Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

Name: John Harvey Norton, IIII

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INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit fourteen (14) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am the Senior member of The Norton Law Firm, P.C. I am an attorney, duly licensed to practice law in the State of Tennessee.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1976; B.P.R. No. 005069

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Not applicable.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any State? If so, explain. (This applies even if the denial was temporary).

Technically, I have never been "suspended" from the practice of law. However, on July 11, 2002, I entered a conditional guilty plea to an action initiated by the Board of Professional Responsibility. The resulting Order imposed a one (1) year suspension, however, that suspension was held in abeyance during a two (2) year probation period. Successful completion of the probation term and conditions resulted in an abatement of the suspension. During the probation period, I was required to remain free of alcohol and controlled substances and to comply with a monitoring/advocacy agreement that I entered into with the Tennessee Lawyers Assistance Program.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

1976 – 1977	**Associate Attorney** – Bobo, Gordon and Grissom (now Bobo, Hunt, White & Nance), P.O. Box 169, Shelbyville, Tennessee 37162;
1977 – Aug. 1978	**Partner** – Bobo, Gordon & Grissom, (now Bobo, Hunt, White & Nance), P.O. Box 169, Shelbyville, Tennessee 37162;
Aug. 1978 – 1985	**Partner** – Rambo, Norton & Rowland, 116 East Side Square, Shelbyville, Tennessee 37160;
1985 – 1987	**Sole owner** – Norton & Seckler, 116 East Side Square, Shelbyville, Tennessee 37160;
1987 – 1992	**Senior member** – Norton, Seckler, Bramlett & Smith, 124 East Side Square, Shelbyville, Tennessee 37160;
1992 – 1999	**Senior partner** – Norton & Smith, 124 East Side Square, Shelbyville, Tennessee 37160;
1999 – 2001	**Senior member** – Norton & Reeves, 124 East Side Square, Shelbyville, Tennessee 37160; and
2001 – Present	**Senior member** – The Norton Law Firm, P.C., 124 East Side Square, Shelbyville, Tennessee 37160.

In addition to practicing law, continuously, since 1976, my wife, Mary Beth Norton, and I own Norton Properties, a residential rental property business, which was formed in December 2001.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

The nature of my present law practice consists principally of criminal defense work, of all types, in state trial courts, state appellate courts and federal district courts. I would suggest that approximately 95% of my practice is in the area of criminal law, and approximately 5% of my practice is in other civil practice areas.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

The Norton Law Firm, P.C., is a general practice firm, addressing, principally, the needs of clients in the areas of criminal defense, divorce/custody issues, personal injury/wrongful death, workers' compensation, DUI/drug defense and limited wills and estates practice. Occasionally, however, the firm will accept some types of cases that do not fit squarely within the aforesaid categories. For approximately the last twenty (20) years, I have devoted the majority of my personal practice to criminal defense, of all types, in both state and federal courts, divorce/custody issues and personal injury/wrongful death cases. For the past ten (10) years, the vast majority of my practice has been limited to criminal defense, some divorce/custody issues and some personal injury/wrongful death litigation, although I have, occasionally, handled civil litigation that related to or arose from representing clients of the firm and/or their family members. At present, and, as stated above, approximately 95% of my practice is criminal defense, approximately 3% is personal injury/wrongful death litigation and approximately 2% is divorce/custody issues.

When I began the practice of law with Bobo, Gordon and Grissom in 1976, as an associate, I either handled or was involved in performing legal work for insurance companies, principally in the nature of defending personal injury cases. Also, during that time, one of the partners was the County Attorney for Bedford County, Tennessee, therefore, I also assisted in handling matters relating to representing Bedford County. The Bobo firm also represented the Shelbyville Housing Authority, and I was involved in or personally prosecuted several condemnation cases relating to the Shelbyville Housing Authority. Additionally, because the Bobo firm did not, when I joined the firm, have an attorney who handled bankruptcy proceedings or social security disability matters, I began to do that type of work for the firm.

It was also right after I joined the Bobo firm that I handled my first criminal case, representing the then Mayor of Shelbyville, H. V. Griffin, who had been indicted for the offense of Official Misconduct. It was alleged that Mayor Griffin had threatened to fire a member of the Shelbyville Police Department, who had charged one of Mayor Griffin's "golfing buddies" with Unlawful Sale of Alcohol to a Minor, if the officer did not dismiss the charge. Our then Circuit Judge, Robert J. Parkes, recused himself, and then trial judge Samuel L. Lewis, from Pulaski, sat on that case. My investigation and my legal research led me to conclude that Mayor Griffin, under the City Charter, did not have the power either to hire or to fire any employee of the city, therefore, I filed a Motion to Dismiss the indictment, based on that fact. Judge Lewis agreed, and he dismissed the charge against Mayor Griffin, without the necessity of a jury trial. Once this occurred, my criminal practice was launched, and, with that launching, I began also to receive many other clients who were either charged with some sort of criminal behavior, wanted to file a divorce action or to fight a child custody battle, or who were involved in car wrecks or work-related incidences. As a result of these types and kinds of cases, I began running into "conflicts" with existing clients represented by the Bobo firm. It then became apparent that, if my practice was going to continue in these areas, it would be necessary for me to leave the firm, which I did in around August 1978, and the firm of Rambo, Norton and Rowland was formed (Andrew C. Rambo and Wendell T. Rowland).

In the latter part of 1978, I began to receive many requests to defend persons who were charged with drug-related offenses. For example, there was a pilot, whose plane crashed in Winchester, Franklin County, Tennessee, with a significant quantity of marijuana located within the plane. There was another plane that crashed in Bedford County, Tennessee, loaded with a substance believed to be cocaine. Representing those clients then led to my handling of drug cases in other states and in other federal jurisdictions, ranging from Illinois to Florida. One particular client was alleged to have been deeply involved in drug trafficking, and he was caught, speeding, in Effingham, Illinois, with four (4) kg. of pharmaceutical cocaine. It was also learned that that same client had an outstanding indictment in the South District of Florida, also relating to alleged drug-trafficking. During the course of my many months of representing this client and, as a result of the client's decision to "get out of" the drug business, the client agreed to cooperate with the Vice President's Joint Task Force on Drug Enforcement, based in Orlando, Florida. After significant negotiations with federal authorities, the client elected to make full and complete disclosure concerning the operation in which he was involved, which eventually led to indictments against individuals in North Carolina, Georgia and Florida, as well as the seizure of significant assets throughout the state of Florida. It also led to the dissolution of a corporation that fundamentally laundered drug money and used it to purchase farms, apartment complexes, condominiums, and other assets. The client is now in the Federal Witness Protection Program.

In the early 1980's, I began defending people against whom prosecutions had been commenced under the Horse Protection Act. While these prosecutions were, initially, criminal in nature, the Government, for various reasons, was not having a great deal of success convicting either the owners or trainers that had been charged. Thereafter, federal prosecutors, representing the United States Department of Agriculture (USDA), decided to prosecute owners and trainers under the civil provisions of the Horse Protection Act. I have defended many, many of those cases, over the years, and my defense work, in part, has "shaped" the manner in which Horse Protection Act cases have been handled and how the Government has decided to apply what is known as the "scar rule". In fact, my last major defense of a case against the USDA involved an attempt to prosecute Sand Creek Farms, the then largest walking horse training facility in middle Tennessee, Mr. Billy Gray, the trainer of the horse that was the subject of the prosecution, and Bill and Sandra Johnson, the owners of the horse. Neal & Harwell, Nashville, Tennessee, defended the Johnsons, and I defended Sand Creek Farms and Mr. Gray. Mr. Gray had been previously twice convicted of Horse Protection Act violations, and he faced a lifetime ban, if convicted. The Johnsons were then, at the time, the largest owners in the walking horse business. Following a segmented trial that, combined, lasted over nine (9) weeks, the Government finally decided that it would be practically impossible to convict either Mr. Gray or the Johnsons under its theory of the "scar rule" application. Mr. Gray was offered a three-year suspension from training or showing horses, which he gladly took, and the charges against the Johnsons were dismissed.

In the late 1970's, a company known as Stanley Tools decided to build a plant in Shelbyville, Tennessee. Upon making that decision, the International Association of Machinists and Aerospace Workers (IAM) decided to try to unionize the plant. A horrible "strike" situation developed, which included bombing utility lines, burning properties owned by workers at the plant, shot-gunning residences, etc... Initially, I was asked to participate in representing Stanley Tools, during that unionization attempt. The actual unionization efforts and picket lines were manned by IAM members, United Textile Workers, United Steelworkers members and Teamsters. Because of our successful efforts against the unions, I was then requested by the National Right to Work Legal Defense Foundation (NRWLDF) to bring a massive lawsuit against the four (4) unions that were involved. I was assisted by the then General Counsel for the NRWLDF, Hon. John J. Fogarty, and, following several years of litigation in the Chancery Court of Bedford County, Tennessee, a settlement was achieved. Since that time, no violent unionization activities have occurred in Bedford County, Tennessee.

During the course of my practice, I have also handled personal injury/workers' compensation, wrongful death and product liability cases. I have achieved settlements/jury recoveries, sometimes as lead counsel and other times as associate counsel, against automobile manufacturers, including General Motors and Chrysler, against Kawasaki, the manufacturer of a certain defective 4-wheeler, A.O. Smith Harvestore Products, a silo manufacturer, and against Pfizer Pharmaceuticals, the manufacturer of Legatrin, subsequently banned in 1994. I have also handled several medical malpractice/mismanagement cases, most of which have resulted in settlements with various healthcare providers/facilities. I have also handled many, many workers' compensation cases over the years, but I am most proud of my accomplishment in the case of *Sara C. Smith v. Empire Pencil Company and Aetna Casualty*

and Surety Company, 781 S.W.2d 833 (Tenn. 1989). This case involved Ms. Smith's tearing her rotator cuff, and her workers' compensation carrier sought to limit her recovery to a portion of 200 weeks, applicable to the loss of an arm, rather than to treat such an injury as an injury to the body as a whole, which would permit an apportioned value based on 400 weeks. For the first time in workers' compensation law, the Supreme Court of Tennessee held that a torn rotator cuff injury should be treated as an injury to the body as a whole.

Respecting my practice of criminal law, I have handled well in excess of fifty (50) homicide defenses, ranging from charges of First Degree Murder to charges of Criminally Negligent Homicide. I have also defended clients against almost every type of other criminal charge, ranging from Rape of a Child to Simple Possession of a Controlled Substance to Driving Under the Influence. While I cannot specifically estimate the actual number of jury trials either that I have conducted as lead counsel or in which I have participated as an attorney, I would respectfully suggest that it has been far in excess of one-hundred (100) jury trials, both civil and criminal. Further, while I cannot reasonably calculate the numbers of clients that I have represented over my thirty-seven (37) years of practice, I would suggest that I have represented approximately 10,000 clients throughout my career.

Of course, while a number of clients were represented on minor matters that were resolved at the General Sessions level, many of those clients had matters that were handled, resolved or tried in either Circuit, Criminal or Chancery courts. My last significant jury trial, in the criminal area, involved the defense of a young man, charged with Reckless Homicide, arising from drunken horseplay at a party, where the victim unfortunately died through a rupture of the hyoid bone. After a trial of several days, the young man was acquitted of Reckless Homicide, acquitted of Criminally Negligent Homicide but convicted of misdemeanor Reckless Endangerment. The last significant civil matter that I handled was an age discrimination case that was referred to me, for defense, by another law firm here in Shelbyville, who had no experience with that type of litigation. That case was successfully resolved with a nominal payment to the plaintiff in December 2012. Assistant District Attorney Michael D. Randles prosecuted the Reckless Homicide case and Hon. Robert S. Peters, Winchester, Tennessee, represented the plaintiff in the age discrimination matter. The last divorce/custody case that I handled involved representing the husband/father, which litigation involved a potential marital estate approximating $25,000,000 and custody of two (2) minor children. It also involved defending the integrity of the Antenuptial Agreement that had been drawn by another lawyer some years ago, and the case was settled in February 2012, for a reasonable payment to the wife/mother, consistent with the provisions of the Antenuptial Agreement, and a joint residential parenting plan.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Please see response to *Question No. 8*.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

During a dismal time in Bedford County judicial history, in late 1997 and into 1998, then General Sessions Judge, W. Nowlin Taylor, was forcibly removed from his position on the bench when he was indicted in the Eastern District of Tennessee, at Chattanooga, and charged with making false statements to federal agents, giving false testimony to a federal grand jury and giving false testimony, as a witness, in the trial of his then girlfriend. Because of the upheaval that resulted from his arrest and forced removal, several members of the Bar, including myself, acted as "interim" judges both for the General Sessions Court of Bedford County and for the Juvenile Court of Bedford County, until actual judges and justices could devise a way for those courts to be handled. I can remember acting as an "interim" judge in the General Sessions Court, at various times during this hiatus, and I sat on both criminal and civil cases. I cannot remember the "substance of each case", nor can I remember any matter of "significance" respecting any of the cases that I handled, however, I do recall this unfortunate time, particularly because I represented Judge Taylor on his federal indictment and in regard to matters affecting his pension.

