Economic Retaliation: A New Point of View

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Tort law has never viewed as wrong in itself the exercise of economic power for retaliatory purposes.[1] Nevertheless, courts have begun to protect plaintiffs against economic retaliation in various settings, including retaliatory firings of employees,[2] retaliatory evictions of tenants,[3] retaliatory cancellations of insurance policies,[4] and retaliatory expulsions from associations.[5] Even within each of these contexts, the cases approach the problem from different viewpoints, apply different tests, and contemplate different remedies. For example, retaliatory discharge has been analyzed in both tort and contract terms;[6] retaliatory eviction has been redressed by the creation of a defense to the landlord's statutory eviction action[7] and with an affirmative cause of action in tort for the tenant.[8] It is apparent from the cases that judges and lawyers are groping, within each context, for the principles that should govern their decisions. These principles can be discovered after recognizing the unifying principle underlying them all: that the economi-

1. Tort law traditionally has sought to accomplish two goals: the compensation of victims for their injuries and the discouragement of antisocial behavior. *See* W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 1, at 6 (4th ed. 1971). Not all wrongs rise to the status of "tort," however. It is only when a moral wrong becomes sufficiently obnoxious to society that courts will label the behavior "tortious" and apply to the actor the sanctions of tort law. *See* Nees v. Hocks, 272 Or. 210, 218, 219, 536 P.2d 512, 515, 516 (1975); W. PROSSER, *supra*, § 1, at 6, § 4, at 16-18; Sax & Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869, 877, 881 (1967).

2. *E.g.*, Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

3. *E.g.*, Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); Aweeka v. Bonds, 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1971); Fair v. Negley, 257 Pa. Super. Ct. 50, 390 A.2d 240 (1978).

4. *See* L'Orange v. Medical Protective Co., 394 F.2d 57 (6th Cir. 1968); Spindle v. Travelers Ins. Co., 66 Cal. App. 3d 951, 136 Cal. Rptr. 404 (1977).

5. *E.g.*, Bernstein v. Alameda-Contra Costa Med. Ass'n, 139 Cal. App. 2d 241, 293 P.2d 862 (1956); Van Daele v. Vinci, 51 Ill. 2d 389, 282 N.E.2d 728, *cert. denied*, 409 U.S. 1007 (1972); Zelenka v. Benevolent & Protective Order of Elks, 129 N.J. Super. 379, 324 A.2d 35 (1974).

6. *Compare* Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (contract) *with* Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (tort).

7. Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

8. Aweeka v. Bonds, 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1971).

cally dependent plaintiff has a right to be free from economic retaliation.

This Note describes the various ways that courts have dealt with cases of economic retaliation, including the contract and tort theories of recovery for retaliatory discharges, evictions, insurance cancellations, and explusions from associations. It proposes that judges and lawyers see these acts as invasions of the plaintiff's right to be free from certain economic retaliations when the economic imbalance in the relationship between the plaintiff and defendant leaves the plaintiff peculiarly vulnerable. This point of view should replace the present one in which the defendant's act is analyzed only with reference to the context in which it occurs—the landlord-tenant context, the employment context, etc. The Note then cautions, however, that to find the proper limits to the plaintiff's right, the activity must be put back into context to identify the competing interests of the defendant and of society. Finally, it is argued that this cause of action covering economic retaliations of all sorts would not create unlimited liability for economic retaliation but that courts would find a greater potential for consistency in their decisionmaking.

I. THE PRESENT APPROACH TO THE ECONOMIC RETALIATION TORT

Although the tort cases show no uniform approach to acts of economic retaliation, many of them are concerned with deterring the defendant's act because it is in violation of public policy.[9] "Public policy" is difficult to define,[10] and courts do not seem to apply this test with much consistency.[11] Some look for a fairly specific statute to de-

9. *See* Daniel v. Magma Copper Co., 127 Ariz. 320, 322-23, 620 P.2d 699, 701-02 (Ct. App. 1980); Pierce v. Ortho Pharmaceutical Corp., 85 N.J. 58, —, 417 A.2d 505, 512 (1980); Nees v. Hocks, 272 Or. 210, 219, 536 P.2d 512, 516 (1975).

10. In Palmeteer v. International Harvester Co., 85 Ill. App. 3d 50, 406 N.E.2d 595 (1980) (Barry, J., dissenting) public policy was discussed;

> It concerns what is right and just, good morals, natural justice, and generally any matter which would affect the citizens of the state collectively. The laws by which the people govern themselves reflect this collective belief of what is right, just and morally correct. 'The public policy of the state is to be found embodied in its constitution and its statutes. When these are silent upon the subject, then in the decisions of its courts.'

Id. at 54, 406 N.E.2d at 599. *See* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959) ("It has never been defined by the courts, but has been left loose and free of definition in the same manner as fraud," (quoting W. STORY, CONTRACTS § 546 (1844)); Safeway Stores v. Retail Clerks Int'l Ass'n, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953), *quoted in Petermann*, 174 Cal. App. 2d at 188, 344 P.2d at 27 ("By 'public policy' *is intended 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*." (emphasis in original).

11. *Compare* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 188-89, 344 P.2d 25, 27 (1959) (employer liable for firing plaintiff because of public policy against perjury) *with* Palmeteer v. International Harvester Co., 85 Ill. App. 3d 50, 52, 406 N.E.2d 595, 597-98 (1980) (employer not liable because there is no precedent in case law for a public policy exception where the plaintiff aided a police investigation).

fine the public policy;[12] others feel freer to articulate the policy even where an explicit statute cannot be (or is not) pointed to.[13]

A court is likely to find liability in tort for economic retaliation when the defendant's act flaunts a competing public interest precisely defined in a statute and when allowing the defendant to go unpunished would frustrate the purposes of the statute.[14] For example, in *Petermann v. International Brotherhood of Teamsters*,[15] a California court of appeal found a violation of "public policy and sound morality"[16] when the defendant employer instructed the plaintiff, a business agent for a union local, to lie at a hearing conducted by a state legislative committee.[17] Instead, he testified truthfully.[18] He was fired the next day.[19] The court, in recognizing a cause of action for wrongful discharge,[20] based its decision on public policy as reflected in the penal code sections that prohibit the commission[21] and solicitation[22] of perjury. The court reasoned that a civil penalty, in addition to the possible criminal sanctions, would "more fully effectuate the state's declared policy against perjury."[23]

If the plaintiff has taken advantage of a right provided by statute and has been fired in retaliation for this, usually courts are willing also to give a remedy in tort.[24] An example is when the employee is discharged for filing a workers' compensation claim. In *Frampton v. Central Indiana Gas Co.*,[25] the court pointed out that workers' compensation statutes create a duty in the employer to compensate the injured worker. If the courts do not protect against a retaliatory dis-

12. *See* Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363, 1366 (3d Cir. 1979); text & note 15 *infra*.

13. *See* Pierce v. Ortho Pharmaceutical Corp., 85 N.J. 58, —, 417 A.2d 505, 512 (1980).

14. *See* Reuther v. Fowler & Williams, Inc., 255 Pa. Super. Ct. 28, 32-33, 386 A.2d 119, 120-21 (1978), which held than an employer could be held liable for firing an employee for refusal to excuse himself from jury duty. It based this holding on the employer's subversion of the community's interest as manifested in statutes covering jury duty, as well as constitutional provisions and case law. *Id.*

15. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

16. *Id.* at 188, 344 P.2d at 27.

17. *Id.* at 187, 344 P.2d at 26.

18. *Id.*

19. *Id.*

20. *Id.* at 189-90, 344 P.2d at 28.

21. *Id.* at 188, 344 P.2d at 27 (citing CAL. PENAL CODE § 118 (West 1970)).

22. 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959), (citing CAL. PENAL CODE § 653f (West 1970)).

23. 174 Cal. App. 2d 184, 189, 344 P.2d 25, 27 (1959).

24. *See, e.g.*, Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973). In *Perks*, the court allowed an employee, who had been fired within one week of refusing to submit to a polygraph test, to sue his employer. 611 F.2d at 1366. He based his claim on a state statute that prohibits employers from forcing their employees to take "lie detector" tests. *Id.* at 1365–66. *Frampton* and *Kelsay* imposed liability on employers who dismissed employees in retaliation for their pursuit of workers' compensation benefits. 74 Ill. 2d at 181, 384 N.E.2d at 357; 260 Ind. at 252, 297 N.E.2d at 428.

