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PROTECTION FOR MOBILIZING IMPROVEMENTS IN THE WORKPLACE: THE UNITED STATES AND RUSSIA

Riley M. Sinder*

INTRODUCTION

Prior to 1985, the United States and the Soviet Union lagged other industrialized nations in legal protection for workers.¹ Both the United

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1. See Donald H. J. Hermann & Yvonne S. Sor, *Property Rights in One's Job: The Case for Limiting Employment-at-Will*, 24 ARIZ. L. REV. 763, 804-12 (1982) (comparing United States dismissal law with that of several industrialized European countries for purposes of suggesting improvements to the substantive and procedural aspects of United States law). Laws in Germany, France, and the United Kingdom prohibited managers from firing workers merely for objecting to manager decisions. See *id.* at 808-10 (stating that German, French, and English managers could not fire workers without good cause). Examples of good cause for termination included: theft, insubordination, absenteeism, fraud, stealing business secrets, or fighting in the workplace. *Id.* In contrast, United States law would not intervene when the manager fired the worker for objecting to the manager's decisions. See *id.* at 765-70 (noting that American managers could fire workers without giving a reason).

The former Soviet Union, similarly, before 1985 did not protect workers who contested against managers regarding improvements to the workplace. See ABEL AGANBEGYAN, *INSIDE PERESTROIKA: THE FUTURE OF THE SOVIET ECONOMY*, 107-08 (Helen Szamuely trans., 1989) (stating that the Soviet Union rarely applied legal methods for protecting the rights of citizens). The inferiority of Soviet production resulted partly from the lack of opportunities and incentives for Soviet workers to make improvements in production processes. *Id.* at 61. Aganbegyan described Soviet assessments of possible workplace reforms that might raise the quality and efficiency of Soviet production. *Id.* at 41-58. Making Soviet production competitive in world markets required making workers responsible for workplace decisions. *Id.* at 68-69. Getting workers to take responsibility for the workplace, in turn, required legal protections for workers. See *id.* at 107-08 (stating that law and the economy are interdependent, and that restructuring the legal system was necessary to realize improvements in the economy).

For this Comment, "worker" is defined as an employee whose work is directed by a "manager." Theoretically, the manager has authority from the "owner" by way of the chain of command to hire and fire the workers who are within the manager's

States and the Soviet Union pursued policies aimed at compelling worker obedience to the commands of managers.² But in 1985, Mikhail Gorbachev, then General Secretary of the Communist Party of the Soviet Union, introduced *perestroika*³ to "restructure" management practices to improve production quality and efficiency.⁴ By establishing new worker

span of control. "Ownership," however, cannot justify the manager's arbitrary right to fire workers in modern settings. See Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 397 (1986) (rejecting the United States notion that the manager's right to fire employees without a valid reason derived logically from the owner's property right to control the workplace). The shareholders are the legal owners of the modern corporation, but they generally exercise negligible control over the managers who make the decisions to hire and fire. *Id.* Even managers are workers whom superior managers can fire without a valid reason. See ROBERT E. LACEY, *FORD: THE MEN AND THE MACHINE* 639, 657 (Ballantine paperback, ed. 1987) (describing how Henry Ford II, the Chairman and Chief Executive Officer of Ford Motor Company, fired Lee Iacocca, then President of Ford). Iacocca was fired despite achieving record profits for the firm. *Id.*

Employees who attempt to improve the workplace generally lack protection. See *Kern v. DePaul Mental Health Servs. Inc.*, 544 N.Y.S.2d 252, 252-53 (App. Div. 1989) (refusing a cause of action where a worker was fired for disclosing a statutory violation presenting a danger to an individual), *appeal denied*, 549 N.E.2d 151 (N.Y. 1989). The court held that if the worker acted to protect merely the rights of an individual and did not remove a threat to the "public at large" as required by the whistleblower statute, the court could not offer protection against the manager who fires the worker for doing a commendable deed. *Id.*

2. See PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 199 (1990) (noting that the traditional United States workplace required the worker to do exactly what the manager commanded); Tatyana Tchertvermina, *Labour Incentives in Alternative Forms of Production*, in *IN SEARCH OF FLEXIBILITY: THE NEW SOVIET LABOUR MARKET* 203, 205 (Guy Standing ed., 1991) [hereinafter *IN SEARCH OF FLEXIBILITY*] (stating that Soviet production depended upon workers following orders thoughtlessly).

3. See MIKHAIL GORBACHEV, *PERESTROIKA: NEW THINKING FOR OUR COUNTRY AND THE WORLD* xi (Perennial Library 1988) (1987) (defining *perestroika* as "restructuring").

4. See *Report by Gorbachev*, Summary of World Broadcasts, Apr. 25, 1985, at 1, available in LEXIS, Nexis Library, BBCSWB File (transcribing Gorbachev's speech which announced the main points of the *perestroika* program for restructuring the Soviet economy). According to Gorbachev, Soviet managers interfered with local initiative. *Id.* at 7. Low quality and high cost of Soviet production compelled a restructuring, a *perestroika*. GORBACHEV, *supra* note 3, at 5-7. Decreasing government regulation and increasing the independence of local enterprises would also serve to restructure Soviet production. *Report by Gorbachev, supra*, at 7. Under the restructuring, workers earned incentives by making improvements in the workplace. *Id.* at 6-7. As a

rights and duties, such as giving workers the right to elect managers, *perestroika* legislation gave workers oversight of management decisions.⁵

The United States, by contrast, generally continues to allow managers to fire⁶ or punish⁷ workers who object to management decisions.⁸ Tra-

part of the economic revisions, political reformers aimed at increasing democratic participation in the country's governance to make the restructuring permanent and self-sustaining. GORBACHEV, *supra* note 3, at 43, 49. One month after becoming General Secretary, Gorbachev took considerable personal risk in announcing the *perestroika* program. BORIS YELTSIN, *AGAINST THE GRAIN* 139 (Michael Glenny trans. 1990). Gorbachev could have successfully postponed political and economic crisis for his lifetime. *Id.* But instead, he chose to lead the nation on a campaign to resolve the economic issues before they grew to catastrophic proportions. *Id.* at 139-41. Had he postponed serious problem-solving, the problems would get worse and would cause an eventual economic collapse. *See id.* at 141 (stating that postponing the problem-solving would result in national suicide, but probably after Gorbachev's time).

5. *See* The Law of the Union of Soviet Socialist Republics on Cooperatives in the U.S.S.R., 22 *Vedomosti Verkhovnogo Soveta SSSR*, June 1, 1988, Item 355, translated in 28 *I.L.M.* 719, 732 (1989) [hereinafter *Soviet Law on Cooperatives*] (granting to members of a cooperative the right to employment in the cooperative, the right to participate in management, and the right to elect and be elected as directors and officers of the cooperative).

6. *See Former Loan Officer Takes Suit Over Firing to State Supreme Court*, UPI, May 8, 1989, available in LEXIS, Nexis Library, UPI File (describing loan officer Dynan's claim that he was fired for refusing to approve a bad investment-loan); *Dynan v. Rocky Mountain Fed. Sav. and Loan*, 792 P.2d 631, 640 (Wyo. 1990) (denying a cause of action even if the worker could show that the firing was punishment for objecting when management insisted on making a bad loan). The Wyoming Supreme Court stated that the health of the savings and loan industry did not depend on employees correcting management because the loan policies of savings and loan associations were regulated and enforced by the Federal Home Loan Bank Board. *Id.* The Federal Home Loan Bank Board finally did intervene after Rocky Mountain Federal closed because of excessive bad loans. Rick Stouffer, *Equimark Deal Meshes Pair of WY Institutions*, *PITT. BUS. TIMES & J.*, Dec. 26, 1988, at A19, available in LEXIS, Nexis Library, PBT File. Over \$70 million of Rocky Mountain bad loans became liabilities for the Federal Savings and Loan Insurance Corporation. *Id.*

7. *See* Samuel C. Florman, *Beyond Whistleblowing; Organizational Changes Can Eliminate the Need for Corporate Martyrdom*, *TECH. REV.*, July 1989, at 20 (relating engineer Boisjoly's heroic, but unsuccessful, effort to stop the Space Shuttle Challenger's flight by repeatedly warning Thiokol's management about the inadequacies in the shuttle's joints). William J. Broad, *The Shuttle Explodes: 6 in Crew and High-School Teacher Are Killed 74 Seconds After Liftoff*, *N.Y. TIMES*, Jan. 29, 1986, at A1 (relating the story of Challenger's fateful launch and subsequent explosion); William D. Marbach et al., *What Happened?*, *NEWSWK.*, Feb. 17, 1986, at 32 (describing the formation of a presidential commission to investigate the cause of the Challenger explosion); Maura Dolan and William C. Rempel, *Took Hard Look at NASA Management; Shuttle Panel Evolved into Bold Investigators*, *L.A. TIMES*, June

ditional legal arguments propose that the manager must have the right to compel worker obedience.⁹ Unfortunately, this may limit incentives for workers to develop their skills fully, and may accelerate the current decline of United States competitiveness.¹⁰ Restoring United States com-

9, 1986, at A1 (stating that Allan McDonald and Roger Boisjoly had objected to management's decision to launch because they predicted the cold weather might cause a seal containing the rocket's fire to fail during the launch). Thiokol management reassigned Boisjoly and McDonald, presumably as punishment for identifying the technical and administrative problems that jeopardized shuttle launches. *Id.* Throughout the development of the space shuttle, management ignored and downplayed valid objections raised by engineers regarding the O-ring seal that failed and started the Challenger explosion. Tom Bancroft, *Two Minutes*, FIN. WORLD, June 27, 1989, at 28. Thiokol management forbade engineers to talk with NASA officials about problems, withheld hazard reports from NASA, and suppressed safety information. *Id.* Some workers, however, frustrated by management's concealment of serious safety problems, informed the FBI. *Id.*; see also *Space Shuttle Accident and the Rogers Commission Report: Hearings before the Subcomm. on Science, Technology, and Space of the Senate Comm. on Commerce, Science, and Transportation*, 99th Cong., 2d Sess. 86 (1986) [hereinafter *Space Shuttle Accident Hearings*] (statement of Sen. Hollings) (concluding that the engineers were right and management was wrong concerning the vulnerability of the O-ring seals to the bitter cold). The engineers had no procedure for influencing managers, and no process for objecting to faulty manager decisions. See *id.* at 72-74 (statement of Hon. William P. Rogers, Chairman, Presidential Commission on the Space Shuttle "Challenger" Accident) (concluding that a flawed decision process, as well as a flawed O-ring design, caused the shuttle accident).

8. See Jay E. Grenig, *The Dismissal of Employees in the United States*, 130 INT'L LAB. REV. 569, 569 (1991) (stating that the United States is the last major industrialized country that generally permits managers to fire workers for no reason). State and federal statutes have protected some workers in specific situations by requiring that the manager have a "just" or "good" cause for the firing. *Id.* Collective bargaining agreements may provide protection against arbitrary firing, arbitrary reassignment, and other mistreatment. WEILER, *supra* note 2, at 7. Only about fifteen percent of United States workers, however, are covered under collective bargaining agreements. *Id.* at 10.

9. See Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951 (1984) (postulating that labor market efficiency generally requires the legal presumption that managers can compel obedience with the threat of firing); *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 109 (Colo. 1992) (asserting that the manager had a right to fire for refusing to obey a command unless such command involved an illegal act, or one against public policy). Hence, in a controversy between a manager and worker over the business interests of the firm, efficiency requires that the worker have no protection against retaliatory firing. See *id.* at 110 (establishing that protection accrued only when the worker had a reasonable belief that the manager's command was illegal, for example, in violating the worker's duty as a citizen or infringing his employment rights).

10. See John Hoerr, *What Should Unions Do?*, HARV. BUS. REV., May-June

petitiveness may require protecting the worker's investment in a job by guaranteeing certain returns based on results.¹¹ This Comment argues that international market competition will force the United States, just as it did the Soviet Union, to grant workers more legal protections.¹²

Part I of this Comment reviews the lack of legal protection under the "employment-at-will" doctrine for American workers who attempt to correct unlawful, unsafe, or uneconomical decisions of managers.¹³ Part II reveals how, under the policy of *perestroika*, Russian law imitates many features of successful Japanese and European workplaces. *Perestroika* encourages workers to take responsibility for circumstances in the workplace.¹⁴ In particular, Russian law offers property rights to the workplace as an assurance that successful results in the marketplace will effect a return for worker-initiated improvements.¹⁵

Part III argues that employment-at-will in the United States, like command-management in the former Soviet Union, allows employers to compel worker obedience and to suppress worker objections, complaints,

1991, at 30, 42 (stating that although success in international competition requires skilled workers, both workers and managers lack proper incentives to develop the worker skills that will make the national economy competitive).

11. See Doron P. Levin, *Detroit Slow to Learn From Japan*, N.Y. TIMES, May 5, 1992, at D-8 (describing how Ford Motor Company, under competitive pressure from Japanese automobile manufacturers, consciously and successfully adopted the Japanese car makers' participatory management techniques). General Motors, in attempting to recover market share lost to the Japanese, also considered copying Japanese management methods, but faced problems relinquishing its normal autocratic management style. *Id.* After failing to duplicate Japanese quality and price with intensive robotic assemblies, General Motors finally applied Japanese management methods at the Saturn Plant in Spring Hill, Tennessee. *Id.* General Motors granted workers annual income, incentive pay, and a strong contractual commitment to lifetime employment. *Unions Can Play Important Role in Restructuring U.S. Business*, Daily Lab. Rep. (BNA), Jan. 16, 1992, at A19. Managers and workers shared responsibilities for decision-making in a structural manner. *Id.* Making workers responsible for improving quality and efficiency has greatly improved competitiveness. Levin, *supra*, at D8.

12. See *infra* part IV (arguing that employment-at-will is a judicial intervention that hinders the recovery of American competitiveness in international markets).

13. See *infra* notes 20-87 and accompanying text (describing the lack of legal protection for American workers attempting to improve the quality and efficiency of their workplaces).

14. See *Report by Gorbachev*, *supra* note 8, at 7 (calling for everyone to work conscientiously and unreservedly to improve efficiency and production).

15. See *infra* notes 88-168 and accompanying text (describing *perestroika* reforms aimed at making the Russian workplace competitive in international markets).

and suggestions. In both the United States and the former Soviet Union, lawmakers assumed that production efficiency required that workers obey managers.¹⁶ Compelling worker obedience, however, stifles the worker resourcefulness that is necessary to duplicate the quality and efficiency offered by foreign competitors.¹⁷

Part IV explores recent corporate attempts in the United States to duplicate the management procedures which have propelled foreign competitors into dominant market positions. Evidently, workers will not exercise an adequate level of resourcefulness unless the law or companies themselves protect that exercise.¹⁸ As a result, the preservation of jobs in the international context will require protections for the worker against management retaliation.

Part V recommends a common law and statutory basis for protecting workers who mobilize improvements in the workplace. Courts and legislatures in the United States should recognize and protect the worker's property interest in workplace-specific skills and resourcefulness.¹⁹

I. EXISTING PROTECTIONS FOR WORKERS AGAINST MANAGER RETALIATIONS IN THE UNITED STATES

International standards for human rights propose that everyone has a right to work under just conditions²⁰ that preserve fundamental freedoms.²¹ To ensure that workers are not fired unless there is a valid

16. See *infra* notes 169-211 and accompanying text (discussing both the United States and Russian approach to employer obedience in the workplace).

17. See *infra* notes 199-211 and accompanying text (arguing that the workplace competitiveness of both the United States and the former Soviet Union are disadvantaged in international trade by a lack of protection for workers attempting to improve their workplaces).

18. See *infra* notes 212-41 and accompanying text (arguing that workers generally require legal protection from management retaliation or they will not participate in the workplace at creative levels that will compete in international markets.).