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

In my years, as a young lawyer, I was appointed as guardian ad litem in several cases, but this would have been in the late 1970's, and I, quite frankly, do not remember these cases.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Commission.

Not applicable.

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

Not applicable.

EDUCATION

14. List each college, law school, and other graduate school which you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

I began my college education at the University of Georgia, Athens, Georgia, in 1968. I was a pre-med student, and I flunked out. I then attended Andrew College, Cuthbert, Georgia, for a portion of 1969. This was a Methodist– affiliated college, and I was "caught" in a compromising position in the women's dormitory, which led to my immediate expulsion. At that point in my educational pursuit, I realized that I was on a totally unacceptable path, which path was not going to continue to be funded by my parents, and that I should seriously decide what type of person I really wanted to be. In the fall of 1969, I was "barely" accepted to LaGrange College, LaGrange, Georgia, where, for the first time, I began to apply myself. I actually graduated early, with an undergraduate Bachelor of Arts degree, with a major in Psychology. In 1972, I applied for and was accepted to a graduate program in Political Science at Middle Tennessee State University, Murfreesboro, Tennessee. It was at that point that I decided that I wanted to be a lawyer. I began "gophering" for Bobo, Gordon and Grissom, while attending graduate school, and I then applied to Memphis State University for admission for the fall 1973, class.

In August 1973, I began my first year at Memphis State University. During my time there, I received the Meritorious Service Award for my service as Student Bar Governor. In late 1974, I was asked to join the Memphis State University Law Review. Beginning in 1975, and continuing until my graduation, I served on the Editorial Board of the Memphis State University Law Review, as Articles Editor. If memory serves me correctly, I graduated second in my class on May 8, 1976, with a Juris Doctor degree. I also received awards of recognition for excellence in the Uniform Commercial Code and other legal areas, but I simply cannot recall exactly what those awards were. I was also invited to and did join *Omicron Delta Kappa*, The National Leadership Honor Society, The University of Memphis Circle, in 1975.

PERSONAL INFORMATION

15. State your age and date of birth.

I am aged sixty-two (62), and I was born on August 29, 1950.

16. How long have you lived continuously in the State of Tennessee?

Since 1972

17. How long have you lived continuously in the county where you are now living?

Since 1972

18. State the county in which you are registered to vote.

Bedford

19. Describe your military Service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable.

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No

22. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

In addition to the matter discussed in my response to *Question No. 4*, I received a Public Censure from the Board of Professional responsibility in 1987. This action resulted from my failure to prepare an appropriate *Order* for several months, relating to a certain case that I had handled.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

Federal Tax Lien:	Filed: March 3, 2008	Released: June 10, 2008
	Filed: November 9, 2009	Released: March 23, 2011

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This

question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Carolyn McCall Norton v. John H. Norton, III, Bedford County Chancery Court; Case No. 10,430 (1978): Carol and I were married, while in school. She became a teacher at The Webb School, and I became a lawyer. Because of our professions, we "drifted apart", and a divorce resulted. [She later became an interior decorator, married to an architect, and she and her husband renovated and redecorated my law offices in 2000.]

Jan H. Norton v. John H. Norton, III, Bedford County Chancery Court; Case No. 10,917 (1980): Jan and I had a common interest in horses, however, that common interest was not enough to sustain a marriage. She was from Oklahoma, and her father was a Senior Executive with BP Oil Company, located, at the time, in Tulsa, Oklahoma. Jan wanted to move back to Oklahoma, and I even interviewed for a position of an oil/gas attorney representing BP, but I decided that I wanted to stay in Shelbyville. The marriage ended.

John H. Norton, III, v. Susan Jane Norton and First National Bank of Shelbyville, Tennessee, Bedford County Chancery Court; Case No. 12,408 (1983): One would think that "once bitten, twice shy"; however, Sue and I also shared a common interest in horses. The marriage lasted only one year, and it was eventually dissolved with a Marital Dissolution Agreement.

Mitzi Kim Winnette Norton v. John Harvey Norton, III, Bedford County Circuit Court; Case No. 7153 (1995): Kim and I were married in 1986. She had a child by a previous marriage, which I adopted. We also had a child, together. Because of my work and the long hours, the marriage fell apart, after nine (9) years. The case was settled with a Marital Dissolution Agreement and a Residential Custody/Support Agreement.

Melody Suzanne Norton v. John Harvey Norton, III, Bedford County Chancery Court; Case No. 21,618 (1998): This marriage lasted a couple of years. Suzy was considerably younger than me, and, again, because of the obligations associated with my work, she found another man. The marriage ended with a Marital Dissolution Agreement.

Carla Marie Walls, et al., v. Cara E. Gruszecki-Smalley, et al., Giles County Circuit Court; Case No. CC-10872 (2006): This was a legal malpractice case filed against Ms. Gruszecki-Smalley, the firm and me. It arose out of Ms. Gruszecki-Smalley's mishandling of a medical malpractice claim. Ms. Gruszecki-Smalley solely worked on the file, failed properly and promptly to employ the necessary experts, lied to the client, lied to the Board of Professional Responsibility and was subsequently suspended from the practice of law. I was determined not to have had any knowledge of or participation in her negligence and wrongdoing, and the firm's malpractice insurance carrier properly settled with Ms. Wall and her family for the payment of $285,000.

The Norton Law Firm, P.C., v. Marvin Parker, Bedford County Circuit Court; Case No. 11,968 (2009): This litigation arose out of my defense of Mr. Parker on several serious felony charges. There was a six-day criminal trial, and Mr. Parker was convicted of several lesser-included offenses. Because of both the necessity of our employing engineering experts and the length of the actual criminal trial, Mr. Parker owed the firm almost $35,000 in attorney's fees and expenses. While we normally do not sue clients for unpaid balances, the firm is not financially situated to absorb such a significant loss. When we sued Mr. Parker, he counter-sued me, for legal malpractice. That case is still pending in Part II of the Circuit Court of Bedford County, Tennessee. [Mr. Parker, through another attorney, appealed his convictions, and his convictions were affirmed. Mr. Parker also sued the "victims" in his criminal cases, again through another attorney, and the victims sued him back, resulting in a judgment against Mr. Parker for in excess of $225,000. Mr. Parker filed a *Post-Conviction Relief Petition* against me, and it was summarily dismissed of by Judge F. Lee Russell, the trial judge, following a several hour hearing.]

John H. Norton, III, et al., v. Shawn Daniel Taylor, et al., Bedford County Juvenile Court; Case No. 2012-JV-399 (2012): In July 2012, my wife and I sued her son, by a previous marriage, and the mother of our grandchild, aged 7. We alleged that the child was "dependent and neglected", by reason of the parents' alcoholism and drug-dependency. The Juvenile Court awarded temporary custody of the child to us, and there is a dispositional hearing scheduled for February 21, 2013.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices which you have held in such organizations.

None

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

Tennessee Association of Criminal Defense Lawyers (TACDL) – within the last five (5) years; Tennessee Bar Association – within the last ten (10) years; and The American Bar Association – within twenty (20) years

[Due to the expense associated with membership in these associations or professional societies, it has been my practice to have some member of the firm, including, on occasion, myself, belong to these various associations and societies. This enabled us to stay abreast of activities, important decisions in differing areas of the law and to obtain other benefits associated with membership.]

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school which are directly related to professional accomplishments.

None

30. List the citations of any legal articles or books you have published.

"*Torts-Libel-Private Defamation Plaintiff Allowed Recovery Based Upon Showing of Negligence in Reporting*", 5 Mem. St. U. L. Rev. 285 1974-1975; and "*A Right to Workmen's Compensation – A Dangling of the Economic Apple?*", 6 Mem. St. U. L. Rev. 465 1975-1976.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

None

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

None

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings which reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

"*Torts-Libel-Private Defamation Plaintiff Allowed Recovery Based Upon Showing of Negligence in Reporting*", 5 Mem. St. U. L. Rev. 285 1974-1975; and "*A Right to Workmen's Compensation – A Dangling of the Economic Apple?*", 6 Mem. St. U. L. Rev. 465 1975-1976; State of Tennessee v. James Edward Farrar, Jr., Appeal No. M2011-00828-CCA-RM-CD, *Application of Appellant for Permission to Appeal*; State of Tennessee v. Candance Carol Bush and Gary Wayne Bush, Appeal No. M2010-0186-CCA-R3-CD, *Brief of Appellant Candance Carol Bush*.

Each of the attached examples were my sole and individual work, except for the typing.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? *(150 words or less)*

My primary reason for seeking this position is based on my belief that I am the most qualified applicant to effectuate a seamless transition, from Judge Robert G. Crigler to the new judge for Part I of the Circuit Court. From approximately 1990, Part I of the Circuit Court has handled all Class A and B felonies in Bedford County, and all Circuit Court criminal matters in Moore, Lincoln and Marshall counties.

I also believe that I can bring to the bench a degree of change and innovation, which will benefit litigants, members of the bar and prosecutors. For example, we need appropriate video, audio and multimedia equipment/technology, an "open file" discovery procedure in criminal cases should be encouraged, and an effort to develop "preliminary instructions" for jurors, after being sworn in but before the actual trial begins, should be undertaken. Lastly, consistent "docket control" should be implemented.

36. State any achievements or activities in which you have been involved which demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. *(150 words or less)*

An examination of my body of work, some of which was reflected in my response to Question No. 8, should demonstrate my commitment to equal justice under the law. I have sued corporations and other major entities for clients who otherwise could not have afforded the litigation. I have represented unpopular defendants, when no one else would take their cases. I have advanced causes and principles because they were just and because I believed in the client's position, irrespective of his/her ability to pay me. I have defended many, many indigent defendants, at the request of various judges, and I have only filed one indigent fee claim in the entirety of my practice. Finally, the *Bush* appeal and preparation of the Brief attached to my response to *Question No. 34*, was also performed *pro bono*, because I believed in Ms. Bush's positions.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. *(150 words or less)*

As I previously mentioned, the judgeship in Part I of the Circuit Court for the 17th Judicial District is primarily a criminal judgeship. I believe that I have both the experience and the demeanor to bring certainty, honor and integrity to that position. In our district, we have two (2) Circuit judges and one (1) Chancellor. I have practiced before all of these judges, and I truly feel both that my relationship with these judges is excellent and that, if asked, each of them would willingly discuss my handling of cases in their courts, my preparation of my cases, my devotion to the practice of law, and who I am, as a person.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? *(250 words or less)*

Unfortunately, the nature of my practice and my commitment to it and to my clients has prevented me from participating in the types of community services or organizations that I am sure other applicants can demonstrate. I work approximately 60+ hours per week, including parts of most weekends. In fact, the obligations of my job, as I see them, have contributed, in whole or in part, to the demise of several marriages. I have, however, been married to my present wife for nearly fourteen (14) years, and she truly understands the importance of what I do. I also spend most of my free time, as limited as it is, with my wife, my children and my grandchildren, since I do not play golf, nor do I hunt or fish.

In truth, becoming a judge would enable me to devote more time to the community and district in which I reside, because I can see no greater public service than to hold the position of a judge. Such a position would also enable me to speak to civic organizations, when asked, about the law, to talk to students, at all levels, about the legal profession, and to make any reasonable public appearances to talk with members of the community about how better the legal system might serve their needs or address their concerns.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Commission in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I have really struggled with trying to give the Commission the "right" response to this question. I guess that the only way that I can answer this is to say that I have been a "real" lawyer. I have devoted my entire adult life to practicing my profession, trying to provide zealous and effective representation to clients and sacrificing many "things" that are normally important in life, in order to practice my profession to the absolute best of my ability. I am also a "real" person, in that I have had failed marriages, I have had times when I drank too much, and I have owed taxes, all of which are part of my life's experiences, which make me human. I have been self-employed, and I know what it is like to have financial obligations to meet, over-head to pay and others who depend on me. I have also trained many lawyers, who have gone on to bring credit to this profession. For example, Judge Crigler worked for me many years ago. Assistant District Attorney Hollynn Eubanks also worked for me. Former Chancellor Tamara L. Smith, who was appointed to the bench in 1999, was my junior partner at the time of her appointment.

Because of these things in my life, I am proud of what I have done and what I have accomplished...and how I have grown. I understand human frailties, but I also recognize the importance of rehabilitation and integrity.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

The first portion of this Question cannot be answered by a simple "Yes". Certainly, I will uphold and apply the law, even if I do not agree with the substance of a law or rule. However, I will not hesitate to prevent injustice, if a law or rule is attempted to be applied improperly or if a law or rule is attempted to be applied in an unconstitutional fashion. When I was admitted to practice law in 1976, I took an oath, whereby I did solemnly swear that I would support the Constitution of the United States and the Constitution of the State of Tennessee. I did not take that oath lightly. If appointed to the bench, I will take another oath, which I will equally honor, to administer justice without respect of persons, and to faithfully and impartially discharge all the duties incumbent upon me as a judge.

