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# OKLAHOMA LAW REVIEW

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## CORPORATE RESPONSIBILITY AND THE EMPLOYEE'S DUTY OF LOYALTY AND OBEDIENCE: A PRELIMINARY INQUIRY

PHILLIP I. BLUMBERG\*

### I. INTRODUCTION

The nature of the American corporate world is changing, reflecting changing concepts of the objectives, role and responsibilities of business. The public corporation as a social and economic organization is undergoing a process of re-examination which has not yet run its course, and the ultimate outcome of which one may still not safely predict. There is general acceptance of the concept of corporate social responsibility with the major public corporation assuming a role of increasing significance in social problem solving. Although highly controversial and not generally accepted, there is also increasing expression of a new view of the large American corporation as a social institution to achieve social objectives, rather than as an economic institution to be operated for economic objectives for the benefit of shareholders. It is inevitable, therefore, that as a corollary, new views will also emerge with respect to the changing relationship between the corporation and the groups vitally affected by it, particularly its employees, as well as such other groups as consumers, suppliers, and the public generally.

### II. THREE RECENT DEVELOPMENTS

This article constitutes a preliminary inquiry into aspects of a problem that the author believes will become an area of dynamic change in the corporate organization and in time will produce significant change in

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established legal concepts. It is concerned with the impact of the new view of the corporation upon traditional concepts of the duties of loyalty and obedience of the employee to his employer, firmly recognized in the law of agency. This impact has been illustrated by a number of recent developments, which have a common core: the right of the employee of the large public corporation to take action adverse to the interests of his employer in response to the employee's view as to the proper social responsibility of his corporate employer.

### *A. The "Public Interest Disclosure" Proposal*

The outstanding example, which will serve as the major topic of this article, is the recent appeal of Mr. Ralph Nader that "professional" employees of corporations, as well as of government, disclose to private agencies information about their "employers' policies or practices that they consider harmful to public or consumer interests."<sup>1</sup> Mr. Nader simultaneously announced the establishment of a "Clearing House for Professional Responsibility" to solicit and receive such reports and to encourage what Mr. Nader termed "responsible whistle-blowing" by scientists, engineers, and other professional employees, and to protect employees acting as informants or tipsters from retaliation by employers. Mr. Nader originally stated his program in terms of professionalism: professional ethics should take precedence over loyalty to employers when the public interest is at stake. Although this initial statement rested on an appeal to a professional responsibility, Mr. Nader's broad reference to harm to "public or consumer interests" was apparently restricted to cases where the employer's behavior was "illegal, hazardous, or unconscionable."<sup>2</sup>

Subsequently, Mr. Nader substantially broadened the scope of his appeal for disclosure of confidential information by employees. He included all employees, not merely professional employees, and extended the area of disclosure to a wide range of information, going far beyond the original restrictions of unprofessional conduct or "illegal, hazardous, or unconscionable" behavior. The *New York Times* reported:

One way Nader sees to alleviate the problem of individual responsibility in the bureaucracies of both the Government and corporations is to turn what he calls "whistle blowing" into an honorable action. "A whistle blower," says Nader, "is anyone in any organization who draws a line on his own account where responsibility to society transcends responsibility to his organization."<sup>3</sup>

<sup>1</sup> N.Y. Times, Jan. 27, 1971, at 32, col. 3.

<sup>2</sup> N.Y. Times, Jan. 15, 1971, at 43, col. 2.

<sup>3</sup> N.Y. Times, Mar. 21, 1971, § 6, at 16, col. 5. For a detailed account of the experiences

Thus, the test has become a personal decision by each employee "where responsibility to society transcends responsibility to his organization."<sup>4</sup> It is clear that Mr. Nader wishes to encourage the "corporate leak" to facilitate efforts of so-called "public interest" organizations<sup>5</sup> in publicizing actions by the major power centers in the society—whether governmental or corporate—not deemed to be in the public interest.<sup>6</sup>

In brief, any person in any organization, who disagrees with a decision of his superiors in the social or environmental area is encouraged to continue the campaign (which he lost, or in which he did not have an opportunity to participate within his own organization) in the public arena via disclosure to a "public interest" organization.

Mr. James M. Roche, Chairman of General Motors Corporation, promptly attacked the proposal, stating:

Some of the enemies of business now encourage an employee to be disloyal to the enterprise. They want to create suspicion and disharmony and pry into the proprietary interests of the business. However this is labelled—industrial espionage, whistle blowing or professional responsibility—it is another tactic for spreading disunity and creating conflict.<sup>7</sup>

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of nine "whistle blowers" honored at a conference sponsored by Mr. Nader, *see* Branch, *Courage Without Esteem: Profiles In Whistle Blowing*, WASHINGTON MONTHLY, May 1971, at 23. It may be noted that only one of the case studies involved a corporation and that particular case pertained to a government-financed project in Peru.

<sup>4</sup> Superficially, Mr. Nader's proposal appears to be modelled after the code of conduct for executives proposed by Professor Robert W. Austin of the Harvard Business School in 1961. Professor Austin's code called for the following affirmative responsibilities:

- . . .
2. The professional business manager affirms that he will place his duty to society above his duty to his company and above his private interest.
  3. The professional business manager affirms that he has a duty to reveal the facts in any situation where (a) his private interests are involved with those of his company, or (b) where the interests of his company are involved with those of the society in which it operates.

HARV. BUS. REV., Sept.-Oct. 1961, at 53, 60.

The context of Professor Austin's article, however, makes it plain that executives would discharge these duties *within* the corporate organization by going "up the [corporate] ladder." The ultimate responsibility for public disclosure would rest with the Board of Directors, which would be subject to the same code. Professor Austin's code does not present any problem of unauthorized disclosure.

<sup>5</sup> The term "public interest" organization is used to refer to the many non-profit groups which are "dedicated to changing the private sector." The Public Affairs Council has published a 28-page directory of such organizations. *See* R. CELLER, *THE CHALLENGERS* (1971).

<sup>6</sup> A recent illustration of the forces contributing to the proposal is the publication of a "purloined" copy of a report indicating excessive amounts of lead in the Los Angeles atmosphere which had been withheld from public dissemination for more than a year by the Environmental Protection Agency. *See* N.Y. Times, May 13, 1971, at 28, col. 1.

<sup>7</sup> N.Y. Times, Mar. 26, 1971, at 53, col. 5.

Thus, the question arises: What is the duty of the employee to his employer? To what extent, if any, has a heightened sense of a responsibility to society—on the employee level as well as on the corporate level—changed the nature of the employee's obligations to his employer?

### *B. Eastern Air Lines*

Another example involves Eastern Air Lines. The airline's procedure required pilots shortly after takeoff to jettison in the atmosphere about three gallons of excess fuel in holding tanks remaining from the previous run. A senior pilot of thirty years experience had repeatedly requested the draining of the tanks on the ground by mechanics because of his concern of the impact of the practice on air pollution. Eastern management had refused. The pilot thereupon violated the regulation and had the kerosene drained while on the ground. Eastern maintained that "each of its 3,700 pilots cannot make his own rules" and discharged the pilot. After considerable publicity (and pressure from the Airline Pilots Association), Eastern reinstated the pilot. It subsequently went further and announced that it was endeavoring to have manufacturers develop engines to eliminate the problem by allowing excess fuel to return to the regular fuel tanks.<sup>8</sup>

### *C. Polaroid Corporation*

A third example relates to the efforts of what appears to be a small number of black employees of Polaroid Corporation, calling themselves the Polaroid Revolutionary Workers Movement, to force Polaroid to cease doing business in South Africa by "confrontation" techniques including a boycott of Polaroid products and by picketing, disruptions and demonstrations. Polaroid responded on a number of levels, including the use of an advisory committee of employees, including black employees, who visited South Africa. The aspect of the episode with which we are concerned is the action of Polaroid management in eventually suspending one of the leaders of the Movement without pay for her "persistent activities in fomenting public disapproval" of the firm and for being "involved in a deliberate campaign calculated to damage the well being" of the company.<sup>9</sup>

<sup>8</sup> TIME, Nov. 2, 1970, at 40; Boston Globe, Nov. 8, 1970, at 2, col. 3. The Eastern Air Lines episode may be regarded as a forerunner of similar occurrences. A recent example is the Ohio steel worker who was suspended for five days for refusing to obey a foreman's order to dump oil and other wastes into the Cuyahoga River. After the threat of a "wildcat" strike by the United Steel Workers (i.e., a strike in violation of the collective agreement), the employee was reinstated. New York Times, July 26, 1971, at 50, col. 7.

<sup>9</sup> Boston Globe, Oct. 18, 1970, at 64, col. 2, Nov. 1, 1970, at B-31, col. 3, Nov. 25, 1970, at 7 (full page), Feb. 11, 1971, at 3, col. 1; N.Y. Times, Jan. 13, 1971, at 9, col. 1, at 23 (full page), Feb. 21, 1971, at 17, col. 1; BUS. WEEK, Nov. 14, 1970, at 32; NEWSWEEK, Jan. 25, 1971.

Still another reflection of changing views as to the traditional duties of loyalty and obedience of employees is the following glimpse of the corporate future depicted in Mr. Anthony Athos' article in the *Harvard Business Review* entitled "Is the Corporation Next to Die?"

"Within five years a president of a major corporation will be locked out of his office by his junior executives," remarked George Koch, president of the Grocery Manufacturers Association, not long ago. The very idea would have seemed outrageous and impossible only a few years ago . . . the situation is rapidly becoming ripe for the kind of action Koch predicts.<sup>10</sup>

The foregoing illustrations of the present and possible future world of the corporate employee require a reexamination of the traditional fundamental concepts of the employer-employee relationship: the employee's duties of loyalty and obedience to the employer, and the employer's freedom to discharge an employee. They reflect a new view of responsibility—a view that the employee's duty as a citizen transcends his duties as employee. This is a companion view to the basic tenet of the "public interest proxy campaign," such as Campaign GM, that the shareholder's interest as a citizen transcends his interest as a shareholder, and that he should act primarily for the good of the country—i.e., the public interest—rather than for the good of the company.<sup>11</sup> These examples may also involve a different concept, the view that employees should play a part in the corporate decision-making process, at least in issues of public concern involving questions of corporate social responsibility.

These views—so profoundly changed from traditional values—reflect the politicalization of the corporation, which the author has discussed elsewhere.<sup>12</sup>

### III. THE RESTATEMENT OF AGENCY

A review of the relevant provisions of the *Restatement of Agency* provides an obvious starting point for consideration of the new view of the role and duties of the employee.<sup>13</sup>

#### A. The Duty of Obedience

Section 383 and Section 385 state the agent's duty to obey the prin-

<sup>10</sup> Athos, *Is the Corporation Next to Die?*, HARV. BUS. REV., Mar.-Apr. 1970, at 49-50.

<sup>11</sup> See Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 480 (1971); Campaign GM Round I, Proxy Statement dated Nov. 19, 1970, at 1, 2.

<sup>12</sup> Blumberg, *The Politicalization of the Corporation*, 26 BUS. LAWY. 1551 (1971).

<sup>13</sup> For the purposes of this paper, "agent" should be regarded as interchangeable with "employee."

cipal. Section 385(1) imposes upon the agent "a duty to obey all reasonable directions" of the principal.<sup>14</sup> Comment *a* points out:

In determining whether or not the orders of the principal to the agent are reasonable . . . *business or professional ethics* . . . are considered.<sup>15</sup> (emphasis added)

Comment *a* continues:

In no event would it be implied that an agent has a duty to perform acts which . . . are *illegal or unethical* . . .<sup>16</sup> (emphasis added)

Thus, Comment *a* expressly excludes matters contrary to "business or professional ethics" or "illegal or unethical" acts from those which an agent would be required to perform. This frees the agent from participation in such behavior and authorizes him to withdraw from the agency relation if the principal persists. It in no way authorizes him to disclose such directions of the principal, or not to comply with an instruction of the principal not to disclose any information about the principal's affairs, even in those cases where he is privileged not to perform in accordance with the principal's instructions. The duty exists not only so long as the agent remains an agent but continues after the agency has been terminated as well.<sup>17</sup>

Section 385(2) provides:

(2) Unless he is privileged to protect his own or another's interests, an agent is subject to a duty not to act in matters entrusted to him on account of the principal contrary to the directions of the principal . . .<sup>18</sup>

The Comments make it clear that "an interest" which the agent is privileged to protect refers only to an economic interest, such as a lien<sup>19</sup> or his business reputation.<sup>20</sup> There is no suggestion that an interest which "he is privileged to protect" includes the public interest.

