Public Policy Limitations on the Retaliatory Discharge of at Will Employees in the Private Sector

A growing minority of courts provide a cause of action for private sector at will employees whose retaliatory discharge violated public policy. This comment discusses the societal justifications for the public policy limitation and presents a test for a public policy violation. It then proposes an analytical framework upon which to organize the case law.

INTRODUCTION

The majority of private sector employees[1] in this country[2]

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[1] Nearly 65% of all American employees are hired on an at will basis. Another 21% are unionized, and almost 15% are federal and state employees. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1980, Table 652, at 394 (total labor force); *id.* Table 714, at 429 (union membership); *id.* Table 519, at 318 (government employees). *See generally* Peck, *Unjust Discharges From Employment: A Necessary Change in the Law,* 40 OHIO ST. L.J. 1, 8-10 (1979).

Collective bargaining agreements protect unionized private sector employees from arbitrary dismissal. Approximately 80% of these agreements contain "just cause" limitations on the right to discharge, governed by mandatory arbitration law. 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) 40:1 (Apr. 10, 1975). Thus they are not covered by this comment, which deals solely with at will employees. For discussion of the protections afforded unionized employees, see Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute,* 62 VA. L. REV. 481, 499-508 (1976); Weyand, *Present Status of Individual Employee Rights,* N.Y.U. 22ND ANN. CONF. ON LAB. 171, 186-201 (1970).

Federal civil service employees are protected under the Civil Service Reform Act of 1978, § 204(a), 6 U.S.C. § 7503 (Supp. III 1979). *See generally* Chaturvedi, *Legal Protection Available to Federal Employees Against Wrongful Dismissal,* 63 NW. U.L. REV. 287, 290-307 (1968). State employees enjoy a variety of protections: tenure and government employee unions, *see* J. WEISBERGER, JOB SECURITY AND PUBLIC EMPLOYEES 9-19, 45-65 (2d ed. 1973), civil service, *see* R. VAUGHN, PRINCIPLES OF CIVIL SERVICE LAW § 5.4 (1976), and in some instances constitutional protections against unjust dismissals. *See, e.g.,* Branti v. Finkel, 445 U.S. 507 (1980); Perry v. Sindermann, 408 U.S. 593

work without job security. Employed "at will," they may resign or be dismissed at any time for any reason without either party incurring legal liability.[3] The severe economic and psychological effects of unemployment render the worker's right to resign an empty one.[4] Instead, an unscrupulous employer may use the threat of discharge to coerce employee compliance with illegal or immoral commands. A worker's refusal to comply often results in his or her retaliatory discharge.[5]

(1972). *See generally* Lowy, *Constitutional Limitations on the Dismissal of Public Employees,* 43 BROOKLYN L. REV. 1 (1976). As to protection of public employees in general, see Vaughn, *Public Employees and the Right to Disobey,* 29 HAST. L.J. 261 (1977).

[3] The United States is one of the few industrial countries which does not provide legal protection against unjust dismissals. *See* Clayton, *A Proprietary Right in Employment,* 1967 J. BUS. L. 139 (law of Great Britain); England, *Recent Developments in Wrongful Dismissal Laws and Some Pointers for Reform,* 16 ALBERTA L. REV. 470 (1978) (law of Canada); Summers, *supra* note 1, at 508-19 (brief survey of Western European countries); *Comparative Labor Law and Law of the Employment Relation, A Symposium,* 18 RUTGERS L. REV. 233, 458-77 (1964) (in-depth analysis of the bounds of employer discipline in Italy and Hungary).

[4] The classic formulation of the "at will" rule is that the employer may discharge "for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong." Payne v. Western & A. R.R., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds,* Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915); *see* 3 A. CORBIN, CONTRACTS § 684, at 224 (1960); 9 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1017, at 129-30 (3d ed. 1967); Blumrosen, *Workers' Rights Against Employers and Unions: Justice Francis—A Judge for Our Season,* 24 RUTGERS L. REV. 480, 481 (1970); Annot., 62 A.L.R.3d 271 (1975); 53 AM. JUR. 2d *Master and Servant* § 43 (1970); Comment, *Employment at Will and the Law of Contracts,* 23 BUFF. L. REV. 211 (1973-74). *But see* 17A C.J.S. *Contracts* § 398, at 478 (1963), which incorrectly requires reasonable notice to effectuate termination.

For a history of the at will rule, see 1 C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 159 (2d ed. 1913); Feinman, *The Development of the Employment at Will Rule,* 20 AMER. J. OF LEGAL HIST. 118 (1976); Annot., 11 A.L.R. 469 (1921); Comment, *The Employment at Will Rule,* 31 ALA. L. REV. 421, 422-30 (1980); Note, *Employment Contracts of Unspecified Duration,* 42 COLUM. L. REV. 107 (1942); Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith,* 93 HARV. L. REV. 1816, 1824-28 (1980); Note, *A Common Law Action for the Abusively Discharged Employee,* 26 HASTINGS L.J. 1435, 1438-43 (1975); Note, *Implied Contract Rights to Job Security,* 26 STAN. L. REV. 335, 340-47 (1974).

[4] *See* text accompanying notes 24-31 *infra.*

[5] Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power,* 67 COLUM. L. REV. 1404, 1405-06 (1967). Of course, discharge is not the only means of employer abuse—the unpopular

A growing number of courts provide terminated employees with a cause of action when their discharge violates public policy. In applying the public policy limitation, courts exercise anew their traditional common law powers to curtail private contract rights for public protection.[6] Despite courts' long familiarity with public policy analysis, they differ in their applications of the limitation.[7] Commentators, in turn, largely ignore the limitation.[8] Instead, they propose a plethora of alternative theories upon which to restrict the employer's absolute right to discharge.[9]

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employee may be harassed, demoted or otherwise made to feel unwanted. *See* Fitzgerald v. Seamans, 553 F.2d 220, 223-24 (D.C. Cir. 1977) (harassment of General Services Administration employee who reported to Congress cost overruns on defense contracts); Ewing, *Employee Rights: Taking the Gag Off*, 1 CIV. LIB. REV. 54, 55 (1974).

[6] Lord Truro, in the case of Egerton v. Bronlow, 4 H.L.C. 1, 196, 10 Eng. Rep. 359, 437 (1853), stated the classic formulation: "Public policy . . . is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good. . . ." This definition, with minor variations, has received wide acceptance by American commentators and courts. *See, e.g.*, BLACK'S LAW DICTIONARY 1041 (5th ed. 1979); E. GREENHOOD, THE DOCTRINE OF PUBLIC POLICY IN THE LAW OF CONTRACTS 2 (1886); 72 C.J.S. *Policy* 211 (1951). American cases accepting Lord Truro's definition can be found in 72 C.J.S. *Policy* 211 nn.61-67. It is of interest to note that all authorities here cited erroneously attribute Lord Brougham's concurring opinion as the source of this definition of public policy.

[7] One commentator recently titled his section on the public policy limitation "The Private Sector: Job Security and the Courts—A Look at Judicial Inconsistency." Note, *Non-Statutory Causes of Action for an Employer's Termination of an "at Will" Employment Relationship: A Possible Solution to the Economic Imbalance in the Employer-Employee Relationship*, 24 N.Y. L. SCH. L. REV. 743, 764 (1979).

