects private employers to both compensatory and punitive damages. McAllister v. South Coast Air Quality Mgmt. Dist., 183 Cal. App. 3d 653, 657, 228 Cal. Rptr. 351, 353 (1986). Tameny, Cleary, and Pugh all sought punitive damages from their employers. Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 169, 610 P.2d 721, 721, 164 Cal. Rptr. 839, 839 (1980); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 448, 168 Cal. Rptr. 722, 725 (1980); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 315, 171 Cal. Rptr. 917, 918 (1981).

140. *See, e.g.*, State Employer-Employee Relations Act, CAL. GOV'T CODE §§ 3512-3524 (West 1980 & Supp. 1988); SAN FRANCISCO ADMIN. CODE ch. 16, art. XI.A (Employee Relations Ordinance) and accompanying SAN FRANCISCO CIVIL SERVICE COMM'N RULES (1984).

141. *See, e.g.*, California Public Safety Officers Procedural Bill of Rights Act, CAL. GOV'T CODE §§ 3300-3311 (West 1980 & Supp. 1988). The Procedural Bill of Rights Act affords certain due process protections to all peace officers, such as the right to an administrative appeal when any disciplinary action is taken. The Act has been described as "a catalogue of the minimum rights the Legislature deems necessary to secure stable employer-employee relations." Baggett v. Gates, 32 Cal. 3d 128, 135, 185 Cal. Rptr. 232, 235 (1982) (citations omitted).

142. *See supra* notes 109-118 and accompanying text.

143. Miller & Estes, *supra* note 34, at 104.

III. Changing the Perspective: Constitutional Solutions to the Wrongful Discharge Dilemma

A. Federal Equal Protection Requirements

At the turn of the century, legislative and judicial lawmaking made clear that the public interest in stable employment relations was subservient to the policy supporting absolute freedom of contract.[144] Since the New Deal, an explosion of employment legislation supportive of employees' rights to be free of unfair termination practices indicates that both federal and state governments consider the employment relationship[145] deserving of sustained intervention.

Numerous federal and state statutes have been enacted since the 1920s to regulate employment matters. The first major statutory scheme, enacted in 1935, was the National Labor Relations Act.[146] Both the NLRA and the Railway Labor Act of 1926[147] imposed limited restrictions on the freedom to terminate unionized employees in various industries affecting national commerce.[148] On a smaller scale, the Selective Service Act of 1940[149] anticipated the postwar influx of returning workers in providing a one year term of reemployment for all returning veterans, making it unlawful to discharge them without cause from the civilian jobs they had held prior to their World War II service.[150] Similarly, the Consumer Credit Protection Act of 1968[151] prohibited dis-

144. Adair v. United States, 208 U.S. 161 (1907); Coppage v. Kansas, 236 U.S. 1 (1915); Blades, *supra* note 5, at 1416-19.

145. As expressed by one commentator:

> The employment relationship is subject to intensive regulation by both the federal and state governments. Of particular significance is the fact that governmental regulation has become focused on what constitutes justification for termination of employment, with the consequence that employers may no longer discharge employees for reasons that were legally unquestionable a few years ago. As the list of forbidden causes lengthens, the implication is strengthened that there is governmental approval of the remaining causes.

Peck, *supra* note 138, at 21.

146. 29 U.S.C. §§ 151-168 (1986).

147. 45 U.S.C. §§ 151-163 (1986).

148. For example, § 8(a)(4) of the NLRA makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." 29 U.S.C. § 158(a)(4) (1986). The basic prohibition of § 8(a)(3) states that it is an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or [in] any term or condition of employment, to encourage or discourage membership in any labor organization." *Id.* § 158(a)(3). The Railway Labor Act's purposes include "to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization." 45 U.S.C. § 152 (1986).

149. Ch. 720, § 8(c), 54 Stat. 885. This statute has been reenacted as the Veterans Reemployment Rights Act, 38 U.S.C. §§ 2021-2026 (1986).

150. 38 U.S.C. § 2021 (1986).