25. 260 Ind. 249, 297 N.E.2d 425 (1973).

charge in this situation, the "end result, of course, is that the employer is effectively relieved of his obligation."[26] The court in *Frampton* called the discharge an "unconscionable act"[27] and permitted the plaintiff's claim for damages.[28]

Similarly, there is comprehensive legislation affecting the rights and duties of landlords and tenants in many states.[29] Some courts have focused on these statutes to justify a creative approach to litigation arising from retaliatory actions of landlords. In the landmark case of *Edwards v. Habib*,[30] a month-to-month tenant[31] who had reported numerous sanitary code violations to District of Columbia officials was served with a 30-day notice to vacate.[32] The District of Columbia Circuit held that the tenant could assert the landlord's retaliatory motive as a defense to the landlord's suit for eviction.[33] The court noted that enforcement of the housing and sanitary codes depends on reports of violations by private citizens.[34] The statutory purpose would be frustrated, then, by the court's condoning evictions in retaliation for filing such complaints.[35]

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26. *Id.* at 252, 297 N.E.2d at 427.

27. *Id.* at 252, 297 N.E.2d at 428.

28. *Id.* The *Frampton* court found the discharge to be a "device" operating to relieve the employer of his duty to provide compensation to injured workers, which was specifically outlawed by the Indiana workers' compensation statute. *Id.* at 252, 297 N.E.2d at 427-28. In Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978), the court refused to distinguish *Frampton* merely because the Illinois workers' compensation statute did not contain the same languge as did the Indiana statute interpreted in *Frampton*. The import of the *Frampton* decision, according to the *Kelsay* court, was in the recognition of the violation of the public policy behind the statute, not in the interpretation of the statutory language. *Id.* at 183-84, 384 N.E.2d at 358.

But see Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978), a case factually similar to *Kelsay* and *Frampton*, where the court refused to infer a tort cause of action, reasoning that the North Carolina workers' compensation statute is so comprehensive that the absence of provision for a tort remedy in the statute indicates a legislative intent to exclude it. *Id.* at 298–300, 244 S.E.2d at 276–77.

29. *E.g.*, ARIZ. REV. STAT. ANN. §§ 33-1301 to -1381 (1974); CAL. CIV. CODE §§ 1941, 1942 (West 1954); D.C. CODE ANN. § 902 (1968).

30. 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

31. The general rule is that the landlord is free to evict a month-to-month tenant "for any reason or for no reason at all." 397 F.2d at 689. This is similar to the general rule in employment cases where the employer is free to fire an employee for any or no cause when the employment is "at will", *i.e.*, when there is no contract for a specified duration. As with the "at will" rule in employment cases, the month-to-month rule in landlord-tenant cases has been modified by statute and case law so that the landlord's prerogative is no longer unlimited. *E.g.*, ARIZ. REV. STAT. ANN. § 33-1381 (1974); CAL. CIV. CODE § 1942.5 (Supp. 1981); *see* 397 F.2d at 689.

32. 397 F.2d at 688-89.

33. *Id.* at 690.

34. *Id.* at 700.

35. *Id.* at 700-01.

> In light of the appalling condition and shortage of housing in Washington, the expense of moving, the inequality of bargaining power between tenant and landlord, and the social and economic importance of assuring at least minimum standards in housing conditions, we do not hesitate to declare that retaliatory eviction cannot be tolerated. . . . Hence an eviction under the circumstances of this case would not only punish appellant for making a complaint which she had a constitutional right to make, . . . but also would stand as a warning to others that they dare not be so bold. . . .

Id. at 701 (footnotes omitted).

Carrying the principle in *Edwards* a step further, a California appellate court, in *Aweeka v. Bonds*,[36] allowed the plaintiffs, who alleged that they were victims of a retaliatory rent increase, to sue their landlord for damages in tort.[37] The landlord had nearly doubled the rent after the tenant took advantage of a state statute giving him the right to deduct from the rent the cost of repairing his dilapidated apartment.[38] According to the court, "It would be unfair and unreasonable to require a tenant, subjected to a retaliatory rent increase by the landlord, to wait and raise the matter as a defense only, after he is confronted with an unlawful detainer action and a possible lien on his personal property."[39]

To this point, the cases discussed have involved public policy as defined fairly specifically in a statute. Even if a court does not regard the defendant's action as one imperiling a statutory policy, the court may nevertheless perceive a hazard to public policy in the sense that the act may injure the "public good."[40] In *Pierce v. Ortho Pharmaceutical Corp.*,[41] a physician who refused to continue research on a drug she considered controversial was offered alternative assignments on other projects.[42] Because she considered this a demotion, she resigned and filed suit for wrongful discharge.[43] The Supreme Court of New Jersey held that an employee could pursue such an action in tort or contract, or both, but only when a clearly expressed public policy is involved.[44] According to the court, public policy may be expressed in legislation, administrative rules, cases, or even a code of professional ethics.[45] Dr. Pierce had urged her employer to stop research on the drug because it contained saccharin and was thus potentially harmful.[46] She refused to continue on the project, of which she was the director, because of the possibility that the drug would be tested on human beings.[47] She claimed that this would violate her professional ethics as set out in the physicians' Hippocratic Oath.[48] Even though the court indicated that

36. 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1971).
37. *Id.* at 281, 97 Cal. Rptr. at 652.
38. *Id.* at 280, 97 Cal. Rptr. at 651.
39. *Id.* at 281, 97 Cal. Rptr. at 652.
40. *See* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 188-89, 344 P.2d 25, 27 (1959); text & note 11 *supra*.
41. 85 N.J. 58, 417 A.2d 505 (1980).
42. *Id.* at —, 417 A.2d at 507.
43. *Id.* at —, 417 A.2d at 507-08.
44. *Id.* at —, 417 A.2d at 512.
45. *Id.* The court excluded, however, any of these sources that do not clearly express public policy. "For example, a code of ethics designed to serve only the interests of a profession or an administrative regulation concerned with technical matters probably would not be sufficient." *Id.*
46. *Id.* at —, 417 A.2d at 507. "In her opinion, there was no justification for seeking FDA permission to use the drug in light of medical controversy over the safety of saccharin." *Id.*
47. *Id.*
48. *Id.* The portion of the Hippocratic Oath cited by Dr. Pierce as applying to her predica-

public policy could be based on this oath, it found that the oath was not violated because testing on humans could not proceed unless authorized by the Food and Drug Administration.[49] The court interpreted the Hippocratic Oath as "clearly" not prohibiting research that "does not involve tests on humans and that cannot lead to such tests without governmental approval."[50] Dr. Pierce's alleged demotion was the result, therefore, of a mere difference of opinion between Dr. Pierce and her employer.[51] The court drew a distinction between a refusal based on "personal morals," which would not invoke the public policy exception, and a refusal based on what "he or she believes is unethical."[52]

This same, broader public policy inquiry appears when courts are called upon to review the expulsion[53] or exclusion[54] of an individual from a private association. Even though courts do not lightly interfere in the decisionmaking of these private bodies, they will not hesitate to review an action that contravenes public policy.[55] The justification for this judicial intervention is the injury to some public policy,[56] but the impetus seems often to be the injury to the individual[57] magnified by

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ment reads, "I will prescribe regimen for the good of my patients according to my ability and my judgment and never do harm to anyone." *Id.* at —, 417 A.2d at 513.

49. *Id.* at —, 417 A.2d at 513. "The case would be far different if Ortho had filed the IND [investigational new drug application], the FDA had disapproved it, and Ortho insisted on testing the drug on humans. The actual facts are that Dr. Pierce could not have harmed anyone by continuing to work on [the drug]." *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at —, 417 A.2d at 514. "Research on new drugs may involve questions of safety, but courts should not preempt determinations of debatable questions unless the research involves a clear mandate of public policy." *Id.*

53. *See, e.g.*, Bernstein v. Alameda-Contra Costa Med. Ass'n, 139 Cal. App. 2d 241, 293 P.2d 862 (1956); Van Daele v. Vinci, 51 Ill. 2d 389, 282 N.E.2d 728, *cert. denied*, 409 U.S. 1007 (1972); Zelenka v. Benevolent & Protective Order of Elks, 129 N.J. Super. 379, 324 A.2d 35 (1974).