To provide an example, from my personal experience, had I been an Assistant District Attorney, a former judge, of any type, or even a mediator, would undoubtedly be fairly easy. As a practicing attorney, however, who has spent his entire career attempting either to make new law or to distinguish existing law from the particular facts of a given case, it is difficult to provide an example that would support my response to the first portion of this Question. Again, I will honor my oath of office, as it is administered.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Commission or someone on its behalf may contact these persons regarding your application.

A. Hon. Robert G. Crigler, Circuit Judge, Part I, 17th Judicial District, Office No.: (931) 488-3055, [redacted];
B. Hon. John T. Bobo, Bobo, Hunt, White & Nance, P.O. Box 169, Shelbyville, Tennessee 37162, Office No.: (931) 684-4611, [redacted]
C. Hon. Andrew C. Rambo, Rambo & Kingree, 104 East Depot Street, Shelbyville, Tennessee 37160, Office No.: (931) 684-6213, [redacted];
D. Mr. Thomas A. Smith, Bedford County Circuit Court Clerk, Public Square Courthouse, Shelbyville, Tennessee 37160, Office No.: (931) 684-3223, [redacted]
E. Mr. Timothy R. Lane, Director, 17th Judicial District Drug and Violent Crime Task Force, 117 South Main Street, Shelbyville, Tennessee 37160, Office No.: (931) 684-0406, [redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the **Circuit Court, Part I, 17th Judicial District** of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: February 13, 2013.

Signature

When completed, return this questionnaire to Ms. Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

TENNESSEE JUDICIAL NOMINATING COMMISSION

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the state of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission and to the office of the Governor.

John Harvey Norton, III
Type or Printed Name

Signature

February 13, 2013
Date

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or business of inventing and obtain a current deduction to the extent of his financial backing, even though the invention never reaches the market.

The Court has given a distinct incentive for entering into a formal written relationship[25] at the initial stage of any financial arrangement which might prove non-profit making during its embryonic phases. Any expenditure under an agreement made to develop new products would, therefore, be deductible by the investor taxpayer under Section 174 as being incurred "in connection with his trade or business."

R.T.D. III

Torts—Libel—Private Defamation Plaintiff Allowed Recovery Based Upon Showing of Negligence In Reporting

Petitioner, libeled by respondent's magazine,[1] filed a diversity action which resulted in a jury verdict in his favor.[2] The district court entered judgment *n.o.v.* for respondent,[3] which the Court of Appeals for the Seventh Circuit affirmed.[4] On writ of certiorari, the Supreme Court of the United States *held*, reversed and remanded. So long as the states do not impose liability without fault, they may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood

25. In the instant case a partnership was formed, but a joint venture or similar relationship would have accomplished the same purpose.

1. Respondent's magazine, *American Opinion*, a monthly outlet for the views of the John Birch Society, accused petitioner of being part of a Communist conspiracy to discredit local police. Petitioner had been retained in a civil damage action by the family of an individual killed by a Chicago policeman.

2. Gertz v. Robert Welch, Inc., 306 F. Supp. 310 (N.D. Ill. 1969).

3. Gertz v. Robert Welch, Inc., 322 F. Supp. 997 (N.D. Ill. 1970). Although petitioner was neither a public official nor a public figure, the district court accepted respondent's contention that constitutional privilege protected discussion of any public issue without regard to the status of the person defamed therein.

4. Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972). The district court's decision preceded the plurality decision in Rosenbloom v. Metromedia, 403 U.S. 29 (1971). On appeal the court read *Rosenbloom* as requiring application of the *New York Times* standard to any publication or broadcast about an issue of significant public interest, without consideration as to the position, fame, or anonymity of the person defamed, and it determined that respondent's statements concerned such an issue.

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injurious to a private individual; yet the amount recoverable is limited to compensatory damages for actual injury. *Gertz v. Robert Welch, Inc.*, 94 S. Ct. 2997 (1974).

The primary controversy pervading the law of libel has been that of a balancing of the equities between the guarantee of freedom of speech and press[5] and the right of the individual to remain secure in his reputation. Although certain "qualified" or "conditional" privileges,[6] along with certain "absolute" privileges,[7] had long been recognized by the courts, defamatory utterances remained unprotected by the shield of the first amendment. In 1959, the decision in *Barr v. Matteo*[8] altered this faithfulness to the common law with an acknowledgment of an absolute privilege of a federal official to comment on matter within the "outer perimeter" of his line of duty, regardless of the truth in or his motive for such utterance.[9] Subsequent cases sought to balance this absolute privilege of a public official with a right of the private individual to freely express his views on matters involving public issues.

The landmark case of *New York Times v. Sullivan*[10] held that the constitutional guarantee of freedom of speech and press imposed severe limitations on the libel laws of the states when the allegedly defamatory publication related to official conduct of a public official. The Court established a qualified privilege holding that the first and fourteenth amendments

> prohibit a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[11]

---

5. *See* U.S. Const. amend. I.

6. *See, e.g.*, White v. Nicholls, 44 U.S. (3 How.) 266 (1845) (letter to President voicing complaint about customs collector); Licciardi v. Molnar, 23 N.J. Misc. 361, 44 A.2d 653 (1945) (communication to officers concerning conduct of other officers). *See also* C. Lawhorne, Defamation and Public Officials—The Evolving Law of Libel 39-56 (1971).

7. *See, e.g.*, Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871) (absolute privilege of a judge for judicial acts); Cooper v. O'Connor, 99 F.2d 135 (D.C. Cir. 1938) (immunity to highest executive officers of federal and state governments); Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926) (absolute privilege for quasi-judicial officers conducting judicial proceedings).

8. 360 U.S. 564 (1959).

9. Barr v. Matteo, 360 U.S. 564 (1959). One dissenting justice hesitated to extend the privilege doctrine to this degree for fear that a private individual would be inhibited from freely expressing his views knowing that "in reply [government officials] may libel him with immunity . . . ." *Id.* at 585 (Warren, C.J., dissenting).

10. 376 U.S. 254 (1964).

11. New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).

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In this case, and in those decisions immediately following, the Court undertook the task of aligning the law of libel with the first amendment.[12]

However, the Court in *New York Times* left to be determined, on an ad hoc basis, what the "public official" designation included. The "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen. . ."[13] became the rationale for holding the constitutional standard to apply to criminal libels[14] as well as civil actions, to candidates for public office,[15] to reports of official activities of lower public officials,[16] and even to those individuals with marginal governmental connections.[17]

In cases following *New York Times* the Court indicated that the constitutional privilege, and the "actual malice" test, were neither limited to public officials nor to their official conduct, and subsequent broadenings of the *New York Times* doctrine resulted. *Time, Inc. v. Hill*[18] applied the *New York Times* standard

12. The Court made reference to the fact "[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the *'breathing space'* that they 'need . . . to survive.' " New York Times v. Sullivan, 376 U.S. 254, 271-72 (1964). (Citations omitted and emphasis added).

13. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

14. Garrison v. Louisiana, 379 U.S. 64 (1964). In addition the Court narrowed the definition of "recklessness" by saying that the recklessness standard meant that "only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions." *Id.* at 74. *See also* Henry v. Collins, 380 U.S. 356 (1965), wherein the Court further defined "recklessness" to mean an actual intent on the part of the defendant to harm the plaintiff through falsehood.

15. *See, e.g.*, Tilton v. Cowles Pub. Co., 76 Wash. 2d 707, 459 P.2d 8 (1969); Noonan v. Rousselot, 239 Cal. App. 2d 447, 48 Cal. Rptr. 817 (1966). *See generally* 71 W. VA. L. REV. 360 (1969).

16. Rosenblatt v. Baer, 383 U.S. 75 (1966) (county supervisor of recreation area). Here the Court gave some definition to the "public official" category in holding that the public official designation applied to all elected or appointed government employees who have, or appear to the public to have, substantial responsibility for, or control over, the conduct of public affairs. *Id.* at 85-87. *See, e.g.*, Time, Inc. v. Pape, 401 U.S. 279 (1971) (a police lieutenant); St. Amant v. Thompson, 390 U.S. 727 (1968) (a deputy sheriff); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967) (an elected county clerk).

17. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (members of a local school board); Linn v. United Plant Guard Workers of America, 383 U.S. 53 (1966) (private company officials); Lundstrom v. Winnebago Newspapers, Inc., 58 Ill. App. 2d 33, 206 N.E.2d 525 (1965) (retired mayor).

18. 385 U.S. 374 (1967). The Court held that the first amendment interests announced in *New York Times* outweighed the plaintiff's privacy interest in light of the non-defamatory nature of the publication, the legitimate public interest in the subject matter, and the newsworthiness of the plaintiff; however, the Court intimated that a different result might be reached if the case involved a libel action brought by a private person *involuntarily* thrust into the limelight. *Id.* at 386-91. *But see* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), which essentially rejected this view.

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to an invasion of privacy case, and the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*[19] extended the doctrine to defamatory publications concerning persons who were "public figures" by virtue of their past national prominence or their own purposeful activities "amounting to a thrusting of [their personalities] into the 'vortex' of . . . important public controvers[ies] . . . ."[20] Although these cases established a "public figure" category to which the constitutional privilege was applied, the Court appeared to place less emphasis on the status of the individual involved than on public interest in the individual or event.[21]

In 1971, the Court decided *Rosenbloom v. Metromedia, Inc.*[22] which augmented the protection afforded the media in previous cases by shifting the focus of the constitutional privilege from the person defamed to the subject matter of the defamatory statement. The Court held the "actual malice" standard applicable to state civil libel actions brought by private individuals for defamatory falsehoods related to their involvement in events of public interest or concern.[23] Rejecting a negligence standard in a civil libel case,[24] the plurality stressed the possibility of an erroneous verdict, based on a preponderance of evidence, being entered against the defendant exercising his first amendment rights. Yet, it was the rationale of the dissent in *Rosenbloom*[25] that has

19. 388 U.S. 130 (1967) (joint decision).

20. Curtis Pub. Co. v. Butts, 388 U.S. 130, 155 (1967). *See* Kalven, *The Reasonable Man and the First Amendment:Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267.

For a more recent definition of a "public figure" see Greenbelt Coop. Pub. v. Bresler, 398 U.S. 6 (1970), wherein the Court ruled that an individual who voluntarily and actively involves himself in matters of significant public concern is a public figure, and as such, must meet the burden of the *New York Times* standard in order to recover damages. *Id.* at 8-9.

21. In later lower court decisions application of the *New York Times* rule was held to depend on the interest of the public in the allegedly defamatory matter irrespective of the plaintiff's status. *See, e.g.*, Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970) (accommodations during the Masters' Golf Tournament); Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir.) *cert. denied*, 398 U.S. 940 (1970) (organized crime); United Medical Laboratories, Inc. v. Columbia Broadcasting Sys., 404 F.2d 706 (9th Cir. 1968) *cert. denied*, 394 U.S. 921 (1969) (public health).

22. 403 U.S. 29 (1971).

23. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971).

24. The 1970 term of the Supreme Court reinforced its prior view that actual malice must be of "convincingly clear clarity," and that mere negligence in operation is insufficient to constitute "reckless disregard" for truth. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Time, Inc., v. Pape, 401 U.S. 279 (1971), Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).

25. 403 U.S. 29, 62-87 (1971). In his dissent, Justice Harlan thought that the private individual need show only negligence on the part of the publisher; however, he would

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emerged in the most recent controversy involving the competing interests of the citizen and the public information media.

In the instant case the Court rejected the philosophy of the *Rosenbloom* plurality and adopted a position contrary to the trend established by *New York Times* and its progeny. While those decisions incorporated their plaintiffs into the "public sector," the Court in *Gertz v. Robert Welch, Inc.* felt that an individual "should not be deemed a public personality for all aspects of his life."[26] Laying down a new "nature and extent of participation" test[27] to determine whether or not an individual should be deemed a public figure, the Court limited the previously expanded scope of the "public figure" category.[28]

The *Gertz* Court retained the *New York Times* rule as it relates to the "public official" and "public figure," but accorded to the private individual a new standard upon which he may condition his libel action. Declaring that there is a legitimate state interest in compensating the private defamation plaintiff for injury to reputation,[29] and that the "public or general interest" test expounded in *Rosenbloom* would abridge that state interest to an "unacceptable degree,"[30] the Court faced the problem of establishing an "equitable boundary" between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. Recognizing that

> a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship,[31]

require a plaintiff to prove actual damages. *Id.* at 62-64. Agreeing with Justice Harlan's standard, Justice Marshall, in a separate dissent joined by Justice Stewart, questioned the ability of the Court and lower courts to measure on an ad hoc basis the area of public or general concern, and to balance the interest of the public's right to know against the individual's right of privacy. *Id.* at 81.

26. Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3013 (1974).

27. *Id.* The Court determined that it would "reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."