The haphazard development of the public policy limitation is probably typical of the common law. Each common law development depends upon the "propitious coming together" of (1) the right case, (2) prepared by dedicated counsel, (3) before a receptive judge, (4) initiated by parties interested and wealthy enough to appeal, (5) before an appellate court ready to break with precedent. Satter, *Changing Roles of Courts and Legislatures*, 11 CONN. L. REV. 230, 231 (1979).

[8] Only one commentator has endorsed the public policy limitation. *See* Comment, *Protecting the Private Sector at Will Employee Who "Blows the Whistle": A Cause of Action Based Upon the Determinants of Public Policy*, 1977 WIS. L. REV. 777.

[9] Commentators since the mid-1960's have advocated various theories providing at will employees with some measure of job security. Professor Blades advocates a "prima facie tort" theory. *See* Blades, *supra* note 5, at 1421-27.

This comment discusses the societal justification for the public policy limitation and proposes a framework for interpreting retaliatory discharge case law. Part I argues for reforming the at will rule through imposition of the public policy limitation. Part II restates the public policy test as first enunciated in the California case of *Petermann v. International Brotherhood of Teamsters, Local 396.*[10] Part III analyzes later courts' application of the *Petermann* test in various contexts. It then proposes an analytical framework with which to subsume this emerging law and facilitate its continued development.

I. THE AT WILL RULE AND SOCIETAL INJURY—A NEED FOR REFORM

Retaliatory discharge of an individual employee may cause so-

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One commentator argues for an implied contractual condition guaranteeing job security. *See* 26 STAN. L. REV., *supra* note 3, at 350-66. Others suggest judicial reform by applying various constitutional restraints to corporations. *See* A. BERLE, THE THREE FACES OF POWER 39-41 (1967); A. MILLER, THE MODERN CORPORATE STATE 182-87 (1976); Peck, *supra* note 1, at 21-42. Some writers argue a property right theory to job security. *See* Comment, *Towards a Property Right in Employment,* 22 BUFF. L. REV. 1081 (1973); 24 N.Y. L. SCH. L. REV., *supra* note 7, at 768-69. Another, discouraged by judicial inaction, suggests statutory repeal of the at will rule. *See* Summers, *supra* note 1, at 519-31.

Most commentators would abolish the at will doctrine through judicial imposition of a good faith standard of discharge. They would thus adopt the rule first articulated in Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974); *see* 93 HARV. L. REV., *supra* note 3, at 1836-44; 26 HASTINGS L.J., *supra* note 3, at 1454-56 (accepting the *Monge* rule but advocating tort remedies); Note, *Judicial Limitation of the Employment at Will Doctrine,* 54 ST. JOHN'S L. REV. 552, 577-79 (1980). For commentaries upon the *Monge* decision, see Comment, *Employment Contract Terminable at Will: Monge v. Beebe Rubber Co. and Bad Faith Discharges,* 63 KY. L.J. 513 (1975); 16 B. C. INDUS. & COM. L. REV. 232 (1975); 7 CONN. L. REV. 758 (1975); 8 CREIGHTON L. REV. 700 (1975); 43 FORDHAM L. REV. 300 (1974); 8 GA. L. REV. 996 (1974); 6 TEX. TECH. L. REV. 271 (1974).

Nevertheless, only a few courts follow the *Monge* rule. *See* Moore v. Home Ins. Co., 601 F.2d 1072, 1074 (9th Cir. 1979) (all contracts contain an implied obligation of fair dealing, citing RESTATEMENT (SECOND) OF CONTRACTS § 231 (1970)); Pstragowski v. Metropolitan Life Ins. Co., 553 F.2d 1 (1st Cir. 1977); Foley v. Community Oil Co., 64 F.R.D. 561 (D.N.H. 1974); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 728-30 (2d Dist. 1980) (analogizing to California case law involving a judicially imposed duty of good faith in insurance contracts); Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977) (essentially following *Monge*).

[10] 174 Cal. App. 2d 184, 344 P.2d 25 (2d Dist. 1959).

cietal injury. This societal harm may occur in several ways. First, the employer may attempt to stifle exercise of an employee's civic duties.[11] This deprives society of fully functioning citizens.[12] Second, the employer may condition continued employment upon the employee's commission of an illegal act.[13] Unlawful activity presumptively injures society since criminal

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[11] The employer may prohibit a variety of employee civic activities:

(1) serving on jury duty: Bender Ship Repair, Inc. v. Stephens, 379 So. 2d 595 (Ala. 1980); Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (4th Dist. 1960); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Reuther v. Fowler & Williams, Inc., 255 Pa. Super. Ct. 28, 385 A.2d 119 (1978). Jurors in federal courts are protected from dismissal for their service by statute. *See* 28 U.S.C. § 1875 (Supp. III 1979).

(2) serving as an election poll officer: Kouff v. Bethlehem-Alameda Shipyard, 90 Cal. App. 2d 322, 202 P.2d 1059 (1st Dist. 1949).

(3) engaging in political activities: Mims v. Metropolitan Life Ins. Co., 200 F.2d 800 (5th Cir. 1952) (discharge for not contributing to campaign fund of senator), *cert. denied,* 345 U.S. 940 (1953); Bell v. Faulkner, 75 S.W.2d 612 (Mo. Ct. App. 1934) (refusal to vote for certain candidates); Annot., 51 A.L.R.2d 742, 745-47 (1957); Note, *California's Controls on Employer Abuse of Employee Political Rights,* 22 STAN. L. REV. 1015 (1970). The law on employer abuse of employee political rights was largely nonexistent until the McCarthy era. Annot., *supra* this note, at 745. *See generally* Comment, *Right of an Employer to Discharge an Employee for Refusal to Testify Before a Congressional Committee on the Ground of Self-Incrimination,* 38 MARQ. L. REV. 8 (1954-55); Note, *Is Invocation of the Fifth Amendment or Alleged Subversive Activity "Just Cause" for Dismissal of a Privately Employed Individual?,* 11 RUTGERS L. REV. 745 (1957).

(4) soliciting union membership: Montgomery Ward & Co. v. NLRB, 339 F.2d 889 (6th Cir. 1965).

(5) speaking out on controversial issues: Blades, *supra* note 5, at 1408 n.16.

(6) engaging in social activities: S. P. SETHI, UP AGAINST THE CORPORATE WALL 399-406 (2d ed. 1974).

[12] Blumberg, *Corporate Responsibility and the Employee's Duty of Loyalty and Obedience: A Preliminary Inquiry,* 24 OKLA. L. REV. 279, 303 (1971).

[13] The employer may attempt to coerce the employee to:

(1) smuggle aliens into the country: Susnjar v. United States, 27 F.2d 223 (6th Cir. 1928).

(2) commit perjury: Odell v. Humble Oil & Refining Co., 201 F.2d 123 (10th Cir.), *cert. denied,* 345 U.S. 941 (1953); Ivy v. Army Times Publishing Co., No. 79-278 (D.C. Ct. App. Mar. 10, 1981); Petermann v. International Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (2d Dist. 1959).

(3) covertly wiretap telephone conversations: Zinman v. Unemployment Comp. Bd. of Review, 8 Pa. Commw. Ct. 649, 305 A.2d 380 (1973).