<sup>14</sup> RESTATEMENT (SECOND) OF AGENCY § 385(1) (1958) [hereinafter cited as RESTATEMENT].

<sup>15</sup> *Id.* § 385(1), Comment *a*. See W. BOWSTEAD, AGENCY 111 (13th ed. 1968) ("In the case of a professional man, he will be bound to a considerable extent by the rules and ethical standards of his profession and he could not be required to perform an act which was contrary to those rules or standards.")

<sup>16</sup> RESTATEMENT § 385(1), Comment *a*.

<sup>17</sup> *Id.* § 396. See W. BOWSTEAD, AGENCY 134 (13th ed. 1968); R. POWELL, LAW OF AGENCY 314 (2d ed. 1961).

<sup>18</sup> RESTATEMENT § 385(2).

<sup>19</sup> *Id.* § 385(2), Comment *f* gives as an example an agent's security interest in the nature of a lien on goods sent to him to sell.

<sup>20</sup> *Id.* § 385(2), Comment *f* (An agent is privileged to perform an authorized contract which is unenforceable under the Statute of Frauds, "although the principal directs him not to do so, in situations in which it is customary for the defense of the Statute of Frauds to be waived and in which the agent's business reputation would suffer by his nonperformance.")



### *B. The Duty of Loyalty*

*Section 387* expresses the general principle that:

an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.<sup>21</sup>

Comment *b* emphasizes the high degree of the duties of loyalty of the agent by stating that they "are the same as those of a trustee to his beneficiaries." It provides, however, that:

The agent is also under a duty not to act or speak disloyally . . . except in the protection of his own interests or those of others. He is not, however, necessarily prevented from acting in good faith outside his employment in a manner which injuriously affects his principal's business.<sup>22</sup>

and provides the following illustration:

3. A, employed by P, a life insurance company, in good faith advocates legislation which would require a change in the policies issued by the company. A has violated no duty to P.<sup>23</sup>

Thus, the agent is free to act "in good faith outside his employment," even in a manner which injures his principal's business, but is subject to a duty identical with that of a trustee with respect to "all matters connected with his agency." Under the comment and illustration, the General Motors employee may campaign in good faith for legislation imposing costly anti-pollution or product safety controls on automobile manufacturers, but he occupies a position equivalent to a trustee with respect to information about General Motors operations which he has acquired in the course, or on account, of his employment.

*Section 394* prohibits the agent from acting:

for persons whose interests conflict with those of the principal in matters in which the agent is employed.<sup>24</sup>

The numerous examples in the comments relate to competitors or adverse parties in commercial transactions or parties with adverse claims and make it plain that the reference to conflicting "interests" means economic interests.

### *C. The Duty of Confidentiality*

*Section 395* imposes a duty upon the agent:

<sup>21</sup> RESTATEMENT § 387.

<sup>22</sup> *Id.* § 387, Comment *b*.

<sup>23</sup> *Id.* § 387, Comment *b*, Illustration 3.

<sup>24</sup> *Id.* § 394.

not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency . . . to the injury of the principal, on his own account or on behalf of another . . . unless the information is a matter of general knowledge.<sup>25</sup>

Comment *a* emphasizes that the agency relation "permits and requires great freedom of communication between the principal and the agent." It expands the agent's duty by stating that the agent:

also has a duty not to use information acquired by him as agent . . . for any purpose likely to cause his principal harm or to interfere with his business, although it is information not connected with the subject matter of his agency.<sup>26</sup>

Comment *b* extends the duty beyond "confidential" communications to "information which the agent should know his principal would not care to have revealed to others."<sup>27</sup> Both Comments *a* and *b* refer to protection of the principal against competition, but it is clear that this is merely one of the interests of the principal protected by the section.

Comment *f* creates a privilege, significantly enough for a public, not an economic, interest:

An agent is privileged to reveal information confidentially acquired . . . in the protection of a superior interest of himself or of a third person. Thus, if the confidential information is to the effect that the principal is committing or is about to commit a crime, the agent is under no duty not to reveal it.<sup>28</sup>

This is the only illustration in the *Restatement* that the term "interest" may embrace something of a non-economic nature. The public interest in law enforcement is deemed a "superior interest" giving rise to a privilege to reveal otherwise confidential information.

If construed to include disclosure to any person, and not solely to law enforcement agencies, Comment *f* would support the "public interest disclosure" proposal to the extent it relates to "illegal" matters, without regard to the nature or seriousness of the offense. Section 395, Comment *f*, however, refers only to commission of a "crime." This contrasts with Section 385 (1) relating to the duty of obedience which refers not only to

<sup>25</sup> *Id.* § 395.

<sup>26</sup> *Id.* § 395, Comment *a*.

<sup>27</sup> *Id.* § 395, Comment *b*.

<sup>28</sup> *Id.* § 395, Comment *f*; see *Willig v. Gold*, 171 P.2d 754, 757 (Cal. App. 1946) (Counsel "cites no case, and we are sure none can be found, that an agent is under a legal duty not to disclose his principal's dishonest acts to the party prejudicially affected.")

"illegal" but also to "unethical" acts and to "business or professional ethics." The inclusion of these latter elements in Section 385(1) and their omission in Section 395 would indicate that the release of confidential information privileged under Section 395 does not extend beyond criminal acts.

Although Section 395 refers only to the agent's use or communication of information "on his own account or on behalf of another" and does not literally prohibit use or communication of such information for the benefit of the public, Comment *a* prohibits such use "for any purpose likely to cause his principal harm or to interfere with his business." Comment *a* thus would appear to expand the duty of the agent beyond acts "on his own account or on behalf of another" to include disclosures made to advance the "public interest," which were not related to commission of a "crime" privileged under Comment *f*.

#### *D. Privileged Conduct*

Section 411 makes "illegality" a defense for an agent's nonperformance. Comment *d* extends the defense to acts:

which are criminal . . . [or] although not criminal, are so contrary to public policy that an agreement to perform them will not be enforced.<sup>29</sup>

This follows the common-law rule that the principal cannot complain of the agent's failure to enter into agreements which would have been unenforceable, since even if the agent had performed, the principal would not have been able to enforce the agreement made by the agent.<sup>30</sup>

Section 411, referring to "illegality" or acts which are "criminal" or "contrary to public policy" closely, but not precisely, follows Section 385(1), Comment *a* which refers to "illegal or unethical" acts. Both Sections 411 and 385(2) dealing with the agent's privileged refusal to act contrast with Section 395 dealing with privileged disclosure which is restricted solely to "crime."<sup>31</sup>

Section 418 confirms the exception contained in Section 385 that:

An agent is privileged to protect interests of his own which are superior to

<sup>29</sup> *Id.* § 411, Comment *d*.

<sup>30</sup> *Thomas Cheshire & Co. v. Vaughan Bros. & Co.*, [1920] 3 K.B. 240 (C.A. 1920); *Cohen v. Kittell*, 22 Q.B.D. 680 (1889); *Webster v. DeTastet*, 7 Term Rep. 157 (1797); see F. TIFANY, *HANDBOOK OF THE LAW OF PRINCIPAL AND AGENT* 376 (2d ed. 1924); W. PALEY, *LAW OF PRINCIPAL AND AGENCY* 8 (1856).

<sup>31</sup> It is possible to envision an act which is "illegal" but not a "crime." There is no indication that the draftsmen of the *Restatement* were attempting to make such a distinction.

those of the principal, even though he does so at the expense of the principal's interests or in disobedience to his orders.<sup>32</sup>

Again, the crucial question is the meaning to be ascribed to "interests." Comment *a* contains the usual emphasis on the agent's economic interests. As in the case of Section 385(2), Section 418, Comment *a* permits the agent to perform a contract unenforceable under the Statute of Frauds "to protect his financial interests or reputation" or to protect "a security interest in the principal's goods."

Comment *a* also provides that:

Similarly the agent has no duty to commit a tort or a minor crime at the command of the principal.<sup>33</sup>

This reference to "tort or a minor crime" may be compared with the references to "illegal or unethical" acts in Section 385(1), Comment *a*, and to acts which are "criminal" or "contrary to public policy" in Section 411 dealing with essentially the same problem.

In summary, except in the single area of "crime," the *Restatement* provides no support for the view that the employee may disclose non-public information about his employer acquired as a result of the employment relationship in order to promote the superior interest of society. While prohibiting affirmative acts of the employee such as disclosure, the *Restatement* relieves the employee of any duty to obey or act for the employer not only in the case of "crime" or "illegality" but also in case of "unethical acts" or acts "contrary to public policy" or constituting a tort.

The duties of obedience, loyalty, and confidentiality enunciated by the *Restatement* and the carefully circumscribed privileged exceptions clearly proscribe the "public interest disclosure" proposal suggested by Mr. Nader. We must recognize, however, that the *Restatement* drawn from the common-law cases is drafted in terms of economic activity, economic motivation, and economic advantage and formulates duties of loyalty and obedience for the agent to prevent the agent's own economic interests from impairing his judgment, zeal, or single-minded devotion to the furtherance of his principal's economic interests. The reference in section 395, Comment *f* permitting the agent to disclose confidential information concerning a criminal act committed or planned by the principal is the sole exception to a system of analysis that is otherwise exclusively concerned with matters relating to the economic position of the parties. Thus, the question may fairly be asked to what extent the *Restatement* and the common-law decisions are useful in the analysis of a proposal that rests

<sup>32</sup> RESTATEMENT § 418.

<sup>33</sup> *Id.* § 418, Comment *a*.

on the concept of an agent's primary obligation as a citizen to the society, transcending his economic duty to the principal.

Are doctrines resting on a policy of protecting the economic position of the principal against impairment by reason of an agent's effort to achieve economic gain properly applicable to the employee who releases non-public information about his employer without intent to obtain economic advantage for himself—and in fact at considerable economic risk to himself—and motivated by a desire to promote the public good rather than to injure the principal (although such injury may in fact result)?

The duties of loyalty and obedience on the part of the agent are unquestionably central to the agency relationship, irrespective of economic considerations. But these duties, as the *Restatement* itself recognizes, have limitations. To paraphrase Mr. Justice Frankfurter's well-known admonition:<sup>34</sup> To say that an agent has duties of loyalty and obedience only begins analysis; it gives direction to further inquiry. It is thus not enough to say that the agent has duties of loyalty and obedience which will be impaired. One must inquire more deeply and ascertain the outer perimeters of the agent's obligations by balancing the conflicting considerations. On this critical question of how far the duties of loyalty and obedience extend, the *Restatement* enunciating the traditional rules in their economic setting provides limited guidance.

#### IV. THE ENGLISH VIEW OF UNAUTHORIZED DISCLOSURE

In contrast to the *Restatement of Agency*, a 1967 English case, *Initial Services, Ltd. v. Putterill*,<sup>35</sup> provides substantial support for the "public interest disclosure" proposal. The *Initial Services* case involved the acts of a sales manager of a linen supply firm who gave two-weeks notice and left employment on August 31, 1966, taking with him documents belonging to his employer. He delivered the documents to reporters for the *Daily Mail*<sup>36</sup> and disclosed that the employer was participating with competitors in price-fixing and was deceiving the public by asserting in circulars to customers that price increases were necessary to offset a newly im-

<sup>34</sup> See Mr. Justice Frankfurter in *SEC v. Chenery Corp.*, 318 U.S. 80, 85-86, 63 S.Ct. 454, 458, 87 L.Ed. 626, 632 (1943) ("But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?")

<sup>35</sup> [1967] 3 W.L.R. 1032, 84 L.Q. Rev. 8 (1968).

<sup>36</sup> The facts of the *Initial Services* case in this respect resemble two actions against Drew Pearson involving his use of confidential documents disclosed by the plaintiff's employee: *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 947, 89 S.Ct. 2021, 23 L.Ed.2d 465 (1969) (damages denied) and *Liberty Lobby, Inc. v. Pearson*, 261 F. Supp. 726 (D.D.C. 1966) (injunction denied). Neither case considered the liability, if any, of the employee.

posed tax whereas they were in fact producing substantially increased profits for the firm. On September 1, 1966, these facts appeared in a front-page story in the *Daily Mail*; a follow-up story appeared on September 2, 1966.

In suing on September 2, 1966 for damages for breach of confidential information, injunctive relief and return of the documents, the linen supply firm contended that every employment relationship implied an obligation upon the employee not to disclose information or documents received in confidence.