28. It should be noted that although petitioner had appeared at the coroner's inquest, his appearance relating solely to the representation of his client, the *Gertz* Court concluded that, under the "nature and extent of participation" test, petitioner would be a private individual, as opposed to respondent's contention that his appearance rendered him a "de facto public official." 94 S. Ct. at 3012.

29. Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3008 (1974).

30. *Id.* at 3010. In addition the Court felt that the *Rosenbloom* test presented the "difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not . . . ."

31. Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3007 (1974).

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yet also recognizing that the private individual

> has relinquished no part of his interest in the protection of his own good name, and consequently . . . has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood,[32]

the Court concluded that a less demanding standard than that required by *New York Times* would best serve the competing interests involved.

However, while granting to the private individual the right to establish liability based upon negligence in reporting, the Court, reasoning that "the States have no substantial interest in securing for [private] plaintiffs . . . gratuitous awards of money damages . . . ,"[33] held that if liability were established under the lesser standard, as opposed to the "knowing-or-reckless falsity" standard, the states would be limited in permitting compensation only to the extent of "actual injury."[34]

Arguing against the new criteria set down by the Court, the dissent contended that a negligence standard is too vague in application and "saddles the press with 'the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it. . . .' "[35] Further, it was urged that the preponderance of evidence proof accompanying the negligence standard gives a jury latitude to impose liability to the extent of threatening those freedoms guaranteed by the first and fourteenth amendments.[36] In conclusion, the dissent felt that the majority opinion by eliminating presumed damages created an almost impossible burden for the private plaintiff; the defamatory statement may be false and of a per se character, but unless the plaintiff can prove negligence or other fault in conjunction with establishing "actual injury,"[37] he will be unable to recover damages.[38]

32. *Id.* at 3010. Here the Court makes reference to the fact that "public officials" and "public figures" have assumed roles of special prominence, inviting attention and comment.

33. Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3012 (1974).

34. *Id.*

35. *Id.* at 3020 (Brennan, J., dissenting), *quoting from* Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

36. Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3016-22 (1974) (Douglas and Brennan, JJ., dissenting).

37. *Id.* at 3012. The majority opinion left it to the trial courts to define "actual injury," yet the Court emphasized that "all awards must be supported by competent evidence concerning the injury."

38. Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3024-25 (1974) (White, J., dissenting). The practical effects of a plaintiff's recovering at least nominal damages are a judicial declaration that the publication was false and a vindication of his reputation.

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It is suggested that future libel adversaries will be faced with an aura of uncertainty. First, with the eradication of the traditional rule that the existence of injury is presumed from publication, all of the harm actually suffered from the defamation must be provable in court. Yet, it should be noted that the weight of authority demonstrates that all of the results of a defamation are not so easily shown.[39] Second, although the threat to the media of substantial punitive damages is eliminated, the uncertainty involved in a reasonable care standard will surely "create the danger that the legitimate utterance will be penalized."[40] In this respect the majority rationale will make it most difficult for the media to predict in advance what sort of harm any person would suffer and whether that person could prove actual damage to the satisfaction of the jury, thereby increasing the fear of litigation, and leading to possible media self-censorship.

J.H.N. III

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39. W. PROSSER, THE LAW OF TORTS § 112, at 765 (4th ed. 1971).

40. Speiser v. Randall, 357 U.S. 513, 526 (1958).

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A Right to Workmen's Compensation—A Dangling of the Economic Apple?

> We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of people upon others for *all* of their income is something new in the world. *For our generation, the substance of life is in another man's hands.*[1]

I. Introduction

The ever-decreasing job mobility in this country during the last half century,[2] an immobility enhanced by technical advancements requiring more and more education and specialization, and the magnified importance of work in an average person's life[3] have given rise to a concern for the present status of individual employee rights. Further, an aura of uncertainty permeates the work environment, and there appears to exist a "widespread conviction among workers that the law has failed them."[4]

At the crux of this problem lies the fact that a majority of jurisdictions have adopted and retained an employer-protective position holding that, absent either express contracts, such as those between employers and unions which protect its members,[5] or statutory restrictions against arbitrary dismissals,[6] or in some

1. F. Tannenbaum, A Philsophy of Labor 9 (1951) (emphasis in original).

2. C. Brainard, M. Herman, G. Palmer, H. Parnes & R. Wilcox, The Reluctant Job Changer: Studies in Work Attachments and Aspirations 153-57 (1962).

3. *See generally* Kahn, *The Meaning of Work: Interpretation and Proposal for Measurement*, in The Human Meaning of Social Change (A. Campbell & P. Converse eds. 1972).

4. Weyand, *Present Status of Individual Employee Rights*, N.Y.U. 22nd Annual Conference on Labor 171 (1970).

5. Many union contracts provide that an employee may not be fired or otherwise disciplined except for "just cause." In the event of a contested disciplinary action, a neutral arbitrator typically decides whether the employer's action was justified.

6. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2a to -2(c) (1970), *as amended*, (Supp. III 1973); National Labor Relations Act, § 8(a)(3), 29 U.S.C. § 158(a)(3)(1970); Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1970); Civil Service Act, 5 U.S.C. § 7501 (1970); Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1970).

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instances individual employment contracts for a fixed duration, a private employer is free to discharge an employee at his unfettered discretion.[7] Practically speaking, as a result of this employer-employee imbalance, the non-unionized "at-will" employee,[8] dependent upon the continued existence of the employment relationship for his livelihood, has been forced to assume the role of "a docile follower of his employer's every wish."[9]

Nevertheless, greater awareness of the myriad hardships created by the well-entrenched principal implicit in the at-will doctrine has been generated in recent years, transforming modern society from the state of stifling apathy into the tenor of inquiring concern. Particular concern has been aroused from the noticeably increasing instances in which at-will employees have been discharged from their employment for claiming the compensation remedy which the legislature has prescribed as their rightful redress for work-related injuries. Surely, such employer frustration of the underlying philosophy of compensation legislation[10] should not go without reprimand. Unfortunately, however, this practice appears quite prevalent, and the law to date has done little to protect or vindicate the rights of the employee.

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7. *See, e.g.*, Buian v. J.L. Jacobs & Co., 428 F.2d 531 (7th Cir. 1970); Brown v. Safeway Stores, Inc., 190 F. Supp. 295 (E.D.N.Y. 1960); Russel & Axon v. Handshoe, 176 So. 2d 909 (Fla. Dist. Ct. App. 1965); Summers v. Phenix Ins. Co., 50 Misc. 181, 98 N.Y.S. 226 (Sup. Ct. 1906); Granger v. American Brewing Co., 25 Misc. 701, 55 N.Y.S. 695 (Sup. Ct. 1899).

So widely accepted has been this rule that references to it appear as dicta in cases where the right of discharge was a subordinate issue. *See generally* Parker v. Borock, 5 N.Y.2d 156, 156 N.E.2d 297 (1959); Town & Country House & Home Serv. Inc. v. Newberry, 3 N.Y.2d 554, 147 N.E.2d 724 (1958).

8. It should be noted that labor unionism has been able to offer a certain degree of protection to those of the labor force who have become members. However, a decline from 35.8% in 1945 to 26.7% in 1972 in the proportion of union members in nonagricultural establishments indicates that the work force has expanded more rapidly than union membership. 97 MON. LAB. REV. 67 (August 1974). In addition, according to the latest annual figures available, the unions' share of the total work force in 1975 was 21.8%, or approximately 19.4 million. 29 THE LABORER 14 (November 1975). Since individually negotiated employment contracts are an exception rather than the rule, it becomes evident that non-organized, "at-will" employees form a large segment of the current total labor force.

9. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967) [hereinafter cited as BLADES].

10. Professor Larson has stated that:

> [t]he ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form. . . . LARSON, WORKMEN'S COMPENSATION § 2.20 (Desk ed. 1974).

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This Note focuses on protection from discharge for seeking workmen's compensation and offers suggested solutions to the problem. Part II presents a brief background on at-will employment, tracing the history of the at-will doctrine to the present. Part III centers on a discussion of the conflict between the doctrine and the underlying concepts of workmen's compensation legislation. Part IV discusses recent limitations on the at-will doctrine, both legislative and judicial. Part V offers suggested solutions composed primarily of two statutory proposals, one of which provides criminal sanctions for wrongful discharge while the other creates civil liability. Part VI and Part VII deal with the nature and implementation of a civil remedy.

II. The Employment At-Will Doctrine

Throughout the nineteenth century there existed in English law a presumption that a "general" hiring[11] amounted to employment for one year.[12] If there was a continuation of employment for longer than the one-year term, the courts would presume employment for an additional one-year term; only at the end of a term could the employee be discharged without cause.[13] However, although the English rules found acceptance in several early American cases,[14] the late nineteenth century produced a radical departure from the British tradition.[15]

The initial impetus for the employment at-will doctrine seemingly stems from the writings of a single commentator, H. G. Wood, who is generally credited with framing the rule in its present form. In 1877, in his treatise on the law of master and servant he wrote:

> With us [contrary to English law] the rule is inflexible that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is on him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and

11. English law used the term "general," and American the term "indefinite," to mean that the employment relationship was being created without any specific duration. *See* 11 A.L.R. 469 (1921).

12. Fawcett v. Cash, 110 Eng. Rep. 1026 (K.B. 1834); Beeston v. Collyer, 130 Eng. Rep. 786 (C.P. 1827). *See also* 2 W. Blackstone, Commentaries *464.

13. 110 Eng. Rep. 1026, 1027 (K.B. 1834).

14. Adams v. Fitzpatrick, 125 N.Y. 124, 26 N.E. 143 (1891)(the general rule of hiring by the year is applied absent other circumstances); Bascom v. Shillito, 37 Ohio St. 431 (1882)(the court emphasized that the rule was not inflexible in America or in England).

15. 1 C. LaBatt, Master and Servant § 159 (2d ed. 1913).

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> no presumption attaches that it was for a day even, but only at a rate fixed for whatever time the party may serve.[16]

Unfortunately, Wood, citing four cases to justify his assertion of the rule with regard to general hirings,[17] apparently misinterpreted the law of his times[18] and, in so doing, dramatically affected the future of the employment relationship.

Because many courts that adopted Wood's Rule failed to provide a definitive analysis in their holdings, often only citing Wood[19] or cases citing him,[20] one is left to presume that the social and economic pressures of the period provided the necessary stimulus for making it the primary doctrine governing employment duration. Bolstered by the influences of *laissez-faire* capitalism, the rule was well-suited to that "rustic simplicity of the days when the farmer or small entrepreneur . . . was the epitome of American individualism."[21] Invariably, the discharged employee met with rigorous application of the at-will doctrine, frequently

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16. H. Wood, A Treatise on the Law of Master and Servant § 134, at 272 (1877)(emphasis in original). It might be noted that another rule received minor acceptance during the late nineteenth and early twentieth centuries. This approach created a presumption that a hiring continues for a period identical to the pay interval. Moline Lumber Co. v. Harrison, 128 Ark. 260, 194 S.W. 25 (1917); Magarahan v. Wright, 83 Ga. 773, 10 S.E. 584 (1889). Even today, Georgia has implemented this rule by statute. Ga. Code Ann. § 66-101 (1966)(when wages are payable by stipulated period, the hiring is for that period).

This approach was also adopted in the Restatement (Second) of Contracts § 32, illus. 6, at 156 (Tent. Draft No. 1 1964). It is suggested, however, that a stipulated pay period may have no relation to the intention of the parties regarding the duration of the contract, and the protection afforded by such a rule is only superficial when the pay period is weekly or monthly. *See, e.g.*, Odom v. Bush, 125 Ga. 184, 53 S.E. 1013 (1906).

17. Wilder v. United States, 5 Ct. Cl. 462 (1869), *rev'd on other grounds*, 80 U.S. 254 (1871); Franklin Mining Co. v. Harris, 24 Mich. 115 (1871); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870); DeBriar v. Minturn, 1 Cal. 450 (1851).

18. None of the cases relied upon by Wood support his statement. *De Briar* held only that an innkeeper had the right to eject a person living in his home after proper notice to leave. 1 Cal. 450, 451 (1851). *Tatterson* is in direct conflict with Wood's assertion for it held that there was no error in allowing a jury to determine the nature of a contract from written and oral communications, the type of employment, wages of the trade and other circumstances. 106 Mass. 56, 60 (1870). *Franklin Mining* also fails to support his position in holding that an indefinite duration of employment by itself did not give an employer complete discretion to dismiss its employee. 24 Mich. 115, 116 (1871). Finally, *Wilder* involved a contract between the Army and private businessmen for the transportation of goods, and had no relation to general hirings as such. 5 Ct. Cl. 462, 464 (1869), *rev'd on other grounds*, 80 U.S. 254, 256 (1871).

19. *See, e.g.*, Clarke v. Atlantic Stevedoring Co., 163 F. 423 (C.C.E.D.N.Y. 1908); Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895).

20. *See, e.g.*, Summers v. Phenix Ins. Co., 50 Misc. 181, 98 N.Y.S. 226 (Sup. Ct. 1906); Booth v. National India Rubber Co., 19 R.I. 696, 36 A. 714 (1897).