54. *See* Treister v. American Acad. Orthopaedic Surgeons, 78 Ill. App. 3d 746, 396 N.E.2d 1225 (1979). Courts are more ready to review an association's decision to expel a member than they are to review a decision to exclude an individual in the first place. Zelenka v. Benevolent & Protective Order of Elks, 129 N.J. Super. 379, 382-83, 324 A.2d 35, 36-37 (1974). A court will, nevertheless, review an association's decision to refuse membership, especially if membership is an economic necessity. Treister v. American Acad. Orthopaedic Surgeons, 78 Ill. App. 3d at 755, 396 N.E.2d at 1231. In Pinsker v. Pacific Coast Soc'y of Orthodontists, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969), a more liberal test was applied where membership in the defendant organization was "a practical necessity for a dentist who wishes not only to make a good living as an orthodontist but also to realize maximum potential achievement and recognition in such speciality." *Id.* at 166, 460 P.2d at 499, 81 Cal. Rptr. at 627. *But see* Pima County Med. Soc'y v. Felland, 115 Ariz. 311, 565 P.2d 188 (Ct. App. 1977), in which the court stated that the *only* reason justifying judicial review of the private medical association's decisions is if the organization controls the physician's access to hospital facilities or where malpractice insurance was denied a person because of lack of membership in the society. *Id.* at 312, 565 P.2d at 189. In such cases, the court said, the association's quasi-governmental function permits the court's scrutiny of its actions. *Id.*

55. Zelenka v. Benevolent & Protective Order of Elks, 129 N.J. Super. 379, 382-83, 324 A.2d 35, 36-37 (1974).

56. *See id.*

57. *See* Van Daele v. Vinci, 51 Ill. 2d 389, 394, 282 N.E.2d 728, 731, *cert. denied*, 409 U.S. 1007 (1972).

the economic power the association exercises over the individual.[58]

In *Zelenka v. Benevolent & Protective Order of Elks*,[59] a New Jersey court reversed the expulsion of an Elks Club member who had defied an Elks regulation that required prior approval of any published writing.[60] The plaintiff had submitted a letter to a local, daily newspaper calling on fellow Elks to vote to change the Elks rule barring blacks from membership.[61] He was expelled and subsequently sued for reinstatement.[62] The court stated that the subject of black membership was an issue of concern to the general public and that the public policy favoring discussion of important public issues—underlying, yet independent of, the first amendment—outweighed the Elks Club's interest in restricting discussion.[63]

Van Daele v. Vinci[64] involved an economic injury to expelled members but contained no discussion of an independent public policy violation. In *Van Daele*, the court reinstated[65] two members of a grocery cooperative, that bought merchandise for its members at cheaper rates than they could get individually.[66] The plaintiffs in *Van Daele* had originally filed a class action suit against the cooperative.[67] The cooperative's board of directors then expelled the plaintiffs after notice and a hearing.[68] The court, however, agreed that the hearing had not been a "good faith disciplinary" hearing but was, rather, a biased proceeding conducted in retaliation for the class action suit.[69]

In the cases discussed above, the courts started from the premise that the defendant had a right to so act but that an exception was proper because the act injured an important public interest. This approach does not lead to consistency. Although it offers a court some guidance in deciding when to give the plaintiff relief, the guide is subject to diverse applications.[70] It is not possible to predict with much

58. *See* Treister v. American Acad. Orthopaedic Surgeons, 78 Ill. App. 3d 746, 762-63, 396 N.E.2d 1225, 1236-37 (1979) (Simon, J., dissenting). The dissent characterized the defendant association as a "monopoly" that has a "stranglehold" on its members because it controls their profession. *Id.* at 762, 396 N.E.2d at 1236 (quoting Virgin v. American College of Surgeons, 42 Ill. App. 2d 352, 368-69, 192 N.E.2d 414, 422 (1963)).

59. 129 N.J. Super. 379, 324 A.2d 35 (1974).

60. *Id.* at 387, 324 A.2d at 39.

61. *Id.* at 381, 324 A.2d at 36.

62. *Id.* at 380, A.2d at 35–36.

63. *Id.* at 387, 324 A.2d at 39.

64. 51 Ill. 2d 389, 282 N.E.2d 728, *cert. denied*, 409 U.S. 1007 (1972).

65. *Id.* at 396, 282 N.E.2d at 732.

66. *Id.* at 390, 282 N.E.2d at 729.

67. *Id.* at 391, 282 N.E.2d at 730.

68. *Id.* at 390, 392, 282 N.E.2d at 730.

69. *Id.* at 393-94, 282 N.E.2d at 731.

70. *Compare* Raden v. City of Azusa, 97 Cal. App. 3d 336, 158 Cal. Rptr. 689 (1979) (employer liable because of the need to deter retaliatory firings where employees file workers' compensation claims) *with* Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978) (no liability for firing employee for filing a workers' compensation claim because the statute would

confidence how a court, faced with a new set of facts, will decide whether public policy has been violated.

For example, one court held that public policy was implicated when a retaliatory discharge could be characterized as the solicitation of perjury.[71] On the other hand, a different court, while apparently applying the public policy exception,[72] could find no reason to give relief to an employee discharged for refusing to obstruct justice.[73] These unpredictable results indicate that the guidance offered by the public policy exception test is negligible. In the end, it appears that there is a public policy violation when the court says there is. At best, this unpredictability can be imputed to a difference of opinion among judges or courts.[74] At worst, it indicates that courts are confused and use the

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have included such a provision if the legislature had intended one). *Compare also* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (employer liable for discharge where the employee refused the employer's direction to give perjured testimony) *with* Palmeteer v. International Harvester Co., 85 Ill. App. 3d 50, 406 N.E.2d 595 (1980) (employer not liable for firing an employee who cooperated with a police investigation of a fellow employee). *See* text & notes 65-69 *infra*.

71. Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

72. *See* Palmeteer v. International Harvester Co., 85 Ill. App. 3d 50, 52, 406 N.E.2d 595, 597 (1980). In Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978), the Illinois Supreme Court established the tort of wrongful discharge where an employee had been fired for filing a workers' compensation claim. 74 Ill. 2d at 181, 384 N.E.2d at 357. In *Palmeteer*, however, an Illinois court of appeals cited to *Kelsay* for the proposition that the "majority of Illinois cases which have granted damages for *breach of contract* contrary to public policy have involved . . . workman's compensation claim[s]." 85 Ill. App. 3d at 52, 406 N.E.2d at 597 (emphasis added). The *Palmeteer* majority then declined to give relief to the plaintiff in tort where the employee-plaintiff had been fired for cooperating with a police investigation, see note 74 *infra*, because "[w]e have been reluctant to expand any tort unless we have been given cogent reasons for the expansion. We do not believe that such reasons exist here." 85 Ill. App. 3d at 52, 406 N.E.2d at 598. The court seemed to be ignoring, or even obscuring, that there indeed was a cause of action in tort for wrongful discharge in the jurisdiction, established in *Kelsay*. *See* Cook v. Caterpillar Tractor Co., 85 Ill. App. 3d 402, 409, 407 N.E.2d 95, 101 (1980) (Barry, J., dissenting): "The result reached in this case and in *Palmeteer v. International Harvester* [citation omitted] reflects a conservatism in matters of employer-employee relations which I find disturbing, and assures to employers that the tort of retaliatory discharge, although recognized by our Supreme Court, is virtually non-existent in the Third District."

73. This is the dissenter's characterization of the defendant's act. *See* Palmeteer v. International Harvester Co., 85 Ill. App. 3d 50, 57-58, 406 N.E.2d 595, 601 (1980); note 74 *infra*.