The employee defended on the grounds that the price-fixing agreement was subject to the Restrictive Trade Practice Act, 1956, and should have been registered under the Act, that the agreement should have been referred to the Monopolies Commission pursuant to the Monopolies and Merger Act, 1965,<sup>37</sup> and that the circulars to customers were misleading to the public, and that, therefore, disclosure to advance the public interest was not actionable.

The case arose on the pleadings, and the Court of Appeal affirmed the lower court's refusal to strike the employee's defenses.

With three judges rendering opinions, the Court squarely refused to limit the employee's privilege to disclose confidential information about his former employer to cases involving "crime or fraud" and thus moved well beyond the apparent limitations of the *Restatement of Agency*.

Lord Denning stated that the exception (or privilege) to the obligation of the employee not to disclose confidential information pertaining to his employer:

... extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others. (at 1037)

He relied on *Gartside v. Outram*<sup>38</sup> (which had involved fraud) and referred to what he described as Vice Chancellor Wood's "vivid phrase" in the *Gartside* case:

There is no confidence as to the disclosure of iniquity.<sup>39</sup>

<sup>37</sup> Although the Court refused to strike this defense, it apparently did not take it very seriously. Lord Denning pointed out that reliance upon it was "more difficult" but not "so completely unfounded as to require that it be struck out." [1967] 3 W.L.R. at 1038. Lord Salmon described it as "perhaps very weak. I think it adds nothing of any real importance" (at 1042).

<sup>38</sup> [1857] 26 L.J. 113. This case upheld an employee's disclosure to his employer's customers that the employer was conducting business in a fraudulent manner. In *Weld-Blundell v. Stephens*, [1919] 1 K.B. 520, 548, Lord Scrutton stated that the employer's acts in the *Gartside* case were "clearly criminal."

<sup>39</sup> *Id.* at 114.

Lord Denning added:

I say nothing as to what the position would be if . . . [the employee's disclosure was] out of malice or spite or . . . for money or for reward. That indeed would be a different matter. It is a great evil when people purvey scandalous information for reward. (at 1039)

Although Lord Denning reached his conclusion in terms of the "public interest" in the disclosure of misconduct, both Lords Salmon and Winn relied in part on the analogy to an illegal contract. They suggested that the test to determine the existence of the privilege to disclose was whether a contractual obligation on the part of the employee not to disclose the information in question would have been "enforceable" or "illegal". (at 1041-43)<sup>40</sup> Such a test of illegality of a hypothetical contract would appear more restrictive than the looser standard of whether disclosure of the employer's conduct was in the "public interest".<sup>41</sup>

The judges divided on the question of the person to whom the information could be disclosed. Lord Denning apparently would restrict privileged disclosure to "one who has a proper interest to receive the information" and referred to governmental authorities. He recognized, however, that:

There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press. (at 1038)

Lord Salmon was less impressed with the argument that the privilege to disclose would be lost if the disclosure was made to the "wrong person" and indicated that he did not regard this element of particular importance. (at 1038) The third judge, Lord Winn, went further and expressly stated that he did not believe the distinction to be sound. (at 1042-43)

The opinions in *Initial Services* must be read in the procedural con-

<sup>40</sup> The judges were influenced by the decisions in *Bradstreets British, Ltd. v. Harold Mitchell & Carapanayoti & Co.*, [1933] 1 Ch. 190 (1932) and *Weld-Blundell v. Stephens*, [1919] 1 K.B. 520. The *Bradstreets British* case upheld the enforceability of a provision in a contract between a credit agency and its customers that its credit reports would be kept confidential, and the *Weld-Blundell* case viewed the implied obligation of an accountant to keep confidential his client's instructions as lawful, although in both cases defamatory material was involved. Neither court was moved by the argument that a contract forbidding disclosure of a tort was unenforceable. The importance of encouraging frank communication with clients in a professional relationship would, however, appear to limit the applicability of these cases.

<sup>41</sup> Although Lord Salmon introduced the concept of the "public interest" in determining whether such a hypothetical contract would be illegal, it would seem that the "public interest" for the purpose of rendering an agreement between the parties unenforceable would be a quite different and more demanding standard than whether the "public interest" would be served by a particular disclosure.

text. The case arose on the pleadings, and Lord Salmon pointed out that "in order to succeed . . . the plaintiffs would have to satisfy the court that this defense is unarguable and has no chance of succeeding." (at 1039) The Court was not so persuaded and sent the case back for trial. The language in the opinions, however, provides substantial support for the "public interest disclosure" proposal. The recognition that the privilege to disclose confidential information is not restricted to "crime or fraud", but includes "iniquity" and Lord Denning's test of the "public interest" in disclosure of the employer's conduct move well beyond the confines of the *Restatement of Agency*<sup>42</sup> in the direction of the "public interest disclosure" proposal. Further, the opinions of Lords Salmon and Winn indicating that disclosure, if justified, could be made to others than governmental authorities supports the utilization of a "public interest clearing house" as the conduit for disclosure.

It should be noted, however, that the conduct which was disclosed in the *Initial Services* case included: (a) a price-fixing agreement which a statute required to be disclosed in any event so that the defendants' acts were not only implementing the public policy underlying the statute but arguably did not involve confidential information at all; and (b) false circulars to customers, which the Court readily found to be at least arguable as an iniquitous trade practice.

Thus, the facts of the case stop well short of the "responsibility to society" used by Mr. Nader as a bench mark, but an extension of the perimeters of "crime or fraud" to "iniquity" and the introduction of a concept of the "public interest" would clearly widen substantially the area of permissible disclosure.

In reviewing the *Initial Services* case, an English commentator noted:

. . . whether a servant or former employee can be restrained from disclosing information entrusted to him in confidence by his employer when that information is such that it is in the public interest for it to be made public . . . has rarely been litigated and does not appear to be discussed in the main authorities on the law relating to trade secrets or industrial law. . . .<sup>43</sup>

He concluded by observing that the conduct of the plaintiffs involved

<sup>42</sup> The *Restatement of Agency* is not necessarily inconsistent with the decision in the *Initial Services* case. Section 395, Comment *f* refers to a "superior interest" which might be construed to include the "public interest" in the disclosure of certain misconduct as used by the Court of Appeal. However, the language of Comment *f* would indicate that the draftsmen of the *Restatement* were not prepared to extend the privilege of disclosure of confidential information beyond "crime" or at most "fraud." These are essentially the limitations set forth in *Weld-Blundell v. Stephens*, [1919] 1 K.B. 520, 527 ("crime or a civil wrong") which were rejected by Lord Denning (at 1038).

<sup>43</sup> See North, *Further Disclosures of Confidential Information*, [1968] J. Bus. Law 32, 35.



no crime, tort or breach of contract but was still regarded as iniquitous and stated:

The effect of this case will be to put at risk all employers whose conduct is against the public interest and it will protect all employees who take reasonable steps to safeguard this public interest by making the "iniquity" known. The employer who uses sharp practices . . . may well have cause to rue his honest servants.<sup>44</sup>

Whether the Court of Appeal would have reached the same conclusion after trial and whether the opinions of the judges will be followed by American courts remain open questions.

## V. MISPRISION OF FELONY

The recognition of Section 395, Comment *f*, of the *Restatement* that the duty of confidentiality does not prevent the agent from releasing confidential information about his employer's actual or potential criminal conduct rests on the citizen's responsibility for law enforcement. At the common law, a person who saw the commission of a felony or knew that a felony had been committed and possessed information that would lead to apprehension of the offender and failed to communicate such information to the proper authorities was guilty of a misdemeanor known as misprision of felony.<sup>45</sup>

For decades, this common-law offense was regarded as "practically obsolete"<sup>46</sup> or even "non-existent,"<sup>47</sup> and the federal act adopted in 1790 making the offense a statutory crime was moribund.<sup>48</sup> In recent years, however, the doctrine has demonstrated considerable vitality. Following six successful prosecutions in England<sup>49</sup> and one in Australia<sup>50</sup> in the period

<sup>44</sup> *Id.* at 39.

<sup>45</sup> W. RUSSELL, *CRIME* 167-171 (12th ed. 1964); G. WILLIAMS, *CRIMINAL LAW* 422-27 (2d ed. 1961); W. CLARK & MARSHALL, *LAW OF CRIMES*, 547-48 (7th ed. 1967); Goldberg, *Misprision of Felony: An Old Concept in a New Context*, 52 A.B.A.J. 148 (1966).

<sup>46</sup> Stephen regarded the doctrine as "practically obsolete." 2 J. STEPHEN, *HISTORY OF CRIMINAL LAW* 238 (1883). See G. WILLIAMS, *supra* note 45, at 423-24; W. RUSSELL, *supra* note 45, at 167.

<sup>47</sup> In a detailed review, Judge Wyzanski concluded that the common law offense did not exist. *United States v. Worcester*, 190 F. Supp. 548, 565-66 (D. Mass. 1960).

<sup>48</sup> In 1934, it was noted that in 144 years, the federal act had come before the courts on only two occasions. See *Bratton v. United States*, 73 F.2d 795, 797 (10th Cir. 1934).

<sup>49</sup> *R. v. Aberg*, [1948] 1 All E.R. 601; *R. v. Wilde*, [1960] CRIM. L. REV. 116-20 (Leeds Assizes Dec. 7-14, 1959), and four unreported cases referred to by counsel and in Lord Denning's opinion in the *Sykes* case, *infra* note 51, at 544, 560; *Rex v. Barnett* (Cent. Crim. Ct., Jan. 17, 1952); *Rex v. Casserley*, *The Times* (London), May 28, 1938, at 7, Col. 5 (Cent. Crim. Ct.); *Rex v. Prothero* (Salop Assizes, June 24, 1949); *Rex v. Tapp* (Hampshire Summer Assizes, July 23, 1952); see Allen, *Misprision*, 78 L.Q. REV. 40 (1962).

<sup>50</sup> *R. v. Crimmons*, [1959] Vict. 270. In *R. v. Semenick*, [1955] 15 W.W.R. (n.s.)

from 1938 to 1961, the House of Lords in the *Sykes* case<sup>51</sup> ended further debate by upholding the existence of the offense as a common-law crime. Similarly, there have been numerous recent cases under the federal statute as well.<sup>52</sup>

In jurisdictions where proof of affirmative concealment is not regarded as an element of the offense,<sup>53</sup> the philosophy underlying the misprision of felony doctrine expresses a principle of public policy that supports the "public interest disclosure" proposal. Both rest on the social importance of citizens aiding law enforcement agencies through the reporting of crime. Unlike agency law where it is necessary to find a privilege justifying the disclosure, the doctrine of misprision of felony manifests a public policy, supported by penal sanction, creating a duty to disclose.<sup>54</sup>

333 (Brit. Colum. Ct. App. 1955), a Canadian court held misprision of felony not a part of Canadian criminal law. The court was influenced by the statutory elimination of the distinction between felonies and misdemeanors.

<sup>51</sup> *Sykes v. Director of Pub. Prosecutions*, [1962] A.C. 528 (1961).

<sup>52</sup> *E.g.*, *Sullivan v. United States*, 411 F.2d 556 (10th Cir. 1969); *United States v. King*, 402 F.2d 694 (9th Cir. 1968); *United States v. Norman*, 391 F.2d 212 (6th Cir. 1968), *cert. denied*, 390 U.S. 1014, 88 S.Ct. 1265, 19 L.Ed.2d 186 (1968); *Neal v. U.S.*, 102 F.2d 643 (8th Cir. 1939); *United States v. Thornton*, 178 F. Supp. 42 (E.D.N.Y. 1959); *United States v. Sullivan*, 284 F. Supp. 579 (D. Okla. 1968); *see Lancey v. United States*, 356 F.2d 407 (9th Cir. 1966), *cert. denied*, 385 U.S. 922, 87 S.Ct. 234, 17 L.Ed.2d 145 (1967).

<sup>53</sup> In the *Sykes* case, the House of Lords expressly held that mere failure to disclose was sufficient. [1962] A.C. at 563-64, 569-73 (1961). Further in specifying the elements of the offense the House of Lords did not require proof of any evil motive. *But see Commonwealth v. Lopes*, 318 Mass. 453, 458-59, 61 N.E.2d 849, 851, (1945); *State v. Wilson*, 80 Vt. 249, 254, 67 Atl. 533, 534 (1907).