151. 15 U.S.C. §§ 1601-1693 (1986).

charge of an employee after a single instance of garnishment for indebtedness.[152]

More broadly, the "Equal Employment Opportunities" provisions of Title VII of the Civil Rights Act of 1964[153] protect all public and private employees from discrimination in the terms and conditions of employment[154] on the basis of race, religion, color, creed, or sex. The Age Discrimination in Employment Act of 1975[155] similarly protects workers between forty and seventy years of age. California's Fair Employment and Housing Act (FEHA)[156] parallels Title VII in many respects, but enlarges the range of prohibited conduct.[157]

Insofar as this plethora of legislative restrictions significantly limits an employer's freedom to terminate at will, at least one commentator has argued that these laws constitute a pattern of intensive state "regulation" of the factors that may justify an employee's discharge.[158] When there is a sufficient nexus[159] between the state regulation and the challenged conduct, there is sufficient "state action" to trigger a traditional equal protection analysis.[160]

Developments in California since 1980 strongly support this hypothesis. The creation of three judicially-devised exceptions to the employment at will rule[161] and recent legislative efforts to modify that rule[162] indicate this state's continuing efforts to regulate the balance of power in the employment relationship. The nexus between state regulation and employment termination practices is very close. California employers must conform to the federal and state statutes discussed above in addition to the three judicial modifications to the employment at will rule. The resulting intrusion into employer termination decisions by state and federal regulatory schemes makes termination decisions a product of state action. This nexus, in turn, leads to the question of whether the regulatory scheme is even-handed in its treatment of all employees—that

152. 15 U.S.C. § 1674 (1986).

153. 42 U.S.C. § 2000(e) (1986).

154. This protection extends to discrimination in hiring, promotions, salary setting, and discharge. Hishon v. King & Spaulding, 467 U.S. 69 (1984).

155. 42 U.S.C. §§ 6101-6107 (1986).

156. CAL. GOV'T CODE §§ 12900-12996 (West 1980 & Supp. 1988).

157. In addition to the five categories in Title VII, the FEHA forbids discrimination on the basis of ancestry, physical handicap, medical condition, or marital status. CAL. GOV'T CODE § 12940 (West 1980 & Supp. 1988).

158. Peck, *supra* note 138, at 21.

159. "Nexus" has been defined as the legal interrelation between two events; a link which is "direct and substantial in nature" and "clearly and logically" ties the two together. 181 Inc. v. Salem County Planning Bd., 133 N.J. Super. 350, 357, 336 A.2d 501, 505 (1975). For a classic exposition of the nexus requirement in the state action context for federal equal protection purposes, see Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

160. Peck, *supra* note 138, at 21-23.

161. *See supra* note 85 and accompanying text.

162. *See supra* notes 91-101 and accompanying text.

is, whether it satisfies the Equal Protection Clause of the United States Constitution.[163]

Once the state action requirement is satisfied, courts must determine the appropriate standard of review. Prior to the New Deal, courts viewed restrictions on employment as simple matters of economic regulation, and thus utilized the rational basis test.[164] It has been argued cogently that even under such a deferential standard "there is no rational basis for denying job protection to some employees while granting it to others."[165] However, this Note next explains why California should employ the more rigorous strict scrutiny test for review of wrongful discharge claims, regardless of whether the employer is a public or private entity or whether the employee is a union member.[166]

B. California's Equal Protection Clause: A Significant Difference

The Equal Protection Clause of the California Constitution[167] furnishes a more compelling argument for constitutional protection of an employee's interest in continued employment than does its federal counterpart. Unlike the federal provision, the California Constitution does not expressly impose a state action requirement. The California Supreme Court has explained the importance of this distinction as follows:

> [The] state equal protection provisions, while "substantially the equivalent of" the guarantees contained in the Fourteenth Amendment to the United States Constitution, are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable. . . . "[I]n the area of fundamental civil liberties . . . our first referen[ce] is [to] California law. . . . Accord-

163. U.S. CONST. amend. XIV, § 1 provides, in part, that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

164. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (invalidating as an abridgment of freedom of contract a New York statute setting a ceiling of sixty hours per workweek for bakers).