(4) actively participate in antitrust violations: McNulty v. Borden, Inc., 474 F. Supp. 1111, 1119 (E.D. Pa. 1979); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

statutes expressly enjoin the conduct.[14] Third, societal harm occurs where the employer attempts to stifle employee exercise of substantive statutory rights.[15] Retaliatory discharge of these employees circumvents the legislative policy behind statutes regulating the employment relationship.[16]

Retaliatory discharge may cause other, more subtle forms of societal harm. The threat of discharge might secure employee participation in unethical activity. Professional employees, subject to ethical codes expressly proscribing certain conduct, face a difficult dilemma in this situation.[17] Where the applicable code

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[14] "It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee . . . on the ground that the employee declined to commit . . . an act specifically enjoined by statute." Petermann v. International Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 188-89, 344 P.2d 25, 27 (2d Dist. 1959).

[15] These statutory entitlements include:

(1) the right to workers' compensation benefits: Shanholtz v. Monongahela Power Co., 270 S.E.2d 178 (W. Va. 1980); *see* text accompanying notes 66-77 *infra*.

(2) the right to unionize: Wetherton v. Growers Farm Lab. Ass'n, 275 Cal. App. 2d 168, 79 Cal. Rptr. 543 (1st Dist. 1969); Glenn v. Clearman's Golden Cock Inn, 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (2d Dist. 1961).

(3) the protection of minimum wage laws: Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (5th Dist. 1970).

(4) the right to pension benefits: Moore v. Home Ins. Co., 601 F.2d 1072 (9th Cir. 1979); Savodnik v. Korvettes, Inc., 488 F. Supp. 822 (E.D.N.Y. 1980).

[16] "[T]he legislature enacted the workmen's compensation law as a comprehensive scheme to provide for efficient and expeditious remedies for injured employees. This scheme would be seriously undermined if employers were permitted to abuse their power to terminate by threatening to discharge employees for seeking compensation under the Act." Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 181-82, 384 N.E.2d 353, 357 (1978).

[17] Professor Blades describes the predicament that may confront the professional employee of a large corporation:

> Consider, for example, the plight of the engineer who is told that he will lose his job unless he falsifies his data or conclusions, or unless he approves a product which does not conform to specifications or meet minimum standards. Consider also the dilemma of a corporate attorney who is told . . . to draft backdated corporate records concerning events which never took place or to falsify other documents so that adverse legal consequences may be avoided by the corporation; and the predicament of an accountant who is told to falsify his employer's profit and loss statement in order to enable the employer to obtain credit.

Blades, *supra* note 5, at 1408-09 (footnotes omitted).

Another example of this same problem arises when a physician is compelled

provision embodies a statement of public policy, violation results in a public injury.[18] Further, a manufacturer-employer is in a unique position to endanger the general public by marketing unsafe products.[19] Discharge of employees for questioning a product's safety allows dangerous consumer items to enter the marketplace.[20] Finally, suppression of employee "whistle blowing" produces corresponding societal harm.[21] The responsible whistle blower acts in the public interest by helping to prevent employer misconduct.[22] Threatened discharge may silence an employee

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to certify for human testing a drug which she thinks is unsafe. *See* Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980). *See generally* Feliu, *Discharge of Professional Employees: Protecting Against Dismissal for Acts Within a Professional Code of Ethics*, 11 COLUM. HUMAN RIGHTS L. REV. 149 (1980); Note, *A Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics*, 28 VAND. L. REV. 805 (1975).

[18] Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 77-83, 417 A.2d 505, 514-18 (1980) (Pashman, J., dissenting). The majority does not disagree in principle. *Id.* at 72, 417 A.2d at 512.

[19] The deterrent rationale of strict products liability law reveals societal concern in preventing unsafe products from reaching the public. *See* Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1277-78 (1976). Similarly, creation of government regulatory bodies demonstrates objective public interest in the safe functioning and production of the industries they oversee. *See, e.g.*, United States v. Diapulse Corp. of America, 457 F.2d 25, 28 (2d Cir. 1972) (passage of the Federal Food, Drug, and Cosmetic Act is "an implied finding that violations will harm the public . . ."); *Hearings of Investigations of Charges Relating to Nuclear Reactor Safety Before the Joint Comm. on Atomic Energy*, 94th Cong., 2d Sess. (vol. 1) 97-135 (1976) (statement of Robert Pollard) (allegations of safety defects in nuclear power plants by former Nuclear Regulatory Commission engineer); Faulkner, *Exposing Risks of Nuclear Disaster*, in WHISTLE BLOWING! LOYALTY AND DISSENT IN THE CORPORATION 39-54 (A. Westin ed. 1980).

[20] *See, e.g.*, Campbell v. Eli Lilly & Co., 413 N.E.2d 1054 (Ind. Ct. App. 1980) (discharge of employee who protested alleged misconduct of supervisors in drug manufacturing); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (salesman terminated for protesting safety of new product); Camps, *Warning an Auto Company about an Unsafe Design*, in A. Westin, *supra* note 19, at 119-29.

[21] C. PETERS & T. BRANCH, BLOWING THE WHISTLE: DISSENT IN THE PUBLIC INTEREST 10 (1972); WHISTLE BLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY 3-5 (R. Nader, P. Petkas & K. Blackwell eds. 1972); A. Westin, *supra* note 19, at 10-13; Walters, *Your Employees' Right to Blow the Whistle*, in INDIVIDUAL RIGHTS IN THE CORPORATION 91-95 (A. Westin & S. Salisbury eds. 1980); 1977 WIS. L. REV., *supra* note 8, at 777-78.

[22] Congress has determined that protection of whistle blowers in the federal

who wishes to report witnessed illegal or immoral activities, yet fears the consequences of doing so.[23]

The absolute right to discharge is the primary source of em-

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bureaucracy would be to the benefit of the civil service system:

> Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.

Commentary upon the Civil Service Reform Act of 1978, 5 U.S.C. § 2302 (Supp. III 1979), in S. REP. No. 95-969, 95th Cong., 2d Sess. 4 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 2723, 2730; *see also* SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95th Cong., 2d Sess., THE WHISTLEBLOWERS: A REPORT ON FEDERAL EMPLOYEES WHO DISCLOSE ACTS OF GOVERNMENTAL WASTE, ABUSE, AND CORRUPTION 1-5 (Comm. Print 1978).

[23] Management may see the whistle blower in a different light. Not quietly "going along" with management, according to James Roche, former chairman of General Motors, is often simply an act of disloyalty:

> Some of the enemies of business [referring specifically to Ralph Nader] now encourage an individual 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 labeled—industrial espionage, whistle blowing, or professional responsibility—it is another tactic for spreading disunity and creating conflict.

N.Y. Times, Mar. 26, 1971, at 53, col. 5.

A worker interviewed by Studs Terkel provides a different perspective. The mobile worker doesn't have to be "loyal" since he or she can gain by moving elsewhere. Yet few employees are in this enviable position. "The only loyal people are the people who can't get a job elsewhere." S. TERKEL, WORKING 409 (1974).

Some corporations are voluntarily providing protections to activist employees. *See, e.g.*, Ewing & Banks, *Listening and Responding to Employees' Concerns*, 58 HARV. BUS. REV. 101 (Jan.-Feb. 1980) (Bank of America); A. Westin & S. Salisbury, *supra* note 21, at 214-15 (IBM). *See generally* Blumberg, *supra* note 12; Blades, *supra* note 5, at 1412 ("For the worker who cherishes his and his family's livelihood, the better part of valor may be to submit to the employer's improper demand."). *But see* L. STESSIN & I. WIT, THE DISLOYAL EMPLOYEE (1967) (traditional management viewpoint).

ployer coercion.[24] At will employees usually lack the personal[25] and procedural due process[26] rights to prevent arbitrary dismissal.[27] Most are dependent upon employment as their sole source of income.[28] Thus the pecuniary impact of dismissal is often se-

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[24] Sventko v. Kroger Co., 69 Mich. App. 644, 648, 245 N.W.2d 151, 153 (1976); Blades, *supra* note 5, at 1405-06.