On the other hand, the federal courts have construed the federal act, which employs the term "conceals," to require affirmative concealment. 18 U.S.C. § 4 (1964); *see cases cited at note 52 supra*. State courts have divided on the question whether the offense constituted a common law crime in the jurisdiction. *Compare State v. Biddle*, 2 W.W. Harr. 401, 124 Atl. 804 (Del. Gen. Sess. 1923); *State v. Wilson*, 80 Vt. 249, 67 Atl. 533 (1907) (upholding offense) *with People v. Lefkovitz*, 294 Mich. 263, 293 N.W. 642 (1940), 54 HARV. L. REV. 506 (1941) (offense not included in Michigan common law). They have also divided on the question whether statutes embracing the offense required proof of affirmative concealment. *Compare State v. Michaud*, 114 A.2d 352 (Me. 1955) (concealment required) *with State v. Hann*, 40 N.J.L. 228 (1878) (knowledge of actual commission sufficient).

It may be noted that the offense of misprision of felony is eliminated as such in the proposed new Federal Criminal Code. Elements are included in provisions relating to hindering law enforcement and aiding the consummation of crime. *See FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS*, § 1303, Comment (1971); *I WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS* 529-36 (1970).

<sup>54</sup> In the *Sykes* case, Lord Denning excluded persons in a professional, confidential relation from any duty to disclose. Lord Denning also stated that an employer might refrain from reporting an embezzling employee to give him another chance, ([1962] A.C. at 564), a view which has been criticized by English commentators. *See G. WILLIAMS, supra note 45, at 425-26*. He did not discuss the employee's privilege not to report the commission of an offense by his employer, and the matter remains open. However, it is difficult to see on what theory public

## VI. OTHER JUDICIAL EXPERIENCE

A brief examination of fundamental tort and equity doctrines may provide further guidance. From the enactment of the Ordinance of Labourers in 1349, the English law regarded inducement of a servant to leave the service of his master as wrongful.<sup>55</sup> After a period of uncertainty, the doctrine was subsequently extended by the common law to breach of personal service contracts<sup>56</sup> and ultimately to inducement of breach of contracts generally.<sup>57</sup> It is established therefore that any inducement of an agent to violate his contractual obligations to his principal is tortious.<sup>58</sup> Although the authorities are divided where the contract or agency is at will, there are signs that the courts are extending liability to this area as well.<sup>59</sup> Similarly, courts are prepared to enjoin third parties from the use of any information that has been imparted to them or is being used in breach of the agent's duty to keep such information confidential, even though the third party has not committed the tort of inducing the breach.<sup>60</sup> In this area, it is not relevant whether the employment was at will, or indeed has already terminated, since the conduct in issue is the use of wrongfully obtained information.

However, in at least one case, where the motivation was to aid the public and not for economic advantage, conduct—otherwise wrongful—was held to be justified.<sup>61</sup> In *Brimelow v. Casson*, an English Court held that a party inducing a breach of contract out of a sense of duty to the public at large had not committed a tort. This decision involved trade unions

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policy would be served by relieving an employee of such a duty. In any event, the privilege would pertain to the employee, not to the employer.

<sup>55</sup> See Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 665-75 (1923).

<sup>56</sup> *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853); *Bowen v. Hall*, 6 Q.B.D. 333 (A.C. 1881).

<sup>57</sup> *Temperton v. Russell*, [1893] 1 Q.B. 715; See IV RESTATEMENT OF TORTS § 766 (1939); F. HARPER & F. JAMES, *THE LAW OF TORTS* 489-97 (1956).

<sup>58</sup> See G. FRIDMAN, *MODERN LAW OF EMPLOYMENT* 581-82 (1963); J. SALMOND, *TORTS* 495-504 (15th ed. 1969); R. POWELL, *LAW OF AGENCY* 327 (2d ed. 1961); RESTATEMENT §§ 312, 316.

<sup>59</sup> See R. POWELL, *supra* note 58, at 327; Payne, *The Tort of Interference with Contract*, 7 CURRENT LEGAL PROBLEMS 94 (1954); RESTATEMENT § 312, Comment *a*; Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728, 742-45 (1928); Annot., *Liability for Inducing Employee Not Engaged for Definite Term to Move to Competitor*, 24 A.L.R.3d 821 (1969). For an opposing view, see Sayre, *supra* note 55, at 701-02; F. HARPER & F. JAMES, *supra* note 57, at 494.

<sup>60</sup> See K. Wedderburn in J. CLARK & W. LENDSELL, *TORTS* 386 (13th ed. 1969); RESTATEMENT § 312, Comment *c* ("A person who, with notice that an agent is thereby violating his duty to his principal, receives confidential information from the agent, may be enjoined from disclosing it and required to hold profits received by its use as a constructive trustee.")

<sup>61</sup> *Brimelow v. Casson*, [1924] 1 Ch. 302 (1923), 38 HARV. L. REV. 115 (1924); See G. FRIDMAN, *MODERN LAW OF EMPLOYMENT* 581-82 (1963).

inducing a breach by a theatre manager of a contract with a touring theatrical company which was paying such low wages that chorus girls were compelled to live in immorality under circumstances that the Court described as a "terrible and revolting tragedy." The Court referred to the union's duty "to the public" as well as to its members. In view of the very unusual nature of the case and the labor relations element, the *Brimelow* decision constitutes an isolated exception.<sup>62</sup> It does illustrate, however, that familiar legal concepts grounded on economic foundations may suddenly become irrelevant when non-economic conduct is under review.<sup>63</sup>

Other English courts have stated in dicta that interference with contract may be justified when the defendant was acting under a duty rather than for protection of his economic interests.<sup>64</sup>

Professors Harper and James emphasize that a privilege justifying otherwise tortious interference with the contractual relations of others reflects a "general social policy" and will exist "if the interest which he seeks to advance is superior to the interest invaded in social importance."<sup>65</sup> They quote Professor Carpenter's comment that "The defendant may be privileged to invade the interest of the plaintiff although it is not for the protection or furtherance of any interest of his own, if the invasion is in furtherance of a social interest of greater public import than is the social interest involved in the protection of the plaintiff's individual interest."<sup>66</sup> Thus, in referring to the *Brimelow* case, Professors Harper and James state "social and economic facts were weighed in determining whether the defendant's purpose was to promote another person or groups or of society in general." They describe the test of liability to be "balancing the conflicting interests of the plaintiff and the defendant and assessing the value which society places upon them."<sup>67</sup>

<sup>62</sup> See Wedderburn, *supra* note 60, at 394; Payne, *The Tort of Interference with Contract*, 7 CURRENT LEGAL PROBLEMS 94, 109-13 (1954) ("... the authorities [justifying interference with contract] are scanty and confusing, and it is uncertain how far the defense extends and what its basis is. . . . *Brimelow v. Casson*, [is] the only case in English law in which the defence of justification has succeeded, . . .")

<sup>63</sup> Thus, Professor Bohlen recognizes: "Often the actor has no direct personal interest to serve, and his act [of intentional interference with the interests of another] is privileged solely because of its utility to the public needs." Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307, 315 (1926).

<sup>64</sup> See *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905] A.C. 239; *De Jetley Marks v. Greenwood*, [1936] 1 All E.R. 863, 873; Payne, *supra* note 59, at 109.

<sup>65</sup> See F. HARPER & F. JAMES, *supra* note 57, at 514.

<sup>66</sup> See Carpenter, *supra* note 59, at 745.

<sup>67</sup> See F. HARPER & F. JAMES, *supra* note 57, at 516; Carpenter, *supra* note 59, at 745 ("An evaluation and balancing of the social import of the conflicting interests of the respective parties and of the social interests *per se* are involved.")

Section 767(e) of the *Restatement of Torts* specifies that in determining whether otherwise tortious inducement to breach of contract is privileged, important factors include "the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand."<sup>68</sup>

Thus, tort law, extending over a full range of human conduct, has embraced a system of values for determining liability which is enunciated in broad social terms, in contrast to the more specialized area of agency law, where the articulation of the underlying considerations is almost exclusively in economic terms. However, one may inquire whether there really is, or should be, any different standard for liability in the two areas, and whether the pre-occupation with economic interests in the agency law merely is a reflection of the way problems for decision have arisen in that more specialized field. In brief, tort law introduces considerations of social interests, which would appear applicable to the agency field as well, and which on preliminary review would appear to provide support for the "public interest disclosure" proposal.

What are the implications of the materials reviewed thus far? What is the balance of conflicting considerations with respect to the relative social costs and benefits arising from encouraging employee disobedience and disloyalty with respect to employer conduct deemed socially irresponsible by an employee?

Although the employee may be motivated by the public interest rather than economic gain, the employer will undoubtedly incur economic loss from the employee's conduct. Changes in airline operating procedures to reduce impact on the environment will result in higher costs. Elimination of South African business will mean a loss of South African profits. As for the disclosure proposal, the inability to conduct business operations without concern that corporate information may become a matter of public knowledge will impose an economic burden on the corporation forced to restructure its organization and operations to reduce the possibility and extent of "leaks." Management will become more cumbersome and less efficient. Suspicion as to the source of leaks and the extent of company "loyalty," as well as the security measures that such concerns necessarily involve, will inevitably mean a loss of human values within the organization, invidious distinctions between those with security clearance and those without it, and a general impairment of group identification, group loyalty, and morale.

Further, it must also be recognized that implementation of the disclosure proposal will rest on the individual judgments of innumerable em-

<sup>68</sup> IV RESTATEMENT OF TORTS § 767(e) (1939).

employees seeking to draw the difficult line "where responsibility to the society transcends responsibility to his organization." Inevitably, a number of such judgments will be unjustified, resting on partial information, misinformation, or misunderstanding. Other judgments will involve improper motivation, reflecting a desire to injure the employer for reasons that could range across the entire spectrum of cause for employee dissatisfaction, or stem from political considerations. Even with the best of faith and intentions, can the members of the Polaroid Revolutionary Workers Movement really be objective in drawing the line between their concept of social responsibility and responsibility to Polaroid?

Thus, the costs of the proposal are unquestionably serious in light of the indisputable value of protecting the principal's right to the undivided loyalty and obedience of his agent without which it is hard to conceive of an efficient, harmonious enterprise. What then is the offsetting social gain and the ultimate justification?

## VII. THE VIEW OF THE CORPORATION AS A POLITICAL INSTITUTION

Presumably, the basis for the proposal for unauthorized disclosure of corporate conduct that is regarded as socially irresponsible rests on a judgment as to the crucial social importance of controlling the important centers of power in the nation.<sup>69</sup> The disclosure proposal would appear to be another variation on Mr. Nader's theme that the large public corporation is a political institution in which forces not represented in the traditional decision-making process of the corporation, such as the public generally, should participate in the decision-making process. This theme was clearly articulated in Campaign GM where its counsel acknowledged that a major objective of the Campaign was to involve the public—not merely shareholders—in the corporate decision.<sup>70</sup> When the references to "professionalism" or "illegal, hazardous or unconscionable" activity are removed, this is the real basis of the proposal that corporate employees become informers, ready to act whenever they believe their responsibility to

<sup>69</sup> The forces leading to the "public interest disclosure" proposal may be better understood in the light of the supporting statement in the General Motors 1970 Proxy Statement submitted by Campaign GM with reference to its proposal for a Shareholders' Committee on Corporate Responsibility:

Past efforts by men such as Ralph Nader to raise these issues have been frustrated by the refusal of management to make its files and records available either to the shareholders or to the public. (General Motors Corporation, Proxy Statement dated April 6, 1970, at 18.)

"Inside" information on corporate activities is apparently deemed essential for the reform effort.

<sup>70</sup> See Schwartz, *supra* note 11, at 485.

society requires disclosure of aspects of their employer's activities which they do not deem to be in the public interest. Emphasizing the view that the public corporation is a political institution, Mr. Nader has also called for "the popularization" of the corporation and the election of 5 directors out of 20 by the public—not shareholders—in a national election.<sup>71</sup> The adaptation of the tolerated, if not accepted, practice of the government "leak" to corporate affairs is a simple corollary of this view.

Even without accepting the implications that Mr. Nader draws from the conclusion, it is clear that his view of the large public corporation as a political institution is in many respects sound. The tremendous concentration of economic power, the lack of accountability of management as a result of the separation of ownership and control, the increasing involvement of the large corporation in social problem-solving, the interrelationship between major corporations and the government arising from the billions of government funds spent for defense and space, the interrelationship between many major corporations, universities, and the government in connection with the employment of the billions of government funds spent for research and development all support the view that in many respects the corporation has become a political institution.