19. See *infra* notes 242-67 and accompanying text (suggesting that American and Russian workplaces will not be competitive on quality and efficiency in international markets unless American and Russian courts protect workers who attempt to improve their workplaces).

20. See *Universal Declaration of Human Rights*, G.A. Res. 217A(III), Art. 23(1), U.N. Doc. A/810 (1948) (proclaiming a right to "just and favorable conditions of work"). The United States voted for adopting this declaration, but the Soviet Union abstained. BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: SELECTED DOCUMENTS* 352 n.1 (1991).

21. See *International Covenant on Economic, Social and Cultural Rights*, G.A.

reason,²² this standard would mandate a pre-termination procedure²³ and a process for appeal.²⁴ Under international standards, these procedures apply regardless of the reason for termination.

The United States is the only major industrialized nation that continues to depart from the international standard that prohibits the termination of an employee absent a valid reason.²⁵ Nevertheless, federal and

Res. 2200, 21 U.N. GAOR Supp. (No. 16), Art. 6(2), U.N. Doc. A/6316 (1966) (proclaiming safeguards for political and economic rights in the workplace). While the Soviet Union ratified this covenant, the United States has not. CARTER & TRIMBLE, *supra* note 20, at 376 n.1.

22. See *Termination of Employment at the Initiative of the Employer*, REC. PROC. [International Labour Office], at 30/21, Art. 4 (1982) [hereinafter *Termination*] (proposing that a worker may be fired only for a legitimate reason that relates to job performance). This labor standard was developed by the International Labour Office (ILO), a United Nations subsidiary in Geneva that was formed for the purpose of improving the conditions of workers internationally. *Statements on U.S. Relations with ILO [International Labour Office] Presented Before Senate Labor and Human Resources Comm.*, Daily Lab. Rep. (BNA) No. 177, at E-15 to E-16 (Sept. 12, 1985) [hereinafter *Statements*] (statement of Abraham Katz, President, U.S. Council for International Business). Under ILO auspices, government, employer, and worker representatives from the member nations examine democratically selected labor issues and develop standards to address these issues. *Id.* at E-15. Subsequently, member nations have an obligation to consider ratifying and implementing the resulting standards as domestic law. See *id.* at E-4 (statement of George P. Shultz, Secretary of State) (responding to the frequent attacks that the United States creates a false impression internationally because it applies international labor standards to other countries, but disregards the standards domestically). Since joining the ILO in 1934, the United States has ratified only seven of 160 ILO standards, and six of the standards that the United States ratified apply only to maritime occupations. *Id.* at E-17 to E-18. The United States Supreme Court, however, considered ILO standards as relevant in deciding that a Maryland statute prohibiting sales on Sunday could have a secular purpose. *McGowan v. Maryland*, 366 U.S. 420, 450-51 (1961) (citing 1921 and 1956 International Labour Office standards which established that major industrialized countries, though originally declaring one day off each week for religious purposes, should continue to grant all workers the same day off for secular reasons); see also *Eagle-Picher Indus. v. Liberty Mutual Ins. Co.*, 829 F.2d 227, 236 (1st Cir. 1987) (accepting an International Labour Office standard as reasonable for assessing the risks of lung-disease).

23. *Termination*, *supra* note 22, at 30/21, art. 7.

24. *Termination*, *supra* note 22, at 30/21, art. 8.

25. *Grenig*, *supra* note 8, at 569; see also *Termination*, *supra* note 22, at 35/4 (statement of Mr. Weinberg, Employers' Adviser, United States) (opposing a requirement that managers give a "valid reason" for firing a worker because this standard frustrates the United States doctrine of employment-at-will); *id.* at 35/4-5 (statement of Mr. Peterson, Government Adviser, United States) (asserting the United States view that reducing government intervention and encouraging the freedom of association,

state legislation does protect workers when legislatures deem such protection necessary for political or moral reasons.²⁶ Unlike most industrialized countries,²⁷ however, the United States has no national policy to protect the majority²⁸ of its workers in speech or action to do their jobs better.²⁹ Moreover, when managers fire workers for protesting business

together with the implied right of workers to leave and managers to fire without a government requirement of valid reason could help solve the world economic problems). Montana, Puerto Rico, and the Virgin Islands have adopted statutes limiting the manager's right to fire. MONT. CODE ANN. § 39-2-901 (1992); P.R. LAWS ANN. tit. 29, § 185 (1992); V.I. CODE ANN. tit. 24, § 76 (1992). A Uniform Employment Termination Act based on the Montana statute has been drafted for adoption by states. *Model Uniform Employment Termination Act Adopted Aug. 8, 1991, by National Conference of Commissioners on Uniform State Laws, Subject to Finalization by Commission Fall 1991*, Daily Lab. Rep. (BNA) No. 156, at D-1 (Aug. 13, 1991) [hereinafter *Model Uniform Employment Termination Act*] (reprinting the text of the proposed model state statute); see also *Model Termination Act Would Improve Remedies Available to Fired Employees, St. Antoine Says*, Daily Lab. Rep. (BNA) No. 94, at A-2 (May 14, 1992) [hereinafter *Act Would Improve*] (stating that the arbitration provisions of the model state legislation would be more comprehensive and dependable than the current tort and contract remedies available through litigation). The provisions of the model statute, as well as the Montana, Puerto Rico, and Virgin Islands provisions, however, are inadequate to protect workers attempting to improve the workplace because there is insufficient guarantee of worker participation in decision making. See *Statements Adopted by AFL-CIO Executive Council, Bal Harbour, Fla.*, Daily Lab. Rep. (BNA) No. 34, E-1 (Feb. 23, 1987) [hereinafter *Statements Adopted*] (noting that reinstatements of workers found to be wrongfully discharged are significantly more successful if the reinstated worker has influence over manager decisions through political support from a team of fellow workers).

26. See *infra* note 33 (summarizing selected federal and state statutes responding to voter demands for legislative action to protect workers); 79 Cong. Rec. 7565 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1935, at 2341 (1985) (statement of Sen. Wagner) (noting the high cost to the American economy for permitting the long and violent conflict between employers and workers over the validity of labor unions, and justifying a legal recognition of the right to union organizing as a means of restoring peace in American industry).

27. See Clyde W. Summers, *Individual Rights in the Workplace: The Employment-at-Will Issue: Introduction*, 16 U. MICH. J.L. REF. 201, 203-04 (1983) (observing that in comparison to other industrialized countries, the United States stands alone in failing to protect workers against invalid terminations); 138 CONG. REC. S7951-52 (daily ed. Mar. 26, 1992) (statement of Sen. Kennedy) (charging that business in the United States, unlike business in most other industrialized democracies, has refused to grant democratic rights in the workplace).

28. See WEILER, *supra* note 2, at 10 (noting that over 80% of workers in the United States have no union protection); *Act Would Improve, supra* note 25, at A-2 (estimating that 150,000 workers are fired each year without a valid business reason).

29. See *Vella v. United Cerebral Palsy*, 535 N.Y.S.2d 292, 294 (Sup. Ct. 1988)

decisions, courts and legislatures in the United States are reluctant to intervene, even when management's conduct is unethical³² or unsafe to the general public.³¹

This reluctance to protect workplace rights is consistent with a general United States aversion to involve government in maintaining the rights of one citizen against another,³² unless there is public outrage.³³ Rights and freedoms in the United States generally are protections against government intrusions, not protections against injuries caused by private parties.³⁴

(refusing a cause of action where a worker was fired for revealing overpayment and wrongful payment of public funds because these allegations did not constitute a specific threat to the "public health or safety" as required for protection under the state whistleblower statute). A deficiency in legal protection for workers in objecting to wasteful or dangerous management decisions chills improvements in quality and price. 137 CONG. REC. E1366 (daily ed. Sept. 26, 1991) (statement of Rep. Clay) (arguing that workers are more productive and work harder when they maintain the right to express opinions about their work). Representative Clay proposed that the United States provide federal protection of expression in the workplace similar to the protections provided by major competitor nations. *Id.*

30. See *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505 (N.J. 1980) (denying a cause of action to a worker who alleged that the manager's research was unethical and finding that the research, even if unethical, did not violate a "clear mandate of public policy").

31. See *Rachford v. Evergreen Int'l Airlines*, 596 F. Supp. 384 (N.D. Ill. 1984) (finding that a worker had failed to state a claim where the manager fired the worker for complaining about unsafe conditions violative of federal standards). There was no law which prohibited firing a worker for complaining about the manager's violations of federal standards. *Id.*

32. See Louis Henkin, *Constitutionalism and Human Rights*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 383, 389-91 (Louis Henkin and Albert J. Rosenthal eds., 1990) (explaining that the United States Constitution protects citizens against individual action, as opposed to state action, only when the right not to be held in slavery is threatened).

33. See, e.g., 29 U.S.C. § 141 (prohibiting firing or punishment for union activity); 29 U.S.C. § 621 (forbidding adverse action based on age); 29 U.S.C. § 701 (outlawing disciplinary action for worker injuries); 29 U.S.C. § 2001 (prohibiting firing or punishment for refusing specified lie detector tests); 42 U.S.C. § 2000(a) (outlawing disciplinary action for disabilities); 42 U.S.C. § 2000(e) (prohibiting firing or punishment based on race, color, national origin, religion, or sex); N.Y. LAB. LAW § 740 (McKinney 1988) (prohibiting disciplinary action for revealing situations threatening to the "public at large").

34. Epstein, *supra* note 9, at 953-54. Epstein argues that the Constitution guards individual freedoms against invasion by the government only. *Id.* Furthermore, the Constitution protects the freedom of contract against government invasion, as it does

Unlike other industrialized nations, the United States continues to resist international efforts to obligate governments to protect human rights.³⁵ Similarly, the United States also rejects a government role in ensuring that managers have a valid business reason for firing a worker.³⁶ Under a theory that freedoms limit the right of government to interfere in private enterprise, courts and legislatures in the United States continue to justify ignoring worker rights issues in an idealized effort to protect the freedoms of both the manager and the worker.³⁷

The common law doctrine of "employment-at-will"³⁸ reflects this concept of "freedom" as a limit on government interference.³⁹ The

freedom of speech. *Id.* Thus, society tolerates the invasion of individual interests by other individuals through an employment contract because it expects individuals to defend themselves against such invasions. *Id.* By similar reasoning, the Supreme Court has asserted that a child has no right to protection from his violent father because the Constitution does not provide protection against the actions of individuals, only against the actions of the government. *DeShaney v. Winnebago Dep't of Social Serv.*, 489 U.S. 189, 195 (1989).

35. See 135 CONG. REC. E1616 (daily ed. May 10, 1989) (statement of Rep. Fascell) (asserting that among major nations, only the United States has not ratified the international human rights covenants); Henkin, *supra* note 32, at 390-91 (stating that the United States rejects the notion that government is obligated to protect individuals from violations by other individuals).

36. See *Termination*, *supra* note 22, at 35/4-5 (statement of Mr. Petersen, Government Adviser, United States) (asserting that legal protections for workers endanger liberty, hinder job creation, and increase unemployment).

37. Epstein, *supra* note 9, at 954-57. Epstein contends that if the state imposed a standard requiring a valid reason for firing, workers would be injured as much as employers. *Id.* To support this contention, Epstein states that, if such a measure would benefit the worker, the worker would bargain for a contract with a limitation on termination. *Id.* at 956-57.

38. *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 553 (1974) (Grimes, J. dissenting) (objecting to making an exception to the traditional employment-at-will rule even if the worker had been fired for refusing the supervisor's sexual overtures). By judicial presumption, an employment relationship of an indefinite term is "at-will." *Id.* Either the manager or the worker can terminate the relationship at any time with no liability. *Id.* No liability will ensue to either party whether the motive for termination is "good cause, bad cause or no cause." *Id.* While no reason for termination must be given, no reason given can create liability in either party. *Id.*

39. See Epstein, *supra* note 9, at 954 (stating that employment-at-will is a common expression of the freedom of contract and hence, no regulation of employment-at-will can logically be justified in the name of individual freedom). Under employment-at-will, the courts and legislatures must presume that workers and managers protect themselves from each other. *Id.* Courts and legislatures should not intervene to substitute their judgment of fairness. *Id.*

worker can quit and the manager can fire without giving notice or a valid reason.⁴⁰ Both quitting and firing are terminations of the at-will relationship that involve no liability.⁴¹ The courts justify the employment-at-will doctrine as a corollary of a policy favoring non-interference with the freedom of either worker or manager to terminate their working relationship.⁴² Courts may reject the employment-at-will doctrine, however, when there is evidence: 1) that a contract other than one at-will was in force⁴³ or 2) that the manager's motive in firing was unlawful.⁴⁴

A. CONTRACT-BASED LIMITATIONS ON THE RIGHT TO FIRE AT-WILL

Under contract law, employment-at-will operates as a rebuttable presumption.⁴⁵ The worker can overcome the presumption by proving that the contractual understanding was other than at-will.⁴⁶ Explicit contracts specifying the possible grounds for termination of the employment rela-

40. See *Darlington v. General Elec.*, 504 A.2d 306, 316 (Pa. Super. Ct. 1986) (stating that, unless the employer promises to fire only for a valid business reason, then the employer does not breach the employment contract when firing the worker for following official company policy).

41. See Epstein, *supra* note 9, at 953-55 (implying that a limitation on the manager's right to fire would require a corresponding limitation on the worker's right to leave). But see Jack M. Beermann & Joseph W. Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 921-22, 922 n.28 (1989) (contending that employment-at-will cannot be justified by a requirement that a contract must be symmetrical, since contracts generally can be non-symmetrical).

42. See *Murphy v. American Home Prods.*, 448 N.E.2d 86, 89 (N.Y. 1983) (holding that if the court allows the manager to fire an accountant for reporting illegal account transactions in violation of internal regulations, the court abstains from interfering with the "unfettered right of termination lying at the core of an employment at will").

43. See *infra* notes 47-58 and accompanying text (summarizing protections based on explicit or construed contracts).

44. See *infra* notes 61-73 and accompanying text (summarizing protections based on policy restrictions of the manager's motives for firing).

45. See *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 892 (Mich. 1980) (characterizing employment-at-will as a presumptive construction that can be overcome by evidence of a company policy to terminate only for just cause); *O'Neill v. ARA Servs., Inc.*, 457 F. Supp. 182, 185 (E.D. Pa. 1978) (stating that, as a rule, a contract of employment for an indefinite period of time is presumably terminable at-will by either party, but that the at-will presumption may be overcome by showing that the parties intended that contract to last for a reasonable time).

46. *Toussaint*, 292 N.W.2d at 892.

tionship negate the employer's right to fire without just cause.⁴⁷ In addition to written or oral contracts with specific workers or groups of workers, courts may construe official personnel documents applied to groups of workers as specifying grounds for termination.⁴⁸

In the absence of documents suggesting a contract, some courts have recognized the worker's acts of detrimental reliance as evidence that the business relationship was other than at-will.⁴⁹ Moreover, some courts have construed the existence of a contract requiring just cause for termination when the worker left a previous job,⁵⁰ moved,⁵¹ or gave up a nearly vested pension.⁵²

47. See *Drzewiecki v. H & R Block, Inc.*, 101 Cal. Rptr. 169 (Ct. App. 1972) (holding that where a written contract for an indefinite period prohibited termination except for improperly conducting business, the manager was liable unless the manager showed that the worker handled business inappropriately); *Ryan v. Upchurch*, 474 F. Supp. 211 (S.D. Ind. 1979) (holding that a manager was liable for firing a worker without stating a valid reason if the worker was hired with an explicit promise, though unwritten, that termination would be only for just cause).