[25] *See, e.g.*, Holodnak v. Avco Corp., 514 F.2d 285, 291 (2d Cir. 1975) (no right to free communication with other employees); *Pressures in Today's Workplace: Oversight Hearings Before the House Subcomm. on Labor-Management Relations in the House Comm. on Educ. & Labor*, 96th Cong., 1st Sess. (vol. 2) 125-52 (1979) (statement of Alan Westin) (no right to privacy); E. LONG, THE INTRUDERS 204, 207 (1967) (microphones hidden in employee washrooms).

On lack of personal rights generally, see D. EWING, FREEDOM INSIDE THE ORGANIZATION 3-11 (1977); H. ZINN, JUSTICE IN EVERYDAY LIFE 217-29 (1974); Burkey, *Employee Surveillance: Are There Civil Rights for the Man on the Job?*, N.Y.U. 21ST ANN. CONF. ON LAB. 199 (1969); Craver, *The Inquisitorial Process in Private Employment*, 63 CORNELL L. REV. 1 (1977); Ewing, *supra* note 5.

[26] *See generally* Chalk & von Hippel, *Due Process for Dissenting "Whistleblowers,"* 81 TECHNOLOGY REV. 49 (June-July 1979); Peck, *Some Kind of Hearing for Persons Discharged from Private Employment*, 16 SAN DIEGO L. REV. 313 (1978).

[27] The history of the at will rule is replete with harsh cases of arbitrary dismissals upheld by the courts. *See, e.g.*, Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439 (7th Cir.) (employee of 28 years alleged loss of his job due to mistake of employer's medical staff), *cert. denied*, 379 U.S. 914 (1964); Clarke v. Atlantic Stevedoring Co., 163 F. 423 (C.C.E.D.N.Y. 1908) (200 black stevedores hired for permanent positions discharged to make room for white stevedores); Comerford v. International Harvester Co., 235 Ala. 376, 178 So. 894 (1938) (employee alleged he was discharged in revenge for supervisor's failure to "alienate the affections" of employee's wife); Scroghan v. Kraftco Corp., 551 S.W.2d 811 (Ky. Ct. App. 1977) (termination for attending law school at night).

[28] "[A] single employee [is] . . . dependent ordinarily upon his daily wage for the maintenance of himself and family. . . ." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937). As Professor Tannenbaum points out:

> We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages . . . Such dependence of the mass of the people upon others for *all* their income is something new in this world. For our generation, the substance of life is in another man's hands.

F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951) (emphasis partially deleted).

The power shift from a property to a job holding society entails a decrease in economic freedom, with corresponding economic dependence upon the employer. "[T]he centralization of property has shifted the basis of economic security from property ownership to job holding. . . . For the employees, free-

vere.[29] Termination also causes adverse psychological consequences. Work helps to fulfill an individual's needs for social status[30] and personal identity.[31] Consequently, the at will rule

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dom and security, both political and economic, can no longer rest upon individual independence in the old sense." C. MILLS, WHITE COLLAR 58 (1951). Similarly, "[f]or the vast majority of men their most valuable property is . . . their job, their profession, their franchise, their contracts. The right to use their labor and skills has become their most valuable property right." Affeldt, *Group Sanctions and Sections 8(b)(7) and (b)(4): An Integrated Approach to Labor Law*, 54 GEO. L.J. 55, 70 (1965). For a discussion of this new concept of property, see Glendon & Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B. C. L. REV. 457 (1979).

[29] Even voluntary mid-career changes are financially prohibitive for most nonprofessional white-collar workers. *See* REPORT OF SPECIAL TASK FORCE TO SECRETARY OF HEALTH, EDUCATION & WELFARE, WORK IN AMERICA 100 (1973) [hereinafter cited as WORK IN AMERICA]. Termination of long-serving employees entails loss of retirement, medical, vacation and other benefits accrued. 54 ST. JOHN'S L. REV., *supra* note 9, at 557.

Job mobility decreases in an economy based on technology. A worker may become technologically tied to a company making the need to start "all over again" a major hurdle. H. VOLLMER, EMPLOYEE RIGHTS AND THE EMPLOYMENT RELATIONSHIP 143 (1960). Change in occupational specialization may entail a risky, long-term investment in retraining. U.S. DEP'TS OF LABOR & HEALTH & HUMAN SERV., EMPLOYMENT & TRAINING REPORT OF THE PRESIDENT 34 (1980).

For older workers, job mobility is much more restricted. *See Age Discrimination in Employment: Hearings Before the Senate Subcomm. on Labor & Public Welfare*, 90th Cong., 1st Sess. (1967); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 1721, THE EMPLOYMENT PROBLEMS OF OLDER WORKERS 10-12 (1971); Ferman & Aiken, *The Adjustment of Older Workers to Job Displacement*, in BLUE-COLLAR WORLD 493 (A. Shostak & W. Gomberg eds. 1965).

Where the employer is the major job provider in a geographic area or market, mobility is further restricted. *See* Freeman v. Eastman-Whipstock, Inc., 390 F. Supp. 685, 690 (S.D. Tex. 1975) (allegation that two companies which dominated the market in several states were blacklisting plaintiff); A. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION 99 (1954) (employer major job provider in geographic area).

Even in a normal context, alternative work may be difficult to procure. The blemish of discharge may further limit reemployment opportunity. Peck, *supra* note 26, at 313-14. Moreover, the opportunity for self-employment in America has steadily declined. WORK IN AMERICA, *supra* this note, at 18-19.

[30] WORK IN AMERICA, *supra* note 29, at 3-8; M. AIKEN, L. FERMAN & H. L. SHEPPARD, ECONOMIC FAILURE, ALIENATION, AND EXTREMISM 2 (1968); P. DRUCKER, THE NEW SOCIETY 47-48 (1950); J. GALBRAITH, THE NEW INDUSTRIAL STATE 156-57 (Rev. ed. 1971). Societal response to a terminated employee may be ostracism of the individual, thus compounding the individual's loss of social status. S. TERKEL, *supra* note 23, at 410.

[31] As stated by Professor Galbraith:

allows employers to inflict substantial harm on employees.

Despite recognized problems with the at will rule, many courts are reluctant to apply the public policy limitation. The traditional public policy limitation restricts only conduct furthering no valid societal objectives.[32] In contrast, the at will rule furthers some worthy societal interests. It promotes both parties' freedom of contract[33] and protects the employer's right to self-management.[34] Also, courts recognize that management's decision to discharge is difficult to review.[35] They fear a flood of litigation[36] arising from judicial creation of a new cause of action founded upon an inherently indefinite principle.[37] Finally, courts reforming the at will rule must oppose the weight of legislative and judicial authority.[38] Some courts, therefore, refuse to act ab-

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> [T]he large corporation . . . endows its members with prestige; it is obviously better to be a General Motors or Western Electric man than an ordinary unattached citizen. The question automatically asked when two men meet on a plane in Florida is, "Who are you with?" Until this is known, the individual is a cipher. He cannot be placed in the scheme of things; no one knows how much attention, let alone respect, he deserves or whether he is worthy of any respect at all. If he is with a well-known corporation—a good outfit—he obviously counts.