General Motors, although obviously not the typical large corporation,<sup>72</sup> has the characteristics of a private government. With 1969 gross revenues of 48 billion dollars (including the revenues of its wholly-owned finance subsidiary, General Motors Acceptance Corporation), with more than 750,000 employees receiving annual wages of approximately 7 billion dollars, with more than 1,300,000 shareholders of record (and 1,500,000 or 2,000,000 or more beneficial holders),<sup>73</sup> General Motors more closely resembles a governmental organization than a "private" corporation.

Finally, the politicalization of the voting processes of the major corporation,<sup>74</sup> symbolized by Campaign GM and other "public interest" groups, reflects the changed nature of the corporate institution.

If the validity of the disclosure proposal rests on the changing nature of the major public corporation into a political institution with government-like qualities, it becomes appropriate to review the duties of obedience, loyalty, and confidentiality of the government employee.

<sup>71</sup> N.Y. Times, Jan. 24, 1971, § 3, at 1, col. 3.

<sup>72</sup> See Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking*, 57 CALIF. L. REV. 1, 33-44 (1969).

<sup>73</sup> GENERAL MOTORS CORPORATION, ANNUAL REPORT 1969, at 38, 39; AM. BANKER, May 28, 1970. Because of the distortions in operations caused by the ten-week strike in 1970, the 1969 statistics pertaining to revenues, number of employees and annual wages have been used.

<sup>74</sup> See note 12, *supra*.

## VIII. THE GOVERNMENT EMPLOYEE

The cases involving the discharge or suspension of government employees for public criticism of the policies or administration of the governmental agencies in which they have been employed provide insight into the degree of importance to be accorded to the employee's duties of obedience and loyalty. The problem presented is the extent to which the government employee loses his constitutional right to free speech with respect to issues of public importance because he has accepted public employment.<sup>75</sup>

In the leading case of *Pickering v. Board of Education*,<sup>76</sup> the Supreme Court held that in the absence of

proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.<sup>77</sup>

The Court made it plain that

teachers may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work.<sup>78</sup>

In reaching its conclusion, the Court recognized that it had

to arrive at a balance between the interests of the teacher, as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.<sup>79</sup>

The significance of the *Pickering* decision is the relatively unimportant role it assigned to "the interest of the State, as an employer" and to the teacher's duty of loyalty and obedience to the school board and the superintendent of schools. The Court left no doubt that in the balance of interests, freedom of speech for government employees was deemed so important that it outweighed any general duty of loyalty and obedience to the public em-

<sup>75</sup> See Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Use of an Old Analogy*, 16 U.C.L.A. L. REV. 751 (1969); Note, *The First Amendment and Public Employees: Times Marches On*, 57 GEO. L.J. 134 (1968).

<sup>76</sup> 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

<sup>77</sup> *Id.* at 574, 88 S.Ct. at 1738, 20 L.Ed.2d at 821.

<sup>78</sup> *Id.* at 568, 88 S.Ct. at 1734, 20 L.Ed.2d at 817.

<sup>79</sup> *Id.* The decision is a far cry from the celebrated statement of Mr. Justice Holmes almost 80 years ago that "The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman." See *McAuliffe v. City of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892).



ployer and that following the rule established in the *New York Times* case,<sup>80</sup> even false statements were protected so long as they were not "knowingly or recklessly made."

Thus, the Court emphasized the degree of intimacy of relationship required before the government employee's right of free public comment would be lost. It stated:

Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.<sup>81</sup>

The Court further noted:

It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases.<sup>82</sup>

In *Meehan v. Macy*, involving a Canal Zone policeman who was discharged for criticizing the Governor's personnel policies during a period of rioting by Panamanian students protesting American "colonialism," the Court of Appeals noted that "the situation in the Canal Zone was tense and official apprehension of renewed rioting was reasonable" and upheld the discharge.<sup>83</sup> The Court emphasized that "such uninhibited public speech by Government employees [may produce] intolerable disharmony, inefficiency, dissension and even chaos."<sup>84</sup> The importance of these elements in the quieter context of a domestic dispute over school affairs was not regarded so highly by the Supreme Court in the *Pickering* case.

A number of state decisions involving school personnel and firemen have similarly reinstated municipal employees discharged or suspended

<sup>80</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 725-26, 11 L.Ed.2d 686, 706-7 (1964). Cf. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 65, 86 S.Ct. 657, 664, 15 L.Ed.2d 582, 591 (1966).

<sup>81</sup> 391 U.S. 563, 570, 88 S.Ct. 1731, 1735, 20 L.Ed.2d 811, 818 (1968).

<sup>82</sup> *Id.* at 570, n. 3, 88 S.Ct. at 1735, n. 3, 20 L.Ed.2d at 818, n. 3.

<sup>83</sup> 392 F.2d 822, 832 (D.C. Cir. 1968), *modified on rehearing*, 425 F.2d 469 (D.C. Cir. 1968), *modification aff'd en banc*, 425 F.2d 472 (D.C. Cir. 1969).

<sup>84</sup> 392 F.2d at 833.

for public criticism of their superiors or their agencies,<sup>85</sup> except where the employee's public criticism was held to disrupt or impair the public service.<sup>86</sup> It may be questioned in the light of the *Pickering* decision whether the latter limitation will persist except in unusual cases.<sup>87</sup>

The first and fourteenth amendments do not apply, at least not thus far,<sup>88</sup> to American corporations, however large their size, however powerful their impact on the American society and citizens, and however governmental-like they may be in their functions. Thus, the *Pickering* and related cases resting on the constitutional protection of the first and fourteenth amendments are not applicable; the cases cannot be extended to limit the right of the private employer to discharge the private employee unprotected by employment contract or collective bargaining agreement.<sup>89</sup> They do, however, ascribe a profound value to the employee's right as citizen to

<sup>85</sup> *Belshaw v. City of Berkeley*, 54 Cal. Rptr. 727 (Ct. App. 1966); *St. Petersburg v. Pfeiffer*, 52 So.2d 796 (Fla. 1951); *Adams v. State ex rel. Sutton*, 69 So.2d 309 (Fla. 1954); *Klein v. Civil Service Commission*, 152 N.W.2d 195 (Iowa 1967); *Puentes v. Board of Education*, 24 N.Y.2d 996, 252 N.E.2d 628 (1969).

Thus in *St. Petersburg v. Pfeiffer*, the Court reinstated a fireman suspended for making "derogatory comments concerning the operation and efficiency" of the department, allegedly "slandering remarks about the character and conduct of the Chief . . . [and who] accused the Chief . . . as being incompetent and inefficient." The Court held: "We approach danger when we allow an employee to be disciplined for criticizing or voicing a want of regard for his superior's abilities. . . . An employee may express himself freely so long as he does not impair the administration of the service. . . ."

<sup>86</sup> *Hayman v. City of Los Angeles*, 17 Cal. App. 2d 674, 679, 62 P.2d 1047, 1049 (1936); *Pranger v. Break*, 186 Cal. App. 2d 551, 9 Cal. Rptr. 293 (1960); *State ex rel. Curtis v. Steinkellner*, 247 Wis. 1, 18 N.W.2d 355 (1944); see *Board of Education v. Swan*, 41 Cal. 2d 546, 261 P.2d 261, 268 (1953), *cert. denied*, 347 U.S. 937, 74 S.Ct. 627, 98 L.Ed. 1087 (1954). It should be noted that each of these cases was decided prior to the *Pickering* case and their continued validity is therefore suspect.

<sup>87</sup> Compare reversals of disciplinary action for public criticism of superiors in the following post-*Pickering* decisions: *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970); *Caldwell v. Craighead*, 432 F.2d 213 (6th Cir. 1970); *Donovan v. Mobley*, 291 F.Supp. 931 (D. Cal. 1968). Some cases upholding discharge have involved criticism within the agency held to be destructive of working relations. *Ruderer v. United States*, 412 F.2d 1285 (Ct. Cl. 1969), *cert. denied*, 398 U.S. 914, 90 S.Ct. 1716, 26 L.Ed.2d 77 (1969); *Lefcourt v. Legal Aid Society*, 312 F.Supp. 1105 (S.D. N.Y. 1970).

<sup>88</sup> Numerous authorities have suggested that constitutional protections and limitations might ultimately be extended to embrace the corporation. See, e.g., A. BERLE, 20TH CENTURY AMERICAN CAPITALISM 5 (1954); A. BERLE, THE THREE FACES OF POWER 39-48 (1967); Miller, *The Corporation As a Private Government in the World Community*, 46 VA. L. REV. 1539, 1551-53 (1960); Miller, *The Constitutional Law of the "Security" State*, 10 STAN. L. REV. 620, 662-66 (1958); Latham, *The Commonwealth of the Corporation*, 55 NW. U.L. REV. 25, 33-37 (1960). But see Wechsler, *Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31 (1959); Manne, *The "Higher Criticism" of the Modern Corporation*, 62 COLUM. L. REV. 399, 410-13 (1962).

<sup>89</sup> See Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 U.C.L.A. L. REV. 751, 752-53 (1969).

speak out on matters of public importance, which transcends the government employer's claim to loyalty and obedience. In the *Pickering* case, the Court singled out as possible exceptions only the isolated cases of a "great" need for confidentiality of relationship (not of information) or of a "personal and intimate" association between the employee and his superior, and even in these cases, the Court carefully reserved the matter for future decision.

Thus, with respect to the balance between the private employee's position as a citizen and the private employer's claim to loyalty and obedience, the *Pickering* case supports the view that traditional concepts as to loyalty and obedience may have to yield to permit employees to fulfill their role as citizens. This is the foundation for the disclosure proposal—the importance to the nation of encouraging citizens interested in working for a better society to place their interests as citizens above the interests of their employer. If governmental agencies may, notwithstanding such public criticism by government employees, function effectively in the view of the Court, why should not the major corporation be able to do the same? With increasing recognition of the "blurring" of the line of difference between the so-called "public" and "private" sectors<sup>90</sup> and the increasing resemblance of employee relations in government service to those in private industry,<sup>91</sup> the implications of the *Pickering* decision for the major public corporation become even more pronounced.

In considering the rights of government employees, it is essential to distinguish sharply between the expression of critical conclusions or opinions and the unauthorized disclosure of confidential information. *Pickering* and the other public employment cases have involved only public employees, who have expressed critical opinions about governmental policy or officials, relying on already public information. None of the cases has involved the disclosure of *information*,<sup>92</sup> as distinct from the expression of *opinion*. The disclosure proposal relates to the transmittal of information, which by definition is non-public, which in many cases may be privileged,<sup>93</sup>

<sup>90</sup> See S. BUCHANAN, *ESSAY ON POLITICS* 140-92 (1953); M. FOGARTY, *COMPANY AND CORPORATION—ONE LAW?* 186-91 (1965); R. BARBER, *THE AMERICAN CORPORATION* 75-77 (1970); R. O'NEIL, *THE PRICE OF DEPENDENCY* 21 (1970).

<sup>91</sup> See R. O'NEIL, *supra* note 90, at 60-61. It has been suggested that the collective bargaining model of private industry should not serve as the model for collective bargaining in the public sector. See Wellington and Winter, *The Limits of Collective Bargaining in Public Employment*, 78 *YALE L.J.* 1107 (1969), *Structuring Collective Bargaining in Public Employment*, 79 *YALE L.J.* 805 (1970).

<sup>92</sup> In *Meehan v. Macy*, 392 F.2d 822 (D.C. Cir. 1968), one of the three counts supporting the dismissal was the disclosure of confidential information. This count was not sustained. See 392 F.2d at 828-29.

<sup>93</sup> See Note, *Privileges to Protect the Government*, 46 *CHI-KENT L. REV.* 87 (1969).

which may have been submitted to the governmental agency on the understanding that it remain confidential, and the disclosure of which may be prohibited by statute or agency regulation.<sup>94</sup>

Where the courts have dealt with opinion, they have been concerned with the delicate constitutional balance between the employee's right to express his opinions on public issues, like any other citizen, and the need of the government to function effectively. They have, therefore, discussed the significance of such matters as the impact of the opinion on the functioning of the agency, the extent to which the opinion would impair the confidentiality of the employment relation, or the extent to which it might indicate the unfitness of the employee. By accepting government employment, the employee has not forfeited his right to express his opinion on public issues as a citizen. He has not, however, acquired any additional right to disobey procedures intended to keep non-public governmental information confidential. The disclosure of non-public information has no relation to the protection of the right of free speech which he possesses outside of his relation to governmental employment.