165. Peck, *supra* note 138, at 42.

166. If nonunionized private sector employees constitute a "suspect classification", then use of the strict scrutiny test is clearly appropriate. While these employees have not as yet been regarded as "suspect", a court could find that a pattern of state action which has consistently excluded this group from the protections afforded other employees constitutes purposeful discrimination. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613 (1982) (at large voting system as evidence of purposeful exclusion of blacks from county government offices). Strict scrutiny may be triggered even though this distinction was not the primary motive for extending job protections to unionized and/or government employees. *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (zoning classification as pretext to exclude low income, integrated housing).

Alternatively, the strict scrutiny standard may be invoked by identifying continued employment as a fundamental right under an equal protection analysis. *See infra* notes 176-183 and accompanying text.

167. CAL. CONST. art I, § 7. *See supra* note 2.

> ingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide *no less* individual protection than is guaranteed by California law."[168]

The California Supreme Court has held that "state action" is not necessary to trigger the safeguards of California's Equal Protection Clause in the employment context. In *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*,[169] plaintiffs proved an equal protection violation by showing that a public utility had excluded homosexuals from any positions of employment. The California Supreme Court noted that although the federal due process and equal protection clauses curtail only "state" activities, section 7(a) of article I of the California Constitution contains no such express restriction.[170] The court first opined that a public utility had "special obligations . . . to refrain from all forms of arbitrary employment discrimination."[171] These obligations, the court reasoned, were significant despite the fact that sexual preference is not a statutorily enumerated category of discrimination under the FEHA.[172] Going beyond the context of public utilities, the court stated:

> Protection against the arbitrary foreclosing of employment opportunities lies close to the heart of the protection against "second-class citizenship" which the equal protection clause was intended to guarantee. . . . "[D]iscrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not just with an individual's sharing in the 'outer benefits' of being an American citizen, but rather the ability to provide decently for oneself and one's family in a job or profession for which he qualifies and chooses."[173]

The Supreme Court in *Foley* should take the equal protection rationale created by *Gay Law Students* to its logical conclusion. While the "special obligation" language of *Gay Law Students* may appear to limit the scope of that decision, the language of section 7(a) does not limit equal protection to persons employed by, or seeking employment with,

168. Serrano v. Priest, 18 Cal. 3d 728, 764, 557 P.2d. 929, 950,135 Cal. Rptr. 345, 366 (1976) (quoting in part People v. Longwill, 14 Cal. 3d. 943, 951 n.4, 538 P.2d. 753, 758 n.4, 123 Cal. Rptr. 297, 302 n.4 (1975)) (emphasis added). *Accord* Pines v. Tomson, 160 Cal. App. 3d 370, 206 Cal. Rptr. 866 (1984) (construing federal and state free speech clauses); *see also* Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 156 Cal. Rptr. 14 (1979); Peck, *supra* note 138, at 23 ("[S]tate supreme courts are under no compulsion to adopt the U.S. Supreme Court standards . . . for the purpose of determining what constitutes state action within the meaning of the due process clauses of state constitutions.").

169. 24 Cal. 3d 458, 156 Cal. Rptr. 14 (1979).

170. *Id.* at 466-68, 156 Cal. Rptr. at 19-20.

171. *Id.* at 466, 156 Cal. Rptr. at 19.

172. *See supra* note 156.

173. 24 Cal. 3d at 470, 156 Cal. Rptr. at 21 (quoting in part Culpepper v. Reynolds Metal Co., 421 F.2d. 888, 898 (5th Cir. 1970)).

employers with special obligations. The basic policy enunciated in *Gay Law Students* was the denunciation of employment discrimination as a particularly "deplorable" form of arbitrary conduct. As long as the law leaves one class of employees vulnerable to termination without just cause while others are protected by just cause standards, California, in effect, continues to endorse arbitrary treatment of some persons while condemning it as to others, even though both classes of employees are similarly situated.