74. The dissenters in some of the cases can be vehement in their disagreement with a majority that fails to find a violation of public policy. In Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974), a salesman bypassed the authority of his superiors to make the defendant corporation aware of safety defects in one of its products. *Id.* at 173–74, 319 A.2d at 175. The product was withdrawn from the market because of his efforts, but he was fired. *Id.* The majority left open the possibility of a cause of action when the discharge furthers no business purpose and where a "clear mandate of public policy is violated." *Id.* at 184-85, 319 A.2d at 180. It did not, however, explore the public policy reasons that might support Geary's claim (because it felt the cause of action failed as soon as the defendant could point to a legitimate business reason for Geary's dismissal). *Id.* at 180, 184-85, 319 A.2d at 178, 180. Justice Roberts, in dissent, felt there was no legitimate business reason behind the firing, *id.* at 185, 319 A.2d at 181 (Roberts, J., dissenting), and marshalled cases, the RESTATEMENT (SECOND) OF TORTS § 402A (1965), and general policy considerations in support of Geary's claim. *Id.* at 187, 319 A.2d at 181. Similarly, in Palmeteer v. International Harvester Co., 85 Ill. App. 3d 50, 406 N.E.2d 595 (1980), *see* text & note 68 *supra*, the court justified its decision to deny liability in tort because "[o]ur research shows no Illinois case in which an employee has been fired because he provided information to the police, agreed to gather more information against a fellow employee and agreed to testify if requested to do so." *Id.* at 52, 406 N.E.2d at 597-98. (These were the precise facts of Palmeteer's

public policy inquiry to mask their uncertainty.[75]

The tort cases discussed above looked to some independently identified public policy, for example a policy against encouraging perjury[76] or one in favor of protecting the integrity of a workers' compensation system.[77] It is submitted, however, that the policy behind these decisions is not merely the need to give full effect to a statute. The policy is much broader and involves a reordering of the balance in relationships when the relationship is heavily weighted in favor of one party. If the legal system is going to make a choice to protect one party from the excesses of the other,[78] it is the party with "everything to lose"[79] who should have this protection rather than the more powerful employer,

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claim.) Justice Barry's dissenting opinion had no difficulty in discerning a subversion of the state's laws and a resultant violation of public policy. *Id.* at 57, 406 N.E.2d at 601 (Barry, J., dissenting). Indeed, he thought it clear that this public policy was expressly stated in ILL. REV. STAT. ch. 38, § 31-4 (1977), which prohibits "obstruction of justice, refusing to aid a police officer, interfering with jurors or witnesses called to testify, and compounding a crime." 85 Ill. App. 3d at 57, 406 N.E.2d at 601 (Barry, J., dissenting). He also cited a new statute, PA. 81-808, effective 1-1-80, which prohibits the discharge of an employee who is absent from work because he has been subpoenaed as a witness to a crime. 85 Ill. App. 3d at 57, 406 N.E.2d at 601 (Barry, J., dissenting).

75. *See* Becket v. Welton Becket & Assocs., 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974). In *Becket*, the plaintiff was an architect with the defendant firm. *Id.* at 818-19, 114 Cal. Rptr. at 532. His father, who owned all the outstanding stock of the company, died, leaving the stock to the plaintiff. *Id.* at 818, 114 Cal. Rptr. at 532. The plaintiff sued the firm in his capacity as co-executor of his father's estate, charging three members of the board of directors with a breach of their fiduciary duties, corporate waste, and usurpation of corporate control. *Id.* at 819, 114 Cal. Rptr. at 532. When one of the defendants threatened to fire him if he did not abandon the lawsuit, the plaintiff instigated a separate suit for wrongful discharge. *Id.* at 819, 114 Cal. Rptr. at 532-33. The court found no articulated policy that would warrant imposing liability on the defendants for wrongful discharge for trying to coerce an employee to drop a lawsuit: "[T]here is no specific statute creating particular rights for employees who also act as executors which protects them in their relationship with their employer." *Id.* at 822, 114 Cal. Rptr. at 534. The court specifically distinguished *Becket* from Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), on the basis that in *Becket*, "[t]he fidelity which the employer demanded and which it had a right to expect from plaintiff was not illegal in nature," as it was in *Petermann*. 39 Cal. App. 3d at 822, 114 Cal. Rptr. at 534. Arguably, however, the *Petermann* opinion's definition of public policy was broad enough to allow the *Becket* court to find a breach of "the public good," *see* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d at 188, 344 P.2d at 27, when a citizen has effectively been denied access to the legal system for fear of being fired. That the court in *Petermann* was specifically concerned with an act that could be characterized as criminal did not require an interpretation of public policy as niggardly as the one in *Becket*. *Cf.* L'Orange v. Medical Protective Co., 394 F.2d 57, 62 (6th Cir. 1968) (insurer may not cancel policy in retaliation for insured's testimony in malpractice suit because "[i]t manifestly is contrary to public policy" to allow insurer to "stifle" malpractice litigation). It is submitted, further, that the more productive inquiry in *Becket* would have been whether the plaintiff was in an economically dependent position; the issue should have been framed as whether his wrongful discharge suit was merely a bargaining chip in the underlying corporate-usurpation suit or, on the other hand, whether he truly was a victim of economic retaliation. *See* Becket v. Welton Becket & Assocs., 39 Cal. App. 3d at 822, 114 Cal. Rptr. at 534: "[The plaintiff's duty as executor of his father's estate] is not owed to the general public but instead is private in nature. . . . The private nature of plaintiff's action as executor is underscored by the fact that he is the major beneficiary of the estate." *See also* Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699 (Ct. App. 1980) (no cause of action for employee who was fired after pursuing a malpractice lawsuit against company doctors, where the plaintiff's medical injury was not work-related).

76. *See* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); text & notes 15-24 *supra*.

77. *See* Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); text & notes 25-28 *supra*.

78. *See* Palmeteer v. International Harvester Co., 85 Ill. App. 3d 50, 58, 406 N.E.2d 595, 601

landlord, or insurer, who is insulated from significant harm and who is in the position to control the transaction. In the law of economic retaliation, the "general rule"[80] protects the economically powerful at the expense of the economically dependent. It can be argued that the law has chosen and that it chose the employer, the landlord, etc. The broader policy exception to the general rule suggested here has been adopted in an important economic retaliation case that proceeds in contract rather than in tort.

Contract

In *Monge v. Beebe Rubber Co.*,[81] the New Hampshire Supreme Court went to the heart of the conflict between an employee, who was making $2.79 an hour, and her foreman, who demoted her when she refused to "be nice" to him.[82] Because the plaintiff's oral employment contract was an "at will" contract, the general rule would subject her to dismissal at the whim of her employer.[83] The *Monge* court modified this general rule, however, by finding an exception if the employer's act is "motivated by bad faith or malice or based on retaliation."[84] Accord-

(1980) (Barry, J., dissenting) (withholding a tort cause of action "arm[s] employers . . . with common law authority.")

79. *Cf.* Shell Oil Co. v. Marinello, 63 N.J. 402, 408-09, 307 A.2d 598, 602 (1973) (franchisor was held liable in contract (in the absence of a franchisor-franchisee statute) for the bad-faith termination of a service station franchise).

80. The "general rule" in employment cases is that an employee can be terminated for any or no cause. Daniel v. Magma Copper Co., 127 Ariz. 320, 322, 620 P.2d 699, 701 (Ct. App. 1980). Likewise, the general rule in landlord-tenant cases is that a tenant at will may be evicted for any or no reason. Abbott, *Housing Policy, Housing Codes and Tenant Remedies: An Integration*, 56 B.U.L. REV. 1, 9 (1976). *See also* Comment, *Improper Motive Invalidates Insurer's Cancellation*, 54 IOWA L. REV. 649, 650-51 (1969) (the general rule is that the insurer's motive is immaterial in the cancellation of an insurance policy if the insurer has reserved the right to cancel). All of these "general rules" have been subjected to modification when public policy is implicated. *See* Edwards v. Habib, 397 F.2d 687, 689 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969) (landlord-tenant); L'Orange v. Medical Protective Co., 394 F.2d 57, 61, 62 (6th Cir. 1968) (malpractice insurance cancellation); Daniel v. Magma Copper Co., 127 Ariz. at 322, 620 P.2d at 701 (employment).

81. 114 N.H. 130, 316 A.2d 549 (1974).

82. *Id.* at 131, 316 A.2d at 550. The trial court had allowed breach of contract damages for Monge's lost wages and mental distress. *Id.* at 134, 316 A.2d at 552. The supreme court upheld the lost-wages award but remanded for a new trial unless the plaintiff would accept a reduction in the award to an amount attributable solely to lost wages. *Id.*

83. *Id.* at 132, 316 A.2d at 551.