This distinction is emphasized by the Federal Freedom of Information Act,<sup>95</sup> which includes the following exemptions, among others:

Exemption (4): "trade secrets and commercial information obtained from a person and privileged or confidential;" and

Exemption (5): "intra-agency or inter-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;"

As explained by the Court in *Ackerly v. Ley*,<sup>96</sup>

The basis of Exemption (5), as of the privilege which antedated it, is the free and uninhibited exchange and communication of opinions, ideas, and points of view—a procedure as essential to the wise functioning of a big government as it is to any organized human effort. In the Federal Establishment, as in General Motors or any other hierarchical giant, there are enough incentives as it is for playing it safe and listing with the wind; Congress clearly did not propose to add to them the threat of cross-examination in a public tribunal.

The Freedom of Information Act, where applicable, relates solely to records available for public inspection. It does not authorize personnel to make disclosures. On the contrary, existing prohibitions of unauthorized disclosure remain in force.<sup>97</sup> The Freedom of Information Act thus repre-

<sup>94</sup> See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.13 (1958).

<sup>95</sup> U.S.C. § 552(b) (1967).

<sup>96</sup> 420 F.2d 1336, 1341 (D.C. Cir. 1969).

<sup>97</sup> Professor Davis points out: "The Act leaves officers free to disclose or withhold records covered by the exemptions, but they may then be governed by other statutory law,

sents Congressional recognition of the importance of preserving an essential area of confidentiality of information in the effective functioning of the governmental organization.

Further, unauthorized disclosure of information is a ground for dismissal or discipline under the Staff Regulations of the United Nations,<sup>98</sup> as well as under the civil service laws of many countries.<sup>99</sup>

In *The Price of Dependency*, Professor O'Neil takes a different view of the problem of the "leak" by the governmental employee. He observes:

The balance to be struck in such a case is a difficult one. Surely the government has some interest in keeping the information confidential, . . . until a time when it will be least damaging to the public confidence. Equally clearly, however, sanctions against public employees who speak the truth should not be lightly permitted . . . . Perhaps what is required when the charge is one of leaking the truth is a test approximating the 'clear and present danger' test applicable to criminal prosecutions against spoken and written attacks upon the government. Thus a dismissal would require proof that divulgence of the information . . . did pose a very substantial threat to the security of the state. That would be a difficult burden to meet, . . . .<sup>100</sup>

This failure to distinguish between critical opinion and unauthorized disclosure of information is believed ill-founded. The line between statements of opinion and of disclosure of non-public information may blur and on occasion not be easy to draw. Nevertheless, it is difficult to conclude that implementation of the public employee's right to free speech requires elimination of such a distinction or that in *Pickering*, the Court had any intention of doing so.

If there is no basis in the cases dealing with the government employee thus far supporting the right of disclosure of non-public information, how-

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by the common law, by executive privilege, by executive orders, or by agency-made law in the form of regulations, orders or instructions. Many statutes confer discretionary power upon agencies to disclose or not disclose specified information, and many statutes require or prohibit such disclosure." See K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.5 (1970 Supp.) ; Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 766 (1967).

<sup>98</sup> See AKEHURST, *THE LAW GOVERNING EMPLOYMENT IN INTERNATIONAL ORGANIZATIONS* 271 (1967). Regulation 1.5 of the Staff Regulations of the United Nations provides:

Staff members shall exercise the utmost discretion in regard to all matters of official business. They shall not communicate to any person any information known to them by reason of their official position which has not been made public, except in the course of their duties or by authorization of the Secretary-General. Nor shall they at any time use such information to private advantage. These obligations do not cease upon separation from the Secretariat.

<sup>99</sup> UNITED NATIONS, *HANDBOOK OF CIVIL SERVICE LAWS AND PRACTICES* (1966). Reference is made to such disciplinary provisions in Ghana (at 112-13), the United Kingdom (at 114), France (at 208), and Brazil (at 280).

<sup>100</sup> See R. O'NEIL, *supra* note 90, at 100.

ever public spirited the employee's intentions may be, the legal right of the corporate employee to do so is similarly doubtful. Thus, in the end, the view of the major public corporation as a political institution provides no support on the legal level for the disclosure proposal.

It is possible, however, to argue for a less restricted standard for disclosure by corporate employees than that applicable to government employees. In democratic society, the existence of the opposition party provides a counter-balance to the administration, and the opposition may be relied upon to look after the public interest in any controversy. The public employee need not feel that he must act to protect the public interest himself. In the corporation run by management not effectively subject to shareholder control, appeal by an employee to the public generally may be the only available alternative for the protection of the public interest, and the forces for disclosure may therefore be stronger. Further, unlike government, the corporation has institutional objectives other than the promotion of the public interest and disclosure may be essential to protect the public interest.

In addition to the question of the applicable rules, one must not lose sight of the practicalities of the situation. Notwithstanding statute and agency regulations, governmental "leaks" have persisted and appear to play a role of some usefulness in the shaping of opinion and the determination of public policy.<sup>101</sup> Government personnel involved may be disciplined in the rare cases where they are identified, but if the political considerations involved are important enough, the political groups whose ends have been served by the "leak" support their source.<sup>102</sup>

In the political arena, it is clear that the role of the "leak" is accepted both within and without the administrative structure.<sup>103</sup> All the while, the

<sup>101</sup> See, e.g., an illustration of the role of "leaks" in the relations between the staff of the Department of Health, Education & Welfare and the Congress. *BUS. WEEK*, May 1, 1971, at 64-65 ("... a largely Democratic understructure can cause headaches for Republican policymakers. 'I know where to go in HEW when I want information,' says one of Senator Long's welfare experts. . . . The result can be as embarrassing as the 1969 flap over what some Republican appointees had hoped would be a quiet change in school desegregation policies. Unhappy staffers in regional offices leaked the information to civil rights leaders, who leaked it to Democratic Senators.")

<sup>102</sup> Thus, President Nixon appointed Mr. Otto F. Otepka to the Subversive Activities Control Board notwithstanding his prior discipline by the Department of State under the Johnson Administration for the unauthorized release of confidential personnel security files to a subcommittee of the Senate Judiciary Committee. *N.Y. Times*, Mar. 20, 1969, at 21, col. 1. *Boston Globe*, May 20, 1971, at 7, col. 1.

<sup>103</sup> See D. CATER, *THE FOURTH BRANCH OF GOVERNMENT* 112-141 (1959) for a thoughtful review of the "leak" in the federal government. Mr. Cater points out (at 125):

On national security matters, secrecy is repeatedly violated in the conflict among the great rival subgovernments in Washington—Air Force *vs.* Army *vs.* Navy; State *vs.*

business of government continues to be conducted. The only question for debate relates to the political interests which are served by a particular "leak." In the political arena, the rules to the contrary are clear, but the practice continues. Is there any reason to suppose that the corporate world would be different? If vital public interests are involved, or seem to be involved to the individual in question, some corporate employees will no doubt respond to an impelling drive to continue the issue in the public arena, for the very reasons which motivate government employees in similar cases to do the same.

In short, the major corporation may well anticipate an unhappy future where corporate "leaks" in the area of social responsibility will become not uncommon, and the corporation, like the government, will have to learn to live with this unwelcome development.

## IX. THE CHANGING ROLE OF THE CORPORATE EMPLOYEE

Underlying the problem is the concept of the proper position of the employee of the major corporation. In the balance of the conflicting rights of the government employee as citizen and the objective of government for efficient administration, the courts have placed a lesser value on the traditional duties of loyalty and obedience and have subordinated these duties to the employee's right of free speech in order to enable the employee to play a role as a citizen in matters of public controversy. Similarly, one may inquire whether, in time, erosion of the traditional employer-employee relation and the traditional concepts of loyalty and obedience will not also occur within the major American corporation.

### *A. The Developing Law*

The basic problem goes to the employer's right of discharge of an

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Treasury *vs.* Defense *vs.* the numberless special agencies and special assistants dealing in security matters. And, of course, there is the constant conflict between the Executive and Congress. These are not petty disputes. They represent the clash of major issues and ideas concerning the fate of the nation. Measured against the penalties incurred by a violation of secrecy, the benefits to be gained from publicity are at times irresistible to the partisans.

The recent publication of the so-called "Pentagon papers" by the New York Times, Washington Post, and other papers and the ensuing litigation, *New York Times Co. v. United States*, 39 U.S.L. Week 4879 (U.S. June 30, 1971), among other things, has resulted in considerable discussion of "leaks" of governmental information, particularly classified information. See, e.g., *ATLANTIC MONTHLY*, Sept. 1971, at 18-23 ("'Government by leak' is the name of the game. . ."); *TIME*, June 28, 1971, at 19 ("Meanwhile, bureaucrats freely use secret information to suit their own purposes; the U.S. Government almost runs on calculated leaks"); *Wall St. Journal*, June 23, 1971, at 14, col. 1 ("Classified information is disclosed by public officials almost every day"); *Wall St. Journal*, June 25, 1971, at 1, col. 1; *Boston Globe*, June 16, 1971, at 10, col. 1.

employee who is publicly acting contrary to the interests of the employer: the Polaroid worker picketing in protest of Polaroid's alleged involvement with apartheid; the Eastern Air Line pilot disobeying standard operating procedures for dumping excess kerosene in the atmosphere instead of draining it on the ground; the automobile worker who protests the shipment of allegedly unsafe cars from his employer's factory; or the employee who "leaks" non-public information in accordance with the "public interest disclosure" proposal.

At common law, the employer's freedom to discharge was absolute. Over the years, this right of discharge has been increasingly restricted by statute and by collective bargaining agreements, but the basic principle of the employer's legal right to discharge, although challenged on the theoretical level, is still unimpaired.<sup>104</sup>

In *NLRB v. Local Union No. 1229*,<sup>105</sup> the Supreme Court held that the discharge of striking employees of a television station because of their attack on the station for poor programming and service did not constitute an "unfair labor practice" under the National Labor Relations Act. The employees' effort to discredit the employer's business, as distinct from his labor practices, was held "such detrimental disloyalty" as to constitute "just cause" for discharge.

Accepting without discussion the employer's absolute right of discharge, except as limited by statute, the Court emphasized "the importance of enforcing individual plant discipline and of maintaining loyalty." Insofar as the limited purposes of the National Labor Relations Act were concerned,<sup>106</sup> the Court stated: "There is no more elemental cause for discharge of an employee than disloyalty to his employer," and upheld the employer's right to discharge for "insubordination, disobedience, or disloyalty."<sup>107</sup>

Discharge of employees for causes not related to unionization has been upheld under the National Labor Relations Act, including such "offenses"

<sup>104</sup> See *Blades, Employment at Will v. Individual Freedom: Or Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); *Blumrosen, Employer Discipline: United States Report*, 18 RUTG. L. REV. 428 (1964); *Blumrosen, Seniority and Equal Employment Opportunity: A Glimmer of Hope*, 23 RUTG. L. REV. 268 (1969). The English Redundancy Payments Act, 1965 provides for severance payments in amounts varying with the term of service in the event of dismissal without cause. See A. SHONFIELD, *MODERN CAPITALISM* 113 (1965). In continental Europe, the employer's freedom to dismiss employees is severely restricted. See A. SHONFIELD, *supra*, at 113-14; extracts from proceedings of Fifth Industrial Congress of Labor Law and Social Security, 18 RUTG. L. REV. 407-27, 446-88 (1964).

<sup>105</sup> 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 195 (1953).

<sup>106</sup> The Act expressly provides: "No order of the Board shall require . . . reinstatement . . . if such individual was suspended or discharged for cause." 29 U.S.C. § 160(c) (1964).

<sup>107</sup> 346 U.S. at 472, 74 S.Ct. at 176, 98 L.Ed. at 202. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46, 57 S.Ct. 615, 628, 81 L.Ed. 893, 915-17 (1936).



as being a member or sympathizer of the Communist Party,<sup>108</sup> or invoking the protection of the fifth amendment at a Congressional hearing<sup>109</sup> or refusing to complete a defense agency security questionnaire.<sup>110</sup> Discharge for testifying under subpoena against the employer in a criminal proceeding has also been upheld.<sup>111</sup> On the other hand, a review of arbitration awards in this area has concluded that these activities were not normally regarded as constituting "just cause" under collective agreements and that some "resulting adverse effect upon the employment relationship which makes the retention of the employee a detriment to the company" was required.<sup>112</sup>

In an illuminating article,<sup>113</sup> Dean Blades has re-examined the traditional concept of employment at will and the employer's traditional power to discharge the employee at any time for any reason (or indeed for no reason) and has suggested that in time the doctrine—already hedged in by statute and collective bargaining agreements—will be modified, possibly by the legislatures, perhaps by the courts, to protect the employee against discharge for exercise of those personal rights which have no legitimate connection with the employment relationship.