48. See *Toussaint*, 292 N.W.2d at 892 (holding that a company supervisory manual declaring a policy to discharge for just cause would overcome the at-will presumption even though the fired worker did not learn of the just cause policy until after his hiring). Documents which limit the manager's contractual right to fire include personnel policy manuals, employee handbooks, stock option agreements, and collective bargaining agreements. See *Carter v. Kaskaskia Community Action Agency*, 322 N.E.2d 574, 576-78 (Ill. App. Ct. 1974) (holding that the grievance procedure described in the personnel policy manual refuted an at-will contract, and that the worker acquired a right to a grievance hearing before termination); *Pine River State Bank v. Mettelle* 333 N.W.2d 622, 624-31 (Minn. 1983) (holding that an employee handbook defining a disciplinary procedure contractually obligated the manager to follow the disciplinary procedure instead of firing at-will); *Haney v. Laub*, 312 A.2d 330 (Del. Super. Ct. 1973) (holding that a stock option agreement extinguished the manager's right to fire at-will where the agreement specified validity until death or dismissal for cause).

49. See *O'Neill v. ARA Servs., Inc.*, 457 F. Supp. 182, 185-86 (E.D. Pa. 1978) (holding that a manager's promise of a future promotion, together with a worker's reliance in leaving his former employment, would show an employment contract that the manager could not terminate at-will without incurring liability).

50. *Id.*

51. See *McIntosh v. Murphy*, 469 P.2d 177, 179-82 (Haw. 1970) (holding that relocating the worker a great distance in reasonable reliance on the manager's offer of a job indicated that a contract other than at-will existed and thus, the employer was liable for breach).

52. See *Rowe v. Noren Pattern & Foundry*, 283 N.W.2d 713, 717 (Mich. Ct. App. 1979) (holding that a worker's decision to give up a soon-to-vest pension at a previous job because of a manager's job offer indicated a contract other than at-will and that therefore, the manager must show just cause to avoid liability for breach).

Some courts also hold that at-will employment contracts contain an implied covenant of good faith and fair dealing,⁵³ though this protection may have limited scope.⁵⁴ Courts typically construe this covenant as imposing on both the worker and the employer a duty not to take unfair advantage of the other party even while pursuing self-interest.⁵⁵ On that basis, courts have held employers liable for damages when workers were fired solely to avoid paying accrued commissions,⁵⁶ to discourage workers from attempting to renegotiate salary,⁵⁷ or to eliminate a temporary worker where the manager led the worker to believe the hiring was long-term.⁵⁸

B. LIMITATIONS ON THE MOTIVES FOR WHICH MANAGERS CAN FIRE AN AT-WILL WORKER

Theoretically, under an at-will employment contract, the manager can fire for any reason or for no reason.⁵⁹ Courts, however, have refused to

53. *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 102 (Del. 1992). Under common law, every contract contained an implied covenant of good faith and fair dealing. *Id.* at 101-01. This implied covenant was extended even to employment contracts construed as at-will in the absence of an express employment contract. *Id.*

54. *See id.* at 103 (stating that firing for no reason is not a violation of the implied covenant of good faith and fair dealing).

55. *Id.* at 102.

56. *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977) (holding that, where a manager had an implied obligation of good faith and fair dealing in a written contract specifying an at-will employment, the manager could not avoid liability for commission on a major sale by exercising the option to terminate at-will). *Id.*

57. *See Sorenson v. Comm. Tek, Inc.*, 799 P.2d 70 (Idaho Ct. App. 1990) (holding that the manager breached an implied covenant when he fired a worker as a means of discouraging other workers from similarly negotiating for better contract terms.)

58. *See Merrill v. Crothall-American, Inc.*, 606 A.2d at 102 (acknowledging a claim for breach of an implied covenant where the manager promised a worker a steady job but continued interviewing for a permanent replacement employee).

59. *See Dateline: New York*, UPI, March 26, 1981, available in LEXIS, Nexis Library, Archives File (reporting pilot Pavolini's claim that he was fired because he reported to the FAA that his charter airline employer was operating unsafe aircraft); *Pavolini v. Bard-Air Corp.*, 645 F.2d 144, 147-48 (2d Cir. 1981) (commending the pilot Pavolini for risking his job in the interest of public safety, but denying the pilot federal court protection against retaliatory firing where the federal statute did not explicitly prohibit firing in retaliation); *Pavolini v. Bard Air Corp.*, 451 N.Y.S.2d 288 (App. Div. 1982) (refusing to protect a worker from unwarranted termination in a state claim unless that worker had a special employment contract, even when the

condone certain reasons for firing.⁶⁰ Thus, in addition to enforcing express or implied employment contracts that require the manager to have cause when terminating, most states grant protection against wrongful discharge⁶¹ when the firing violates a clear public policy.⁶² Courts, therefore, have held employers liable for damages if the worker was fired for performing an important public duty or obligation,⁶³ exercising a job-related legal right or privilege,⁶⁴ reporting violations of explicit statutes to the proper authorities,⁶⁵ or refusing to obey a command to violate the law.⁶⁶

Just as courts created the employment-at-will doctrine,⁶⁷ courts created the wrongful discharge exception to employment-at-will because they disapproved of some motives for terminations.⁶⁸ Courts, however, are

worker could show that the termination was retaliation for reporting unsafe aircraft to the proper federal authorities). In 1984, the New York legislature enacted a "whistleblower protection statute" that provides limited protection when the worker can show that the manager acted because the worker revealed a situation that threatened the "public at large". N.Y. LAB. LAW § 740 (McKinney 1988).

60. See *Petermann v. International Bhd. of Teamsters*, 344 P.2d 25, 28 (Cal. Ct. App. 1959) (granting a cause of action if the worker was fired for refusing to commit perjury).

61. See *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 106 nn.3-4 (Colo. 1992) (surveying, in a case of first impression, the states that adopted a cause of action for wrongful discharge). Thirty-seven states had adopted wrongful discharge; nine had declined; and three had not yet ruled on the issue. *Id.*

62. See *id.* 108-09 (granting a cause of action if a worker was fired for refusing the manager's order to misrepresent testing deficiencies where the misrepresentation would violate federal law).

63. See *Nees v. Hocks*, 536 P.2d 512, 516 (Or. 1975) (granting a cause of action if the worker was fired for reporting availability for jury duty).

64. See *Frampton v. Central Ind. Gas Co.*, 297 N.E.2d 425, 428 (Ind. 1973) (granting a cause of action if the worker was fired for filing a workers compensation claim as an exercise of a statutorily conferred right).

65. See *Potter v. Village Bank of N.J.*, 543 A.2d 80, 87 (N.J. Super. Ct. App. Div. 1988) (granting a cause of action to a bank president if the firing was for reporting illegal drug money laundering activities to the proper authorities).

66. See *Petermann v. International Bhd. of Teamsters*, 344 P.2d 25, 28 (Cal. Ct. App. 1959) (granting a cause of action to a worker if the firing was for refusing a manager's command to commit perjury).

67. See *Martin v. New York Life Ins. Co.*, 42 N.E. 416, 417 (N.Y. 1895) (creating the employment-at-will doctrine for New York State); *Beermann & Singer*, *supra* note 41, at 987 (noting that courts created employment-at-will and, thus, they logically cannot wait for legislatures to correct the injustices that follow from the at-will doctrine).

68. See *Petermann*, 344 P.2d at 28 (denying that managers can fire workers for

reluctant to develop the law defining "wrong" motives,⁶⁹ relying upon legislatures to establish the scope of exceptions to the at-will doctrine.⁷⁰

Hence, in general, the law protects a worker from discharge for attempting to improve the workplace only if the legislature has foreseen and validated the need for the particular improvement that the worker initiated.⁷¹ For example, the court protected a worker who refused to misrepresent product test results where a statute clearly prohibited such misrepresentation.⁷² Similarly, the court protected a worker in reporting unhealthful radiation levels where a statute expressly prohibited punishing workers for reporting safety violations.⁷³ Nonetheless, because there are any number of "wrong" motives for firing workers, the legislature generally fails to provide adequate protection against "wrong" motives for firing.⁷⁴

refusing to commit perjury).

69. See *Foley v. Interactive Data Corp.*, 765 P.2d 373, 380 (Cal. 1988) (refusing to expand the definition of "wrong motives" to include firing a worker for following the firm's internal procedures and regulations).

70. See *Dynan v. Rocky Mountain Fed. Sav. and Loan*, 792 P.2d 631, 639-40 (Wyo. 1990) (looking to federal and state statutes to ascertain public policy that defines wrong motives for firing). The court concluded that firing a worker for refusing to make a bad loan was not in violation of any law and thus, denied the plaintiff a cause of action. *Id.*

71. See *Bordell v. General Elec. Co.*, 564 N.Y.S.2d 802, 805 (App. Div. 1990) (granting a cause of action where a health professional was fired for reporting unhealthy radiation levels); Gary Minda & Katie R. Raab, *Time for an Unjust Dismissal Statute in New York*, 54 BROOK. L. REV. 1137, 1138-40 (1989) (suggesting that rather than formulating exceptions to the employment-at-will doctrine, the legislature should repeal the at-will rule and require the manager to have a valid business reason for firing a worker). *Id.*

72. See *Dateline: Denver*, UPI, July 25, 1981 available in LEXIS, Nexis Library, Archives File (recounting engineer Lorenz's claim that he was fired for discovering faults in the testing procedures for materials used in the attachment between the booster-rocket and the shuttle-craft in the space-shuttle program); *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 111 (Colo. 1992) (granting a wrongful discharge cause of action to engineer Lorenz on a claim of being fired for refusing a management command to misrepresent testing deficiencies where such misrepresentation would violate federal law).

73. *Bordell*, 564 N.Y.S.2d at 805.

74. Minda & Raab, *supra* note 71, at 1183-84. The New York legislature developed legislation to protect whistleblowers based on extensive hearings on situations requiring worker protection. *Id.* However, during a four-year period following passage of that legislation, only two whistleblowing situations fit the legislative criteria and in both cases a cause of action was denied. *Id.*

C. LIMITATIONS ON THE MANAGER'S ACTIONS IN FIRING A WORKER

While protection against wrongful discharge limits the manager's permissible motives for firing,⁷⁵ the tort of intentional infliction of emotional distress⁷⁶ may further limit the manager's treatment of the worker,⁷⁷ including the manager's method of firing.⁷⁸ Under a claim of intentional infliction of emotional distress, the manager's motive is relevant only to show that the manager intended the emotional distress that was caused.⁷⁹ Proof of the manager's motive for firing, however, fails to satisfy the test for outrageous conduct, even if the motive for firing appears outrageous.⁸⁰ "The mere act of firing an employee, even if wrongfully motivated, does not transgress the bounds of socially tolerable behavior,"⁸¹ which an actionable claim for intentional infliction of emotional distress requires.⁸² Furthermore, even if the firing causes demonstrable harm to the worker, the worker must still prove the manager's intent and foreknowledge of the likelihood that harm would

75. See *Madani v. Kendall Ford, Inc.*, 818 P.2d 930, 933 (Or. 1991) (noting that the lower court failed to draw a necessary "distinction between wrongful discharge, which focuses on the reason for termination, and intentional infliction of emotional distress, which focuses on the manner of termination").

76. *Id.* at 933. To state a claim for intentional infliction of emotional distress, the worker must show that: 1) the manager intended to inflict emotional distress on the worker; 2) the manager caused emotional distress to the worker; and 3) the manager's actions exceeded the bounds of socially tolerable conduct. *Id.*

77. See *Mellaly v. Eastman Kodak Co.*, 597 A.2d 846, 848 (Conn. Super. Ct. 1991) (granting a cause of action to a worker where the manager knew of the worker's alcoholism and, based upon that knowledge, taunted and harassed the worker and told the worker to "go get drunk").

78. See *Tandy Corp. v. Bone*, 678 S.W.2d 312, 316-18 (Ark. 1984) (holding the employer liable where the worker's reaction to stress and request for Valium put the manager on notice that the worker was not "of ordinary temperament" during the investigation preceding the firing).

79. *Mandani*, 818 P.2d, at 934-35.

80. See *id.* at 932 (denying a cause of action for intentional infliction of emotional distress even if the worker could show that the firing was punishment for three times refusing to obey the manager's command to "to pull down his pants, and expose his buttocks, testicles, and penis" in a public place, in violation of city and county ordinances, but where the manager's manner in executing the firing was "ordinary").

81. *Id.* at 934.

82. See *id.* at 935 (asserting that stating a valid claim for intentional infliction of emotional distress requires pleading that an intolerable act caused the injury) (citing with approval *Brewer v. Erwin*, 600 P.2d 398 (Or. 1989)).

result.⁸³ Thus, despite the potential applicability of tort law, the burden of proof is such that the law provides little protection for workers who attempt to improve the quality or efficiency of the workplace.

D. LIMITATIONS ON THE MANAGER'S RIGHT TO CONTROL SPEECH IN THE WORKPLACE

Despite the importance of information that the worker may provide to the public,⁸⁴ the First Amendment does not protect workers from employer actions that may restrain the worker's efforts to inform the public.⁸⁵ Only where the worker can argue that state action exists,⁸⁵ for instance, where the worker's employer is the government, is a court likely to grant First Amendment protection.⁸⁷ Thus, the First Amendment provides little protection against the hazards of employment-at-will if the worker attempts to correct the workplace or serve the public interest.

83. See *Kentucky Fried Chicken Nat'l Mgmt. v. Wethersby*, 607 A.2d 8, 24 (Md. 1992) (holding that a worker's nervous breakdown on being fired did not qualify for intentional infliction of emotional distress because the manager did not have constructive notice of the worker's "emotional makeup and vulnerability").

84. Matthew L. Wald, *Questions Raised About the Safety of Navy Reactors*, N.Y. TIMES, Jan. 1, 1991, at A1 (quoting a senator's claim that public scrutiny was necessary to compel secret decision makers to be realistic about problems of safety and nuclear waste).

85. See *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976) (declaring that the First Amendment does not protect speech on private property where there is no state action); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 560 (1972) (permitting restrictions on speech by the owner of a shopping center on the grounds that the shopping center did not perform state functions and thus state action was missing); *Brandenburg v. Ohio*, 395 U.S. 444, 450 (1969) (applying First Amendment protection, as incorporated by the Fourteenth Amendment Due Process Clause, to prohibit the state prosecution of speech which merely "advocated" violent action); *Civil Rights Cases*, 109 U.S. 3, 11-12 (1883) (limiting the scope of the Fourteenth Amendment to state action). "Individual invasion of individual rights is not the subject-matter of the amendment." *Id.* at 11.

86. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

87. *Freeman v. McKellar*, 792 F. Supp. 733 (1992) (granting a First Amendment and Fourteenth Amendment claim under 42 U.S.C. § 1983 where a city government manager fired a worker for testifying to a grand jury). To qualify for protection, the worker had to show that there was state action by the manager in firing, that the speech was of concern to the public, and that the public concern outweighed the manager's legitimate interest in controlling the worker's speech. *Id.* at 737-39.

II. ATTEMPTS TO "BREAK UP" COMMAND-MANAGEMENT: THE FORMER SOVIET UNION

A. DECENTRALIZING THE DECISION MAKING

In April 1985, Mikhail Gorbachev, then General Secretary of the Communist Party of the Soviet Union, introduced *perestroika*, in part as an attempt to make the Soviets competitive in world markets⁸⁸ by broadening participation in workplace decision making.⁸⁹ The new laws placed decision making responsibilities not only on local managers, but also on workers.⁹⁰ Under *perestroika*, the state provided incentives and protections⁹¹ to encourage workers to uncover managers' mistakes or malfeasance.⁹² While *perestroika* might have hastened the demise of the Soviet Union,⁹³ this decentralization continues in Russia under Boris

88. See YELTSIN, *supra* note 4, at 139 (describing Gorbachev's decision to initiate *perestroika* within the then existing Soviet command system). One month after the Politburo promoted him to General Secretary, Gorbachev announced the program of *perestroika* ("restructuring"). *Id.* Gorbachev, by continuing the totalitarian tradition, could have successfully postponed facing the political and economic problems in the Soviet Union for his lifetime. *Id.* Gorbachev maintained that *perestroika* was "necessary and inevitable" because of the high cost and low quality of Soviet production compared with the cost and quality of production in other developed nations. GORBACHEV, *supra* note 3, at 5-7.