The California Supreme Court thus should utilize section 7(a) to end the continued exclusion of non-unionized, private sector employees from the protections against the employment at will rule which are presently afforded to other groups of employees. There is no greater need for protection from wrongful discharge decisions in government employment than there is in private employment. Nor does this exclusion serve any legitimate state purpose; it certainly serves no compelling state interest.[174] The court's application of the California Equal Protection Clause in *Gay Law Students* makes clear that the more restrictive federal standard, with its "state action" requirement, need not control when vulnerable individuals' rights to equal protection are implicated.[175]

A fundamental rights analysis also supports this conclusion.[176] Cal-

174. The California Supreme Court has recently voiced its disapproval of dissimilar treatment of public and private sector employees in other employment matters. In County Sanitation Dist. No. 2 v. Los Angeles County Employees' Ass'n, 38 Cal. 3d 564, 214 Cal. Rptr. 24 (1985), the court concluded that a blanket prohibition against strikes by public employees was no longer appropriate. The court traced the development of the right to strike from the era when it was punishable as a conspiracy to its present status as a protected activity under the Norris-La Guardia Act, 29 U.S.C. §§ 101-115 (1982). 38 Cal. 3d at 569, 214 Cal. Rptr. at 426-27. Although the California legislature had enacted statutes based on the NLRA model to permit state and local employees to engage in collective bargaining, it had remained silent on the question of strikes. The court held that absent valid statutory prohibitions, public employee strikes would not be unlawful unless it was clearly demonstrated that a strike created "a substantial and imminent threat to the health or safety of the public." *Id.* at 586, 214 Cal. Rptr. at 439.

Similarly, the court held one year later that statutory classifications which forbade the involuntary administration of polygraphs to any private employee and to state "public safety officers" constituted a denial of equal protection to public employees not exempted by the statute. Long Beach City Employees Ass'n v. City of Long Beach, 41 Cal. 3d 937, 227 Cal. Rptr. 90 (1986). Noting the existance of California's constitutionally based right of privacy, the court explained: "legal distinctions between public and private sector employees that operate to abridge basic rights cannot withstand judicial scrutiny unless justified by a compelling governmental interest." *Id.* at 951, 227 Cal. Rptr. at 99. The same result should follow in the arena of employment termination decisions.

175. *See* Steffes v. California Interscholastic Fed'n, 176 Cal. App. 3d 739, 222 Cal. Rptr. 355 (1986) (education); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 95 Cal. Rptr. 329 (1971) (right to engage in common occupations of the community).

176. Federal fundamental rights are those "personal rights that can be deemed . . . 'implicit in the concept of ordered liberty.' " Roe v. Wade, 410 U.S. 113, 152 (1973) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

ifornia courts may determine that a given right is fundamental and protected under the California Constitution despite determinations by the United States Supreme Court that the same right is not "fundamental" under the United States Constitution.[177] For example, in *Serrano v. Priest*,[178] the California Supreme Court declared education a fundamental right. Using the strict scrutiny test, the court held that the state had not met its burden of demonstrating a compelling state interest that would justify discrimination in public educational opportunities on the basis of school district wealth.[179] The California Supreme Court respectfully but emphatically distinguished *San Antonio School District v. Rodriguez*,[180] in which the United States Supreme Court held that a similar school financing system in Texas did not violate the federal Equal Protection Clause.[181]

The United States Supreme Court's refusal to designate rights to continued employment as "fundamental"[182] does not prevent the California Supreme Court from deciding otherwise under the more generous provisions of the California Constitution. In addition, another section of the California Constitution suggests that the right to employment is an "explicitly or implicitly guaranteed,"[183] and therefore fundamental, right.

C. Employment Protections in the California Constitution

Article I, section 8 of the California Constitution provides: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."[184] Article I, section 8 originally prohibited only discrimination based on sex. It was amended in the November 5, 1974 General Election to prohibit the other enumerated forms of dis-

177. CAL. CONST. art. I, § 24 expressly provides for this independent state authority: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."

178. 18 Cal. 3d 728, 135 Cal. Rptr. 345 (1976).

179. *Id.* at 776, 135 Cal. Rptr. at 374.

180. 411 U.S. 1 (1973).

181. In *Rodriguez*, the United States Supreme Court explained that the right to education was not explicitly or implicitly guaranteed by the terms of the United States Constitution. *Id.* at 33-34. The Court determined that education was not a fundamental interest entitled to strict scrutiny, and that the Texas system rationally advanced that state's legitimate objective of furthering local control of education. *Id.* at 36-39.

182. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972). These cases focused on the procedural due process requirements for divesting civil service or tenured employees of whatever rights to employment had arisen under the relevant substantive laws of the jurisdiction. This is a far cry from designating the right to continued employment per se as fundamental.