21. Blades, note 9 *supra*, at 1416.

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rationalized by an almost "simplistic" argument:

> May I not refuse to trade with any one? May I not forbid my family to trade with any one? May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster?[22]

However, by and large it would be unfair to fail to recognize that the law of contracts provided justification in several instances for denying relief to the discharged employee. Employment for an indefinite term was said not to be a contract *per se*, but rather an offer looking to a series of unilateral contracts in which the employer was the offeror and the employee the offeree, to be accepted by the employee through the performance of specified services.[23] Discharging him was simply the withdrawal by the employer of a revocable offer.[24]

Additionally, a combination of job abundance and labor scarcity was attributed to the need to uphold the doctrine. It was supposedly to the worker's advantage to be able to change jobs easily, and so achieve advancement of position.[25] Thus, in those situations where the employment contract was seen as bilateral in nature, if the employee were free to terminate the employment "at will," the doctrine of mutuality of obligation would require that so also must the employer have the same right.[26] Destined to become a legal paradigm of the employment relationship, the "at-will" concept blossomed.

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22. Payne v. Western & Atl. R.R., 81 Tenn. 507, 518 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1916).

23. 1 A. CORBIN, CONTRACTS § 70, at 292-93 (1963). This approach led one author to state that:

> [t]he labor contract is not a contract, it is a continuing renewal of a contract at every successive moment, implied simply from the fact that the laborer keeps at work and the employer accepts his product.

J. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 285 (1924).

24. 1 A. CORBIN, CONTRACTS § 70, at 293 (1963).

25. *See* 9 S. WILLISTON, CONTRACTS § 1017, at 131 n.12 (1907). Even during the Great Depression this rationale was used to bolster the rule.

> An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition; indeed, in this land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself . . . .

Pitcher v. United Oil & Gas Syndicate, 174 La. 66, 69, 139 So. 760, 761 (1932).

26. J. CALAMARI & J. PERILLO, CONTRACTS § 67 (1970); 9 S. WILLISTON, CONTRACTS § 1017, at 129 n.11. *See also* Kiser v. Amalgamated Clothing Workers, 169 Va. 574, 194 S.E. 727 (1938); Rich v. Doneghehy, 1 Okla. 204, 177 P. 86 (1918). However, not all courts required employment contracts to bind the parties alike. *See, e.g.*, Newhall v. Journal Printing Co., 105 Minn. 44, 117 N.W. 228 (1908).

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In 1908, the employer's right to discharge reached constitutional proportions with respect to a statute that attempted to place restrictions on employer discretion. In *Adair v. United States*,[27] the Supreme Court struck down an act making it a federal offense for an agent or officer of an inter-state carrier to discharge an employee from service to the carrier because of his membership in a labor organization.[28] In concluding that the statute invaded the personal liberty of the employer, the Court held that laws interfering with the "right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it, . . ." were violative of due process.[29]

This *laissez-faire* philosophy was reexhibited seven years later in *Coppage v. Kansas*[30] when the Court again struck down a similar anti-yellow-dog statute. The Kansas act made it a criminal offense, punishable by fine or imprisonment, for employers to coerce, require, or influence employees not to join or remain members of labor organizations. Concluding that the employer's right to "hire and fire" as he chose was a constitutionally protected property right,[31] as well as an essential element of uninhibited freedom of contract, the Court stated:

> As to the interest of the employed, it is said by the Kansas Supreme Court . . . to be a matter of common knowledge that "employes, as a rule, are not financially able to be as independent in

27. 208 U.S. 161 (1908).

28. Adair v. United States, 208 U.S. 161, 175 (1908).

29. *Id.* at 174.

> In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with tha liberty of contract which no government can legally justify in a free land.

208 U.S. at 175.

30. 236 U.S. 1 (1915).

31. Coppage v. Kansas, 236 U.S. 1, 17 (1915). It is interesting to note two recent cases in the area of public employment which tend to evidence the growing concern for the status of individual employee rights and thus a shift in the Supreme Court's view of the employment relationship. *See* Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972). Moreover, although these cases dealt primarily with due process guarantees, they do contain implications for private employment contracts. In *Perry* the Court stated that the

> absence of such an explicit contractual provision [one dealing with tenure] may not always foreclose the possibility that a teacher has a *"property" interest* in reemployment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be "implied."

408 U.S. 593, 601 (1972). *See generally* Lanzarone, *Teacher Tenure—Some Proposals for Change*, 42 FORD. L. REV. 526 (1974).

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> making contracts for the sale of their labor as are employers in making contracts of purchase thereof." No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. . . . [S]ince it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.[32]

Stifled by a continued imbalance in the employment relationship, no doubt in part a product of the support accorded the at-will doctrine by the Supreme Court in these two cases, employees sought to find a method to combat the inequality. Organized labor surfaced, and with it came the first significant judicial approval of a limitation on the employer's coercive ability to discharge.[33] Once recognized as a protected right, the employee found a powerful weapon in collective bargaining, and a new era of unionism was born.[34]

However, given both the rapid increase of personnel in areas of employment *not* covered by labor agreements[35] and the awesome power wielded by the growing number of corporate employers,[36] one can merely surmise why additional steps have not been taken to protect at-will employees. A transformation in the driving economic policy behind the traditional rule,[37] coupled with the shift in emphasis from protection of industry's general eco-

32. 236 U.S. 1, 17 (1915). *See also* Rodes, *Due Process and Social Legislation in the Supreme Court—A Post Mortem*, 33 NOTRE DAME LAW. 5 (1957).

During this part of the twentieth century, statutes similar to those in *Adair* and *Coppage* were also being declared unconstitutional at the state level. *See, e.g.*, St. Louis S.W. Ry. v. Griffin, 106 Tex. 477, 489, 171 S.W. 703, 707 (1914); Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 305, 76 P. 848, 850 (1904).

33. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)(upholding the constitutionality of a provision of the National Labor Relations Act which prohibited the discharge of any employee because of membership in a labor union).

34. Currently, nearly all contracts negotiated by the union provide that any dismissal must be "for cause." *See* note 5 *supra*.

35. *See* note 8 *supra*.

36. J. GALBRAITH, THE NEW INDUSTRIAL STATE 76 (1967). *See also* KAYSEN, *The Corporation: How Much Power? What Scope?* in THE CORPORATION IN MODERN SOCIETY 85 (E. Mason ed. 1960).

37. Concentrated protection of business and industry is unnecessary today since the economy has changed from an agrarian and small entrepreneur economy to one of a highly sophisticated industrial state. *See* BLADES, *supra* note 9, at 1404.

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nomic interest to a concern for the individual,[38] would seemingly dictate a reappraisal of the validity of the at-will doctrine. Regrettably, this has not been sufficiently undertaken.

Of course, federal legislation and many state statutes now provide proscriptions against arbitrary dismissal for union activities,[39] for political beliefs,[40] for wage garnishment[41] or for other reasons.[42] To the contrary only a minority of jurisdictions through express legislation forbid discharge for invoking the compensation remedy.[43] In an age when industrial acccidents are a recognized cost of production that society *expects* the employer to bear, no reasonable basis can remain for allowing this policy to be circumvented.[44] Nevertheless, in the absence of affirmative action to curtail the abuse, the compensation arena remains a principal playground for economic coercion of the at-will employee.

III. Compensation and the Doctrine

Workmen's compensation legislation is designed to provide

38. *Cf.* Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971); Henningson v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). *See also* Uniform Commercial Code § 2-302(1) (1972).

39. *See, e.g.*, National Labor Relations Act, § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970); N.H. Rev. Stat. Ann. § 275:1 (1966).

40. *See, e.g.*, Cal. Lab. Code § 1102 (West Supp. 1974).

41. *See, e.g.*, 15 U.S.C. § 1674(a) (1970); Cal. Lab. Code § 2929(b) (West Supp. 1974).

42. *See, e.g.*, Equal Opportunity Act of 1972, 42 U.S.C. §§ 2000(e) *et. seq.* (Supp. 1974)(prohibits discharge involving discrimination on the basis of race, color, religion, sex, or national origin); Fla. Stat. Ann. § 448.03 (1966)(an employer may be fined or imprisoned for discharging an employee because the employee did business as a customer with another merchant).

43. *See, e.g.*, Cal. Lab. Code § 132a (West Supp. 1974); Maine Rev. Stat. Ann. tit. 39 § 111 (Supp. 1973); Tex. Rev. Civ. Stat. Ann. art. 8307c (Supp. 1974); Wis. Stat. § 102.35 (1974).

44. The Supreme Court of the United States has even extended an invitation to the legislatures of the several states to end arbitrary practices in the employment environment.

> This Court . . . has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. . . . Under this constitutional doctrine the due process clause is no longer to be so broadly construed that . . . state legislatures are put in a straight jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.

Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536-37 (1949) (footnotes omitted).

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the employee with a method of relief from industrial accidents which is both expeditious and independent of proof of fault. As a balancing factor, the employee surrenders his former right to an action in tort,[45] and agrees to accept limited, scheduled damages varied according to his disability. In essence a form of "social" insurance, such legislation rests upon a theory of shifting the risk of loss due to work-related injuries from the employee to the better "cost-avoider"—the employer.[46] However, the unbridled power of an employer to discharge at will or the threat by him to exercise this power can and does have a "chilling"[47] effect on the filing of compensation claims, thereby preventing this proper distribution from being effectuated.

It is suggested, therefore, that the principle underlying the employment at-will doctrine is to a large degree inconsistent with the philosophy of the compensation system.[48] To the extent that an injured employee is forced to choose between filing his claim and continued employment, the basic concept of workmen's compensation is frustrated. When faced with this choice, the at-will employee is likely to forego his statutory right to relief. If he does, he bears the entire expense of the industrial accident,[49] and the

45. *See, e.g.*, TENN. CODE ANN. § 50-908 (1966) which provides that

> [t]he rights and remedies herein granted to an employee . . . on account of personal injury or death by accident . . . shall exclude all other rights and remedies of such employee, his personal representative, dependents, or next of kin, at common law or otherwise, on account of such injury or death.

46. In addition, the compensation concept adopts

> the economic principle that those persons who enjoy the product of the business—whether it be in the form of goods or services—should ultimately bear the cost of the injuries or deaths that are incident to the manufacture, preparation and distribution of the product.

W. MALONE, M. PLANT & J. LITTLE, THE EMPLOYMENT RELATION 47 (1974). Under this rationale, the employer may reasonably pass on to the consumer this cost of doing business. *See generally* G. CALABRESI, THE COST OF ACCIDENTS 39-129 (1970).

47. The "chilling effect" doctrine has its foundation in constitutional law. Under this theory, conduct designed to "chill" the exercise of fundamental rights has been prohibited. Although initially directed at state action, the doctrine has been extended in labor relations to private action. *See, e.g.*, Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965); *cf.* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

48. *See* note 10 *supra*.

49. For example, assume that an employee, 28 years old, who earns $140 per week as a laborer, suffers a work-related injury to his back involving approximately $300 medical expenses. Assume further that the injury renders him 5% permanently, partially disabled to the body as a whole, entitling him to an additional $1700 under TENN. CODE ANN. § 50-1007(c)(Supp. 1975). Faced with the choice of absorbing the $300 medical expense and foregoing the $1700 compensation, or being discharged and forced to seek other employment in an "employer's market," the decision is painfully easy. Not only must the employee bear the cost of the industrial accident, but the employer and/or his insurer is unjustly enriched by the sum of $2000.

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cost-avoidance theory has been sapped of its vitality.

To the employee work serves not only a useful economic purpose, but plays a crucial role in his psychological identity and sense of order,[50] and a discharge, for whatever cause, often impairs his ability to secure other employment.[51] Further, although the immediate economic impact on a worker who loses his job has always been significant, in this age of munificent fringe benefits the discharged employee loses much more than his wages. Profit-sharing plans, insurance coverage, and seniority may also be forfeited, thereby severely damaging his financial security and that of his family.[52] Thus, the at-will employee is left in a most untenable position.

It has been noted, however, that many employers and their insurers believe that "wholesale abuses" occur in the compensation system, particularly in the area of permanent, partial disability where measuring loss of earning capacity is difficult, and that discharge is a method of curbing invalid or inflated claims.[53] Nevertheless, determination of the validity of a claim has been vested in the court,[54] not in the employer, and discharge or the threat of discharge for the purpose of discouraging filings which management or its insurer feels to be ficticious or unjustified substitutes financial consciousness for judicial impartiality. In addition, it is doubtful that the employer or his insurer would be heard to complain when other employees failed to file meritorious claims for fear that similar treatment would be accorded them.

With such fundamental interests of the at-will employee dependent upon the conduct of the employer, it does not appear unreasonable to place limitations on his discharge power. To this end, regardless of the reason,

> [w]hether for the sake of providing specific justice for the afflicted individual, deterring a practice which poses an increasingly serious threat to personal freedom generally, or instilling into employers a general consciousness of and respect for the individuality of the employee, the law should confront the problem.[55]

50. REPORT OF SPECIAL TASK FORCE TO SECRETARY OF HEW, WORK IN AMERICA 4-6 (1972).

51. H. VOLLMER, EMPLOYEE RIGHTS AND THE EMPLOYMENT RELATIONSHIP 143 (1960).

52. One commentator has remarked that a man who loses his job loses everything. *See* F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951).