89. See GORBACHEV, *supra* note 3, at 14-15 (declaring the changes that *perestroika* would bring to the Soviet Union). *Perestroika* included removing the restrictions and bans on worker objections and suggestions. *Id.* at 15.

90. See GORBACHEV, *supra* note 3, at 33-34 (noting that, before *perestroika*, workers were not made a part of decision making to the extent necessary for a healthy socialist society). Gorbachev intended that workers at all levels, "from shopfloor worker to minister" would "attain all their democratic rights and learn to use them in a habitual, competent, and responsible manner." *Id.* at 42-3.

91. See GORBACHEV, *supra* note 3, at 84, 89 (calling for the right of workers to elect their managers); Soviet Law on Cooperatives, *supra* note 5, arts. 13-14 (establishing the rights and duties of membership and employment in cooperatives and guaranteeing each member of a cooperative one vote in the election of management).

92. See GORBACHEV, *supra* note 3, at 42-43 (asserting that restructuring extended to workplaces, as well as to other areas of society, where if subordinates exercised their right to object and if managers responded appropriately to the objections, problems causing concern could be tackled before the difficulties intensified).

93. See Francis X. Clines, *End of the Soviet Union; Gorbachev Plans to Give Up Power to Yeltsin Today*, N.Y. TIMES, Dec. 25, 1991, at A1 (describing the disintegration of the Soviet Union and the formation of eleven independent republics, loosely associated in a confederation dominated by Russia as the strongest and richest nation).

Yeltsin,⁹⁴ and might yet succeed in making Russia competitive in world markets.⁹⁵

If *perestroika* represents a "restructuring" of the pre-1985 Soviet economy,⁹⁶ then command-management represents the social and economic order that *perestroika* aimed to dismantle.⁹⁷ Though not formalized by constitution or statute,⁹⁸ command-management was the very essence of the Soviet hierarchical command structure.⁹⁹ Under this structure, the General Secretary of the Communist Party controlled the nation's industrial complex, much as would a Chief Executive Officer in a Western corporation.¹⁰⁰ Under command-management, which Soviet courts rein-

94. See VLADIMIR SOLOVYOV & ELENA KLEPIKOVA, *BORIS YELTSIN: A POLITICAL BIOGRAPHY* 26-27 (1992) (portraying Russia as continuing the tradition of the former Soviet Union, including the *perestroika* program).

95. See Louis Uchitelle, *Russian Auto Maker Follows a Survival Blueprint: Exports*, N.Y. TIMES, July 23, 1992, at A1 (describing the transition of a state-owned manufacturing enterprise to a privately-held corporation and noting the gamble of devoting limited investment resources to develop a product with competitive quality and price for export). *But see* Michael Dobbs, *In Russian Heartland, Post-Reform Life Is Bleak*, WASH. POST, Aug. 9, 1992, at A25 (describing the uncertainty in the transition to a market economy in one urban area where the first private farmers complain of rising prices after the removal of price controls and express a preference for the days of "stagnation" under hard-line Communist rule).

96. See YELTSIN, *supra* note 4, at 139 (describing Mikhail Gorbachev's rise to power as General Secretary of the Communist Party of the Soviet Union and recounting Gorbachev's announcement of *perestroika* as a "restructuring" of Soviet society to improve the quality and efficiency of consumer-goods production); *Report by Gorbachev*, (Moscow home service, Apr. 23, 1985), available in LEXIS, Nexis Library, OMNI File (announcing the goal of improving the quality and efficiency of production by stimulating worker initiative through incentives for improvements).

97. See Mortimer B. Zuckerman & Douglas Stanglin, *'There Is No Way We Can Turn Back'*, U.S. NEWS & WORLD REP., Dec. 2, 1991, at 64 (interview with Mikhail Gorbachev, General Secretary of the Communist Party of the Soviet Union) (summarizing Gorbachev's description of command-management as the inefficient process that *perestroika* restructured).

98. See OLIMPIAD S. IOFFE & PETER B. MAGGS, *THE SOVIET ECONOMIC SYSTEM: A LEGAL ANALYSIS* 106 (1987) (explaining that Soviet law does not describe the organizing principles of Soviet production because Soviet leaders preserved their freedom to manage by decree).

99. See GORBACHEV, *supra* note 3, at 97-98 (reviewing the role of the modern Communist Party in bringing about a "command-economy system of management" where managers made decisions without participation by the workers whom the decisions affected).

100. JEROME A. BARRON ET AL., *CONSTITUTIONAL LAW: PRINCIPLES AND POLICY* 14 (3d ed. 1987) (noting that "the Soviet Union functions much like a modern corporation").

forced,¹⁰¹ every Soviet citizen was a worker¹⁰² forced to obey managers, who could coerce obedience with impunity by threatening to fire,¹⁰³ demote,¹⁰⁴ or imprison¹⁰⁵ those who disobeyed. Doctors, scientists, and artists all were mere workers under the command-management of a state agency and manager.¹⁰⁶

According to Soviet advocates of reform, command-management frustrated attempts by workers and managers to improve production quality and efficiency.¹⁰⁷ Centralized planning under command-management encouraged local managers to behave inefficiently.¹⁰⁸ Because workers could advance in the hierarchy only by obeying command-management

101. See Christopher Osakwe, *Equal Protection of Law in Soviet Constitutional Law and Theory — A Comparative Analysis*, 59 TUL. L. REV. 974, 974-75 (1985) (describing the abstinence of Soviet courts from forming public policy). Soviet courts only administered and enforced laws made by the legislative and executive branches of government. *Id.*

102. See KONST. SSSR art. 60 (1977), translated in ARYEH L. UNGER, CONSTITUTIONAL DEVELOPMENT IN THE USSR: A GUIDE TO THE SOVIET CONSTITUTIONS 232, 239 (1982) (assigning each citizen a duty to work productively); IOFFE & MAGGS, *supra* note 98, at 53 (stating that all Soviet citizens were employed by the state, except those working at minor jobs such as priests and baby-sitters).

103. See AGANBEGYAN, *supra* note 1, at 137-38 (relating the firing of a scientist for objecting to the decision of the President of the Agricultural Academy to end the study of biology in the Soviet Union).

104. See AGANBEGYAN, *supra* note 1, at 117 (reporting an economist's transfer to a position in metallurgical studies as punishment for exploring methods of balancing the national economy).

105. See AGANBEGYAN, *supra* note 1, at 116-17 (recounting the arrest of a technician for comparing economic sectors of the United States with comparable sectors in the Soviet Union in defiance of management opposition to such comparisons).

106. See IOFFE & MAGGS, *supra* note 98, at 53 (noting that every significant employer was under the direct or indirect command of a government agency); Tchetvernina, *supra* note 2, at 207 ("Intellectual workers were reduced to fulfilling administrative orders as state employees . . .").

107. See GORBACHEV, *supra* note 4, at 5 (describing the stifling effect of command-management attempts to improve production).

108. See GORBACHEV, *supra* note 4, at 7 (noting that, under command-management, local managers obeyed their bosses unquestioningly, even when evidence suggested the bosses were wrong). Under command-management, even scientific discussion became servile. *Id.* at 7-8. When the Central Planning Committee established a head count on cows as part of the plan, farmers responded to the plan by keeping non-producing cows that any economical farmer would have otherwise butchered, because the plan included a head count on cows but did not call for tallying gallons of milk produced or the cost of feeding the cows. AGANBEGYAN, *supra* note 1, at 131.

directives,¹⁰⁹ initiative atrophied¹¹⁰ and industry declined.¹¹¹

B. CREATING THE WORKER'S DUTY TO IMPROVE THE WORKPLACE

Soviet courts could have interpreted existing Soviet labor codes reasonably to protect workers against unjust firing or punishment.¹¹² Nonetheless, the courts allowed managers to retaliate against workers as a "political discharge,"¹¹³ which legislation did not authorize.¹¹⁴ The

109. See YELTSIN, *supra* note 4, at 82 (describing the difficulty of "getting things done" under command-management where underlings attend only to the appearance of obedience rather than taking responsibility for completing a task).

110. See Zuckerman & Stanglin, *supra* note 97, 110, at 64 (reporting Gorbachev's view that command-management eliminated natural worker perceptions of the workplace as a challenge to get a better reward for personal initiative).

111. See GORBACHEV, *supra* note 3, at 5 (noting that industry was not rationally organized). Distorted standards resulted in high praise for workers or enterprises that expended the most labor. *Id.* The workers at the base of the hierarchy realized the corrections that were necessary, but the workers had no means to influence the decision makers. *Id.* at 7.

112. See Kodeks Zakonov o Trude RSFSR [Russian Code of Laws on Labor], art. 29 (delineating Soviet Labor Code protection for workers); IOFFE & MAGGS, *supra* note 98, at 170 (prohibiting managers from firing workers for reasons not explicitly enumerated in the Labor Code). Workers of indefinite term were considered to be working under an indefinite term contract. This indefinite term contract did not need to be in writing because the Labor Code already specified its terms. Russian Code of Laws on Labor, *supra*, art. 18; IOFFE & MAGGS, *supra* note 98, at 166. The Labor Code limited the allowed grounds for discharge to the following: elimination of the worker's position because of reorganization, unsuitability of the worker to the position, repeated breach of duties after previous disciplining, unexcused absence, inability to work because of disability for longer than four months, reinstatement of worker previously assigned to the position, and appearing at work in a drunken state. Russian Code of Laws on Labor, *supra*, art. 33; IOFFE & MAGGS, *supra* note 98, at 170-71. Normally, the approval of the worker's trade union was required before a manager fired a worker. See GORBACHEV, *supra* note 3, at 99 (stating that a court of law would automatically reinstate a worker if a manager fired him without approval of the worker's trade union). However, trade unions surrendered to command-management and trade union officials did as managers commanded. See *id.* (reproaching the trade unions for "pandering to managers"). Hence, the trade unions offered workers little protection for improving the workplace. See *id.* at 100 (asserting that trade unions had the right to protect workers in making legitimate objections to manager decisions, admonishing trade unions for failing to protect workers, and asserting that workers needed protection even under socialism).

113. IOFFE & MAGGS, *supra* note 98, at 173. A manager or a scholar could be fired in retaliation under expedited procedures. *Id.* Other workers could be fired in retaliation by gathering or fabricating infractions of work rules or by contriving a reduction in force. *Id.* Even though published legislation did not authorize "political

range of retaliations available to managers effectively silenced the objections of workers and secured obedience.¹¹⁵

Within production facilities, the worker did not seek improvements.¹¹⁶ Advocates of reform insisted that this disinterest was due to the lack of a property interest in the workplace.¹¹⁷ Reform advocates reasoned that since managers could fire or transfer workers for no reason or for a bad reason,¹¹⁸ the worker had no expectation of benefiting from any improvement.¹¹⁹ Without protection against command-management capriciousness, workers simply obeyed managers' instructions¹²⁰ without examining their reasonableness.¹²¹ Thus, workers attempted to

discharge," the courts did not interfere with such terminations. *Id.*

114. IOFFE & MAGGS, *supra* note 98, at 173.

115. See ANDREI D. SAKHAROV, MY COUNTRY AND THE WORLD 29-30 (Guy V. Daniels trans., 1975) (characterizing the Soviet worker as obedient to "immediate and remote superiors" in order to survive).

116. See AGANBEGYAN, *supra* note 1, at 151-52 (noting that methods of management based on commands did bring stability, but command-management also brought stagnation because it prevented workers from providing useful information to management resulting in informed decisions).

117. See Vladimir Shcherbakov, *The Labour Market in the USSR: Problems and Perspectives*, in IN SEARCH OF FLEXIBILITY, *supra* note 2, at 19 (expressing the official opinion that high efficiency in production will require legal authorization that a worker owns the ability to perform a certain job). Without a property interest in the ability to perform a certain job, the worker becomes irresponsible in the workplace and becomes capable of only one service: obedience. *Id.* at 24. Not rewarding and not protecting the worker's skills creates a low quality worker. *Id.* at 26. Accordingly, economic recovery requires that the workers own a property-like guarantee of return for the investments of skills development and improving output. *Id.* at 27.

118. See *supra* notes 103-13 (reciting retaliatory firings, punishments, and perceived consequences); IOFFE & MAGGS, *supra* note 98, at 174 (summarizing the procedures for resolving disputes between manager and worker). Executives and scholars had no protection against being fired or punished by managers, and workers had no protection from being fired or punished for political reasons. *Id.* at 174-75.

119. See AGANBEGYAN, *supra* note 1, at 60-61 (comparing production and required manpower in two gold mines). In the gold mine where the workers had a property interest in improvements made to the workplace, "there was no director, no deputy, no special technician." *Id.* The workers improved their skills by their own effort thereby reducing manpower costs when there was a guarantee of return for the investment. *Id.*

120. See GORBACHEV, *supra* note 3, at 86 (noting that paying a worker without rewarding that worker's cultivation of productive workplace skills resulted in the worker saying "let the bosses have the headache").

121. See GORBACHEV, *supra* note 3, at 83-84 (stating that the lack of a proprietary role in the workplace made workers withhold useful opinions). Without a proprietary role, the worker became dormant. *Id.* at 15. As a result, quality and efficiency

raise neither the level of their own performances, nor those of fellow workers.¹²² Furthermore, workers stopped pressing for scientific and technological development in the workplace,¹²³ except when following the instructions of management.¹²⁴ In short, having no property interest,¹²⁵ the worker viewed the workplace as the manager's responsibility.¹²⁶

C. PROTECTION FOR WORKERS ATTEMPTING TO IMPROVE THE WORKPLACE

Soviet and Russian reformers hypothesized that command-management failed by centralizing too much of the decision-making.¹²⁷ Consequently, the reformers attempted to create a system of laws that authorized¹²⁸ and protected decentralized decision making.¹²⁹ Additionally,

fell. *Id.* at 7.

122. See Vladimir Veretennikov, *Wage Differentials: The Trade Union View*, in *SEARCH OF FLEXIBILITY*, *supra* note 2, at 221, 225 (noting that pay incentives to improve quality and efficiency are more effective where each worker and each manager participates in assigning and evaluating the other members of the team rather than following the decisions of a single command manager).

123. See Tchetvermina, *supra* note 6, at 204-05 (attributing the lack of technological innovation under the Stalinist model to workers having no property interest in the workplace to provide a basis for responsibility in making improvements).

124. See Tchetvermina, *supra* note 6, at 205 (describing managers as relying upon "thoughtless obedience" and workers as functioning like cogs in a machine).

125. See Tchetvermina, *supra* note 6, at 213-14 (noting that making workers responsible for a property interest in the workplace is more effective than pay incentives for increasing the efficiency of production).

126. See Roy D. Laird, *The USSR's Food Crisis*, *CHRISTIAN SCI. MONITOR*, July 26, 1990, at 19 (proposing that command-management, in addition to realizing industrialization through central planning, also changed the mindset of the worker to expect that better workplace performance would not improve earnings for the worker).

127. See John N. Hazard, *Prospects for a New Type of Federation*, in *BEYOND PERESTROIKA: OPTIONS FOR A NEW SOVIET UNION 6* (Laurence J. Aurbach ed., 1991) (validating Soviet attempts to improve efficiency through decentralization, and noting that large, private corporations in the West also decentralize to improve efficiency).

128. See AGANBEGYAN, *supra* note 1, at 167 (arguing that workers must have authority to influence workplace decisions, and asserting that the workers' authority must be guaranteed by power that is not dependent on any liberal grants of authority from managers making decisions behind closed doors).