J. GALBRAITH, *supra* note 30, at 154. *See also* WORK IN AMERICA, *supra* note 29, at 5. Self-identity with one's occupation is more prevalent among professional and skilled workers. *Id.* at 14.

[32] For illustrations of agreements traditionally violative of public policy, see 14 S. WILLISTON, *supra* note 3, §§ 1629-1629A, at 8-11.

[33] The rule protects the employee's right to resign. *See* Simmons v. Westinghouse Elec. Corp., 311 So. 2d 28, 31 (La. Ct. App. 1975) ("An employee is never presumed to engage his services permanently, thereby cutting himself off from all chances of improving his condition. . . ."); Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 393, 153 N.W.2d 587, 590 (1967).

[34] Percival v. General Motors Corp., 539 F.2d 1126, 1130 (8th Cir. 1976).

[35] Geary v. United States Steel Corp., 456 Pa. 171, 182-83, 319 A.2d 174, 179 (1974); Blades, *supra* note 5, at 1427-31.

[36] *E.g.*, Pierce v. Ortho Pharmaceutical Corp., 166 N.J. Super. 335, 342, 399 A.2d 1023, 1026-27 (1979), *rev'd on other grounds*, 84 N.J. 58, 417 A.2d 505 (1980); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974).

[37] As late as 1977, the Alabama Supreme Court held that a public policy basis is as a matter of law "too nebulous" a standard upon which to modify the at will rule. Hinrichs v. Tranquilaire Hosp., 352 So. 2d 1130, 1131 (Ala. 1977).

[38] "[F]ew legal principles seem to be better settled than the broad generality that an employment for an indefinite term . . . may be terminated at any time by either party for any reason or for no reason at all." Annot., 62 A.L.R.3d 271, 271 (1975).

sent express legislative guidance.[39]

II. A Public Policy Test

The California case of *Petermann v. International Brotherhood of Teamsters, Local 396*[40] was the first to enunciate the public policy limitation of the at will rule.[41] The court established the basic test for determining whether a particular discharge violates public policy. All cases adopting the public policy limitation have at least implicitly employed the *Petermann* test.[42]

Petermann involved a union official fired for refusing to commit perjury before a legislative committee investigating the

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[39] The basis for this reticence is a division of powers argument. These courts look to the legislature to define expressly the public policy of the state. *See* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 179-80, 610 P.2d 1330, 1337-38, 164 Cal. Rptr. 839, 846-47 (1980) (Clark, J., dissenting); Mallard v. Boring, 182 Cal. App. 2d 390, 396, 6 Cal. Rptr. 171, 174-75 (4th Dist. 1960); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 190-98, 384 N.E.2d 353, 361-64 (1978) (Underwood, J., dissenting).

[40] 174 Cal. App. 2d 184, 344 P.2d 25 (2d Dist. 1959).

[41] *Petermann* is a much analyzed case. *See, e.g.*, Simpson, *Contracts*, 35 N.Y.U. L. Rev. 341, 343 (1960) (contract theory analysis); 1977 Wis. L. Rev., *supra* note 8, at 786-87 & 791-93 (public policy analysis); 14 Rutgers L. Rev. 624 (1960); 14 Vand. L. Rev. 397 (1960).

[42] The following jurisdictions in addition to California have accepted the public policy limitation: Connecticut, Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980); District of Columbia, Ivy v. Army Times Publishing Co., No. 79-278 (D.C. App. Mar. 10, 1981); Illinois, Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Indiana, Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Michigan, Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976); New Jersey, Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980); New York, Savodnik v. Korvettes, Inc., 488 F. Supp. 822 (E.D.N.Y. 1980); Oregon, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Pennsylvania, Reuther v. Fowler & Williams, Inc., 255 Pa. Super. Ct. 28, 386 A.2d 119 (1978); West Virginia, Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978).

The following jurisdictions have accepted the limitation in principle: Arizona, Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977); Idaho, Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977); Iowa, Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978); Kentucky, Scroghan v. Kraftco Corp., 551 S.W.2d 811 (Ky. Ct. App. 1977); Montana, Keneally v. Orgain, 606 P.2d 127 (Mont. 1980); Nebraska, Mau v. Omaha Nat'l Bank, 299 N.W.2d 147 (Neb. 1980); Vermont, Jones v. Keogh, 137 Vt. 559, 409 A.2d 581 (1979); Washington, Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 568 P.2d 764 (1977).

union. Citing no precedent, a unanimous court found that the discharge violated public policy and gave rise to a cause of action for retaliatory discharge.

Petermann established a two-prong test for a public policy violation. The first prong asks whether the discharge inflicts a public injury. This first prong adopts the general principle of the law of contracts that "no citizen can lawfully do that which has a tendency to be injurious to the public. . . ."[43] Although individual litigants are before the court, the interest of society is the true object of judicial concern.[44] The second prong asks whether the discharge adversely affects a significant interest or function of the community.[45] Courts will restrict the employer's contract rights only when necessary to protect an objectively important and specific public mandate.

Applying its two-prong test of a public policy violation, the *Petermann* court first found a public injury in the coerced commission of a felonious act.[46] Applying the second prong, the court declared that the employer's conduct contravened a specific societal interest—the integrity and proper administration of

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[43] Petermann v. International Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (2d Dist. 1959) (emphasis omitted) (quoting from Safeway Stores v. Retail Clerks Int'l Ass'n, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953)). For the source of this definition of public policy, see note 6 *supra*.

[44] The special interest afforded a litigant invoking a public policy argument is stated in Elsie v. Evans:

> We are not here concerned with litigation involving purely private rights . . . but are confronted with a situation wherein there is presented the question of whether certain respondents have been subjected to conduct on the part of appellant which it is urged is . . . contrary to the declared public policy of the State of California. In such a case, the courts have full power to afford necessary protection.

Elsie v. Evans, 157 Cal. App. 2d 399, 408-09, 321 P.2d 514, 520 (2d Dist. 1958), *cited in* Glenn v. Clearman's Golden Cock Inn, 192 Cal. App. 2d 793, 796, 13 Cal. Rptr. 769, 771 (2d Dist. 1961), a retaliatory discharge case.

For an analysis of plaintiff's failure to allege no more than a private injury, see text accompanying notes 51-54 *infra*.

[45] Petermann v. International Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (2d Dist. 1959), cites 72 C.J.S. *Policy* 212 (1951): "[W]hatever contravenes good morals or any *established interests* of society is against public policy." (Emphasis added.) This statement is paraphrased from W. STORY, A TREATISE ON THE LAW OF CONTRACTS § 546 (1856).

[46] *See* note 14 *supra*.

public affairs.[47] Thus the court refused to support indirectly conduct injurious to the public welfare.[48]

Since a "public injury" will always result when a "significant societal mandate" is adversely affected, the second prong of the *Petermann* test subsumes the first.[49] Consequently, later courts have usually collapsed the two prongs of the test by simply inquiring whether plaintiff's discharge contravenes a clear societal interest. By applying this modified test to varied fact patterns, courts have expanded the law of retaliatory discharge beyond the context in which it originally arose.[50]

When plaintiff alleges no more than a private injury, courts are careful to keep the two elements of the *Petermann* test separate. They deny employees a cause of action since the public policy limitation does not remedy private harm.[51] Private injury

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[47] Peterman v. International Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (2d Dist. 1959).

[48] "To hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and the employer. . . ." *Id.* at 189, 344 P.2d at 27.