53. Blumrosen, *The Right to Seek Workmen's Compensation*, 15 RUT. L. REV. 491, 492 (1961).

54. Although in the majority of jurisdictions compensation claims are handled by an administrative tribunal, in Tennessee the claim is asserted initially in the trial court.

55. BLADES, note 9 *supra*, at 1410.

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IV. Limitations on the Doctrine

A. Legislative

An apparent failure to comprehend fully a reality of twentieth century industrial organization has fostered widespread retention of the at-will doctrine.[56] The reality is that providing a source of relief from *any* wrongful termination of the employment relationship will help to check a serious threat in today's society—the coercive dismissal power of employers.[57] However, several important pieces of legislation have emerged at both the federal and state levels which have had, as their direct or indirect by-products, a tremendous impact on employer-employee relations. Indeed, such legislation has in many cases been most prophylactic in its effect on an employer's right of discharge.

In 1935, the Congress of the United States passed what is considered, perhaps, as the most important statutory limitation on the employer's power to discipline and discharge—the National Labor Relations Act.[58] Simply stated, this statute guarantees employees the right to form unions and to engage in concerted activity for their mutual aid or protection or for purposes of collective bargaining without incurring the risk of employer retaliation.[59] More particularly, Section 8(a)(4) of the Act makes the discharge of or any discrimination against an employee who has filed a claim to enforce these rights or testified in any proceeding under the Act an unfair labor practice forbidden by the NLRA.[60]

The Fair Labor Standards Act[61] was the next significant piece of Congressional legislation imposing a statutory restriction on employer power. Basically, the FLSA provides that a minimum hourly wage be paid to all employees who are either "engaged in commerce or in the production of goods for commerce" or "employed in an enterprise engaged in commerce or in the production of goods for commerce."[62] In addition, the Act provides that time-and-a-half be paid by employers to all covered employees working

56. *See, e.g.*, Lorson v. Falcon Coach, Inc., 214 Kan. 670, 522 P.2d 449 (1974); Senac v. L.M. Berry Co., 299 So.2d 433 (La. App. 1974); Cactus Feeders, Inc. v. Wittler, 509 S.W.2d 934 (Tex. Civ. App. 1974).

57. Connecticut Law Times, April 12, 1975, at 6, col. 1.

58. 29 U.S.C. §§ 151-68 (1970).

59. National Labor Relations Act § 7, 29 U.S.C. § 157 (1970).

60. 29 U.S.C. § 158(a)(4) (1970).

61. 29 U.S.C. §§ 201-19 (1970).

62. Fair Labor Standards Act § 6(a), 29 U.S.C. § 206(b) (1970).

in excess of forty hours per week.[63] Of major importance, however, is the fact that discharge or discipline of any employee for invoking the provisions of the FLSA is specifically prohibited.[64]

Protection against discrimination regarding the employment of men and women who have served in any branch of the armed forces constitutes yet another important limitation on the at-will doctrine. Adopted in 1948 as the Universal Military Training and Service Act,[65] this statute provides three unique types of protection to such employees. Principally, any discrimination based simply on the fact that an employee has served in the armed forces is deemed unlawful.[66] In addition, an employee has a statutory right to job reinstatement when he returns once again to civilian life.[67] Finally, the third type of protection provided by the Act centers specifically on discharge. Any covered employee is granted the right, for a period of time, not to be discharged from his position of employment without cause or reason. For one year after returning to his civilian job, such employee may not be discharged unless just cause is shown by the employer.[68]

The Civil Rights Act of 1964[69] must also be included among the series of formal restraints imposed upon the exercise of employer disciplinary and discharge power. The affirmative action mandate of Executive Order 11246, as amended,[70] combined with Title VII of the Civil Rights Act of 1964 and the Equal Pay Act,[71] have resulted in a significant alteration of various practices among employers throughout the nation. Aimed generally at providing equal employment opportunity for all persons, while protecting the individual from employment discrimination because of his racial, ethnic, religious or sex status,[72] these provisions have supplied a most effective limitation on the at-will doctrine.

Finally, although discrimination on the basis of age had been prohibited at the state level for a number of years,[73] it was not

63. Fair Labor Standards Act § 7(a)(1), 29 U.S.C. § 207(a)(1) (1970).

64. Fair Labor Standards Act § 15(a)(3), 29 U.S.C. § 215(a)(3) (1970).

65. 50 U.S.C. §§ 451-73 (1970).

66. Military Selective Service Act of 1967, 50 U.S.C. § 459(d) (1970).

67. 50 U.S.C. § 459(b) (1970).

68. 50 U.S.C. § 459(c) (1970).

69. 42 U.S.C. §§ 2000e to 2000e-17 (1970), *as amended*, (Supp. III, 1973).

70. 41 C.F.R. § 60 (1975).

71. 29 U.S.C. § 206 (1970).

72. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1970), *as amended*, (Supp. III, 1973).

73. *See generally* Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526 (1961).

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until 1967 that the Congress enacted age discrimination legislation derived from patches of previously enacted federal law. A hybrid statute, the Age Discrimination in Employment Act[74] merged elements of the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964[75] with several of the enforcement procedures of the Fair Labor Standards Act,[76] substituting "age" for "race, color, religion, sex or national origin"[77] as the ground for impermissible discrimination.[78] It should be noted, however, that the Act protects only those workers "who are at least forty years of age but less than sixty-five years of age,"[79] and who are employees or potential employees of an employer "engaged in an industry affecting commerce who has twenty or more employees" during the requisite period.[80] As an additional restriction on employer power, the Age Discrimination in Employment Act "promote[s] employment of older persons based on their ability rather than age . . . [and] prohibit[s] arbitrary age discrimination in employment. . . ."[81]

However, while the American legal system may be moving slowly toward a general requirement of fair treatment and fair dealing between employer and employee,[82] it must be said that the well-entrenched principle implicit in the at-will doctrine, the superiority of the employer in the employment relationship, though criticized by modern commentators for its rigid austerity[83] has been difficult to abrogate. Moreover, despite a continuing need to protect at-will employees from the coercive power of their

74. 29 U.S.C. §§ 621-34 (1970).

75. 42 U.S.C. §§ 2000e-2(a) (1970), *as amended*, (Supp. III, 1973).

76. 29 U.S.C. §§ 211(b), 216, 217 (1970).

77. Age Discrimination in Employment Act, 29 U.S.C. § 623(a) (1970).

78. There is no indication of specific legislative intent in this joinder of the provisions of Title VII and the FLSA. However, it has been suggested that Congress was already concerned about the case load of the EEOC, and that the special provisions for continuing study and educating the public about the problems of age discrimination would be implemented more effectively under the auspices of the Department of Labor. *See* Comment, *Class Actions Under the Age Discrimination in Employment Act: The Question Is "Why Not?"*, 23 EMORY L.J. 831, 837 (1974).

79. 29 U.S.C. § 631 (1970).

80. 29 U.S.C. § 630(b) (1970).

81. 29 U.S.C. § 621(b) (1970).

82. *See generally* H. VOLLMER, EMPLOYEE RIGHTS AND THE EMPLOYMENT RELATIONSHIP 142-47 (1960).

83. *See, e.g.*, F. MEYERS, OWNERSHIP OF JOBS: A COMPARATIVE STUDY 15 (1964); E. GINZBERG & I. BERG, DEMOCRATIC VALUES AND THE RIGHTS OF MANAGEMENT 170 (1963); BLADES, note 9 *supra*, at 1404-06; Blumrosen, *Settlement of Disputes Concerning the Exercise of Employer Disciplinary Power—United States Report*, 18 RUT. L. REV. 428, 432-34 (1964).

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employers, particularly in the area of workmen's compensation, with few exceptions[84]

> it is evident that neither the common law nor statutory law, nor . . . [employer] practices thereunder, afford employees any protection from the arbitrary and capricious exercise by the employer of his power to discharge . . . for good cause, bad cause or no cause at all . . . so long as there is no discrimination because of union activities, race, color, sex, or age.[85]

B. Judicial

As early as 1959, judicial appreciation of a need to limit the at-will doctrine emerged. Recognizing that an otherwise unbridled right of discharge might be restricted when a failure to do so would be contrary to statutory policy, the court in *Petermann v. Teamsters Local 396*[86] granted a cause of action for damages to an at-will employee discharged for refusing to commit perjury at the insistence of his employer.[87] Escaping the confines of the traditional theory, this court realized that such employer coercion could not be allowed to frustrate established interests of society.[88]

Another significant step toward ameliorating the often harsh effects of at-will employment arose out of a recent New Hampshire case. The court in *Monge v. Beebe Rubber Co.*[89] invalidated

84. *See, e.g.*, Civil Service Act, 5 U.S.C. § 7501 (1970) (the federal government may not discharge its own employees except for such cause as will promote the efficiency of the relevant government agency); Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1970)(an employer has no power to dismiss an employee solely because his earnings have been subjected to one garnishment); FLA. STAT. ANN. § 448.03 (1966)(an employer may be fined or imprisoned for dismissing an employee because the employee did business as a customer with another merchant); CAL. LAB. CODE § 1102 (West Supp. 1974)(employer cannot coerce particular political action or activity by an employee). *See also* note 43 *supra*.

85. Weyand, *Present Status of Individual Employee Rights*, N.Y.U. 22ND ANNUAL CONFERENCE ON LABOR 171, 185-86 (1970).

86. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

87. Petermann v. Teamsters Local 396, 174 Cal. App. 2d 184, 187, 344 P.2d 25, 27 (1959). In essence, the court took a California statute which made it a crime to solicit the commission of perjury, and used the same to implement a civil remedy for the discharged employee.

88. 174 Cal. App. 2d 184, 187, 344 P.2d 25, 27 (1959). The California courts, however, have not taken as broad a view of public policy as might be expected. In Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960), an employee had been discharged for agreeing to serve as a juror. Although the court noted the importance of serving as a juror, it failed to mention either *Petermann* or public policy, and found that the discharge had not been wrongful. *See also* Marin v. Jacuzzi, 224 Cal. App. 2d 549, 36 Cal. Rptr. 880 (1964).

89. 316 A.2d 549 (N.H. 1974).

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a discharge which had been based on the plaintiff's rejection of sexual advances by her foreman. Acknowledging the existence of a "new climate" in employer-employee relations, the court held that judicial redress was required in an instance where termination of the employment relationship was a result of bad faith, malice or *retaliation*.[90] Further, in stating that dismissals without just cause "[are not in] the best interest of the economic system or the public good . . .,"[91] this court appeared to recognize the changes that have occurred in the social and economic factors that produced the at-will doctrine.[92]

Although these cases seemingly provide the foundation upon which to base a cause of action for wrongful discharge for invoking the compensation remedy,[93] the characterization of the right of action in both was one of breach of contract. This is unfortunate in two respects. First, the unyielding requirement of consideration to support the employment contract would prevent most courts from granting relief to a discharged at-will employee.[94] The employee is regarded as fully recompensed by wages for his services, leaving nothing to support a promise of continued employment.[95] Second, it would appear that theories of tort liability should govern a recovery for wrongful discharge. Numerous analogies may be found for such an action, including abuse of process[96] and various economic torts.[97] Moreover, a tort theory would

90. Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974).

91. *Id.*

92. *See* notes 35-38 *supra* and accompanying text.

93. It should be noted that *Petermann* and *Monge* differ in one major respect. In *Petermann*, it was clear that absent the policy considerations, the employer could have discharged the employee without reason or cause. In *Monge*, the court established a new general rule against wrongful discharge that does not require a strong statutory policy to bring it into effect. Thus, although *Monge* is by far the better approach, at the time of this writing, it has been cited in only one case and in the dissenting opinion of that case. In Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974), the court refused to allow a cause of action where a salesman, employed at-will, was discharged for questioning the safeness of a product about to be marketed by his employer. In his dissenting opinion, Justice Roberts, citing *Monge*, felt that the court was "duty-bound to fashion remedies for the changing circumstances of economic and social reality." 319 A.2d at 185 (Roberts, J., dissenting).

94. Neither *Petermann* nor *Monge* discussed the need for consideration. *But see* Bixby v. Wilson & Co., 196 F. Supp. 889 (N.D. Iowa 1961); United Sec. Life Ins. Co. v. Gregory, 281 Ala. 264, 201 So.2d 853 (1967).

95. *See* BLADES, note 9 *supra*, at 1420. *See also* Note, *Employment Contracts of Unspecified Duration*, 42 COLUM. L. REV. 107 (1942).

96. *See* W. PROSSER, THE LAW OF TORTS § 121, at 856 (4th ed. 1971) [hereinafter cited as PROSSER].