129. See Viktor Demidenko & Mikhail M. Write, *Minister's Order Canceled on Workers' Demand*, *TASS*, Dec. 29, 1987, available in *LEXIS*, Nexis Library, *TASS* File (describing an implementation of reform law which afforded protection and authorization to the workers in a glass-works plant to reinstate by majority vote the local

the new laws granted workers the right to information about the enterprise.¹³⁰ Maintaining some centralized decision making, the 1987 Law on State Enterprises¹³¹ authorized local managers of factories and other enterprises to make economic decisions based on the local managers' view of the market.¹³² The workers, however, were given the right to elect the managers, the foremen, and the team leaders by majority vote.¹³³ In support of the reforms, the courts announced their readiness to enforce the worker rights sections of the Law on State Enterprises.¹³⁴

The 1988 Law on Cooperatives¹³⁵ provided authorization¹³⁶ and protection¹³⁷ for workers who attempted to improve product quality or pricing¹³⁸ by competing directly with state enterprises.¹³⁹ Any group

director after he was fired by the oversight ministry).

130. See AGANBEGYAN, *supra* note 1, at 167 (noting that under *glasnost*, or "openness," the worker has a right to be informed so that the worker can provide an appropriate influence on the eventual decision); Soviet Law on Cooperatives, *supra* note 5, art. 13(1)(4) (granting members of all cooperatives the right "to obtain information on any question of the cooperative activities and operations").

131. Law of the Union of Soviet Socialist Republics on the State Enterprises (Associations), 26 Vedomosti SSSR, Item 385 (1987) [hereinafter Soviet Law on State Enterprises], translated in 27 SOVIET STATUTES & DECISIONS (1990).

132. See *Soviet Parliament Ends Session*, TASS, June 30, 1987, available in LEXIS, Nexis Library, TASS File (highlighting new laws passed by the Soviet legislature, including the Law of State Enterprises). The Soviet Law on State Enterprises gave workers and managers at plants and factories certain rights to make economic decisions based on the market viewed by the managers and workers. *Id.*

133. See *Soviet Parliament Adopts Law on the State Enterprise*, TASS, June 30, 1987, available in LEXIS, Nexis Library, TASS File (announcing that, under the 1987 Law on State Enterprises, workers would elect senior managers as well as heads of production shops, foremen, and team leaders).

134. See *Sovetskaya Rossia on Legislation Reform in USSR*, TASS, Dec. 23, 1987, available in LEXIS, Nexis Library, TASS File (reporting comments by the Russian Minister of Justice and the Russian Chairman of the Supreme Court verifying that the courts were willing to apply the Law on State Enterprises to protect worker rights to self-management).

135. Soviet Law on Cooperatives, *supra* note 5.

136. See Soviet Law on Cooperatives, *supra* note 5, art. 1, para. 4 (declaring that cooperative enterprises are a legitimate part of the "national business complex").

137. See Soviet Law on Cooperatives, *supra* note 5, art. 13, para. 1 (establishing the rights of members, including the rights to obtain employment, participate in management, recommend improvements, and receive earnings in proportion to their labor contribution and their investment contribution).

138. See Soviet Law on Cooperatives, *supra* note 5, art. 1, para. 2 (stating that cooperatives, and the form of privately held property implied, were lawful and desir-

of three or more workers¹⁴⁰ who were over sixteen-years-old could form a cooperative to compete with state enterprises.¹⁴¹ The Law guaranteed each member of the cooperative the right to be employed by the cooperative,¹⁴² and the right to participate in management.¹⁴³ The members also had the right to select managers and directors by majority vote.¹⁴⁴ Finally, an employee of a state enterprise could join one, but no more than one, cooperative without interference from the manager of the state enterprise.¹⁴⁵

Furthermore, the 1991 Law on Employment addressed dislocations likely to result from workplace reforms. The prior Soviet emphasis on full employment encouraged enterprises to hire more workers than they required, creating conditions of over-employment and low productivity.¹⁴⁶ By creating free market areas of competition, the Soviet legislators attempted to force workers to migrate from low-productivity workplaces to high-productivity workplaces.¹⁴⁷ In making this transition, workers required training and preparation for the more competitive work and consequently faced significant risks of financial loss.¹⁴⁸ The Law

able for the purpose of bringing higher quality goods to the market at lower cost).

139. See Soviet Law on Cooperatives, *supra* note 5, art. 1, para. 5 (stating that cooperatives, and the resulting compensation incentives for high labor productivity, are designed to provide improvements on state enterprise production through competition); AGANBEGYAN, *supra* note 1, at 2 (outlining the transition redundancy in production which created incentives for privately owned cooperatives to compete with state enterprises for the same goods and services).

140. See Soviet Law on Cooperatives, *supra* note 5, art. 11, para. 1 (setting the minimum membership in a cooperative).

141. See Soviet Law on Cooperatives, *supra* note 5, art. 12, para. 1 (setting the lower age limit for membership in a cooperative).

142. Soviet Law on Cooperatives, *supra* note 5, art. 13, para. 1.

143. See Soviet Law on Cooperatives, *supra* note 5, art. 13, para. 1 (declaring that a member's rights to management participation shall include voting for the directors and officers of the cooperative).

144. Soviet Law on Cooperatives, *supra* note 5, art. 13, para. 1.

145. Soviet Law on Cooperatives, *supra* note 5, art. 12, para. 2.

146. See V.E. Tokman, *Preface to IN SEARCH OF FLEXIBILITY*, *supra* note 2, at v, vi (paraphrasing the prevailing view that over-employment caused low productivity in the Soviet Union and that consequently, raising productivity required releasing excess workers from current production to other manufacturing activities, such as increasing the production of consumer goods).

147. See Mikhail Bermant & Marina Feonova, *Training and Retraining: The Link With Employment*, in *IN SEARCH OF FLEXIBILITY*, *supra* note 2, at 329 (estimating the occupational changes to involve 50 million workers by the year 2000).

148. See Bermant & Feonova, *supra* note 147, at 323 (reviewing the resources

on Employment¹⁴⁹ aimed to minimize these risks and to ease the transition¹⁵⁰ from low-productivity workplaces to high-productivity workplaces.¹⁵¹

Furthermore, new law under *perestroika* explicitly prohibited race, sex, and age discrimination in hiring practices during the migrations caused by new market forces.¹⁵² Finally, the law created economic incentives for employers in hiring workers with disabilities.¹⁵³

D. DEMOCRACY TO IMPROVE THE DECISION MAKING

The principles of the laws on enterprises, cooperatives, and employment depended largely on worker ambition.¹⁵⁴ The legislators sought to encourage workers to take entrepreneurial risks to prepare them for challenges from international market forces.¹⁵⁵ The reformers praised

initially available for upgrading worker skills in the transition to a market economy).

149. Basic Principles of the Legislation of the Union of Soviet Socialist Republics and its Republics on Employment of the Population, Jan. 15, 1991, *translated in* LAB. LAW DOCS., 1991/2, at 35 [hereinafter Soviet Law on Employment].

150. *See* Soviet Law on Employment, *supra* note 149, art. 26 (specifying the financial assistance available to discharged workers, including severance pay, unemployment and medical benefits, and training).

151. *See* Valeri F. Kolosov, *The New Employment Policy in the USSR*, in *IN SEARCH OF FLEXIBILITY*, *supra* note 2, at 45, 47 (noting the legislative concern for release of workers from low-productivity workplaces in formulating the 1991 Law on Employment). Soviet legislators intended to provide training, incentives, and counseling for released workers to prepare them for high-productivity employment. *Id.*

152. *See* KONST. SSSR art. 34 (declaring legal equality for all Soviet citizens irrespective of origin, social position, race, national origin, sex, education, attitude to religion, type and nature of occupation, and place of residence), *translated in* UNGER, *supra* note 102, at 240; Soviet Law on Employment, *supra* note 149, § 4 (legislating equal opportunity in employment irrespective of race, sex, attitude to religion, age, political convictions, nationality, and social status).

153. Soviet Law on Employment, *supra* note 149, art. 6 (specifying tax incentives and set asides to guarantee employment assistance to disabled workers).

154. *See* Shcherbakov, *supra* note 117, at 37 (stating that *perestroika* reform intended to make workers responsible for rectifying poor management, lack of regulation, and insensitivity to market processes).

155. *See* Soviet Law on Cooperatives, *supra* note 5, art. 4, para. 2 (establishing that cooperatives would operate on principles of self-financing whereby the profits from operation would improve the standard of living of the cooperative members while simultaneously solving society's problems and providing high-efficiency production of goods and services); Shcherbakov, *supra* note 117, at 41 (stating that, while there was no consensus on the role and effectiveness of collectives, there was opportunity in collectives for worker "initiative and entrepreneurship").

critical and responsible workers rather than obedient ones¹⁵⁶ because workers with some independence were more flexible, more productive, and required less management overhead.¹⁵⁷

Although these laws aimed to dismantle command-management, they actually manifested command-management.¹⁵⁸ Accordingly, Gorbachev feared that if *perestroika* originated from his office, then the reform would depend on command-management for survival.¹⁵⁹ He observed that the reform would be reversible as long as it relied on the authority of the General Secretary.¹⁶⁰ That is, a subsequent return to a command hierarchy easily could originate from the office of a future General Secretary.¹⁶¹

In Gorbachev's view, however, democratizing the workplace would provide an irreversible departure from old command-management practices.¹⁶² He reasoned that after the reform had secured a competitive workplace, then political democracy could follow as a secondary effect.¹⁶³

156. See GORBACHEV, *supra* note 3, at 16-17 (noting that *perestroika* intended to raise the level of responsibility by inducing workers to act according to their conscience).

157. See Shcherbakov, *supra* note 117, at 24-27 (describing procedures for making workers less dependent on management oversight). *Perestroika* incentives protecting the worker's property interest in the workplace intended to raise the worker's sense of efficiency and willingness to assume responsibility. *Id.*

158. See GORBACHEV, *supra* note 3, at 42 (acknowledging that *perestroika* was a revolution from above initiated by high level Communist Party leadership); YELTSIN, *supra* note 4, at 227 (stating that the reform would not make a significant difference until workers acted from personal power instead of waiting for direction from managers).

159. See GORBACHEV, *supra* note 3, at 42 (asserting that the reforms would have little chance at success without strong popular backing).

160. See GORBACHEV, *supra* note 3, at 43 (observing that if a reform requires intimidation by the authorities then the reform is weak and loses direction). In Gorbachev's view, popular resistance against a reform indicates a likely problem that hinders success. *Id.*

161. See GORBACHEV, *supra* note 3, at 43 (noting the common perception that new Russian leaders construct programs to blame unresolved problems on the former leaders while no actual change takes place); AGANBEGYAN, *supra* note 1, at 110 (admitting that *perestroika*, in many ways, resembled prior reforms that command-management had initiated and then later reversed).

162. See GORBACHEV, *supra* note 3, at 43 (discussing reversibility of previous reforms in comparison to *perestroika* based on democratic principles).

163. See GORBACHEV, *supra* note 3, at 13 (stating that the primary concern objective of *perestroika* aimed to improve economic conditions); *id.* at 21-22 (conceding

Alternatively, some of Gorbachev's advisors argued that democracy should include the political process,¹⁶⁴ and Yeltsin, the dissident in those days, contended that democracy of the political process should precede democracy of the workplace.¹⁶⁵ In any case, the notion of workplace democracy did not necessarily include political democracy.¹⁶⁶ Workplace democracy was merely a mechanism for better decision making to promote competitive quality and pricing.¹⁶⁷ In essence, workplace democracy was a matter of economics, not politics.¹⁶⁸

III. COMPELLING WORKER OBEDIANCE: THE FORMER SOVIET UNION AND THE UNITED STATES

A. STATEMENT OF THE PROBLEM: FIRED FOR DOING THE JOB

Valid controversies can arise between the worker and the manager regarding sound workplace policies and practices, as well as job duties.¹⁶⁹ How one defines the job depends upon one's perceptions of the

that ultimately the *perestroika* reforms would spread to include popular democratic control of politics and ethics). When comparing *perestroika* to Western democracy, Gorbachev believed that the Western nations did not practice genuine democracy because the workers did not elect the managers and managers did not tolerate valid criticisms. *Id.* at 113.

164. See AGANBEGYAN, *supra* note 1, at 166-67 (describing activities in preparation for democratizing the political process to give citizens the ability to establish priorities and control public funds).

165. YELTSIN, *supra* note 4, at 248.

166. See YELTSIN, *supra* note 4, at 170-71, 248 (noting that workers were beginning to assert decision making rights in the workplace, but that these democratic reforms did not extend to political areas).

167. See GORBACHEV, *supra* note 3, at 5, 7, 13 (recalling the inefficiency of socialism which produced a deterioration in quality of goods and services).

168. See Guy Standing, *Towards Economic Democracy and Labour Flexibility? An Era of Experimentation*, in IN SEARCH OF FLEXIBILITY, *supra* note 2, at 389-95 (analyzing the *perestroika* programs in terms of political, economic, and industrial democratic principles). Economic democracy consisted of Soviet efforts to provide workers with wage incentives which corresponded to achievements in improved quality and reduced costs. *Id.* at 390. Industrial democracy embodied an effort to improve production decisions through authorizing and protecting workers in the process of affecting management decisions. *Id.* at 394-95. Political democracy could survive only if the economic infrastructure ensured a sufficient supply of goods and services that consumers wanted. *Id.* at 389-90.

169. See Joseph Sensenbrenner, *Quality Comes to City Hall*, HARV. BUS. REV., Mar.-Apr. 1991, at 64, 68 (relating the controversial views of workers that redefined the job of "maintenance" and contributed to improving the quality of city transporta-

workplace and society,¹⁷⁰ the potential for profits or losses,¹⁷¹ and the influences affecting productivity.¹⁷² Thus, worker and manager bring to the controversy different views of the difficulties and possible solutions.¹⁷³ The commentators supporting employment-at-will characterize the worker's views as mere reflections of self-interest with negligible objective merit.¹⁷⁴ Gorbachev, on the other hand, in preparing to emulate the workplace efficiency of Germany and Japan noticed the fundamental necessity of worker solutions in achieving competitive quality and efficiency.¹⁷⁵

Courts in the former Soviet Union¹⁷⁶ and in the United States¹⁷⁷

tion while cutting costs).

170. See ANDREI SAKHAROV, MEMOIRS 216-17 (Richard Lourie trans., 1990) (comparing a physicist's view with the view of his manager regarding the foreseeable futility of resuming nuclear weapon testing); NIKITA S. KHRUSHCHEV, KHRUSHCHEV REMEMBERS: THE LAST TESTAMENT 68-71 (Strobe Talbott trans., 1974) (portraying a manager's distrust of the physicist Sakharov who attempted to re-define an assigned technical job as a political responsibility and task).

171. See John Thorbeck, *The Turnaround Value of Values*, HARV. BUS. REV., Jan.-Feb. 1991, at 52, 57-60 (describing an entrepreneur who developed a high-quality marketing strategy that conflicted with the managers' low-cost plan). The entrepreneur contended that the managers were wasting the profitability of corporate resources. *Id.*

172. See AGANBEGYAN, *supra* note 1, at 144-46 (describing a manager's inability to understand the influence and advantages of a subordinate's ideas for increasing productivity).

173. See John S. Brown, *Research That Reinvents the Corporation*, HARV. BUS. REV., Jan.-Feb. 1991, at 102, 108 (noting that management often over-looked the practical knowledge of workers when attempting to cut costs).

174. See Epstein, *supra* note 9, at 974-76 (denying the objective value of a worker's viewpoint and recognizing only competing self-interests in the negotiation between worker and manager).

175. See GORBACHEV, *supra* note 3, at 67-69 (recognizing that each different viewpoint among honest people "reflects some real aspects of life" worthy of management consideration); AGANBEGYAN, *supra* note 1, at 83-86 (discussing the possibility that inducing managers to consider the viewpoints of workers can revitalize a stagnating economy).