84. *Id. See* Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980), in which the author, advocating a contract approach to wrongful discharge, proposes the implication of a covenant to discharge an employee only for good cause. Something of the sort was used by a California court in Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). The court noted the "trend toward recognition by the courts and the Legislature of certain implied contract rights to job security, necessary to ensure social stability in our society." *Id.* at —, 168 Cal. Rptr. at 729. Cleary was an employee of 18 years who was fired, according to the pleadings, for his participation in union activities and without recourse to procedures prescribed by American Airlines regulations. *Id.* at —, 168 Cal. Rptr. at 724-25. The court held that these two factors—the length of employment and the company procedures—estopped the airline from discharing Cleary without good cause. *Id.* at —, 168 Cal. Rptr. at 729-30.

ing to the court, this malicious discharge was not in the best interest of the "public good" and constituted a breach of the at will employment contract.[85] The court analogized to a similar readjustment it had made in the landlord-tenant relationship, a relationship historically overweighted in favor of the landlord.[86] Just as circumstances have changed in that context, so too is there "a new climate prevailing generally in the relationship of employer and employee."[87]

Monge's recognition of the need to make basic readjustments in the relationship of the parties[88] applies equally as well to tort cases as it does to the contract analysis,[89] but no tort cases have spoken as sweepingly of a need to rebalance the prerogatives of the parties. The reason is suggested in *Monge's* holding on the lower court's assessment of damages for mental distress,[90] an element of damages that is not usually awarded in breach of contract cases. Tort liability is much more far-reaching than contract liability because it can include punitive damages and damages for mental distress—two elements of damages encompassing potentially large sums.[91] For this reason, courts are

85. 114 N.H. 130, 133, 316 A.2d 549, 551. The court weighed three interests: 1) The employer's need to run his business effectively; 2) the employee's need to keep his job; and 3) the public's need to maintain a balance between the two. *Id. Contra*, Daniels v. Magma Copper Co., 127 Ariz. 320, 324, 620 P.2d 699, 703 (Ct. App. 1980). *Daniels* expressly rejected *Monge* because the at-will contract under the *Monge* rule becomes a "hybrid contract under which the employee cannot be discharged unless his work is unsatisfactory or his services are no longer needed." *Id.* By implying a duty to fire only for good cause, "the *Monge* decision is a substitute for a union collective bargaining agreement." *Id.*

86. 114 N.H. at 132, 316 A.2d at 551.

87. 114 N.H. at 133, 316 A.2d at 551. *See also* Palmeteer v. International Harvester Co., 85 Ill. App. 3d 50, 54, 406 N.E.2d 595, 599 (1980) (Barry, J., dissenting). According to Justice Barry, "It has been recognized that the law of tort is a battleground of social theory in which the court, while seeking a fair determination of the competing claims of the litigant [sic], recognizes the general interests of society in the form of public policy." *Id.* at 53, 406 N.E.2d at 598 (Barry, J., dissenting). This dissent, quoting *Monge*, also suggested the need to recognize the "new climate" in the employment relationship. *Id.* at 53, 406 N.E.2d at 598–99 (Barry, J., dissenting). *Cf.* Abbott, *supra* note 80, at 2 (there has been a radical redistribution of rights in the landlord-tenant relationship).

88. *See* Comment, *Protecting the Private Sector at Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WIS. L. REV. 777, 797. *See generally* Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Note, note 84 *supra*.

89. The inquiry in most of the tort cases concerns the implications of the defendant's act on an independent public policy. *See* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (perjury); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (jury duty); see text & notes 76-77 *supra*. Probably for this reason, the tort opinions do not usually allude to the broader, underlying public policy consideration for the need to protect the weaker party from the abuse of economic power. In Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979), however, the court noted a judicially perceived need to modify the employer's "unfettered right to discharge" because of the economic relationship between employer and employee. *Id.* at 1365. As examples of this reasoning, *Perks* cited Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); and Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975), all tort cases. *Id.* at n.4.

90. 114 N.H. 130, 134, 316 A.2d 549, 552 (1974). The jury awarded the plaintiff $2,500. *Id.* $1,416.20 was attributed (by the appellate court) to loss of work for 20 weeks, $1,083.80 for mental suffering. *Id.*

91. *See generally* D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES § 12.4, at 818-21, § 12.3, at 804 n.24 (1973).

more cautious when expanding tort liability than when dealing with contract actions.[92] That is not, however, a reason for refusing absolutely to recognize causes of action in tort for economic retaliation.[93] It is a crucial reason to delay such recognition until courts are quite certain what it is that should be protected and what the competing interests might be. It is submitted that *Monge* suggests the interest to be protected: freedom from economic retaliation when the victim is vulnerable to the superior party's abuse of its position in their relationship.[94] Because tort damages can be more extensive, though, the analysis of the competing interests must be given greater emphasis than was done in *Monge*. An exploration of these interests, which have already been explored in law review articles and cases, has the potential of limiting tort liability.

II. A SUGGESTION FOR A CHANGE OF VIEWPOINT

T earns $X.00 an hour and relies on overtime to support her family. The apartment she can afford to rent is inadequate, but she considers herself lucky to have shelter for herself and her children. Because T lives her life on the economic fringe of the community, she is particularly vulnerable to any retaliatory actions by those who hold her welfare in their hands—her boss, her landlord, etc. She probably did not foresee a retaliatory eviction or discharge in her future; if she did, she most certainly was not in a position to bargain meaningfully about it. If her landlord now doubles her rent to spite her for some reason, her injury will be crushing. If her employer dismisses her in retaliation for some legitimate act or refusal to act on her part, the injury is equally serious. Can it be imagined what her anger and frustration[95] will be if she has nowhere to turn for help when these circumstances of her life

92. *See* Palmeteer v. International Harvester Co., 85 Ill. App. 3d 50, 52, 406 N.E.2d 595, 598 (1980).

93. *But see* Palmeteer v. International Harvester Co., 85 Ill. App. 3d 50, 52, 406 N.E.2d 595, 598 (1980).

94. *See* Blades, *supra* note 88, at 1404, 1410; *Cf.* Shell Oil Co. v. Marinello, 63 N.J. 402, 408, 307 A.2d 598, 601 (1973) (a franchisor's termination of a service station franchise was under contract terms that were "grossly unfair" because of the disproportion in bargaining power; thus, a suit in contract would lie, even where the franchisor-franchisee statute did not apply). *See also* Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363, 1365 (3d Cir. 1979).

95. *See* Sax & Hiestand, *supra* note 1, at 872-73. The authors recommended a damages remedy for tenants who have been victimized by substandard housing. *Id.* According to Sax & Hiestand, slumlordism arouses the retributive instinct in its victims. *Id.* The "shocking" failure of the law to give a damages remedy ignores this instinct, which is described as "a fact of life which has emphatically shown its ugly side in the excess of Watts and Harlem." *Id.* The authors also discuss a possible cause of action for intentional infliction of emotional distress. *Id.* at 875-77. Although rejecting that theory as less effective than a tort for "slumlordism," the authors nevertheless express indignation at the helplessness of the victim of slumlordism, especially when compared to the "profound attention" of the court where a "little old lady [was tricked] into believing that she had discovered the pot of gold at the end of the rainbow." *Id.* at 882, discussing the famous case, Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920).

cause the defendant's act truly to victimize her?[96] Can it be denied that the misuse of the employer's or landlord's overwhelming economic advantage for purely malicious and retaliatory purposes is an anti-social act of great magnitude?[97]

Commentators have argued feelingly for the creation of causes of action for "wrongful discharge"[98] or "slumlordism,"[99] pointing out that economic retaliation in those contexts is conduct that falls below the minimum required in a civilized society and advocating recognition of this conduct as a legal wrong. This paper does not seek to reargue the issue. The hypothetical situation just described does present a good point of departure, however, because it focuses attention on what happens to the plaintiff when the defendant pursues a retaliatory course of action. When the courts now grapple with economic retaliation, their attention seems to be everywhere but with the plaintiff. They worry about the burden of liability on the defendant (or on those generally in the defendant's position),[100] the effect of the defendant's act on a statute,[101] or the trauma to the law if there is tampering with traditional rules.[102]

What is needed, and what this paper proposes, is merely a shift in emphasis. It is suggested that courts look first at the plaintiff's injury by taking the complaint out of context—the landlord-tenant context, the employment context, etc. This is not a recommendation for a new cause of action entitled "economic retaliation." It is, rather, a suggestion for a new way of looking at the problem, with the emphasis first on

96. The plaintiff's economic condition determines whether the defendant's act will inflict a significant injury or one that amounts only to an annoyance. The premise of this paper is that the plaintiff *must* find protection in the courts when the economic imbalance between plaintiff and landlord or plaintiff and employer is great because only this combination of social setting and retaliatory abuse of economic power will produce an injury significant enough to need redress both from the individual plaintiff's viewpoint and for social stability generally. *See* Sax & Hiestand, *supra* note 1, at 872. This necessarily punishes the individual defendant for circumstances, many of which are beyond its control. *See id.* at 890, in which the authors recognize this argument but make clear that "the mere failure of society to realize some national goal with respect to a given individual should [not] give that individual a tort action." *Id.* at 890. In addition, the authors point to antitrust legislation as an analogy: "In that area, it has long been understood that anti-competitive behavior, the dramatic results of which are manifested largely in cumulative effects on the economic structure of the society, reaches that ultimately destructive point only through intermediate and often intangible effects on particular victims." *Id.* at 885.