It is noteworthy that even Dean Blades who has ventured boldly to foresee limitations on the employer's right of discharge has restricted himself to two areas: the protection of the employee against improper employer influence over the area of the employee's life unrelated to the employer; and safeguards to enable the employee as a practical matter to insist on those rights already theoretically granted him under agency law not to be an unwilling participant in immoral, unlawful, or unprofessional activity. Dean Blades further recognizes that "[t]here may even be occasions

<sup>108</sup> *Black v. Cutter Laboratories*, 43 Cal.2d 788, 278 P.2d 905 (1955) (4-3 decision vacating arbitration award under collective agreement), *cert. denied*, 351 U.S. 292, 76 S.Ct. 824, 100 L.Ed. 1188 (1956); *Allure Shoe Corp.*, 138 N.L.R.B. 395, 406 (1962); *Admin. Dec. of N.L.R.B. Gen. Counsel*, Nos. 72 (1951), 335 (1952), 797 (1953), 916 (1954).

<sup>109</sup> *United Electrical Radio & Machine Workers v. General Electric Co.*, 127 F. Supp. 934 (D.D.C. 1954); *Farson v. United Press Assn's*, 154 N.Y.S.2d 741 (Sup. Ct. N.Y. Co. 1956); *Admin. Dec. of N.L.R.B. Gen. Counsel*, No. F-361 (1958).

<sup>110</sup> *Admin. Dec. of N.L.R.B. Gen. Counsel*, No. F-34 (1957).

<sup>111</sup> *Odell v. Humble Oil & Refining Co.*, 201 F.2d 123 (10th Cir. 1953), *cert. denied*, 345 U.S. 941, 73 S.Ct. 833, 97 L.Ed. 1367 (1953). The circuit court of appeals upheld the power of the employer to discharge, held that the discharge did not violate the federal statute making it a criminal offense to obstruct justice, but did not reach the question of whether the discharge constituted a breach of contract.

<sup>112</sup> See Comment, *Industrial Due Process and Just Cause for Discipline: A Comparative Analysis of the Arbitral and Judicial Decisional Processes*, 6 U.C.L.A. L. REV. 603, 669-71 (1959). Cases involving qualification for unemployment insurance benefits provide another source of authority on what constitutes "just cause" for discharge. See *BUS. WEEK*, July 24, 1971, at 34.

<sup>113</sup> See Blades, *supra* note 104.

when an employee's public utterances on controversial subjects can be considered incompatible with his professional position and the duty of loyalty he owes to his employer."<sup>114</sup>

Thus, even this proposed transformation of employee status from its traditional role of employment at will would only restrict the employer from "overreaching domination" which is "clearly not justified by the employer's legitimate concerns." It would not protect the Polaroid employee, or the Eastern Air Lines pilot, or the employee of the giant automobile corporation making unauthorized disclosure to a "public interest clearing house."

Professor Blumrosen has similarly suggested that the employer's unrestricted right of discharge has been changed so drastically by a "complex network of contract and statutory provisions" and the "restraints on that freedom are now so extensive that the principle itself is in question, and the United States' legal system may be moving toward a general requirement of just cause and fair dealing between employer and employee." He can offer no authority, however, to support this conclusion insofar as it relates to employees not protected by collective agreements or by statute.<sup>115</sup>

Where a collective agreement covers the employee, the requirement of "just cause" for discharge and other provisions have been construed in the rough and tumble of the labor arbitration process to afford significantly greater protection to the employee than indicated by the traditional statements in the older legal authorities.<sup>116</sup> The living law has progressed beyond the law in the books. This, no doubt, underlies Professor Blumrosen's conclusion as to the movement of the law in this area. A new view of the corporation and of the role of the employee will also undoubtedly result in further modification of the concept of "just cause" under collective agreements.

In a changing society with changing values, long prevailing views on social relationships will inevitably change as well. Thus, the suggestion that the employee of the major corporation has certain rights and duties as a citizen which transcend his traditional obligations as an employee may find increasing support although the suggestion conflicts with long-accepted legal doctrines.

If the public school teacher can be protected against discharge for public criticism including allegedly false statements concerning the school

<sup>114</sup> See Blades, *supra* note 104, at 1406, 1408-09.

<sup>115</sup> See Blumrosen, *Employer Discipline: United States Report*, 18 RUTG. L. REV. 428 (1964).

<sup>116</sup> See Comment, *Industrial Due Process and Just Cause for Discipline: A Comparative Analysis of the Arbitral and Judicial Decisional Processes*, 6 U.C.L.A. L. REV. 603, 630-75 (1959); P. SELZNICK, *LAW, SOCIETY AND INDUSTRIAL JUSTICE* 154-78, 229-30 (1969).

board and the school superintendent, is it too much to suggest that a similar protection may develop in time for the employee of one of America's giant corporations who publicly challenges the conduct of his employer in a sphere of public interest? In the absence of constitutional protection for the corporate employee, unlike the governmental employee, the question is whether new law—whether created by statute, judicial decision, arbitration award, or collective agreement—will develop in the future to reach a similar result.

In any such analysis, the nature of the employee's conduct is fundamental.

Participation in public controversy involving the employer through the exercise of free speech presents the most appealing case for extension of employee rights. In the light of the balance-of-interests expressed in the *Pickering* case on the constitutional level, should the Polaroid employee be free, without fear of retaliation, to urge publicly that American corporations, including Polaroid, cease doing business in the Union of South Africa or Greece or the Soviet Union, if he so chooses? Should his duty of loyalty and obedience be so construed as to deprive him of his right to speak out on public issues? Although courts may not uphold such a position at the present time, will not changing social values likely produce such a conclusion in the law of the future? On the other hand, is there justification for the Polaroid employee joining in a concerted campaign to injure his employer through an organized boycott of its products? Does this involve free speech or economic warfare?

The Eastern Air Lines case rests on the reasonableness of the employer's instructions in the light of the intense public concern with environmental abuse. Even today, one might inquire whether in arbitration under a labor agreement permitting discharge only for "just cause," an arbitrator would hold that such conduct, however disobedient, justified discharge, or whether some lesser penalty such as reinstatement without back pay might not be deemed appropriate.<sup>117</sup>

In view of the absence of theoretical support for any right of unauthorized disclosure on the governmental level or of any relationship

<sup>117</sup> Although there was originally some question as to the right of the arbitrator to modify a penalty, it is now generally accepted. Compare Comment, *Industrial Due Process and Just Cause for Discipline: a Comparative Analysis of the Arbitral and Judicial Decisional Processes*, 6 U.C.L.A. L. REV. 603, 645-48 (1959) with *Southern California Edison Co.*, 51 Lab. Arb. 869 (1968) (McNaughton, Arbitrator); *Safeway Stores, Inc.*, 51 Lab. Arb. 413 (1967) (Gillingham, Arbitrator); *Weirton Steel Co.*, 50 Lab. Arb. 103 (1968) (Kates, Arbitrator); *Kaiser Sand & Gravel*, 49 Lab. Arb. 190 (1967) (Koven, Arbitrator); *Trans World Air Lines, Inc.*, 46 Lab. Arb. 611 (1965) (Wallen, Arbitrator); *Brewer Drydock Co.*, 43 Lab. Arb. 689 (1954) (Altieri, Arbitrator).

between such conduct and the employee's right to conduct himself like any other citizen, it is hard to visualize the development of a legal right of unauthorized disclosure for the corporate employee. Further, there is the additional hurdle of the decisions under the National Labor Relations Act that the use or disclosure of confidential information is just cause for discharge for the limited purposes of the statute, even when related to unionization activities.<sup>118</sup>

### *B. The Dynamics of the Public Climate*

As one moves from the theoretical level to the practical level, one may inquire whether the employer's right of discharge has not already been impaired at least in those cases where public sympathy is squarely behind the employee, as in the case of the Eastern Air Lines pilot who placed his concern with air pollution above obedience to company regulations. The rules of law may condemn such activity as a clear breach of the duty of loyalty and obedience. The corporation may be tempted to exercise its right of discharge, but its freedom of action (without regard to obligations under any union contract) will be severely restricted by the climate of public opinion which may well have been significantly influenced by the publicity attending the affair.

In the arena of public opinion, the issue will involve the merits of the conduct of the employee, not whether the conduct was contrary to instructions. In the Eastern Air Lines case, the intentional violation of regulations and the impracticability of allowing each of the 3,700 Eastern Air Lines pilots to "make his own rules"<sup>119</sup> were not the issues before the public. The subject of the public debate was the impact of the Eastern Air Lines practice on air pollution. Unless the corporation can prevail in the battle for public opinion on the merits of the conduct in issue, it must yield to public clamor or face the consequences of unfavorable public reaction. Moreover, if the employer is unionized, it is unlikely that the union efforts on behalf of the employee will be limited to the legal question of whether the conduct constitutes "just cause" for discharge under the collective agreement.<sup>120</sup>

At this stage, whatever the traditional legal doctrines, the corporation's

<sup>118</sup> *NLRB v. Clearwater Finishing Co.*, 203 F.2d 938 (4th Cir. 1953); Admin. Dec. of Gen. Counsel, N.L.R.B., Case No. SR-1878, 1962 CCH N.L.R.B. Dec. ¶ 11,207 (Mar. 28, 1962); Admin. Dec. of Gen. Counsel, N.L.R.B., Case No. SR-2093, 1962 CCH N.L.R.B. Dec. ¶ 11,532 (July 19, 1962).

<sup>119</sup> See note 8 *supra*.

<sup>120</sup> See the episode of the Ohio steel worker who was suspended for refusing to obey his foreman's order to dump waste in the Cuyahoga River and reinstated after the threat of a "wildcat" strike by the United Steel Workers Union. See note 8 *supra*.

right of discharge may be illusory. The major corporation must recognize that it has become a public institution and must respond to the public climate of opinion. Thus, whether or not the major corporation, in the law of the future comes to be regarded as a quasi-governmental body for some purpose, it operates today as a political as well as economic institution, subject to political behavior by those affected by it and to public debate over those of its actions which attain public visibility.

The pervasive public concern with corporate social responsibility will unquestionably lead to employee response to an appeal for disclosures of confidential information tending to show corporate participation in the creation of social or environmental problems. It is only realistic, therefore, to anticipate the appearance of the government-type "leak" in the major corporation. Whether or not it violates traditional agency concepts, a "public interest clearing house" may be expected to transact considerable business. Aggrieved employers are hardly going to feel free to resort to theoretically available legal or equitable remedies for redress so long as the unauthorized disclosures relate to "anti-social" conduct and do not reflect economic motivation. The corporation that is guilty of environmental abuse reported to the "clearing house" will not be well-advised to compound its conduct by instituting action against the "clearing house" or the employee (if it can identify him) and thereby assure even greater adverse publicity with respect to its objectionable environmental activities.

The "corporate leak" will join the "government leak" and serve the same political purposes. Whatever the incidental cost, business will survive, as has government, and indeed wrongful though it may be, the possibility of such a "leak" may serve a useful therapeutic or preventative function. Nevertheless, it may be well to review some of the inevitable aspects of the "public-interest disclosure" proposal. An official of the Federal Highway Safety Bureau commented in the *New York Times*:

Many a night I've spent late at the office trying to 'Nader-proof' a regulation. The pipelines this guy has into this agency are unbelievable.<sup>121</sup>

*Fortune* similarly reports:

Both reporters and professional politicians find him [Mr. Nader] extremely useful. "Nader has become the fifth branch of government if you count the press as fourth," says a Senate aide who has worked with Nader often in drafting legislation. "He knows all the newspaper deadlines and how to get in touch with anybody anytime. By his own hard work he has developed a network of sources in every arm of government. And believe

<sup>121</sup> Duscha, *Stop! In the Public Interest*, N.Y. Times, Mar. 21, 1971, § 6, at 4, col. 5.

me, no Senator turns down those calls from Ralph. He will say he's got some stuff and it's good, and the Senator can take the credit."<sup>122</sup>

Once the duty of loyalty yields to the primacy of what the individual in question regards as the "public interest," the door is open to widespread abuse.

In a society accustomed to governmental "leaks"—deliberately instigated by an administration as trial balloons as well as by bureaucrats dissatisfied with administrative decision—extension of the conduct described above to the corporate area will be merely more of the same, part of a tolerated pattern in a political world, embracing the major corporation as well as government. At the same time, it sharply poses the question of the desirability of encouraging the spread of such patterns of violation of the concepts of loyalty and obedience from government to major business. The proposal for disclosure to private groups—however disinterested their objective or public-spirited their purpose—seems an excessive and dangerous response<sup>123</sup> to the problem of subordinating to social controls the tremendous economic and social power of the major public corporations.