176. See *Sovetskaya Rossia*, *supra* note 134 (paraphrasing two Russian court officials' statements that new legislation provided authority for courts to protect workers in objecting to manager decisions); *Supreme Soviet — Gorbachev's Speech*, TASS, Nov. 29, 1988, available in LEXIS, Nexis Library, TASS File (explaining that protecting workers included ensuring that proposals to improve the workplace were not suppressed by managers); N.I. Ryzhkov, *Address to USSR Supreme Soviet on 29th June*, PRAVDA, June 30, 1987, 2d ed., at 1, available in LEXIS, Nexis Library, BBCSWB File (giving an example of protection for workers in a roofing factory where the supervisor issued an unreasonable order). Under the reform rules, subordinates would have a legal right to object and reason with managers. *Id.*

177. See *Geary v. United States Steel Corp.*, 319 A.2d 174, 180-82 (Pa. 1972)

have noted the deficiency in protection for workers who dispute manager decisions.¹⁷⁸ Although the worker might have implemented a reasonable interpretation of company policy,¹⁷⁹ often courts would not provide the worker with adequate protection; courts presumed that the manager's view was more realistic than the worker's.¹⁸⁰ Despite evidence that such disagreements manifested a worker's unusual dedication to the job, the court still refused to protect the worker who reasonably disagreed with the manager merely to improve the workplace when there was no issue of illegality or public safety.¹⁸¹

B. INTENDING TO COMPEL WORKERS TO OBEY

Policy in both the pre-1985 Soviet Union¹⁸² and in the United States¹⁸³ presumed that modern production required obedient workers.

(Roberts, J. dissenting) (stating that workers who perform their duty to warn managers of relevant dangers are inadequately protected).

178. See *Vella v. United Cerebral Palsy, Inc.*, 535 N.Y.S.2d 292, 294 (Sup. Ct. 1988) (denying a cause of action to a worker fired for objecting to a manager's diversion of funds where such diversion would not explicitly violate a statute).

179. See *Citizens State Bank of N.J. v. Libertelli*, 521 A.2d 867, 869-70 (N.J. Super. Ct. 1987) (holding that statutory and common law permit a board of directors to fire a bank president who "insisted on following sound and lawful banking practices and would not go along with the self-dealing improprieties of board members"); *Kemper v. First Nat'l Bank*, 418 N.E.2d 819, 821 (Ill. 1981) (upholding the interpretation of a federal statute that allows a board of directors to dismiss a bank president for buying stock in the bank).

180. See *Rossi v. Pennsylvania State Univ.*, 489 A.2d 828, 836 (Pa. Super. Ct. 1981) (presuming a manager's view to be correct while refusing to consider the substance of a worker's objection to that view).

181. See *Foley v. Interactive Data Corp.*, 765 P.2d 373, 380 (Cal. 1988) (recognizing that, although a worker may have a duty to report information relevant to a manager's interest, the law does not protect a worker from being fired when meeting that obligation).

182. See IOFFE & MAGGS, *supra* note 98, at 134 (stating that Soviet authorities, like the tsars who preceded them, attempted to modernize society by force). Obedience provided the necessary coupling of worker activity to the centralized plan. *Id.* When a national plan depends on obedience, high management attention is required. *Id.* As long as manpower and natural resources were cheap, the more efficient methods based on initiative and competition were unnecessary. *Id.*

183. See *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 836 (Wis. 1983) (holding that the manager requires the unrestricted power to manipulate the worker in managing the workplace); Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 38 (1988) (arguing that an enterprise with job security provisions is more costly to operate and

For Soviet policy makers, production management merely meant expanding the crisis techniques that mobilized the nation for World War II.¹⁸⁴ Thus, central planners formulated the desired mix of military and consumption goods for the next period.¹⁸⁵ Workers at lower levels in the hierarchy, including middle managers, followed the commands of superiors.¹⁸⁶ Even though the Soviet Union promoted full employment, disobedience triggered punishment by demotion or firing.¹⁸⁷ Though the law technically prohibited firing or punishment without a valid reason,¹⁸⁸ the courts generally would presume that the manager acted reasonably in a controversy with a worker, and thus would find for the manager.¹⁸⁹

Similarly, the practice in the United States of compelling worker obedience developed from the industrial experience. In particular, entrepreneurial experts devised production lines for workers who performed according to the direction of expert managers.¹⁹⁰ While unions argued

is less flexible than a work-place where the workers obey the commands of the manager).

184. See GORBACHEV, *supra* note 3, at 32 (stating that centralized planning and the associated command style of management was necessary for getting the nation through wartime conditions).

185. See AGANBEGYAN, *supra* note 1, at 31-32 (describing the centralized planning process which specifies by customer the products to produce).

186. See AGANBEGYAN, *supra* note 1, at 32-33 (portraying middle managers who were forced to resort to illegal deals on the black market in order to satisfy the orders of superiors). Even foolish commands were carried out regardless of the financial impact or the waste involved. *Id.* at 35. Goods were delivered to customers whether or not the customers could use the product. *Id.* at 36.

187. See AGANBEGYAN, *supra* note 1, at 138 (stating that managers fired, disgraced, or jailed many scientists who disagreed with management decisions).

188. See Russian Code of Laws on Labor, art. 18 (stating the legal limitations on the manager's right-to-fire), translated in IOFFE & MAGGS, *supra* note 98, at 166 & n.42.

189. See IOFFE & MAGGS, *supra* note 98, at 70-71 (noting that by law, the state owned all property). Any worker activity that deviated from the manager's command risked criminal and civil liability for misappropriation of property. *Id.* Similarly, exceeding administrative authority risked prosecution as a violation of property laws. *Id.* at 70. Fulfillment of the central plan was the principal criterion of performance review. *Id.* at 291. On the other hand, a worker's deviation from the manager's rules risked prosecution as an injury to the economy. *Id.* at 290.

190. See LACEY, *supra* note 1, at 95-100 (describing the highest officer in the corporation assembling a technical team of experts and personally tackling the technical details of prototype automobiles with intense efforts such as forty-two-hour work stints). Technical experts developed all details of the production methods. *Id.* at 111-14. Managers trained low-expertise workers to do routine jobs. *Id.* at 115.

with managers over such matters as workers' share of profits, they did not demand participation in efforts to identify and promote processes to improve efficiency.¹⁹¹ Thus, unionized workers were encouraged to demonstrate neither creativity nor business initiative.¹⁹²

Though differing in historical origins, the policies of the pre-1985 Soviet Union¹⁹³ and the United States¹⁹⁴ depended upon the expertise of managers and the obedience of workers. Neither nation considered workers to have either managerial talent or entrepreneurial abilities.¹⁹⁵ Both nations offered promotion from worker to manager for those who exhibited talent,¹⁹⁶ but the differentiation between managers and workers was sharp.¹⁹⁷ Managers gave orders; workers obeyed.¹⁹⁸

191. WEILER, *supra* note 2, at 87, 132-33, 197, 295-96 (noting that unions have pressed management for worker interests in wages and job security, but have not proposed worker participation in management decisions). Instead, unions have isolated their activities from management concerns. *Id.* Supervisors and managers are excluded from union membership. *Id.* at 230. *But see* Clyde W. Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29, 34 (1979) (noting that the original purpose of empowering unions, under the protections of the National Labor Relations Act, was to establish democratic management of the workplace comparable to the democratic principles established for American government).

192. WEILER, *supra* note 2, at 295-96.

193. *See* IOFFE & MAGGS, *supra* note 98, at 3 (stating that the Soviet system is dependent upon maintaining the political power of experts to command workers).

194. *See* WEILER, *supra* note 2, at 196-97 (characterizing American mass production lines as a combination of technical experts giving commands and unskilled laborers following orders).

195. *See* GORBACHEV, *supra* note 3, at 52-55 (arguing that suppressing conflicts of opinion extinguished the initiative and resourcefulness of Soviet workers); Brown, *supra* note 173, at 103 (proposing that although corporations could modify procedures in accordance with the innovations of workers to improve profitability, managers commonly disregard these insights).

196. *See* YELTSIN, *supra* note 4, at 46-53, 241 (describing the management promotions of the young Yeltsin from an engineering background to becoming the first elected president of the Russian Republic); LEE IACOCCA, *IACOCCA: AN AUTOBIOGRAPHY* 31, 100-01 (Bantam paperback ed. 1986) (1984) (describing Iacocca's rise through the ranks of Ford Motor Company from student engineer to president).

197. *See* YELTSIN, *supra* note 4, at 82 (describing the threats, pressure, and coercion typical in a Soviet manager's treatment of workers); Levin, *supra* note 11 (noting the hierarchical and authoritarian tradition of management in the automotive industry). To improve the quality and cost of production, Ford Motor Company, in the late 1980's, had to fire those managers that would not listen to subordinates. *Id.* In this restructuring, Ford was copying Japanese workplace management that de-emphasizes the differentiation between workers and managers. WILLIAM B. GOULD, *JAPAN'S RE-SHAPING OF AMERICAN LABOR LAW* 4 (1984).

198. *See* WEILER, *supra* note 2, at 196-97 (stating that American managers per-

C. COURTS PROTECT ONLY WHAT THE COURTS PERCEIVE

In the United States and, before 1985, in the Soviet Union, the worker offered no significant value to the employer other than an ability to obey commands.¹⁹⁹ Reflecting this view, Soviet²⁰⁰ and American law²⁰¹ failed to protect the worker in challenging the wisdom of management decisions.²⁰² Nonetheless, both American and Soviet laws did provide some protection for worker interests that the courts perceived.²⁰³ For instance, courts and legislatures often were sympathetic to workers who had fulfilled a duty to report illegal activities, and who confronted employer retaliation as a result.²⁰⁴ But the courts simply did not recognize the worker's interest in workplace-specific skills,²⁰⁵ in-

ceived worker obedience as a requirement for efficiency); IOFFE & MAGGS, *supra* note 98, at 3 (summarizing the obedience required under Soviet command-management).

199. See WEILER, *supra* note 2, at 196-97 (stating that American managers perceived worker obedience as a requirement for efficiency); IOFFE & MAGGS, *supra* note 98, at 3 (summarizing the obedience required under Soviet command-management).

200. See YELTSIN, *supra* note 4, at 82 (suggesting the typical treatment that Soviet workers received in the absence of legal protections against manager retaliation).

201. *Geary v. United States Steel Corp.*, 319 A.2d 174, 181-82 (Pa. 1972). The court asserted that the law did not recognize any social value in the worker's effort to prevent injuries from defective steel piping. *Id.* On the contrary, the law recognized the importance of managers obtaining obedience from their workers. *Id.*

202. See Epstein, *supra* note 9, at 956-57 (noting that in free bargaining between the manager and worker, the manager's offer of wage represents the totality of value for the worker's labor). Other than the terms of the contract, there is no interest that requires protection by the state. *Id.* at 953-54.

203. See *supra* notes 47-58 and accompanying text (summarizing the protections for which the American worker could bargain); *supra* note 112 and accompanying text (summarizing the protections promised to the Russian worker not having a specific contract).

204. See *Potter v. Village Bank of N.J.*, 543 A.2d 80, 87 (1988) (granting a cause of action where the board of directors fired a bank president for reporting suspected laundering of drug money).

205. See OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANITRUST IMPLICATIONS* 64 (1975) (stating that a worker acquires specialized skills that give that worker a value above the worth of an equivalent worker that is not familiar with the workplace in question). These workplace-specific skills are such that a worker cannot learn them in a classroom away from the workplace. *Id.* at 62. Hence, a new worker must learn while performing the job during an initiation period. *Id.* at 63-64. The manager destroys these workplace-specific skills when he fires the worker. Epstein, *supra* note 9, at 974.

stead recognizing only the employer's interest in those skills.²⁰⁶

In allowing the manager a right to fire the worker without a valid business reason, courts failed to perceive the fragile nature of the learning process in a modern production environment.²⁰⁷ That is, the modern workplace routinely gives rise to situations that differ from the ordinary circumstances for which the enterprise has developed successful responses. As new competition may demand new tactics, so developing a successful response to an unfamiliar workplace situation may require some adaptation.²⁰⁸ Accordingly, uncertainty generally accompanies new opportunities, and worker and manager alike may feel stress.²⁰⁹ When a

206. See Epstein, *supra* note 9, at 970-74 (arguing that, since the employer bears the essential cost of losing the worker, courts and government agencies should refrain from interfering with the employer's judgment).

207. See Levin, *supra* note 11 (stating that Japanese competitiveness in quality and price is dependent on a learning process in which managers apply many of the suggestions of workers). Punishing or firing workers without a valid business reason wastes resources that are critical for this learning process. See *id.* (asserting that General Motors finally realized that Japanese quality and price could not be obtained by passing orders down the hierarchy, but stating that General Motors could duplicate Japanese quality and price when managers fostered learning from worker suggestions).

208. See Richard H. Day, *Adaptive Processes in Economic Theory*, in ADAPTIVE ECONOMIC MODELS 3-5 (Richard H. Day & Theodore Groves eds., 1975) (defining *adaptation* as a reorganization of responses to competitive threats so that the enterprise survives). To survive in the environment of international competition, the workplace must solve not only the accepted problems of routine production but also the new threats from improved quality and efficiency of competing foreign workplaces. See *id.* at 5 (proposing that when competition increases, successful enterprises must devote increased attention to discovering new ways of responding to new challenges). If a workplace does not adapt to resolve competitive threats, the workplace may bankrupt the firm. See *id.* at 10 (noting that bankruptcy results when the firm does not respond adequately to competitive threats). During the bankruptcy proceedings, the court often manages a proper reorganization so that the resulting firm adapts more effectively to competitive threats. *Id.* In contrast, some enterprises adapt or reorganize to meet competition without going through bankruptcy. See *id.* at 12 (recognizing that thoughtful managers can modify strategies and tactics before business failure forces a change). When the courts allow the manager to fire the worker for criticizing management decisions, the courts allow the manager to avoid facing the elements of business reality that the worker presents. See *id.* at 3 (stating that the firm's competitive environment consists of a threatening reality that the firm must face and resolve in order to survive); *id.* at 15 (noting that a firm's failure to adapt might derive either from wrongly analyzing the threat or from ineffective action to the threat); Levin, *supra* note 11, at D-8 (implying that the Saturn automobile likely would have less competitive success against the quality and price of foreign automobiles if managers could silence either the workers' analysis of workplace problems or suggestions for solutions).

209. Harry Bernstein, *Worker Participation Survives Early Woes*, L.A. TIMES, Sept.

controversy arises between manager and worker, two common tendencies may interfere with learning: 1) managers may fire or punish the worker for reasons unrelated to the job while attempting to avoid the discomfort of the learning process,²¹⁰ and 2) workers may acquiesce to even unreasonable commands unless the worker has reason to believe that the initiative leading to a success will receive a credible reward.²¹¹

Therefore, permitting the manager to fire or punish the worker destroys the learning process that may underlie a controversy between worker and manager. Consequently, the court must consider the effects of its action whether intervening or not intervening in an employment termination. If the court intends to assist domestic producers in achieving the level of learning that foreign producers accomplish on the production line, then the court must select a remedy that encourages the solution of the workplace problem that gave rise to the termination that had no valid business reason. That is, the United States judicial process must provide legal boundaries for containing workplace controversies long enough for workers and managers to adapt to, rather than terminate, the learning process.

16, 1991, at D2. Workers are more involved with their jobs when their ideas compete for making improvements in the workplace. *See id.* (observing that absenteeism drops significantly when the workers participate in making the decisions). The job creates more stress, however, when controversies between managers and workers are administered to achieve learning. *See id.* (quoting the union president associated with a worker participation project). When workers assume responsibility for making improvements in the workplace, they cannot blame somebody else but instead, must resolve any difficulties among themselves. *Id.*

210. *See* EDWARD R. SHAPIRO & A. WESLEY CARR, *LOST IN FAMILIAR PLACES: CREATING NEW CONNECTIONS BETWEEN THE INDIVIDUAL AND SOCIETY* 141 (1991) (describing how the learning process in a law firm creates disorienting tensions). When a new problem arises, managers and workers must accommodate the distracting interpersonal confusion to assess the workplace issue. *See id.* at 136-41 (describing the process of identifying the new workplace issue amid distracting interpersonal tensions in a law firm).