97. *See* Blades, *supra* note 88, at 1404–05, Sax & Hiestand, *supra* note 90, at 872–73.

98. *See* Blades, *supra* note 88, *passim*.

99. *See* Sax & Hiestand, *supra* note 1, *passim*.

100. *See* Geary v. United States Steel Corp., 456 Pa. 171, 181-82, 319 A.2d 174, 179 (1974); Note, *supra* note 85, at 1834-35, 1838.

101. *E.g.*, Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363, 1365-66 (3d Cir. 1979); Aweeka v. Bonds, 20 Cal. App. 3d 278, 281, 97 Cal. Rptr. 650, 652 (1971); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 251, 297 N.E.2d 425, 427 (1973).

102. *See* Palmeteer v. International Harvester Co., 85 Ill. App. 3d 50, 52, 406 N.E.2d 595, 597-98 (1980); Dockery v. Lampart Table Co., 36 N.C. App. 293, 297, 244 S.E.2d 272, 275-76 (1978). *See also* Daniel v. Magma Copper Co., 127 Ariz. 320, 324, 620 P.2d 699, 703 (1980) (a court should not imply a covenant to fire only in good faith because that would be a substitute for a union's collective-bargaining agreement).

the plaintiff's injury. On the other hand, the plaintiff should not have carte blanche. The debate within each context has shown the existence of legitimate, important, competing interests. These interests should be given their full weight in the balance of the parties' rights. By placing the challenged act back into its factual context at this next stage of the analysis, it should be possible to find specific kinds of rights of employees, tenants and others that courts will not allow to be violated by one with superior economic power, rather than to rely on vague formulas.

Employment

Surely the most important of the employer's interests that must be considered in cases of economic retaliation is simply the need to run a business effectively.[103] Courts understandably do not want to usurp this function of the employer,[104] nor would they be equipped to make the employer's business decisions.[105] Nevertheless, if it is conceded that the victim of economic retaliation deserves legal vindication, then the courts must begin the "difficult line-drawing"[106] to delineate the rights and obligations of the employer and employee. The right to be free of retaliatory discharge will be restricted principally by the plaintiff/employee's corresponding duty of loyalty to the defendant/employer: the rights of the defendant/employer who oversteps legitimate business concerns will be curtailed.

Ideally, the employer's intrusion on the employee's life should be limited to those things that unambiguously are business-related.[107] The employee would probably interpret the "duty of loyalty"[108] to refer only to performance on the job from nine to five, and then only to patterns of behavior that do not demonstrably interfere with produc-

103. *See* Monge v. Beebe Rubber, 114 N.H. 130, 133, 316 A.2d 549, 551-52 (1974); Geary v. United States Steel Corp., 456 Pa. 171, 181-82, 319 A.2d 174, 179 (1974).

104. Percival v. General Motors Corp., 539 F.2d 1126, 1129 (8th Cir. 1976). *Percival* refused to take exception to the at-will rule for an employee who was fired after refusing his employer's instructions to give false information to investigators about General Motors' allegedly deceptive trade practices (and who corrected the investigators' misapprehensions). *Id.* at 1130. According to the court, "[w]hether an employee has performed satisfactorily is to be determined by the employer and not by the courts." *Id.* at 1129. Further, the court noted that "as far as an employment relationship is concerned, an employer as well as an employee has rights" and that the employer "must be accorded wide latitude in determining whom it will employ . . . in high and sensitive managerial positions," especially in mechanical engineering. *Id.* at 1130. Interestingly, the court left open the possibility of a cause of action against Percival's superiors, rather than the company. *Id.*

105. But the same or similar factual determinations regularly are made in statutory actions against employers. *See, e.g.*, 15 U.S.C. § 1674(a) (1976) (prohibiting the discharge of an employee whose wages have been garnished); 42 U.S.C. § 2000e-2(a)(1) (1976) (prohibiting dismissal because of race, color, religion, sex or national origin); ARIZ. REV. STAT. ANN. § 41-1463(B)(1) (Supp. 1980-81) (prohibiting job discrimination based on the same factors and including age).

106. *See* Geary v. United States Steel Corp., 456 Pa. 171, 189, 319 A.2d 174, 182 (1974) (Roberts, J., dissenting).

107. *See* Blades, *supra* note 88, at 1406.

108. *See* D. EWING, FREEDOM INSIDE THE ORGANIZATION 29-36 (1977).

tion. For many types of employees, this would be an acceptable standard. But for others, notably executives, the employee's business responsibilities take up much of the day and extend beyond the office.[109] These are essentially factual determinations, however, and the extent of the duty of loyalty would be well within the province of a jury to decide. The degree of loyalty required of one employee would not necessarily be the same as that required for another employee in different circumstances.[110]

Also, this duty of loyalty is so vague that it ought to serve only to set a very minimal level of conduct for the employee. Further, what may seem to be a breach of the duty of loyalty may in fact be a breach of some other duty. For instance, if an employee of a chemical company, on a day off, were to make a speech against the employer, what might seem wrong is an almost unavoidable breach of confidentiality. Absent a risk of using company information, however, the employee's speech is not so menacing. It may be unfortunate that the employee "bites the hand that feeds him," but this bit of ingratitude does not excuse an abusive, retaliatory action by the employer. If the Sunday speeches in no way affect the employee's performance or effectiveness on the job, the defendant should not be allowed to raise a "duty of loyalty" defense, especially when there is no clear definition for "loyalty."

The more crucial inquiry concerning the employer's interests, then, is whether the decision to fire was a legitimate business decision.[111] In *Geary v. United States Steel Co.*,[112] the Pennsylvania Supreme Court recognized that an employer's right to fire is not absolute.[113] In *Geary*, a salesman was fired after bypassing his immediate superiors to apprise his company of a defect in one of its products.[114] The court refused to reinstate Geary, because the defendant corporation proved a legitimate, nonretaliatory reason for the discharge: Geary's actions had disrupted the company's normal operations.[115] While granting that there may be areas in the employee's life "in which the employer has no legitimate interest" and into which the employer cannot intrude "by virtue of [the] power of discharge,"[116] the court offered no guidance for future decisions on what these areas might be.

109. *See id.* at 141-42.
110. *See* Percival v. General Motors Corp., 539 F.2d 1126, 1130 (8th Cir. 1976).
111. *See* Blades, *supra* note 88, at 1414, 1421-22. *Cf.* Amoco Oil Co. v. Dickson, — Mass. —, 389 N.E.2d 406 (1979) (franchise revocation).
112. 456 Pa. 171, 319 A.2d 174 (1974).
113. *Id.* at 184, 319 A.2d at 180.
114. *Id.*
115. *Id.* at 184, 319 A.2d at 179-80.
116. *Id.*

Certainly the employer has no legitimate interest in coercing illegal conduct from an employee by a threat of discharge; thus, the cases that have found liability when the dismissal was in retaliation for the employee's refusal to commit the illegal act[117] are correctly decided. Although an employer may be said to have some interest in keeping an employee at work instead of taking jury duty,[118] the employee has a greater right—in fact a duty—to serve time in the jury box. Similarly, the employer's business would almost certainly be advantaged if employees could be forced to conceal illegal activities. In both situations, however, the employer's business decision should be overridden by the courts—not on a theory of a public policy in favor of jury service or against illegality but rather because the decision intrudes on the employee's rights.