183. Constitutional rights need not be literally enumerated to be deserving of protection. *See Rodriguez*, 411 U.S. at 33.

184. CAL. CONST. art. I, § 8.

crimination.[185] In the same election, voters first added the provisions of article I, section 7 to the California Constitution.[186] The ballot arguments for these two amendments reveal that they were proposed to strengthen California's "Declaration of Rights" in article I.[187] The amendment to section 8 appears to have been in part inspired by the fate of former article I, section 26.[188] The United States Supreme Court held the latter provision unconstitutional as an attempt to indulge private property owners who wished to restrict property transfers on the basis of racial or other prejudices.[189]

The language of sections 7(a) and 8 of article I clearly goes beyond the federal constitutional language. Indeed, section 8 explicitly identifies employment discrimination as a prohibited practice. The California Supreme Court should make use of these constitutional provisions in deciding *Foley*, and hold that freedom from employment discrimination is explicitly guaranteed by the California Constitution. The importance of this freedom to society as a whole has been demonstrated in cases holding that section 8 confers standing to sue even on plaintiffs not directly discriminated against.[190] The court should read section 8 with section 7(a) to mandate an end to arbitrariness of any kind in employment termination decisions. The fact that use of the federal Constitution would bring a different result need not prevent California from fashioning its own constitutional standard for ensuring fair employment termination procedures for its residents.

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185. *See* California Voters' Pamphlet for the November 5, 1974 General Election 72 [hereinafter Voters Pamphlet] (copy on file at the offices of the *Hastings Constitutional Law Quarterly*). The use of election ballot arguments as an aid in construing state constitutional amendments was noted with approval in Long Beach City Employees Ass'n v. City of Long Beach, 41 Cal. 3d 937, 943 n.5, 227 Cal. Rptr. 90, 93 n.5 (1986) (initiative amendments).

186. Voters' Pamphlet, *supra* note 185, at 27. CAL. CONST. art I, § 7 provides:

> (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.
>
> (b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.

Sections 7 and 8 were contained collectively in Proposition 7.

187. Voters' Pamphlet, *supra* note 185, at 28. California's "Declaration of Rights" includes free speech, petition, and assembly clauses similar to the federal model. CAL. CONST. art. I, §§ 2-3. It also contains provisions not found in the federal Bill of Rights, most notably the right to privacy. *Id.* art I, § 1.

188. Voters' Pamphlet, *supra* note 185, at 72. CAL. CONST. art. I, § 26, enacted through initiative petition, provided:

> Neither the state nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to declare to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses . . . .

189. Reitman v. Mulkey, 387 U.S. 369 (1967) (invalidating CAL. CONST. art. I, § 26); *see also* Voters' Pamphlet, *supra* note 185, at 28-29.

190. Smithberg v. Merico, Inc., 575 F. Supp. 80, 83 (C.D. Cal. 1983).

D. The *Foley* Solution

Foley presents the California Supreme Court with the opportunity to bring consistency to the hodgepodge of wrongful discharge analyses which have developed in response to the inherent unfairness of the employment at will rule. The court in *Gay Law Students* took an important first step in construing article I, section 7(a) to prohibit arbitrary decisionmaking by certain employers.[191] In *Serrano*, the court pointed out that California may define a fundamental interest even where the United States Supreme Court would find none.[192] By additionally relying on article I, section 8 to demonstrate the "fundamental" importance of employment rights, the court in *Foley* justifiably can utilize a strict scrutiny test to determine whether *any* employee's discharge violates equal protection.[193]

Although *Tameny*, *Pugh*, and *Cleary* have been useful in limiting the employment at will rule, they have inherent limitations. The court in *Pugh* has already pointed out the propriety of judicial modification and reinterpretation of Labor Code section 2922, which is merely the codification of a historically inaccurate common law rule.[194] Moreover, continuation of this series of judicial modifications risks the danger of increasing conflicts with existing federal labor legislation. Only by basing its analysis on state constitutional grounds can the court safely fashion a workable, evenhanded standard that avoids the perils of preemption on the one hand and incipient equal protection problems on the other. The court can readily adapt standards to be applied under such a constitutionally-based approach from the existing body of decisions in, for example, the grievance and arbitration setting of collective bargaining.[195]

Further, the creation of a constitutionally-based standard will better serve the interests of the employer, the employee, and the public. Employer interests in directing and controlling the workforce need not be sacrificed under this standard. Employers would retain the right to discharge employees where sound, nondiscriminatory business reasons exist. Employees could expect uniform treatment without regard, for

191. *See supra* notes 169-173 and accompanying text.