211. *See* AGANBEGYAN, *supra* note 1, at 71 (stating the *perestroika* goal of involving workers in making decisions which affect the workplace). Unless workers share in making decisions, efficient decisions will not be made. *Id.* Furthermore, unless the workers have a protected right to share in the profitability resulting from increases in efficiency, the workers will not put forth the effort required to improve efficiency. *Id.*

IV. DEVELOPING LAW TO COMPETE, NOT TO SUIT IDEOLOGY

A. CHOOSING A PARADIGM²¹² FOR COURT INTERVENTION

In an attempt to avoid interference in the workplace, courts may employ one of three strategies.²¹³ First, a court may recognize natural business practices and pass judgment in conformity with observed norms.²¹⁴ Second, the court may simply defer to the manager's business judgment regarding employment terminations.²¹⁵ Third, a court may find that any new remedy for wrongful discharges would require substantial investigation into broader social implications and thus, justify shifting the burden to the legislature.²¹⁶

Though a court might attempt to avoid intervention by sustaining the manager's decision to fire a worker,²¹⁷ this impulse ignores the history and nature of the at-will doctrine.²¹⁸ By creating the at-will doc-

212. See Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 23 (1989) (asserting that, if the court believes it can administer justice without actively altering society, that belief misleads the court so that the court does not notice the effects that court rulings generate). The reactions of society do not permit the courts, or any other state agency, to implement neutral rules for society. *Id.* at 25. Thus, when a state agency implements a rule, the agency intervenes and turns the society to a new heading. *Id.* at 10 and 10 n.40. Moreover, repeating a ruling induces new changes because the society is not in the same situation that prevailed when the state agency previously administered the rule. *Id.* at 20.

213. See *Wysocki v. Norden Sys., Inc.*, No. CV90 03 15 43S, 1990 Conn. Super. LEXIS 1369, at *6 (Conn. Super. Ct. Oct. 12, 1990) (stating that the courts have a "well established" rule to avoid interference in employment relations whenever the employee does not have a contract specifying a term of employment).

214. See *Bushko v. Miller Brewing Co.*, 396 N.W.2d 167, 171 (Wis. 1986) (giving direction to lower courts to screen discharge cases to protect the manager's customary discretion in firing at-will employees).

215. See *Darlington v. General Elec.*, 504 A.2d 306, 320 (Pa. Super. Ct. 1984) (declaring that "the employer should be master of his business").

216. See *Murphy v. American Home Prods. Corp.*, 448 N.E.2d 86, 89-90 (N.Y. 1983) (stating that the legislature should institute any limitations on the manager's right to discharge because the legislature, and not the court, has resources to ascertain and weigh the relevant interests within the community beyond the mere parties to the suit).

217. See *id.* at 300 (arguing to retain the at-will termination rule because the court feared the unknown effects from requiring managers to have a valid business reason for firing workers).

218. See Tribe, *supra* note 212, at 25 (implying that sustaining the manager in a

trine,²¹⁹ the courts interfered with the business landscape,²²⁰ and interfered with “the natural order of things,”²²¹ as surely as they would by protecting workers against management retaliation.²²² Thus, courts distort business practices even when enforcing the manager’s right to fire.²²³ Denying a claim on the basis of employment-at-will maintains a doctrine created by judicial fiat and perpetuates the original judicial intervention.²²⁴ Consequently, the courts’ choices are limited to options that intervene,²²⁵ either by: 1) endangering the status quo that courts established with the at-will doctrine,²²⁶ or 2) thwarting the processes by

controversy is as much an intervention as is protecting the worker against the manager’s adverse action). This intervention is inevitable because the court excludes other possible outcomes that may be more efficient, more natural, or more equitable. *Id.*

219. *See, e.g.,* *Martin v. New York Life Ins. Co.*, 42 N.E. 416 (1895) (creating the employment-at-will doctrine for the State of New York).

220. *See* *Beermann & Singer, supra* note 41, at 986-87 (recalling that United States courts, prior to creating the at-will presumption, had instituted a presumption that employment was for a fixed term, usually a year).

221. *See* *Tribe, supra* note 212, at 20 (arguing that courts generally reshape relations in the society regardless of which side of a controversy prevails). Declaring for either side in an employer-employee controversy modifies power relations compared with the situation before the court made the decision. *Id.* at 24-25.

222. *See* *Epstein, supra* note 9, at 951-52 (stating that requiring managers to have a valid business reason for firing a worker would distort the customary patterns of doing business).

223. *See* *Martin v. New York Life Ins. Co.*, 42 N.E. 416 (1895) (initiating in New York the manager’s right to fire the worker without having a valid reason); *Beermann & Singer, supra* note 41, at 987 (stating that the courts created the employment-at-will presumption, so a court’s claim of avoiding interference when upholding the rule is an illogical claim).

224. *See* *Tribe, supra* note 212, at 32 (arguing that *stare decisis* is a recognition that the courts alter expectations in society by earlier decisions). An honoring of precedent merely restates prior social choices by the courts. *Id.* at 25.

225. *See* *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a state law that interfered with the “right to contract”). The Court’s choices were limited to either interfering with the state legislative process or condoning the state’s interference with the contracting process. *See id.* at 76 (Holmes, J., dissenting) (faulting the majority with preventing “the natural outcome of a dominant opinion”). Deciding with either the majority or the dissenting position would entail intervening into an ongoing social process. *See* *Tribe, supra* note 212, at 20, 24-25 (asserting that when the Court recognizes any particular view on property or contract rights the Court has intervened to alter the status of society).

226. *Geary v. United States Steel Corp.*, 319 A.2d 174, 179 (Pa. 1972). The majority rejected the plaintiff’s request to overturn court precedent and intervene in employer decisions previously considered a matter of employer right. *See id.* (noting that

which workers attempt to take responsibility for their workplaces.²²⁷

B. ESTABLISHING THE PRESUMPTIONS FOR EMPLOYMENT
WITHOUT A SPECIFIC CONTRACT

Because the court has no alternative but to intervene, either by perpetuating or by altering the court's own at-will intervention, it must identify and justify the proper basis for intervention.²²⁸ Suggested rationales for intervention include dominant practice,²²⁹ controversy resolution,²³⁰ and protection of equity.²³¹ Dominant practice might refer to either the domestic community²³² or the international community.²³³

allowing such a cause of action would interfere with the employer's prerogative to control the upper management in the firm).

227. See *Geary*, 319 A.2d at 184-85 (Roberts, J., dissenting) (contending that the majority opinion disrupted the natural progression of cases protecting workers for acts that responsibly protect the public from danger).

228. See *Tribe*, *supra* note 212, at 22-23 (asserting that an awareness of judicial effects on the fabric of the society need not change the decisions rendered). Without examining the courts' effects on the natural order of things, courts carelessly perpetuate the view of those that the courts put in power. *Id.* at 38.

229. See *Epstein*, *supra* note 9, at 951-52 (maintaining that since most managers in the United States consider their agreement with workers to be at-will, then the court should presume an employment agreement is at-will, unless there is a specific contract stating otherwise).

230. WEILER, *supra* note 2, at 96. The Montana Wrongful Discharge from Employment Act, MONT. CODE ANN. § 39-2-901 (1987) extinguishes the employer's right to fire at-will, requires a valid business reason for firing, and encourages worker and manager to settle. *Id.* at 96-97. The Montana Act serves to limit the employer's liability. *Id.* Another effort, the Model Uniform Employment Termination Act, provides that either worker or manager can demand arbitration resolution of a termination dispute. *Model Uniform Employment Termination Act*, *supra* note 25, § 5(a), (c). The Model Act serves as a guideline for legislation requiring a manager to have a valid business reason when firing a worker. *Current Legal Remedies Are Inadequate for Majority of Workers*, *Professor Says*, Daily Lab. Rep. (BNA) No. 132, at A-7 (July 10, 1991).

231. *Epstein*, *supra* note 9, at 974-76. A surplus value is created when the worker becomes an expert in the workplace. *Id.* at 975. This surplus value represents the benefit to the employer above the value of a replacement worker. *Id.* The surplus value of an experienced worker forms the basis for a property interest. See *Beermann & Singer*, *supra* note 41, at 952 (arguing that the court created real property interests, such as adverse possession, to avoid inequities against productive pursuits, and hence, the court should also create a property interest to protect the investment of the long-term employee in the workplace).

232. See *Epstein*, *supra* note 9, at 951-52 (arguing that, in the United States, the presumption of the at-will contract exists to simplify employer-employee relations).

By asserting that managers must retain the power to fire workers at-will,²³⁴ the courts promote a traditional American idea that management by hierarchy makes good business. This assumption may or may not accord with reality, especially given the new competition from abroad.²³⁵ For example, the success of the General Motors Saturn project depended on giving workers rights against hierarchical managers, thus illustrating the elemental weakness of the assumptions underlying the at-will doctrine.²³⁶ Before the Saturn project, General Motors unsuccessfully had attempted to make domestic production lines more competitive by applying traditional hierarchical management methods, demonstrating the assumption that the at-will doctrine reflects: the success of the enterprise depends upon management control over workers.²³⁷ When

Because the at-will contract is the dominant practice in the employment context, a presumption requiring a valid business reason for termination would require managers and workers to expend extra energy drafting at-will contracts. *Id.*

233. See Lane Kirkland, *Don't Undercut Workers*, USA TODAY, Apr. 10, 1992, at 10A (noting that German and Japanese companies have built a superior competitive position without resorting to such tactics as "permanent replacements" for strikers). Germany and Japan build long-term relationships with workers in return for higher productivity. *Id.* American corporations, on the other hand, are permitted by law to replace workers to lower costs. *Id.* Though these managers believe they are improving the corporate position, they are destroying the workplace experience that is essential for America in meeting the competition from Germany and Japan. See *id.* (stating that America can recover a competitive position in international markets only if managers provide experienced workers with a real voice in managing the workplace).

234. See *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 101-03 (Del. 1992) (asserting that absent bad faith, a manager may terminate an employee without regard to the employee's perception of the job's duration).

235. See *id.* (theorizing that the legal tension in a controversy between manager and worker consists of the manager's need to act in self-interest versus the society's requirement that the manager not overreach in bargaining with the worker). A more realistic approach may entail determining whether manager or worker has the more accurate perception of the workplace. See Beermann & Singer, *supra* note 41, at 918 (summarizing insights that international competition may require providing a more secure environment for the worker); *Space Shuttle Accident Hearings*, *supra* note 7, at 72-73, 78-79 (statement of Hon. William P. Rogers, Chairman, Presidential Commission on the Space Shuttle "Challenger" Accident) (recommending a deliberative process to improve communication between management and other personnel to eliminate flawed decision making).

236. See Levin, *supra* note 11, at D-8 (describing the General Motors learning process in attempting to duplicate the quality and cost performance of Japanese production lines).

237. See Levin, *supra* note 11, at D-8 (describing the traditional hierarchical practice of assuming that, in a controversy between manager and worker, the manager

domestic manufacturing dominated domestic markets, hierarchical management methods indeed may have facilitated production by helping to restrain worker objections, with minimal impact on American competitiveness. Given more intense international competition in domestic markets, however, hierarchical management methods fail because they are less efficient than management methods practiced abroad.²³⁸

Thus, the courts' justification for perpetuating the at-will doctrine, given prevailing business conditions, seems as provincial²³⁹ as the mindset of the Brezhnev theoreticians in the former Soviet Union. These theoreticians paralleled the tendency of current American courts by refusing to examine assumptions in light of the management presumptions that consistently have given foreign competitors the advantage in international markets.²⁴⁰ American courts have failed to reassess their role in preserving an obsolete presumption and, therefore, can be unwitting accomplices in retarding American competitiveness.²⁴¹

should prevail). Ford Motor Company and General Motors improved their competitive position in international markets by abandoning the presumption that the manager had the right answer. *Id.*

238. Levin, *supra* note 11, at D-8.

239. See Tribe, *supra* note 212, at 24-25 (asserting that every court judges from the point of view of a value-imposing paradigm which inevitably modifies the society). A court's effect on society is not the result of the court's intention or action alone, but rather the reaction of the society to what the court does. *Id.* at 21-22. A reasonable court, then, must consider the changes it makes whether the court assesses its role as passive or aggressive. *Id.* at 22-23.

240. See AGANBEGYAN, *supra* note 1, at 149-50 (describing the pre-1985 Soviet institutions that repeatedly rejected proven management methods that had improved quality and price in foreign production facilities). Reformers had developed the *perestroika* proposals for decentralizing decision making and limiting manager prerogatives over workers before Gorbachev came to power in 1985. See *id.* at 150 (repeating Gorbachev's statement that activists had developed the *perestroika* ideas before he came to power).

241. See Epstein, *supra* note 9, at 951 (suggesting that if the courts makes the wrong presumption, the courts bias business to inefficient operations, by encouraging a theoretically waivable requirement to become conclusive in fact). Theoretically, the at-will presumption is waivable, but has, through court intervention, become conclusive in fact. See Minda & Raab, *supra* note 71, at 1183-84 (illustrating the persistence of the at-will presumption even in the face of legislative resistance).

V. RECOMMENDED COMMON LAW AND STATUTORY
PROTECTION FOR WORKERS ATTEMPTING TO
IMPROVE THE WORKPLACE

A. ALTERNATIVES FOR PROPERTY PROTECTION OF WORKER
RESOURCEFULNESS

Nevertheless, the principles of United States property law afford a policy basis for court protection of the worker's investment in the workplace at least when the society needs that investment.²⁴² In particular, the laws of adverse possession,²⁴³ mortgage equity,²⁴⁴ and long-term tenant rights²⁴⁵ suggest that society may benefit from protecting critical worker skills as against the rights of managers. Moreover, the traditional view of private ownership as a means of promoting productivity²⁴⁶ suggests that the worker's interest should merit court protection when the worker's skills represent necessary elements in international competition.

In summary, the principles of property law can provide a legal framework for recognizing the worker's property interest in workplace-specific skills²⁴⁷ while responding to three fundamental policy concerns. First, a

242. Beermann & Singer, *supra* note 41, at 952.

243. Beermann & Singer, *supra* note 41, at 950-51. Depriving the worker of a property right in personal effort would amount to discouraging productive labor. *See id.* (arguing that taking land away from the adverse possessor who put personal effort into making the land productive would harm society by discouraging the productive use of abandoned land).

244. Beermann & Singer, *supra* note 41, at 949-950. Denying the worker of a property interest would amount to allowing control of the entire bundle of property rights by someone not deserving. *See id.* (maintaining that restricting the lender's property right to only the unpaid amount of the loan permits the unhindered access of a homeowner while protecting the lender's value).

245. Beermann & Singer, *supra* note 41, at 951. Granting the worker a property right in personal effort would improve proper care of vital resources that concern the society as a whole. *See id.* (contending that transfer of title to long-term lessees while compensating the legal owner for value encourages homeowners to become self-sufficient).

246. *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 30 (3d ed. 1986) (stating that any resource of importance to the society will be more productive if the court recognizes a private property interest in it). Valuable resources which are not assigned to an owner will be vulnerable to uneconomical use. *See id.* at 30-31 (arguing that a pasture not assigned to an owner is vulnerable to overgrazing because no one has sufficient incentive to control misuse).

247. *See* ROBERT B. REICH, *THE WORK OF NATIONS: PREPARING OURSELVES FOR*

worker's skills in promoting creative solutions should merit the court's protection because these skills constitute a primary United States strength in global markets.²⁴⁸ Second, though generally courts have hindered rather than assisted the development of decentralized decision making in American workplaces, that hindrance derived from considering the worker's civic worth, not from weighing the importance of the worker's skills.²⁴⁹ Third, protecting the worker's skills need not involve new legal principles, for, as shown in the following section, the common law doctrine of emblements²⁵⁰ not only demonstrates the legal na-

21ST-CENTURY CAPITALISM 208, 219-21 (stating that America's strength in international markets is providing technical and managerial talents for solving new problems). Making a production facility competitive in modern international markets requires that workers become responsible for solving new problems as they arise. A. H. Raskin, *The Role of and Challenges Facing Unions in the 1940's and the 1980's — A Comparison*, 52 *FORDHAM L. REV.* 1071, 1080 (1984). Survival of key American industries may depend on encouraging American workers to enhance workplace-specific skills. *Id.* at 1078.