Beyond these rather clear instances, though, how are the courts to decide what is a legitimate business decision? What oversteps the bounds of an employer's legitimate concern and unduly interferes with the employee's life? Professor Blades analogized to constitutional rights for a delineation of areas of the employee's life into which the employer may not venture by retaliation.[119] Although it is well settled that the Constitution does not limit the actions of private individuals,[120] it is also true that tort law concerns itself with activities of private persons that are closely analogous to constitutional wrongs.[121] As Professor Blades suggested, the limits of this idea can only be decided case by case.[122]

There remains one more stumbling block to employer liability for economic retaliation: the so-called "at will rule." This hoary creation sprang full blown from the head of a treatise writer in 1877[123] and is

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117. *See* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 169-70, 610 P.2d 1330, 1331, 164 Cal. Rptr. 839, 840 (1980); Petermann v. International Bhd. Teamsters, 174 Cal. App. 2d 184, 188-89, 344 P.2d 25, 27 (1959).

118. *See* Blades, *supra* note 88, at 1406. Although "some argument can almost always be made that the employer has an interest in whatever his employee does or believes," according to Professor Blades there are instances in which the employer's interference can be seen as "overreaching," for example coercing the employee into incriminating himself or foregoing his right of free speech or political choice, as well as coercing his participation in illegal, immoral, or unethical conduct. *Id.* at 1407-08.

119. *Id.* at 1407.

120. J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 378 (1978).

121. Sax & Hiestand, *supra* note 1, at 877-78. The authors assert that constitutional inquiries, including the definition of liberty or what "shocks the conscience," are the same as the inquiry posed by the RESTATEMENT (SECOND) OF TORTS: "When does conduct reach the point that we will say it is intolerable in a civilized society?" *Id.* at 877. They find parallels between constitutional and civil wrongs, for instance between trespass and search and seizure. *Id.* at 878. *See* D. EWING, *supra* note 108, at 144-54, in which the author proposes an "employee bill of rights."

122. Blades, *supra* note 88, at 1406-07.

123. Note, *A Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics*, 28 VAND. L. REV. 805, 822-23 n.80 (1975). The new "rule" was in fact a rejection of the English tradition. *Id.* Further, the treatise's author, H.G. Wood, "offered no analysis to justify . . . this rule" and used "only four American

still invariably commented upon in wrongful discharge opinions.[124] Stated simply, the rule is: If no statute or contract is to the contrary, an employee hired for an indefinite period may be fired, at will, "for good cause, for no cause or even for cause morally wrong."[125] The rule was nurtured by theories of mutuality: If the employee has the absolute right to quit, then the employer must have an absolute right to fire.[126] The absolute expression of the rule even today is stated in the opinions, but it is almost always immediately qualified by a recognition that the employer's right is modified when public policy requires giving a remedy to the employee.[127]

Some critics would more severely limit the at-will rule.[128] It has been argued that the mutuality idea is really a concern with a lack of consideration and that the employee's past service can be seen as consideration for future employment.[129] Further, there might be an implied-in-fact promise of employment for a specific duration or the plaintiff may show detrimental reliance on a promise of job security.[130]

Besides the idea of mutality, a second underpinning of the at-will rule is the idea that judges should not change the bargain that the parties themselves arranged. In other words, an employee wanting job security would have contracted for it.[131] This assumes, of course, that the employee foresaw this possibility and had sufficient weight in the bargaining relationship[132] to require a job-security provision in the other-

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cases as authority . . . , none of which supported him." *Id.* (quoting Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341 (1974)).

124. *E.g.*, Daniel v. Magma Copper Co., 127 Ariz. 320, 322, 620 P.2d 699, 701 (Ct. App. 1980); Nees v. Hocks, 272 Or. 210, 216, 536 P.2d 512, 514-15 (1975); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. Ct. 28, 31, 386 A.2d 119, 120 (1978).

125. Payne v. Western & Atl. Ry., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915); *see* Blades, *supra* note 88, at 1405: "This traditional rule, which forces the non-union [at-will] employee to rely on the whim of his employer for preservation of his livelihood, is what most tends to make him a docile follower of his employer's every wish." The danger posed by the rule is magnified today, when an estimated two-thirds of the work force in the United States comprises "at will" employees. *See* Note, *supra* note 84, at 1816.

126. Blades, *supra* note 88, at 1419.

127. Daniels v. Magma Copper Co., 127 Ariz. 320, 322, 620 P.2d 699, 701 (Ct. App. 1980); Pierce v. Ortho Pharmaceutical Corp., 85 N.J. 58, —, 417 A.2d 505, 509 (1980); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. Ct. 28, 31, 386 A.2d 119, 120 (1978).

128. *See* Blades, *supra* note 88, at 1413, 1416; Note, *supra* note 84, at 1836-37.

129. Blades, *supra* note 88, at 1419-20. "Indeed, there seems to be some truth in the assertion that an employee who spends a significant part of his working life working for one employer to the exclusion of others has conferred a substantial benefit on the employer . . . [and] that such an employee has suffered a real detriment in the irretrievable loss of productive years," especially when the employee loses death or retirement benefits and cannot use the skills of the old job on a new job. *Id.* at 1420.

130. Note, *supra* note 84, at 1820.

131. *Id.* at 1818-19.

132. *See id.* at 1828-29. The basis of the "economic retaliation" theory contemplates an inequality in the economic power of the parties, *see* text & note 96 *supra*. The inequality would exist "when [the employee] becomes dependent upon a private entity possessing greater power than himself." Blades, *supra* note 88, at 1404.

wise at-will employment agreement. Some courts have recognized that this is not the case and have implied a duty of the employer to dismiss only for good cause.[133]

Another criticism of the at-will rule depends on the circumstances of its adoption in early industrial times when labor was scarce.[134] In that situation, the rule aided the small entrepreneur but imposed very little inconvenience on the employee.[135] Because labor was in short supply, a discharged employee could find equal or better work elsewhere. Thus, the at-will rule was seen at its beginnings as a slight interference with the interests of the employee. An employer arguably would be less inclined to fire an able employee for malicious reasons if the employer did not have ready access to replacement labor. The social and economic realities at the time of the rule's adoption would therefore have provided a check on employer abuses of the rule.[136] The social realities today, however, are much changed. Employers wield tremendous economic power which can result in hardship and the destruction of employees' freedoms.[137] An employer's capricious actions will go uncurbed when unemployed workers are available in abundance to replace a fired employee.

Thus, the critics argue, the at-will rule in and of itself should not bar liability for wrongful discharge. The cause of action, it is submitted here, should be based on the economic retaliation by the employer for an improper purpose. The improper purpose would include anything that is not motivated by a legitimate business purpose. "Legitimate business purposes" would be decided case by case by the courts. The courts would use fundamental rights, as embodied in the Constitution, as a rough guide to determine if an employer has overstepped legitimate business functions and impermissibly interfered with the private interests of the employee. The employer can show that the decision to fire the employee was done for business purposes if the employer can

133. *See* Fortune v. National Cash Register Co., 373 Mass. 96, 104, 364 N.E.2d 1251, 1257 (1977); Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974); Note, *supra* note 84, *passim*. In *Fortune*, the court asserted that the implication of a covenant to fire only in good faith would not hamper the employer's flexibility in making his business decisions. 373 Mass. at 104, 364 N.E.2d at 1257.

134. Note, *supra* note 123, at 823.

135. *Id.* In fact, it was to the worker's advantage to be free to change jobs at will. *Id.*

136. *See* Blades, *supra* note 88, at 1412-13.

137. Blades, *supra* note 88, at 1406.

> 'We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for *all* of their income is something new in the world. *For our generation, the substance of life is in another man's hands.*'

Id. at 1404 (quoting F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951) (emphasis in original)). *See generally* D. EWING, note 108 *supra*.

demonstrate that the employee overstepped the employee's pursuit of personal liberty and adversely affected the running of the employer's business.