[49] The converse is not true—a public injury does not necessarily entail violation of a societal mandate. This distinction is made clear in Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (4th Dist. 1960). Plaintiff was discharged for serving jury duty. In court she argued that the discharge violated public policy since jury duty is as important a citizen obligation as two statutorily protected civic duties—"political activity" and "serving as an election official." *Id.* at 395-96, 6 Cal. Rptr. at 174-75. The court "heartily" agreed that the three civic duties are of equal societal worth, thus conceding that the discharge inflicted a public injury. *Id.* at 396, 6 Cal. Rptr. at 175. However the court did not find that jury duty was a societal mandate deserving judicial protection. "If public policy requires that this protection should be afforded prospective jurors, we feel it should be done by the Legislature as they have done in the case of election officials." *Id.*

[50] This expansion is the subject of Part III, "THE LAW OF RETALIATORY DISCHARGE," *infra.*

[51] The public policy limitation's interest in preventing only public injury contrasts with the *Monge* rule, which remedies the private injury of the discharged employee. *See* note 9 *supra.* Clearly the *Monge* rule's imposition of a good faith standard on dismissals provides employees with much greater protection than does the public policy limitation. For a variety of cases quite properly denying relief under the limitation which probably would have stated a cause of action under *Monge,* see note 83 *infra.* Indeed, the facts involved in *Monge*—retaliatory discharge of an employee who resisted her supervisor's sexual advances—arguably does not violate a clear mandate of society, despite the widespread occurrence of this abuse. *See* C. MACKINNON, SEXUAL HARRASSMENT

cases fall into two categories. Cases in the first category involve firings which are arguably "wrongful,"[52] but which only affect a wholly private interest.[53] Cases in the second category involve what are in effect good faith dismissals for just cause.[54] In either category of cases, the court never reaches the second prong of the *Petermann* test. The dismissal could not have contravened a societal mandate, since clearly no societal interest could be at stake if no public injury occurred.

III. The Law of Retaliatory Discharge

In attempting to decide whether an employee's firing violates public policy, courts must identify the employee conduct which the employer's action discourages and the societal interest thereby harmed. Courts have applied the public policy limita-

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OF WORKING WOMEN (1979); Comment, *Sexual Harassment in the Workplace: New Rules for an Old and Dirty Game,* this issue at 711.

[52] A "wrongful" discharge is one not done for "just cause." A just cause is one "inherent in and related to the qualifications of the employee or a failure to perform some essential aspect of the employee's job function." Comfort & Fleming Ins. Brokers v. Hoxsey, 26 Wash. App. 172, 177, 613 P.2d 138, 141 (1980). Even an employee with job security can legally be fired for just cause. Larsen v. Motor Supply Co., 117 Ariz. 507, 509, 537 P.2d 907, 909 (Ct. App. 1977).

[53] The most litigated issue involves discharge of an employee-stockholder. Annot., 84 A.L.R.3d 1107 (1978). Courts consistently hold that stock ownership does not *ipso facto* grant an employee greater job security. Becket v. Welton Becket & Assoc., 39 Cal. App. 3d 815, 822, 114 Cal. Rptr. 531, 534-35 (2d Dist. 1974). A plaintiff's rights as an employee are separate from his rights as a stockholder. Webster v. Schauble, 65 Wash. 2d 849, 853, 400 P.2d 292, 294 (1965). Stockholder rights, in turn, are proprietary and hence private in nature. Campbell v. Ford Indus., Inc., 274 Or. 243, 249-50, 546 P.2d 141, 145-46 (1976) (right to inspect corporation's books is a right incident to ownership of corporate assets). Thus violation of a stockholder's interest concerns only the corporation. Marin v. Jacuzzi, 224 Cal. App. 2d 549, 554, 36 Cal. Rptr. 880, 883 (1st Dist. 1964) (even if plaintiff's discharge stemmed from protesting the board's *ultra vires* activity, his relief with the board lay in terms of a derivative suit).

[54] Invariably, employee infraction of a company policy prompted the firing. *See, e.g.,* Larsen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (Ct. App. 1977) (refusal to submit to polygraph test given to all employees); Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977) (participation in unauthorized "Christmas party fund" financed through illicit selling of employer's scrap metal); Trombetta v. Detroit, T. & I. R.R., 81 Mich. App. 489, 265 N.W.2d 385 (1978) (discharge for "insubordination"); Roberts v. Atlantic Richfield Co., 88 Wash. 887, 568 P.2d 764 (1977) (participation in illegal activity on the job).

tion in three contexts. First, the discharge may stem from the worker's refusal to engage in illegal activity at the employer's command. Second, an employee may be terminated for exercising substantive statutory rights granted specifically to employees. Third, when no statute regulates the employee's conduct, the courts may find a public policy violation based solely on common law principles. The courts apply the *Petermann* test in all three situations, though the public policy arises from a different source in each context.

A. Employment Conditioned upon Commission of Unlawful Activity

Conditioning employment upon commission of illegal conduct is a *per se* public policy violation.[55] *Petermann* remains the leading case stating this rule, though courts have applied the rule in various situations.[56] Courts have provided several reasons for creating a common law cause of action in this context. Primarily, a criminal statute embodies the legislature's expression of public policy.[57] Thus both prongs of the *Petermann* test are

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[55] A *per se* rule applies in a given context without having to determine anew whether or not the discharge violates public policy. It contrasts with the case-by-case determination courts must make, absent controlling precedent, in most of retaliatory discharge law.

[56] McNulty v. Borden, Inc., 474 F. Supp. 1111, 1119 (E.D. Pa. 1979) (violation of antitrust laws); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (same); Ivy v. Army Times Publishing Co., No. 79-278 (D.C. App. Mar. 10, 1981) (commission of perjury); Trombetta v. Detroit, T. & I. R.R., 81 Mich. App. 489, 265 N.W.2d 385 (1978) (order to alter pollution control reports); O'Sullivan v. Mallon, 150 N.J. Super. 416, 390 A.2d 149 (1978) (order to x-ray technician to perform catheterization which only a nurse or physician legally could perform); Zinman v. Unemployment Comp. Bd. of Review, 8 Pa. Commw. Ct. 649, 305 A.2d 380 (1973) (wire taps). For an analysis of *Tameny*, see Madison, *The Employee's Emerging Right to Sue for Arbitrary or Unfair Discharge*, 6 EMPLOYEE REL. L.J. 422, 423-26 (1980-81).

The case of Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980) provides an interesting variation. The employer fired the plaintiff, a quality control director, who had protested violations of the state Food, Drug and Cosmetic Act. Violation of the Act was a strict liability crime. Thus, the court felt that plaintiff risked personal criminal liability so long as the defects were not remedied. *See generally* Mooney & Pingpank, *Wrongful Discharge: A "New" Cause of Action?*, 54 CONN. B. J. 213 (1980); McWeeny, *Out of the Fog: A Different View on Retaliatory Discharge*, 54 CONN. B. J. 235 (1980) (reply article by plaintiff-appellant's counsel).