248. See REICH, *supra* note 245, at 196 (noting that the basis for competitive success in international markets has changed in the last twenty years). The economic health of the United States no longer depends on the success of United States corporations. See *id.* at 209 and 209 n.1 (noting that, when higher productivity derives from moving manufacturing capital to lower-cost labor markets, corporations are forced by international competition to migrate routine production facilities and jobs). Rather, in the modern era, United States economic health depends on the value that United States workers produce for the global economy. See *id.* at 208-09 (noting that while the wages are declining for workers performing routine production, the wage rates are rising for those who make headway on the tough problems such as producing higher quality at lower cost). Accordingly, encouraging the quality of work force that will be competitive in international markets requires training and sustaining workers who have the ability and resolve to challenge manager decisions that appear faulty. See *id.* at 231 (asserting that the quality of worker that can provide competitive value in international markets is not one who solves the problem given, but rather one who looks for short-cuts within the worker's overall comprehension of the workplace task). By fostering an attitude among workers to think for themselves and coordinate with others, the United States would enhance a natural economic strength and market advantage. See *id.* at 234-35 (noting that the worker who can make the United States competitive in international markets requires an appropriate environment that allows and promotes creativity).

249. See *supra* notes 234-46 and accompanying text (describing American court hindrances to applying worker resourcefulness in making American manufacturing competitive in international markets).

250. See *Moy v. Silveira*, 7 Cal. Rptr. 251, 253 (Cal. Ct. App. 1960) (holding that though a lease of uncertain tenure might terminate, the property interest in a crop of tomatoes remains with the farmer that planted, and that the farmer, under law, has access to the land as necessary for harvesting the crop). If a farmer leases

ture of the skills meriting protection, but also illustrates the extent of protection that would suffice to promote the competitiveness of United States workplaces.

B. WORKPLACE-SPECIFIC SKILLS: RESOURCES ATTACHED TO AN UNDERLYING PROPERTY RIGHT OF INDEFINITE TERM

If a worker has an at-will contract with a manager, the contract expires when either the worker or the manager says that the contract is terminated.²⁵¹ Hence, the contract of employment is of uncertain term.²⁵² A manager's termination of an at-will contract extinguishes²⁵³ any remaining contract interest the discharged worker might have in the workplace.²⁵⁴

Nonetheless, a worker under a contract of uncertain term may elect to

land from someone who has only a life estate, the farmer's lease terminates when the lessor dies. *Jones v. Scott*, 31 So.2d 361, 363 (Ala. 1947). Hence, such a farmer has a lease of uncertain tenure. *Dupree v. Worthen Bank & Trust Co.*, 543 S.W.2d 465, 467 (Ark. 1976). That farmer may still elect to plant and cultivate with the hope of harvest. *Id.* If the farmer's life-tenant lessor dies while the crop is still growing, and yet unripe, the farmer is in jeopardy of losing the fruits of toil. *Id.* After the life-tenant lessor dies, ownership of the land passes to the remainderman. *Id.*

The crops, however, do not pass in ownership to the remainderman. OHIO REV. CODE ANN. § 2115.10 (Baldwin 1991). Under the law of emblements, the crops, if planted before the life-tenant lessor died, will belong to the lessee of the life-tenant. *Moy v. Silveira*, 7 Cal. Rptr. 251, 253 (Cal. Ct. App. 1960). Though the lease be terminated and though any subsequent, implied tenancy at-will be also terminated, the farmer is granted protection for the crops and is granted lawful access onto the land for purposes of cultivating and harvesting those crops. *Id.* After the crops have been harvested, the lessee of the life-tenant then becomes a stranger to the land and can no longer enter the land without trespassing, unless the lessee of the life-tenant has permission to enter from the remainderman-owner. *See id.* (granting time of access only through the time necessary to harvest the crop).

The policy purpose for the law of emblements is to encourage the growth of crops since crops are important to the society. *Noble v. Tyler*, 56 N.E. 191, 193 (Ohio 1900). Relatively, the growth of crops is more important than the harm to the remainderman-owner in losing the enjoyment of the land for the reasonable time required for the lessee to cultivate and harvest the crops. *Id.* Because crops are important to the society, the farmer's property interest in the crops is protected even if the farmer's lease of uncertain term terminates, by no fault of the farmer. *Id.* If the farmer bears the peril of reaping, sowing would be discouraged. *Id.*

251. *See Epstein, supra* note 9, at 954 (defining employment-at-will).

252. *See Epstein, supra* note 9, at 954 (defining employment-at-will).

253. *See Epstein, supra* note 9, at 954 (defining employment-at-will).

254. *See Epstein, supra* note 9, at 954 (defining employment-at-will).

develop certain skills and resourcefulness that are not transferrable to another workplace.²⁵⁵ Should the manager terminate an at-will worker who has developed such skills, then the worker likely will lose the fruits of toil that those skills represent.²⁵⁶ Moreover, the loss of workplace-specific skills harms society as well as the worker, because such skills are a means of adding value to output.²⁵⁷

Consequently, courts should not encourage the waste of workplace-specific skills and resourcefulness through strict application of the at-will doctrine. Just as the law of emblements grants the planter certain property interests in crops after the termination of an agricultural lease, courts should recognize the worker's property interest in workplace-specific skills by granting the worker an exemption from the at-will doctrine.²⁵⁸ Under this framework, workplace-specific skills, if developed before termination,²⁵⁹ would comprise a property interest belonging to the worker.²⁶⁰ Courts should protect the worker's property interest in workplace-specific skills by granting the worker access to the workplace for the time those skills represent a national resource.²⁶¹ After the skills no longer represent a national resource, then the worker no longer has a right of access to the workplace.²⁶²

The policy purpose in protecting the worker's property interest against the employer's right to fire at-will is to encourage workers to develop

255. See Epstein, *supra* note 9, at 973 (recognizing workplace-specific skills).

256. See Epstein, *supra* note 9, at 973 (recognizing that termination destroys workplace-specific skills).

257. See REICH, *supra* note 245, at 196 (asserting that recovery of the American economy will depend on the value that American labor adds to the global economy); Epstein, *supra* note 9, at 973 (recognizing that termination destroys workplace-specific skills).

258. See *Moy v. Silveira*, 7 Cal. Rptr. 251, 253 (Cal. Ct. App. 1960) (asserting that crops grown on a property right of uncertain term do not pass to the owner, but remain property of the person who can best advance the valuable resource to a marketable state).

259. See *Dupree v. Worthen Bank & Trust Co.*, 543 S.W.2d 465, 467 (Ark. 1976) (noting that the planter is not protected unless the planting was begun before the termination of the tenancy).

260. *Beermann & Singer*, *supra* note 41, at 951 (arguing that the American worker would have a greater incentive to increase efficiency if the worker had a protected property right in the workplace).

261. See *id.* (holding that access to the land is granted to the planter so that the crops can be harvested by the one who will best protect society's interest in crops).

262. See *id.* (holding that the planter's right of access to the land terminates after the planter has harvested the crop and that the planter then becomes stranger to the land unless granted permission to pass by the remainderman).

workplace-specific skills and resourcefulness that promote American competitiveness in global markets.²⁶³ These interests outweigh the interests involved in management's right to terminate workers at will.²⁶⁴ Requiring a just cause for firing is a reasonable restraint on managers and owners of the workplace given the social and economic value of workplace-specific skills.²⁶⁵ Thus, courts should protect the worker's property interest in workplace-specific skills even if, through no fault of the worker, the at-will employment contract expires.²⁶⁶ Without this protection, the worker bears the peril of termination and lacks the incentive to develop critical workplace-specific skills.²⁶⁷

CONCLUSION

Before 1980, domestic production in both the Soviet Union²⁶⁸ and the United States²⁶⁹ dominated the respective domestic markets. Because of this domination, both nations could formulate industrial and labor policy without much fear of diminution of domestic market share.²⁷⁰ Since 1980, however, intense foreign competition has forced open domestic markets in both nations, causing domestic manufacturing to struggle for survival.²⁷¹

In an effort to regain competitiveness, both America and the republics of the former Soviet Union must restructure their economies.²⁷² The

263. See *Noble v. Tyler*, 56 N.E. 191, 193 (Ohio 1900) (holding, in an age when agriculture was crucial to national development, that recognizing the planter's rights to the crops cultivated by the planter was necessary to protect society's dependence on properly harvested crops).

264. See *id.* (holding that the owner's loss of control over the property was less important than encouraging the cultivation of resources vital to the national economy).

265. See *id.* (balancing the harm to the owner compared with the harm to the society from reduced cultivation of resources important to the national economy).

266. See *id.* (conditioning the planter's right to the crops on the planter not being cause of the termination).

267. See *id.* (explaining that the court recognized the planter's right to the crops in order to maintain an incentive for the development of resources important to the society).

268. AGANBEGYAN, *supra* note 1, at 173. The Ministry of Foreign Trade controlled foreign imports to Soviet markets. *Id.*

269. See WEILER, *supra* note 2, at 132 (describing foreign penetration of the relatively insulated United States automobile market during the 1980's).

270. REICH, *supra* note 245, at 72-73. Various protectionist mechanisms allowed American corporations and labor to bargain with domestic partners by local customs without having to consider international advances and trends. *Id.*

271. REICH, *supra* note 247, at 76-77.

272. See REICH, *supra* note 247, at 219-221 (recommending that American busi-

United States can learn from the Soviet experience with *perestroika* because the attitude toward labor in the United States resembles that in the former Soviet Union: the manager commands, and the worker obeys.²⁷³ Specifically, three lessons from the Soviet experience with *perestroika* should guide American policy with respect to recovering a reasonable domestic market share.

First, democracy is not merely a political means of restricting government.²⁷⁴ Democracy can be a potent economic strategy for competing in international markets.²⁷⁵ Theoretically, high quality at low cost might arise from many different combinations of management and labor policy.²⁷⁶ The most feasible basis, however, appears to be the German and Japanese rule that *perestroika* emulated: make the workers responsible for the decisions of the enterprise.²⁷⁷

Second, democratizing the workplace to promote efficiency will not succeed if it is merely a prerogative of management.²⁷⁸ Workers must have a meaningful voice in the decision making process.²⁷⁹ That is, the workers must have sufficient power so that those who have good ideas for improving the workplace have a reasonable chance to implement

ness restructure to capitalize on the American strengths in management and technology in an effort to re-establish American profitability); Uchitelle, *supra* note 95 (stating that a Russian automobile manufacturer redesigned the production facilities specifically to produce vehicles for export).

273. WEILER, *supra* note 2, at 196-97; IOFFE & MAGGS, *supra* note 98, at 3.

274. See *supra* note 168 (suggesting that democracy in the workplace might serve merely material ends by increasing efficiency and quality of work).

275. See *supra* note 4 (outlining Gorbachev's view that workplaces competitive in international markets must necessarily provide certain degrees of democratic protections for worker initiatives and resourcefulness).

276. See Levin, *supra* note 11, at D-8 (comparing Japanese and American theories on achieving high quality at low cost).

277. See Levin, *supra* note 11, at D-8 (indicating the non-competitiveness of methods other than making the workers responsible for quality and efficiency).

278. AGANBEGYAN, *supra* note 1, at 167. Mere liberalizing consists of managers granting privileges that can be taken away. *Id.* If the worker's bargaining power is based on the manager's authority, then the worker has no influence when progress requires learning on the part of the manager. See Kirkland, *supra* note 233 (stating that manager-sponsored work councils or union functions do not provide a voice for the worker when hard bargaining is necessary).

279. See WEILER, *supra* note 2, at 291 (arguing that American success in international markets requires providing workers with influence over workplace decisions); Tchervernina, *supra* note 2, at 213-14 (maintaining that, if the worker has a guaranteed property interest in the workplace, then the worker has incentives as well as the means to increase the productivity of the workplace).

them.²⁸⁰ Furthermore, the worker should be guaranteed some return on improvements that result from the worker's investment of skills and resourcefulness.²⁸¹ This guarantee would provide the worker with an incentive to initiate and promote innovative ideas.²⁸² Additionally, when the worker legitimately objects to management decisions that harm or hinder improvements in the workplace, the worker must have protection against manager retaliation.²⁸³

Third, just as courts protect crops on land held by a lease of uncertain tenure, they should protect the worker's property interest in workplace-specific skills²⁸⁴ that might outlast the term of employment.²⁸⁵ Under the at-will doctrine, the manager may terminate the employment contract regardless of the loss to the worker and to society. In the context of intense international competition, however, workplace-specific skills represent a national resource that should have the protection of law.²⁸⁶

Effective protection of workplace-specific skills will require: 1) implementing a process for workers to influence management decisions;²⁸⁷ 2)

280. See WEILER, *supra* note 2, at 285 (suggesting that workers should be given influence over such decisions as wages, benefits, hiring, firing, training, discipline, promotion, and grievances).

281. See *Saturn Pact Is Amended*, N.Y. TIMES, Nov. 15, 1991, at D4 (reporting that attainment of training, quality, and production goals will determine 20% of the worker's pay in 1995 at the Spring Hill, Tennessee, Saturn plant).

282. Levin, *supra* note 11. At a typical Japanese automobile plant over half of the worker suggestions are implemented resulting in worker recognition, prizes, and monetary awards. *Id.*

283. *Bordell v. General Elec. Co.*, 564 N.Y.S.2d 802, 805 (App. Div. 1990) (granting a cause of action where a health professional was fired for reporting unhealthful radiation levels).

284. See AGANBEGYAN, *supra* note 1, at 80-81 (describing the workplace improvements possible when the worker feels like a master).

285. See *Strand v. Boll*, 183 N.W. 284 (S.D. 1921) (granting the lessee of a life tenant possession of the land against the remainderman, for purposes of harvesting crops, where the lessee had planted before the death of the life tenant). The court awarded the temporary possession as a matter of public policy to encourage the planting and cultivation of crops even in times of uncertain tenure. *Id.*

286. See *supra* notes 247-48 (arguing that workplace-specific skills represent resources that government policy should promote rather than hinder).

287. WEILER, *supra* note 2; at 284-88 and 288 n.73. Germany establishes a work council concept which provides each workplace with a procedure for workers to participate in the decisions affecting the workplace. *Id.* Japan organizes workplace committees that provide workers with an opportunity to influence manager decisions. GOULD, *supra* note 197, at 95.

altering the laws governing the manager-worker relationship to reduce rigid distinctions;²⁸⁸ and 3) providing an adequately strong remedy of reinstatement to curtail retaliation when workers attempt to improve the workplace.²⁸⁹

288. GOULD, *supra* note 197, at 95-97. The United States tradition is characterized by an adversarial relation between manager and worker. *Id.* at 94. The distinction between manager and worker is established as a matter of law in the National Labor Relations Act. 29 U.S.C. § 152(5), 29 U.S.C. § 158(a)(2) (1970). Workplace committees may qualify as labor organizations. 29 U.S.C. § 152(5). *See* NLRB v. Cabot Carbon, 360 U.S. 203, 205 (1959) (interpreting 29 U.S.C. § 152(5) as including groups that process employee complaints). Employers are prohibited from organizing or subsidizing a labor union. 29 U.S.C. § 158(a)(2).

289. *Statements Adopted*, *supra* note 25. Where the reinstated worker has union support, the occurrence of manager retaliation for the reinstatement is low. *Id.* On the other hand, without union support, many reinstated workers do not actually return to the job, or they leave within one year. *Id.*