Tenants

Tenants are vulnerable to their landlords in much the same manner as employees are vulnerable to their employers.[138] Their need for protection against economic retaliation, therefore, is similar, if they are also in a significantly inferior bargaining position. They should be free from the threat or actuality of a retaliatory eviction in corresponding situations: when they have fulfilled a civic duty, taken advantage of a statutory right,[139] or, arguably, exercised in a reasonable manner any one of their fundamental rights.[140] The landlord's competing interests echo those of the employer. Therefore, courts must decide, again case by case, just what is a legitimate business decision in the landlord-tenant context, an inquiry in which some courts have expertise because of their interpretation of housing legislation.[141]

Associations

Voluntary associations have long been one of the great strengths of American society.[142] By pursuing their special interests, these groups present ideas that otherwise may not have been considered,[143] thus enriching the whole society. Because the freedom of association is as important to American society as individual freedoms,[144] associations are due a great deal of deference in choosing their own membership.

An analysis of the competing interests of an association that has expelled or excluded an individual from membership should begin by recognizing that there are many different kinds of organizations. The most obvious difference is that between a purely social club and one that affects the livelihood of members and nonmembers. The difference here is not one of form but rather of function or, as Professor Lon L. Fuller has described it, of "principles of association."[145] Professor Fuller sees two principles: (1) The principle of shared commitment; and (2) the legal principle, *i.e.*, when an association functions by "for-

138. *See* Note, *Consumer Protection Legislation and the Assertion of Tenant Rights: The Massachusetts Paradigm*, 59 B.U.L. REV. 483, 483 (1979).
139. *See* Aweeka v. Bonds, 20 Cal. App. 3d 278, 281, 97 Cal. Rptr. 650, 651-52 (1971).
140. *See* Blades, *supra* note 88, at 1431; Sax & Hiestand, *supra* note 1, at 878; text & notes 119-22 *supra*.
141. *See* Abbott, *supra* note 80, at 13 n.55.
142. *See* Fuller, *Two Principles of Human Association*, in VOLUNTARY ASSOCIATIONS 13 (J. Pennock & J. Chapman eds. 1969).
143. *Id.*
144. *See* R. HORN, GROUPS AND THE CONSTITUTION 1 (1971).
145. Fuller, *supra* note 142, at 6.

mal rules of duty and entitlement."[146]

Often, at its beginning, a group exists solely for its members to pursue a shared interest, as, for example, a literary club.[147] An association can evolve, however, to the point that it controls a pecuniary or material interest of its members, for example, a trade union or an executives' club. When membership is prerequisite to the acquisition of a material gain or carries with it high social status,[148] the association usually will terminate a membership only after giving the member some sort of due process.[149] This development leads to the preeminence of the "legal principle" over the "principle of shared commitment."

The structure of Professor Fuller's analysis points out the importance of determining the function and purpose of the organization against which the expelled or excluded plaintiff is proceeding. As the function of the voluntary association varies, so varies the kind and degree of harm the plaintiff will suffer from exclusion.[150]

The most serious harm is a deprivation of livelihood, as when an association controls access to work.[151] Here, courts will scrutinize the association's action most closely. Not only retaliatory exclusions but also merely capricious exclusions are reviewed by the courts if the individual's livelihood is affected. There is some quibbling over the degree of harm the plaintiff must suffer before a court will overturn the association's decision.[152] Nevertheless, courts do take an active interest if the plaintiff suffers an economic or other significant injury.[153]

The differences discussed above—differences in the various functions of organizations and the resulting variety of harm suffered by the plaintiff—indicate what courts should be examining when looking for

146. *Id.*

147. Professor Fuller gives a delightful account of his first voluntary association, a literary club comprising his fourth-grade classmates, and their dilemma at whether and how to expel a member who just did not belong. *Id.* at 3-7.

148. *See* Trautwein v. Harbourt, 40 N.J. Super. 247, 123 A.2d 30 (App. Div.), *cert. denied*, 22 N.J. 220, 125 A.2d 233 (1956) (membership in a fraternal or social organization carries with it a "cachet," the loss of which can be a deprivation more serious than the loss of property).

149. Fuller, *supra* note 142, at 14.

150. *See* M. ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 229 (1961).

151. *See* Pima County Med. Soc'y v. Felland, 115 Ariz. 311, 312, 565 P.2d 188, 189 (Ct. App. 1977); M. ABERNATHY, *supra* note 150, at 229.

152. *Compare* Pima County Med. Soc'y v. Felland, 115 Ariz. 311, 312, 565 P.2d 188, 189 (Ct. App. 1977) ("strict economic necessity test") *with* Pinsker v. Pacific Coast Soc'y Orthodontists, 1 Cal. 3d 160, 166, 460 P.2d 495, 499, 81 Cal. Rptr. 623, 627 (1969) ("practical necessity" test).

153. *See* Van Daele v. Vinci, 51 Ill. 2d 389, 394, 282 N.E.2d 728, 731, *cert. denied*, 409 U.S. 1007 (1972); Anthony v. Syracuse Univ., 223 N.Y.S. 796, *passim* (1927); M. ABERNATHY, *supra* note 150, at 229. *Anthony* (expulsion from a university) and *Van Daele* (expulsion from a purchasing cooperative) were clear cases of injury to the plaintiffs' capacity to earn a living. Even when this element is not clearly present, however, associations are vulnerable to judicial review. Thus, in Zelenka v. Benevolent & Protective Order of Elks, 129 N.J. Super 379, 324 A.2d 35 (1974), the plaintiff's membership in the Elks Club, a social organization, was reinstated by the court because the club's bylaw, which the plaintiff had violated, was against public policy. *Id.* at 387, 324 A.2d at 39.

limits on the plaintiff's right to a damages or reinstatement remedy for retaliatory expulsion or exclusion. If the voluntary association is truly a social organization, whose primary function is one of shared commitment,[154] then there would be no element of economic retaliation in the plaintiff's exclusion. A degree of aggravation may be suffered, but that interest is not within the purview of this paper. Thus, it is suggested that *Zelenka v. Benevolent and Protective Order of Elks*[155] was wrongly decided, at least from the point of view of the economic retaliation interest.

The crucial factor in economic retaliation by associations is the organization's control over the plaintiff's economic well-being. The Elks Club is primarily a social organization. However morally reprehensible any social club's policy may be, its members have the right to band together to pursue that policy.[156] Unless the organization occupies a position from which to coerce its members, there is no reason for a court to interfere in its internal policies. The plaintiff in *Zelenka* had the option to work within the Elks Club's rules or to end his association with it. Nothing in the case indicates that his membership brought him any advantage other than the pleasure of associating with other Elks. He was able to exercise free choice: abide by the rules or quit the club. The law does not exist to make moral or ethical choices easier for people. Only when a person or group becomes so powerful that it can take away the element of choice from others should the courts enter the scene to readjust the balance. Making a choice between writing a letter to the editor of a newspaper or retaining one's job is the sort of situation with which the courts considering economic retaliation should be concerned. But if the choice is between writing a letter to the editor of a newspaper or retaining membership in a social club, as was the case in *Zelenka*, then the courts should not interfere. If membership in the organization carried with it a pecuniary benefit, however, then a retaliatory expulsion would fall within the rubric of economic retaliation and should be rectified by money damages and reinstatement.

Conclusion

This note argues for a shift in the way lawyers and judges perceive the legal injury to individuals who suffer economic retaliation from persons or groups who abuse a position of economic power over the individual. There is something fundamentally unfair and repugnant about a party's abuse of its position of privilege to coerce another into

154. *See* text & notes 145-49 *supra*.
155. 129 N.J. Super. 379, 324 A.2d 35 (1974).
156. *See* Fuller, *supra* note 142, at 6-7.

doing its will though the threat of loss of job or eviction or any of the other economic retaliations discussed in this Note. The persons who would be vulnerable to this type of retaliation are just those who have nowhere to turn for help except to the courts or to their own retributive mechanisms. Their economic injury must gain some recognition as a legal injury. This cannot, of course, be something as broad as an absolute right to be free from any and all kinds of economic retaliations. Nevertheless, when the injury to the individual is serious and the act is repugnant, then the injury should at least be given serious attention by the courts.

The line of inquiry suggested here would focus first on the abuse of the disparity in the economic power of the parties and then on the legitimate competing interests of the defendant. These interests vary with the context in which the retaliation arises. Law review articles have explored many of them in depth and a few have been touched upon lightly here. No matter how far the plaintiff's cause of action will be limited by this examination of the defendant's competing interests, the law will take a small step forward by recognizing that, in many circumstances, economic retaliation will not be condoned.