The problem of unauthorized disclosure inevitably has political overtones. The significance of the erosion of the employee's traditional duties of loyalty, obedience, and confidentiality may be better appreciated if the problem is viewed in a setting that does not involve issues of social and environmental responsibility that are currently matters of such deep national concern. Such a setting may be found in the case of the university communities which are increasingly troubled by reports that the Federal Bureau of Information, the military, or the local police has been maintaining surveillance over campus activities. In some cases, university staff personnel, such as security officers and switchboard operators, apparently on an individual basis, have been supplying information about faculty, students, and campus activities. These university employees have made apparently unauthorized disclosure of non-public information in response to the appeals of government officials for information to enable them to discharge their concept of their public law enforcement responsibilities. No doubt, these employees were responding to their personal views of their social responsibility to cooperate with the "authorities." This problem has created deep concern at many institutions. Thus, at Swarthmore College, President Robert D. Cross responded by warning faculty, students, and staff that "those who divulged confidential information not demanded by law or college policy risked dismissal."<sup>124</sup>

<sup>122</sup> Armstrong, *The Passion that Rules Ralph Nader*, *FORTUNE*, May 1971, at 144, 145.

<sup>123</sup> The possible disclosure of what the employer may regard as trade secrets further aggravates the problem.

<sup>124</sup> *Chronicle of Higher Education*, May 31, 1971, at 1, col 1.

In brief, unauthorized disclosure of confidential information presents serious problems for any organization; the matter can hardly be allowed to rest on each individual employee's decision as to the nature of his responsibilities to society and to his employer.

### *C. Alternatives to Unauthorized Disclosure*

Other alternatives to reach the same objective without the same corrosive effect on personnel and the same potential for private abuse are available. These involve the use of governmental machinery with governmental safeguards with respect to the use of information received.

1. Traditional doctrines of agency law recognize the privilege of employees to report violations of law to proper governmental authorities.<sup>125</sup> Private vigilante efforts should not be essential to achieve effective administration. "Public interest" groups would seem better advised to continue to concentrate their attention on improving the efficiency and effectiveness of the regulatory processes.<sup>126</sup>

2. Another alternative is to extend further the growing statutory and administrative requirements of disclosure of conduct in areas of social responsibility.<sup>127</sup> Examples include the Employer Information Report EEO-1 on minority employment practices filed with the Federal Equal Employment Opportunity Commission,<sup>128</sup> the Affirmative Action Compliance Program filed with the Office of Federal Contract Compliance,<sup>129</sup> the water pollution data filed under the Federal Water Pollution Control Act,<sup>130</sup> and the reports on work-related deaths, inquiries and illnesses under the Federal Occupational Safety and Health Act.<sup>131</sup> Enforcement of such matters by

<sup>125</sup> RESTATEMENT § 395, Comment *f*. Code of Ethics for Government Service, House Doc. No. 103, 86th Cong., 1st Sess. (1958) ("Any person in government service should . . . (xi) Expose corruption wherever discovered").

<sup>126</sup> See, e.g., studies produced under auspices of the Center for Study of Responsible Law: J. TURNER, *THE CHEMICAL FEAST* (1970); J. ESPOSITO, *THE VANISHING AIR* (1970); R. FELLMETH, *THE INTERSTATE COMMERCE OMISSION* (1970); H. WELLFORD, *Sowing the Wind: Pesticides, Meat and the Public Interest* (1971), Wall St. Journal, July 19, 1971, at 9, col. 2; N.Y. Times, July 18, 1971, § 1, at 45, col. 3.

<sup>127</sup> Thus, the Securities and Exchange Commission was asked by the Project on Corporate Responsibility and the Natural Resources Defense Council to require disclosure of minority employment and pollution control activities in reports under the 1933 and 1934 Acts. N.Y. Times, June 10, 1971, at 25, col. 4. The Commission subsequently required disclosure of environmental requirements or legal proceedings under civil rights statutes which might have a material effect on the corporation. Securities Act Release No. 5170, Securities and Exchange Act Release No. 9252, July 19, 1971, CCH FED. SEC. L. REP. ¶ 78,150.

<sup>128</sup> 29 C.F.R. § 1602.7 (1971).

<sup>129</sup> 41 C.F.R. § 60-1.40(a) (1971).

<sup>130</sup> 18 C.F.R. § 607.3(a) (1971).

<sup>131</sup> P.L. 91-596, § 8(c), (g); see Wall St. Journal, May 21, 1971, at 23, col. 3.

public agencies under public standards and with public personnel and safeguards would serve the basic object without the serious disadvantages involved in the "public-interest disclosure" proposal.

3. Still another alternative is the development of the so-called social audit or a systematic quantitative (and possibly qualitative) review of a corporation's activities in the area of social responsibility. This proposal, suggested almost 20 years ago,<sup>132</sup> has been gathering increasing attention and strength with a number of institutions and corporations<sup>133</sup> endeavoring to develop a satisfactory methodology. Such disclosure and evaluation seem an inevitable product of the forces making for greater corporate participation in the solution of social and environmental problems. Development will obviously take some time. In the meanwhile, "public interest" groups and others have proposed resolutions calling for wider disclosure in this area for consideration at the annual meetings of such corporations as General Motors Corporation,<sup>134</sup> Honeywell, Inc.,<sup>135</sup> American Metal Climax, Inc.,<sup>136</sup> Kennecott Copper Corporation,<sup>137</sup> Phelps Dodge Corporation,<sup>138</sup> and Gulf Oil Corporation.<sup>139</sup>

#### *D. Protection Against Discharge*

Another aspect of the proposal for a "public interest clearing house" has considerable merit. This is the objective to provide protection through exposure to public opinion for corporate employees discharged for refusal to participate in illegal, immoral, or unprofessional acts.<sup>140</sup> Involving no breach of confidentiality, this is a laudable effort to translate into reality

<sup>132</sup> See H. BOWEN, *SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN* 251 *et seq.* (1953).

<sup>133</sup> See NATIONAL COUNCIL OF CHURCHES, *CORPORATE RESPONSIBILITY AND RELIGIOUS INSTITUTIONS* 43-47 (1971); address by A. Clausen, Pres. of Bank of America, *Toward an Arithmetic of Quality*, at the Sixth Annual Financial Conference of the Conference Board, Feb. 18, 1971. N.Y. Times, Feb. 14, 1971, at 58, col. 3. Mr. Marshall S. Armstrong, President of the American Institute of Certified Public Accountants, has called for "better methods than we now have for measuring cost/benefit ratios in the social field" and for a "well defined system of social accounting." M. ARMSTRONG, *NEW THINKING ON ENVIRONMENTAL AND SOCIAL PROBLEMS* (1971).

<sup>134</sup> General Motors Corporation, Proxy Statement dated April 5, 1971, for Annual Meeting, at 37-39.

<sup>135</sup> Honeywell, Inc., Proxy Statement dated April 2, 1971 for Annual Meeting, at 6-7.

<sup>136</sup> American Metal Climax, Inc., Proxy Statement dated April 6, 1971, for Annual Meeting, at 15-16.

<sup>137</sup> Kennecott Copper Corporation, Proxy Statement dated April 6, 1971, for Annual Meeting, at 14-16.

<sup>138</sup> Phelps Dodge Corporation, Proxy Statement dated March 25, 1971, for Annual Meeting, at 14-15.

<sup>139</sup> Gulf Oil Corporation, Proxy Statement dated March 25, 1971, for Annual Meeting, at 6-7.

<sup>140</sup> N.Y. Times, Feb. 28, 1971, at 72, col. 1. (Report on concern of computer specialists about discharge of personnel objecting to programming of private personal information in computerized data banks).



the theoretical legal rights of the employee recognized at common law and in the *Restatement of Agency* in the face of the grave economic inequality between the individual employee and the giant corporate employer. Such an effort should receive the support of all interested in raising the standards of industrial morality.

The related objective of assuring employee rights to participate in the public discussion of corporate conduct, including that of their employer, may also be achieved through extension of employee protection in collective bargaining agreements. As public concern over the social implications of corporate conduct continues to increase, and as more employees feel an individual sense of responsibility by reason of their identification with their employer and its activities, it is not unlikely that protection of employee freedom of speech and even of unauthorized disclosure to advance the "public interest" will increasingly become topics both at the collective bargaining table and in arbitration proceedings over the meaning of "just cause."

An example of the power of the trade union is provided by Mr. Nader:

For example, the Fisher Body inspector who, five years ago, turned over information to me about defective welding of Chevrolet bodies, after the plant manager and all his other bosses told him to forget it, is still on the job. Why? Because he is a union member. Had he been an engineer, or a scientist, or a lawyer or any nonunion person, G.M. could have showed him the door at 5 p.m. and he would have had no rights.<sup>141</sup>

Statutory relief is another possible method to achieve appropriate protection for the rights of employees covering unionized and non-unionized employees alike. Anti-discrimination employment statutes already prohibit discrimination on the basis of "race, color, religion, sex, or national origin,"<sup>142</sup> age,<sup>143</sup> or union membership.<sup>144</sup> They might well be extended to make unlawful discrimination for political, social, or economic views<sup>145</sup>

<sup>141</sup> N.Y. Times, Jan. 24, 1971, § 3, at 1, col. 6.

<sup>142</sup> 42 U.S.C. § 2000e-2(a) (1) (1964).

<sup>143</sup> 29 U.S.C. § 623(a) (1) (1964).

<sup>144</sup> 29 U.S.C. § 158(a) (3) (1964).

<sup>145</sup> Mr. Nader has recommended: "Congress should enact legislation providing for safeguards against arbitrary treatment by corporations against employees who exercise their constitutional rights in a lawful manner." N.Y. Times, Jan. 15, 1971, at 43, col. 5. This statement assumes that employees have "constitutional rights," and thus misses the point. The problem is that at the present stage of the law, the constitutional safeguards protecting government employees against governmental action are inapplicable to corporate conduct so that corporate employees do not have constitutionally protected rights as employees. This is the very factor that makes statutory protection essential. Further, the reference to "a lawful manner" constitutes an odd contrast to Mr. Nader's proposal for disclosure which is of dubious validity under traditional legal doctrines.

even when publicly expressed in opposition to an employer's policy. Similarly, statutory prohibition of discharge for refusal to participate in acts that are illegal or contrary to established canons of professional ethics, or for cooperation with governmental law-enforcement, legislative or executive agencies,<sup>146</sup> deserves serious consideration.

## X. CONCLUSION

The duties of loyalty and obedience are essential in the conduct of any enterprise—public or private. Yet, they do not serve as a basis to deprive government employees of their rights as citizens to participate in public debate and criticism of their governmental employer and should not be utilized to deprive corporate employees of similar rights.

As employee attitudes and actions reflect the increased public concern with social and environmental problems and the proper role of the corporation in participating in their solution, traditional doctrines of the employee's duties of loyalty and obedience and the employer's right of discharge will undergo increasing change. The pressure of "public interest" stockholder groups for increased corporate social responsibility will also be reflected by employees. At some point in the process, disagreement with management policies is inevitable. When the employees persist in their disagreement and the disagreement becomes public, an erosion of the traditional view of the duties of loyalty and obedience will have occurred. Yet, this hardly seems a fundamental problem for the corporation or undesirable from the point of view of the larger society. The real question is to establish civilized perimeters of permissible conduct that will not silence employees from expressing themselves on the public implications of their employers' activities in the social and environmental arena and at the same time will not introduce elements of breach of confidentiality and impairment of loyalty that will materially impair the functioning of the corporation itself. A balancing of interests, not a blind reiteration of traditional doctrines, is required. It is hoped that this preliminary review will suggest some possible solutions to the problem.

<sup>146</sup> In today's world, it would be difficult to defend the right of an employer to be free to discharge an employee for testifying under subpoena for the government in a criminal case against the employer. Cf. *Odell v. Humble Oil & Refining Co.*, 201 F.2d 123 (10th Cir. 1953), *cert. denied*, 345 U.S. 941, 73 S.Ct. 833, 97 L.Ed. 1367 (1953). An anti-pollution bill being drafted by a subcommittee of the Senate Public Works Committee would prohibit the discharge of an employee who filed a complaint or who testified against his employer during investigation of an alleged violation. *Wall St. Journal*, July 19, 1971, at 1, col. 7.