192. *See supra* notes 178-181 and accompanying text.

193. The rational basis test does not afford the desired level of protection. The California Legislature, under pressure from employers, conceivably could enact laws to satisfy the minimal requirement of showing some "reasonable" governmental objective in granting inadequate, piecemeal job protections. Since the California Supreme Court has already defined certain employment opportunities as a fundamental right, *see supra* note 175 and accompanying text, use of the strict scrutiny test is appropriate.

194. *See* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 319-20, 171 Cal. Rptr. 917, 920-21 (1981), *see also supra* note 46 and accompanying text.

195. This was the approach envisioned under S.B. 1348 and A.B. 2800. *See supra* notes 93-101 and accompanying text.

example, to union affiliation.[196] Employer and employee interests would be served by use of predictable and reliable codes of disciplinary conduct; more harmonious and even more productive working conditions would likely follow.[197] The public's interest in encouraging more peaceful industrial relations has been cited as a factor in the enactment of such varied legislative packages as the NLRA[198] and the California Public Safety Officers' Procedural Bill of Rights.[199] A uniform, constitutionally-premised standard of equal treatment in all employment termination decisions would represent a responsible, innovative, and timely institutional commitment to fairness in an area of fundamental human concern.

Conclusion

The California judiciary has made real progress towards limiting the employment at will doctrine, an outmoded rule developed in an era when workers' skills were less specialized and more easily transferable, and when the loss of a job did not necessarily portend the economic and psychological disaster that it often does today.[200] The *Tameny*, *Pugh*, and *Cleary* "trilogy" of exceptions to this rule, based on public policy, the implied-in-fact covenant, and the implied covenant of good faith and fair dealing, are significant restraints on the bad faith or arbitrary exercise of an employer's powers. These exceptions, however, do not go far enough.

The California Legislature has also begun to fashion stronger limits on abusive discharge practices.[201] But a plethora of federal labor statutes raises the continuing threat of federal preemption of the state's complete freedom to legislate in this area.[202]

The optimal solution is for California to rely upon the distinctive and precisely pertinent provisions of its own Constitution. Under those provisions, the right to continue in one's employment is properly characterized as a fundamental right. In deciding *Foley v. Interactive Data Corp.*, the California Supreme Court should rely on sections 7(a) and 8 of the California Constitution. These provisions should be utilized to trigger strict scrutiny of employment terminations when good cause for dis-

196. *See* Peck, *supra* note 138, at 14-15 ("[S]tatutes protecting employees from discharge for union activities obviously require review of an employer's decision to discharge . . . for the purpose of determining whether that decision was motivated by consideration of the employee's union activities . . . .").

197. Summers, *supra* note 16, at 507-08. Professor Summers observes that in western Europe similar job protections serve this goal of improving the work environment.

198. *See supra* note 103 and accompanying text.

199. CAL. GOV'T CODE §§ 3300-3311 (West 1980 & Supp. 1988). *See supra* note 141 and accompanying text.

200. Blades, *supra* note 5, at 1404. *See also supra* note 22 and accompanying text.

201. *See supra* notes 91-101 and accompanying text.

202. *See supra* notes 102-136 and accompanying text.

charge is not present. Good cause standards are readily available.[203] Uniform application of these standards would promote the interests of employers and the public, and would provide important protections to employees threatened by bad faith or arbitrary discharge. *Foley* provides the opportunity to further these fundamental constitutional values.

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203. Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 330 n.26, 171 Cal. Rptr. 917, 928 n.26 (1981) ("labor arbitrators have generated a large body of decisions interpreting and applying such terms as 'just cause.' "). *See also* Summers, *supra* note 16, at 500-01 ("arbitrators have achieved substantial consensus about underlying [just cause] principles and many detailed rules").

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