97. *See* PROSSER, note 96 *supra*, §§ 128-30, at 915-69. *See also* United States Fidelity & Guar. Co. v. Millonas, 206 Ala. 147, 89 So. 732 (1921)(employee allowed recovery against

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avoid the requirement of consideration, so essential to a contract action.

However, characterizing wrongful discharge as a tort action is not completely free of difficulty. It will be remembered that "a tort is a breach of a *duty* [other than a breach of contract] which gives rise to an action for damages."[98] At issue, then, is the harm done to the employee and a breach of a duty owed to him by the employer. Herein lies the problem, for a *duty* is difficult to establish where a near-absolute *right* appears to exist.[99] Nevertheless, with respect to the compensation area one court has supplied a precedent.

In *Frampton v. Central Indiana Gas Co.*,[100] the plaintiff, an employee of the defendant company, sought actual and punitive damages for an allegedly "retaliatory"[101] discharge arising out of the exercise of her statutory right to collect workmen's compensation benefits from her employer. In the complaint she alleged that, although she had feared the loss of her job, she sought the compensation remedy, and within a month after settlement was discharged without explanation. In holding that the plaintiff had stated a claim upon which relief could be granted[102] the court in *Frampton* made available to the at-will employee an unprecedented civil remedy in this area of the law.[103] Further, emphasiz-

employer's insurer because of his discharge as a result of insurer's threatened cancellation of policy if employee filed claim).

98. PROSSER, note 96 *supra*, § 1, at 1, n.1 (emphasis added).

99. This "near-absolute right," of course, is the employer's power of discharge over the at-will employee.

100. 297 N.E.2d 425 (Ind. 1973).

101. For purposes of further discussion, any discharge of the employee as a result of his filing a workmen's compensation claim will be referred to as "retaliatory."

102. Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973). It should be noted that the plaintiff had been proceeding on a tort theory, but in granting a cause of action the Supreme Court of Indiana seemed to have difficulty in characterizing its nature. However, since the court spoke in terms of an employer's "duty" to provide compensation to the employee, it is presumed that it considered the plaintiff's theory correct. 297 N.E.2d 425, 427 (Ind. 1973). *See also* Monge v. Beebe Rubber Co., 316 A.2d 549, 553 (N.H. 1974) (Grimes, J., dissenting), wherein *Frampton* was characterized as a tort action.

103. Several other cases have refused to recognize a cause of action to the employee discharged for seeking workmen's compensation. *See* Lester v. County of Terry, 353 F. Supp. 170 (N.D. Tex. 1973)(governmental immunity held as absolute defense to such a tort claim); Narens v. Campbell Sixty-Six Express, Inc., 347 S.W.2d 204 (Mo. 1961), *relying on*, Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956)(statute forbidding discharge for exercising right of compensation held not to create a new civil claim in discharged employee); Raley v. Darling Shop of Greenville, Inc., 216 S.C. 536, 59 S.E.2d 148 (1950)(threat of and resulting dismissal held not actionable since plaintiff had not withdrawn her compensation claim). *See also* 63 A.L.R.3d 979 (1975).

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ing that workmen's compensation legislation is for the benefit of employees and must be liberally construed, the court stated:

> The Act creates a *duty* in the employer to compensate employees for work-related injuries . . . and a *right* in the employee to receive such compensation. But in order for the goals of the Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal.[104]

Unable to cite other cases as direct authority for the proposition that interference with the right to workmen's compensation should be actionable, the court, referring to a provision in the Indiana Workmen's Compensation Act to the effect that "[n]o contract or agreement, written or implied, no rule, regulation or *other device* shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by this act,"[105] determined that discharge, or the threat thereof, was a "device" within the meaning of the Act, "and hence, in clear contravention of public policy."[106] Relying upon the parallel in landlord and tenant law of "retaliatory eviction,"[107] the court expressed the opinion

104. 297 N.E.2d 425, 427 (Ind. 1973)(emphasis in original). For purposes of creating a remedy for the retaliatorally discharged at-will employee, this statement, although dicta, is very significant. It not only makes clear the right of an employee to receive redress for industrial accidents, but also the *duty* of the employer to provide this redress. Thus, if this duty is breached, the resulting harm to the employee should give rise to an action in tort.

105. IND. ANN. STAT. § 22-3-2-15 (1971)(emphasis added). *See also* TENN. CODE ANN. § 50-916 (1955).

106. 297 N.E.2d 425, 428 (Ind. 1973). It should be noted, however, that this interpretation is not completely without difficulty. Even assuming that other jurisdictions whose acts contain the same or similar language would consider a retaliatory discharge a "device" within the meaning of their acts, it does not automatically follow that the courts (or administrative tribunals) in these jurisdictions would find that the employer was liable to the employee in damages for the discharge. In other words, from a literal reading of the statute a court (or administrative tribunal) could find that although an employer had discharged his employee, and thus made use of a "device" within the meaning of the state's act, if the employee had, in fact, received his compensation despite the discharge, the employer had not been relieved of his obligation under the act and could not, therefore, be held liable to the employee for damages. *Cf.* Raley v. Darling Shop of Greenville, Inc., 216 S.C. 536, 59 S.E.2d 148 (1950).

107. These cases generally involve a situation whereby a tenant has reported housing code violations to the proper authorities in an attempt to motivate the landlord to make necessary repairs and improvements. The landlord, because of the tenant's action, either gives him notice to quit or "evicts" him by raising the rent to an unaffordable level. A landmark case in this area of the law, Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969), held that a tenant who had reported housing code violations to the authorities could raise the retaliatory motive of his landlord as a defense

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that public policy demanded that an action for damages also be available in this instance.[108]

However, despite the definite need to protect an employee's right to compensation, a need readily evidenced in the *Frampton* opinion, sufficient steps have not been taken to this end. Moreover, judicial creation of a civil remedy on the "bootstrap" of statutory policy, where one is not expressly provided for, remains an area of much debate.[109] Consequently, the obvious solution lies in cooperative action by the legislature and the courts through the adoption of "anti-discharge" legislation, supplemented with a closely supervised cause of action for damages to the retaliatorally discharged employee.

V. Suggested Solutions

It is submitted that the foregoing discussion has demonstrated that the at-will doctrine is no longer an unwaivering rule by which employer-employee relations are governed. Indeed, underlying policy considerations present a much more compelling argument for protecting an employee from an overreaching employer. Moreover, the proliferation of exceptions to the doctrine that has developed in recent years adds credibility to the proposition that the rule is in need of serious examination.[110]

The following core proposals are suggested as possible solutions in the area of workmen's compensation for righting the existing imbalance that significantly favors the employer in the

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in eviction proceedings. Going one step further, the court stated that

> [t]he notion that the effectiveness of remedial legislation will be inhibited if those reporting violations of it can legally be intimidated is so fundamental that a presumption against the legality of such intimidation can be inferred as inherent in the legislation even if it is not expressed in the statute itself.

397 F.2d at 701-02 (emphasis added). Taking this to a logical conclusion, a recent decision, Aweeka v. Bonds, 20 Cal. App. 3d 278, 97 Cal. Rptr. 650 (1971), recognized an affirmative cause of action based on landlord retaliation although there was no statutory provision creating the same. For a detailed discussion of this area see Comment, *The Uniform Residential Landlord and Tenant Act: New Hope for the Beleaguered Tenant?*, 48 St. John's L. Rev. 546 (1974).

108. 297 N.E.2d 425, 428 (Ind. 1973).

109. *See* 82 Harv. L. Rev. 932, 934 (1969), wherein it is argued that a

> court's assumption of power . . . in accordance with pressing social needs violates the accepted canon of construction that statutes will not be interpreted to effect [sic] a change in right-duty relationships well established at common law in the absence of specific statutory language to that effect.

But see Hart & Sacks, The Legal Process 1173-74 (temp. ed. 1958).

110. *See generally* E. Levi, An Introduction to Legal Reasoning 8-27 (1972).

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employment relationship. The first proposal refers to a discharge for the exercise of legitimate rights, while the second specifically establishes a civil action[111] for the employee.

> **Proposal 1.** *Discrimination Against Employee for Exercise of Rights—Penalty.* It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has made known his intention to claim, has claimed, or has attempted to claim workmen's compensation benefits from such employer, or because he has testified, or is about to testify, in any proceedings under this Act.
>
> It shall be unlawful for any insurance carrier to advise, direct, induce or encourage an insured under threat of cancellation or an increase in premium or by any other means, to discharge or in any other manner discriminate against an employee as to his employment because such employee has made known his intention to claim, has claimed, or has attempted to claim workmen's compensation benefits from such insured, or because he has testified, or is about to testify, in any proceedings under this Act.[112]

> **Proposal 2.** *Liability to the Employee for Violation of Proposal 1.* Any person who violates any provision of Proposal 1 shall be liable to the employee or employees for reasonable damages suffered by such employee or employees as a result of the violation, and the court [or administrative tribunal] may, in addition to any judgment awarded to the plaintiff or plaintiffs, grant such other relief as may be appropriate.

VI. The Nature of the Remedy

By far the simplest method to provide relief for the at-will

111. The second proposal is included to avoid the situation which occurred in Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956). An at-will employee brought an action for damages alleging that he had been discharged in violation of a section of the Missouri Workmen's Compensation Act which made it a misdemeanor for an employer to discharge or in any other manner discriminate against an employee for seeking the compensation remedy. In upholding the dismissal of the employee's complaint, the court stated that the Act did not create a new civil action for damages against an employer who violated the section. Further, the court noted that in the absence of clear legislative intent to the contrary, a statute which creates a criminal offense and provides a penalty for its violation will not be construed as creating a new civil cause of action when to do so would conflict with established common law doctrines. *See also* Narens v. Campbell Sixty-Six Express, Inc., 347 S.W.2d 204 (Mo. 1961).

112. The inclusion of penalties for a violation of this proposal has been purposefully avoided. Each state should be free to prescribe its own punishment in accordance with the touchstone of its own conscience.

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employee would be through the enactment of appropriate legislation. Undoubtedly, a state, as a legitimate exercise of its police power, could prohibit coercive employer conduct in the area of workment's compensation through the adoption in whole or in part of the above proposals.[113] In fact, broad statutory provisions of this type would serve the dual purpose of establishing protection and redress for the worker, while at the same time leaving the courts free to perform their interpretive functions.

On the other hand, again assuming that legislative action would be undertaken, an additional alternative for protecting the retaliatorally discharged employee exists through the use of an administrative agency to deal specifically with the problem.[114] In those jurisdictions where the compensation system remains controlled entirely by the courts, a new agency could be established vesting in it the authority to administer the system, including any employee claims of retaliatory discharge. So also, in those states where administrative tribunals are the initial triers of fact in any compensation case, might the authority of an existing agency be expanded.[115] In either instance, the remedial tools available to an agency,[116] as well as its broad range of investigatory powers, necessarily imply that this approach offers a most appropriate means for advancing the interests under consideration.

Nevertheless, although this problem could be said to be a shoe that fits well the feet of any state legislature, the prospects of legislative reform in this context seem at best visionary. It has been pointed out that certain characteristics of the legislative process present untold obstacles to any significant attempt at reformation in the area of private law.[117] Moreover, the unlikeli-

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113. *See* CAL. LAB. CODE § 132a (West Supp. 1974); MAINE REV. STAT. ANN. tit. 39 § 111 (Supp. 1973); TEX. REV. CIV. STAT. ANN. art. 8307c (Supp. 1974); WIS. STAT. § 102.35 (1974). *Cf.* CAL. LAB. CODE § 1102 (West Supp. 1974).

114. *Cf.* Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526 (1961).

115. It is also suggested that a state fair employment agency might be empowered to hear and determine a claim of retaliation by a discharged employee. A majority of states now have administrative tribunals which enforce prohibitions against other forms of discrimination in employment. *See* Bonfield, *The Origin and Development of American Fair Employment Legislation*, 52 IOWA L. REV. 1043, 1088 n.208 (1967).

116. Under Title VII of the Civil Rights Act of 1964, for example, the Equal Opportunity Commission can grant injunctive relief and such other relief "as may be appropriate," which may include reinstatement and back pay. 42 U.S.C. § 2000e-5(g) (1970), *as amended*, (Supp. 1974).

117. *See generally* Peek, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963). Among the characteristics considered by the author as generally obstructing statutory reform are that legislators are indifferent, lack insight and

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hood that such legislation will be enacted in the immediate future is enhanced by the inevitable fact that strong interest groups will forcefully oppose it.[118] Thus, in the absence of a statutory solution designed to prevent unreasonable employer conduct in the area of workmen's compensation, some other source of relief must be looked to.

The obvious counterbalance for legislative indifference to critical problems deserving of prompt attention is an acceptance by the judiciary of the active role of a reformer.[119] Unfortunately, courts often hesitate to blaze new trails in a relatively unexplored frontier. In addition, the power of even progressive courts to formulate remedial pronouncements of public policy is sharply restricted; otherwise, they would become judicial legislatures rather than remaining instrumentalities for interpretation of the law. However, as has been previously suggested,[120] a cause of action characterized as a tort, one specifically referred to as the tort of "retaliatory discharge," seemingly could be created without sacrificing important *employer* interests which must also be considered in this context.