[57] "The public policy of this state as reflected in the penal code. . . ."

always met. In addition, by denying a cause of action, a court paradoxically might indirectly encourage illegal behavior.[58] Finally, the *per se* rule equitably assures aid to employees suffering egregious employer oppression.[59]

B. Termination for Exercising Substantive Employee Rights

A cause of action lies for termination in retaliation for exercising a substantive employee statutory right.[60] This rule is a logical extension of the *Petermann* test to a new context of employee conduct. Statutory law is a state's primary source of public policy.[61] Here, the legislature deems it in the public interest to alter the employment relationship by granting substantive entitlements to the employee.[62] The employer thwarts the legis-

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Petermann v. International Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 189, 344 P.2d 25, 27 (2d Dist. 1959); Trombetta v. Detroit, T. & I. R.R., 81 Mich. App. 489, 495, 265 N.W.2d 385, 388 (1978) ("[T]he public policy of this state does not condone attempts to violate its duly enacted [criminal] laws.").

[58] *See* note 48 *supra*.

[59] Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 178, 610 P.2d 1330, 1336, 164 Cal. Rptr. 839, 845 (1980).

[60] *See* note 15 *supra*.

[61] *See, e.g.*, Building Serv. Employees Int'l Union, Local 262 v. Gazzam, 339 U.S. 532, 537-38 (1949) ("The public policy of any state is to be found in its constitution, acts of the legislature, and decisions of its courts. 'Primarily it is for the lawmakers to determine the public policy of the State.' "); Harris v. Harris, 424 F.2d 806, 811-12 (D.C. Cir.), *cert. denied*, 400 U.S. 826 (1970).

The legislature has the prerogative to guide the courts in determining the public concerns of the community. Kinney Loan & Fin. Co. v. Sumner, 159 Neb. 57, 67, 65 N.W.2d 240, 249 (1954). *But see* Satter, *supra* note 7, at 240-42 (legislature attempting to shift public policy-making of politically sensitive issues to the courts). Courts have the corresponding duty to follow, where constitutional and equitable, the intent of the legislature. Landgraves v. Emanuel Charity Bd., 203 Or. 489, 280 P.2d 301 (1955).

[62] A variety of state and federal statutory law restricts the grounds upon which an employer may discharge an employee. *See, e.g.*, CAL. LABOR CODE § 1102 (West 1971) (prohibition of discharge for political reasons); CONN. GEN. STAT. § 31-379 (1975) (penalty imposed on employer who discharges an employee for reporting violation of state employee safety codes); FLA. STAT. ANN. § 448.03 (Supp. 1977) (discharge of employee for trading or failing to trade with particular firms or persons); 18 PA. CONSOL. STAT. ANN. § 7321(a) (Purdon 1973) (misdemeanor for employer to condition employment upon employee's taking a polygraph test). For a detailed listing of state laws regulating the employment relationship, see 4 LAB. REL. REP. (BNA) 1:35-:52 (1980). For a more extensive listing of legislative protections than provided here, see 22 BUFF. L. REV., *supra* note 9, at 1090-93; 26 HASTINGS L.J., *supra* note 3, at 1446-47; 54

lative mandate by using the threat of discharge to prevent the employee from exercising the right. Since under the "collapsed" *Petermann* test contravention of a societal mandate entails a public injury, both elements of the test are satisfied.[63]

Clearly a cause of action lies where a pertinent statute expressly protects the employee from retaliatory measures for exercising the entitlement.[64] In addition, courts readily imply a cause of action where the statute explicitly declares a public policy conferring particular benefits upon employees.[65]

Absent an express statutory directive, courts face various problems in ensuring employees free exercise of their statutorily conferred rights. The lack of statutory language may imply that the legislature wished to deny individual employees a cause of

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ST. JOHN'S L. REV., *supra* note 9, at 558-60; 1977 WIS. L. REV., *supra* note 8, at 784-85.

[63] *See* text accompanying note 49 *supra*.

[64] *See, e.g.*, Kouff v. Bethlehem-Alameda Shipyard, 90 Cal. App. 2d 322, 202 P.2d 1059 (1st Dist. 1949) (employer cannot discriminate against worker who serves as election officer on election day); LoDolce v. Regional Transit Serv., Inc., 77 A.D.2d 697, 429 N.Y.S.2d 505 (1980) (express statutory protection of employees who utilize workers' compensation scheme); Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979) (statute prohibiting employer use of polygraph tests).

Legislation protecting employee conduct by providing the employee with a private remedy deprives the plaintiff of a public policy cause of action. The plaintiff must sue under the statute alone. *See, e.g.*, McCluney v. Jos. Schlitz Brewing Co., 489 F. Supp. 24 (E.D. Wis. 1980) (male employee must sue under statute where fired for opposing employer's sex discrimination toward female employees); Schroeder v. Dayton-Hudson Corp., 448 F. Supp. 910, 917 (E.D. Mich. 1977) (plaintiff claiming age and/or sex discrimination must pursue her statutory remedies); Walsh v. Consolidated Freightways, Inc., 278 Or. 347, 351-53, 563 P.2d 1205, 1208-09 (1977) (safety complaint).

[65] *E.g.*, the California Labor Code grants employees the right of self-organization free from employer coercion or restraint as "the public policy of this State. . . ." CAL. LABOR CODE § 923 (West 1971). Courts construe such language as granting an employee discharged for unionizing activities a cause of action. Glenn v. Clearman's Golden Cock Inn, 192 Cal. App. 2d 793, 796-97, 13 Cal. Rptr. 769, 771 (2d Dist. 1961).

Of course, express constitutional guarantees of employee rights similarly imply a cause of action if the worker is discharged for exercising such a right. *See* Daniel v. MAGMA Copper Co., 620 P.2d 699 (Ariz. Ct. App. 1980) (workers' compensation benefits); Smith v. Arthur C. Baue Funeral Home, 370 S.W.2d 249 (Mo. 1963) (right to unionize); Cooper v. Nutley Sun Printing Co., Inc., 36 N.J. 189, 175 A.2d 639 (1961) (same).

action.[66] Another difficulty is the at will rule itself.

Frampton v. Central Indiana Gas Co.,[67] decided in 1973, was the first case to find a public policy violation in this context of employee conduct. *Frampton* involved an employee discharged for filing a workers' compensation claim.[68] Lacking express legislative guidance, the court relied upon attenuated arguments to imply a cause of action based upon alternate holdings. The first holding involved statutory construction. The court held that the discharge constituted an employer "device" to escape obligations under the act.[69] The second holding, based in part upon an analogy to retaliatory eviction law, found the employer conduct to be an "unconscionable," . . . "intentional, wrongful act. . . ."[70] Other jurisdictions have not found the unsophisticated *Frampton* analysis persuasive precedent.[71]

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[66] *E.g.*, in Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 179-80, 384 N.E.2d 353, 358 (1978), the workers' compensation statute provided only criminal punishment for employer infractions, thus arguably barring a civil remedy. In Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976), the workers' compensation statute prohibited only "consistent discharges" of employees who filed claims, while plaintiff claimed a cause of action based solely upon her retaliatory dismissal.

[67] 260 Ind. 249, 297 N.E.2d 425 (1973).

[68] For the state of the law prior to *Frampton*, see Blumrosen, *The Right to Seek Workmen's Compensation*, 15 RUTGERS L. REV. 491 (1961); Annot., 63 A.L.R.3d 979, 983-85 (1975).

The vast majority of cases finding a public policy violation in this context involve employees discharged for filing workers' compensation claims. One court has also found a public interest in protection of pension rights. In Savodnik v. Korvettes, Inc., 488 F. Supp. 822 (E.D.N.Y. 1980), a "model" employee of thirteen years was terminated "virtually at the eleventh hour," thereby being deprived of benefits. *Id.* at 826. After much talk of a good faith standard, *id.* at 824-25, the court finally found a public policy violation. *Id.* at 826. The Ninth Circuit, dealing with a less than exemplary employee, reached the opposite conclusion on very similar facts. *See* Moore v. Home Ins. Co., 601 F.2d 1072 (9th Cir. 1979) (applying Arizona law).