Readily analogous is an action for abuse of process, the gist of which concerns the use by the defendant of a lawful power[121] for a purpose other than that for which such power was intended.[122] Although the traditional theory was and still is that an at-will employment relationship may be terminated by the employer at any time, public policy would now appear to dictate that this power not be used for a discriminatory, coercive or *retaliatory* purpose. Witness the multitude of limitations that currently exist on the employer's power of discharge over the

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experience, are paid inadequate wages, and fail to hold satisfactory committee and public hearings.

118. It can be assumed that neither employers nor unions would favor such legislation. Employers would naturally fear any statutory provisions that would subject them to possible liability, while unions would oppose any laws which enabled employees to protect themselves without union help. *See* D. TRUMAN, THE GOVERNMENTAL PROCESS 362-63 (1951).

119. *See* Keeton, *Judicial Law Reform—A Perspective on the Performance of Appellate Courts*, 44 TEXAS L. REV. 1254 (1966); Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963); Friedmann, *Legal Philosophy and Judicial Lawmaking*, 61 COLUM. L. REV. 821 (1961).

120. *See* notes 93-108 *supra* and accompanying text.

121. This power, of course, is the near-absolute right of discharge granted to the employer by the at-will doctrine.

122. *See* PROSSER, note 96 *supra*, § 121, at 856. *See also* Glidewell v. Murray-Lacy & Co., 124 Va. 563, 98 S.E. 665 (1919); Wood v. Graves, 144 Mass. 365, 11 N.E. 567 (1887); Grainger v. Hill, 132 Eng. Rep. 769 (C.P. 1838).

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employee.[123]

Adopting this analogy, emphasizing the important element of an "ulterior purpose" for the exercise of a lawful power,[124] the crucial issue then becomes the *motive* underlying the employer's conduct. To elaborate: the recognition of a cause of action to a discharged employee which is conditioned upon the establishment of an "ulterior purpose," or in other words a retaliatory motive, would accomplish the desired result of providing a means of redress to the worker, while at the same time accommodating the employer's interest in retaining sufficient business prerogative to make independent judgments about his employees. In this respect, courts, both in good conscience and to the satisfaction of critics of judicial creativity, could fashion a remedy compatible with the current values of society without totally destroying an established doctrine.[125]

Thus it is suggested that existing principles of tort law provide the foundation upon which to build new rights for at-will employees. However, absent legislative initiative, the burden falls on the judiciary to determine these employee rights.[126] In so doing it will be necessary for courts both to consider and to protect the competing interests involved, and a "motive-based" cause of action apparently offers the means by which this may be best accomplished.

VII. The Implementation of a Civil Remedy

The gravamen of the retaliatory discharge action is the "intention" of the employer, and if his "intention" is to punish the employee for claiming the compensation remedy or to intimidate other employees by discharging one of their number who insists on exercising his legal rights, the discharge should generate liability. However, as in any case which turns on motive, proof of that motive can pose serious problems for both the employee and the courts. In addition, concurrent with the recognition of a right of recovery to a discharged worker, the danger of "vexatious lawsuits by disgruntled employees fabricating plausible tales of em-

123. *See* Section IV *supra*.

124. *See* Prosser, note 96 *supra*, § 121, at 857. *See also* Templeton Feed & Grain Co. v. Ralston Purina Co., 69 Cal. App. 2d 461, 446 P.2d 152 (1968); White v. Scarritt, 341 Mo. 1004, 111 S.W.2d 18 (1937).

125. *Cf.* Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974).

126. *See* note 119 *supra* and accompanying text.

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ployer coercion" arises.[127] Given these difficulties, a proper allocation of the burden of proof coupled with appropriate inferences to be derived from certain circumstantial and extrinsic evidence should provide the criteria by which the validity of a claim might be reasonably tested and a complete sacrifice of the employer's normal right of discharge avoided.

A. *The Employee's Prima Facie Case*

The burden of proof in any civil action is more accurately subdivided into the burden of production[128] and the burden of persuasion.[129] Logically, both burdens initially should be placed on the employee. Moreover, the ultimate burden of persuasion that the employer's motive for the discharge was retaliatory in nature should remain on the discharged worker.[130] However, presumptions of an improper motive can help the employee carry this burden.

To create a presumption of improper motive the employee must first establish a prima facie case of retaliation by a preponderance of the evidence.[131] Proof (1) that he filed a workmen's compensation claim, (2) that an involuntary termination of the employment relationship occurred, and (3) that the termination was the result of employer retaliation should be sufficient to establish his prima facie case. Once having done this, the burden of production should then shift to the employer to present enough evidence to permit a jury to find *proper* motivation.

B. *Proof of Retaliation*

While the production of evidence substantiating both the fil-

127. BLADES, note 9 *supra*, at 1428.

128. This is the burden of coming forward or producing in the first instance, evidence of a quantity prescribed as sufficient to enable the reasonable jury to find the existence of the element. C. MCCORMICK, THE LAW OF EVIDENCE § 338, at 789 (2d ed., E. Clearly 1972) [hereinafter cited as MCCORMICK].

129. This requires the trier of fact to find against the burdened party as to the contested fact unless persuaded, in view of all the evidence, that its existence is more probable than not. MCCORMICK, note 128 *supra*, § 339, at 793.

130. *But see* the Military Selective Service Act of 1967, 50 U.S.C. § 459 (1970)(burden of proof on the employer). *See also* Carter v. United States, 407 F.2d 1238 (D.C. Cir. 1968).

131. The possibility of the use of a higher standard of proof to prevent fictitious claims has been suggested by one commentator. *See* BLADES, note 9 *supra*, at 1429. However, it would appear that an employee discharged for seeking the compensation remedy should have no greater burden than one discharged for union membership or activities. *Cf.* National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1970).

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ing of a compensation claim[132] and an involuntary termination of employment should not be particularly difficult for the employee, the same will not be true concerning proof of retaliation. In fact, any retaliation will have to be proved almost entirely by circumstantial and extrinsic evidence. In most instances the employee's testimony will directly conflict with that of the employer, with disinterested witnesses seldom available to corroborate either side's version of the facts. However, equally difficult proof problems have arisen in cases under the National Labor Relations Act[133] with regard to proving discrimination on grounds of union membership or activities, and the criteria developed in these cases may be easily adapted to proving retaliation for seeking the compensation remedy.

Under the NLRA, an employer may not fire an employee because of his union activity,[134] and various inferences have been used to establish a prima facie case of such discrimination. For example, of primary importance in a retaliatory discharge situation would be the fact that the employer had given the employee notice of discharge closely related in time to when the employee filed his claim.[135] Obviously, the shorter the time-span, the stronger the inference that the discharge was retaliatory. Evidence that the employer was evasive when asked the reason for the discharge may also be relevant.[136] In addition, the fact that the worker had recently received a job promotion or a raise would seemingly indicate that the discharge was a result of something other than his performance as an employee.[137]

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132. Discussion of the implications of a situation where the employee, although in good faith, would not be entitled to recover workmen's compensation because his injury did not meet the requirements of his state's act has been avoided. It is suggested, however, that an employer should not escape liability for retaliatory discharge simply because the employee was mistaken as to his rights. *Cf.* Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969)(under Title VII, even malicious complaints by employees concerning employment practices have been protected).

133. 29 U.S.C. §§ 151-68 (1970).

134. 29 U.S.C. § 157 (1970). Yet, an employer may discharge for cause, or without cause, and not be guilty of unlawful discrimination under the Act. *See* 83 A.L.R.2d 527 (1962).

135. *Cf.* Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345 (3d Cir. 1969)(discharge of two long time employees on the day following their protest after employer's announcement that there would be no contribution to profit-sharing plan); NLRB v. Council Mfg. Corp., 334 F.2d 161 (8th Cir. 1964)(discharge on the same day employee began organizational efforts); NLRB v. Tepper, 297 F.2d 280 (10th Cir. 1961)(discharge one day after the organizational meeting).

136. *Cf.* A.J. Krajewski Mfg. Co. v. NLRB, 413 F.2d 673 (1st Cir. 1969).

137. *Cf.* NLRB v. Council Mfg. Corp., 334 F.2d 161 (8th Cir. 1964); NLRB v. Tru-Line Metal Prods. Co., 324 F.2d 614 (6th Cir. 1963), *cert. denied*, 377 U.S. 906 (1964).

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More objective evidence regarding the circumstances surrounding the discharge would also suggest the inference of retaliation. Undoubtedly, the employer will assert that the employee was guilty of some work-related infraction, thereby causing his discharge. However, if the employer has condoned similar employee conduct in the past,[138] if he has applied a rule unequally to other employees,[139] or if he had not raised any serious objections to the discharged employee prior to the filing of his claim,[140] the inference is that the employer acted *not* because of the employee's misconduct, but out of a desire to retaliate against him.

Finally, the examination and introduction into evidence of employment records may be a most effective method of raising the inference of retaliation. Proof that an inordinate number of employees who had filed workmen's compensation claims had been discharged or laid-off should in itself suggest such an inference.[141] In fact, it is submitted that this evidence alone should render suspect any employer attempt to justify the discharge on other grounds.

C. *A Question of Mixed Motives*

Once the discharged employee has established a prima facie case of retaliation, the employer-defendant must successfully rebut the evidence supporting that prima facie case. However, a desire to retaliate may coexist with other good and valid justifications for the discharge.[142] When this occurs, the question arises concerning the effect that the presence of an improper motive should have on a finding of a retaliatory discharge.

Understandably, the most favorable answer to the employer would be to require that the employee prove that the *sole* motive for the discharge was retaliation.[143] To some, this would not seem an undue burden in light of the importance of protecting an employer's normal right of discharge. Realistically, however, such a

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138. *Cf.* Colecraft Mfg. Co. v. NLRB, 385 F.2d 998 (2d Cir. 1967); NLRB v. Pioneer Plastics Corp., 379 F.2d 301 (1st Cir.), *cert. denied*, 389 U.S. 929 (1967).

139. *Cf.* NLRB v. Plant City Steel Corp., 331 F.2d 511 (5th Cir. 1964); NLRB v. Berg-Airlectro Prods. Co., 302 F.2d 474 (7th Cir. 1962); NLRB v. Solo Cup Co., 237 F.2d 521 (8th Cir. 1956).

140. *Cf.* NLRB v. Monumental Life Ins. Co., 162 F.2d 340 (6th Cir. 1947).

141. *Cf.* Sterling Aluminum Co. v. NLRB, 391 F.2d 713 (8th Cir. 1968); Montgomery Ward & Co. v. NLRB, 377 F.2d 452 (6th Cir. 1967); NLRB v. American Casting Serv., Inc., 365 F.2d 168 (7th Cir. 1966).

142. *Cf.* NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963).

143. *Cf.* Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297 (1970).

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requirement would have an almost nullifying effect on the employee's cause of action for it is seriously doubted that given this standard the employer could not produce some evidence of a proper motive.

On the other hand, application of a standard whereby the discharge would be improper if motivated even in part by the employer's desire to retaliate,[144] although most favorable to employees, should also be avoided. Fundamental fairness does not require that the employee be protected from the natural consequences of his own wrongdoing. Nor should an employee whose conduct warrants discharge by the employer be entitled to protection from the same. However, utilizing such an approach would make it decidedly easier for the average jury, one likely to be sympathetic to a discharged worker, to find on the basis of the employee's prima facie case alone that the employer was partially motivated by a desire to retaliate.

In the final analysis, it is submitted that resort to a standard quite familiar to both courts and juries offers the most satisfactory answer to the question of mixed motives. Commonly known as the "but for" or "sine qua non" rule,[145] this test would require a finding that the discharge would not have occurred *but for* the employee's filing a compensation claim before liability could be imposed upon the employer. Not only would this approach avoid any unnecessary infringement on an employer's business prerogative, but it would also greatly alleviate the danger of ficticious claims by *rightfully* discharged workers.

CONCLUSION

The protection of an employee who claims the compensation remedy which has been prescribed as his rightful redress for work-related injuries takes on an importance far beyond the individual employee. Unremedied retaliation not only inhibits the lawful exercise of a statutory right by a *class* of individuals, but also frustrates a valuable interest of society in providing relief for injured workers.

Experience has shown, however, that legislative action to curtail abuse in the area of workmen's compensation is unlikely. For this reason, the burden rests on the judiciary to resolve the incom-

144. *Cf.* Ridgely Mfg. Co. v. NLRB, 510 F.2d. 185 (D.C. Cir. 1975); Conrad v. Delta Air Lines, Inc., 494 F.2d 914 (7th Cir. 1974).

145. PROSSER, note 96 *supra*, § 41, at 238-39.

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patibility between the employer's right of discharge and the employee's right to compensation. Once properly accomplished, the employee will receive no less than that to which he is entitled, and the employer will relinquish no more than that which fundamental fairness demands.

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