[69] Frampton v. Central Ind. Gas Co., 260 Ind. 249, 252, 297 N.E.2d 425, 428 (1973).

[70] *Id.* at 252-53, 297 N.E.2d at 428.

[71] Neither holding of *Frampton* is necessarily persuasive outside of Indiana. Other jurisdictions without the term "device" in their statute can easily distinguish the decision. *See, e.g.*, Loucks v. Star City Glass Co., 551 F.2d 745, 749 (7th Cir. 1977) (applying Illinois law). *But see* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 182, 384 N.E.2d 353, 357 (1978).

Frampton's second holding does not provide an analytical basis upon which to find a public policy violation. Ruling the employer's act "unconscionable"

Five years after *Frampton,* the Illinois Supreme Court in *Kelsay v. Motorola, Inc.,*[72] bridged the gap between the grant of a statutory entitlement and judicial protection for its exercise.[73] Like *Frampton, Kelsay* involved an employee discharged for filing a workers' compensation claim. The court found that the workers' compensation system was a comprehensive regulatory scheme with the principal aim of benefiting employees.[74] Be-

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only attests to an inequitable act. A later Indiana court declined even to apply a public policy analysis to an employee discharged for protesting alleged misconduct in the employer's manufacture of drugs. The court stated, "[W]e conclude from *Frampton* that in order to fall within a recognized exception to the employment at will rule, a plaintiff must demonstrate that he was discharged in retaliation for either having exercised a statutorily conferred personal right or having fulfilled a statutorily imposed duty in order to state a claim upon which relief may be granted." Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1061 (Ind. Ct. App. 1980).

The following courts have refused to follow *Frampton:* Blevins v. General Elec. Co., 491 F. Supp. 521, 525 (W.D. Va. 1980) (refused to make new law in West Virginia); Segal v. Arrow Indus. Corp, 364 So. 2d 89 (Fla. Dist. Ct. App. 1978); Stephens v. Justiss-Mears Oil Co., 300 So. 2d 510 (La. Ct. App. 1974) (*Frampton* distinguished though statutory language identical); Kelly v. Mississippi Valley Gas Co., No. 52,337 (Miss. Feb. 4, 1981) (*Frampton* distinguished as relying upon statutory interpretation); Dockery v. Lampart Table Co., 36 N.C. App. 293, 295-96, 244 S.E.2d 272, 274-75 (distinguished *Frampton* on ground that North Carolina has no retaliatory eviction law), *cert. denied,* 295 N.C. 465, 246 S.E.2d 215 (1978). For a critical analysis of *Dockery,* see Note, *Workmen's Compensation—No Private Right of Action for Retaliatory Discharge in North Carolina,* 15 WAKE FOREST L. REV. 139 (1979).

Most commentators responded enthusiastically to *Frampton.* One such response is provided in Lambert, *Workmen's Compensation,* 35 AM. TRIAL LAW. A. L.J. 132, 153 (1974): "[*Frampton*] is one of the most important decisions ever handed down to strengthen the employee's armamentarium of remedies against a vengeful employer who fires the employee for his shameless temerity in claiming the compensation remedy which the legislature has ordained as his rightful redress for work-related injuries."

The following courts adopt *Frampton* in finding a public policy limitation for discharge for filing a workers' compensation claim: Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976); Lally v. Copygraphics, 173 N.J. Super. 162, 413 A.2d 960 (1980); Brown v. Tanscon Lines, 284 Or. 597, 588 P.2d 1087 (1978).

[72] 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

[73] *Kelsay* is a much analyzed case. *See, e.g.,* Note, Kelsay v. Motorola, Inc. *—Illinois Courts Welcome Retaliatory Discharge Suits Under the Workmen's Compensation Act,* 1980 U. ILL. L. FORUM 839; 29 DEPAUL L. REV. 561 (1980); 12 JOHN MARSHALL J. PRAC. & PROC. 659 (1979); 1979 So. ILL. U. L.J. 563.

[74] Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 180-81, 384 N.E.2d 353, 356 (1978). In analyzing the comprehensiveness of the regulation, the court noted

cause of the sheer size of this protected class, the system's proper functioning benefited the state as a whole and thus furthered "a sound public policy."[75]

The court then found that plaintiff's discharge violated the state's public policy. It noted that few employees would pursue their statutory entitlement if it meant losing their job.[76] Therefore, the employer's conduct vitiated the legislative design to alter the employment relationship. The court reasoned that a judicially created cause of action was necessary to further the legislative intent.[77]

Courts should find the reasoning in *Kelsay* persuasive. *Kelsay* logically applies not only to workers' compensation systems in all states,[78] but also to other regulatory schemes conferring substantive rights on employees.[79] In addition, by relying upon a "legislative intent" argument, *Kelsay* provides nonactivist courts

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two factors. First is that the act preempts the previous common law system. The legislature thereby deprived the employer of "the right to plead numerous common law defenses." *Id.* at 180, 384 N.E.2d at 356. Second, the essence of the new scheme is a delicate compromise between employer liabilities and employee rights. The employer is obligated to no more than a fixed level of damages, while the employee is guaranteed a remedy regardless of fault. *Id.* The first factor evidences strong legislative interest in the workers' compensation system. The second factor suggests the need for heightened judicial scrutiny to ensure successful maintenance of the legislative compromise.

[75] *Id.* at 181, 384 N.E.2d at 356.

[76] *See* note 16 *supra.*

[77] Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 181-82, 384 N.E.2d 353, 358 (1978); *accord* Lally v. Copygraphics, 173 N.J. Super. 162, 413 A.2d 960 (1980). The New Jersey statute subjected an employer to criminal prosecution for discharging an employee who filed a workers' compensation claim. N.J. STAT. ANN. § 34:15-39.1 (West Supp. 1980). The court concluded, however, that the statutory remedies were insufficient to deter employer retaliatory discharges. The court therefore implied a public policy cause of action for compensatory and punitive damages. The employee may elect which remedy to pursue. 173 N.J. Super. at 178-82, 413 A.2d at 968-69.

[78] The general applicability of *Kelsay's* analysis contrasts with *Frampton,* which relied upon the precise wording of the state's statute. *See* note 71 *supra.*

[79] 1980 U. ILL. L. FORUM, *supra* note 73, at 865. For an application of the *Kelsay* analysis implying a public policy cause of action in a different statutory scheme, see Mantague v. George J. London Memorial Hosp., 78 Ill. App. 3d 298, 302-03, 396 N.E.2d 1289, 1292-93 (1979) (cause of action found where patient's rights under the state's Mental Health Act were violated). *But see* Rozier v. St. Mary's Hosp., 88 Ill. App. 3d 994, 998, 411 N.E.2d 50, 53 (1980), restricting *Kelsay's* public policy limitation to discharge for filing a workers' compensation claim.

with a conservative basis for modifying the at will rule.

C. Public Policy Limitations Grounded Solely in the Common Law

In this context courts must derive any cause of action solely from common law analysis. No relevant statutory expression of public policy protects the employee. Thus courts face difficult analytical obstacles in trying to decide, without clear legislative guidance, whether a dismissal contravenes a societal mandate.[80]

In a variety of situations, courts find that no public interest is present. Various rationales support these decisions. Some courts blindly adhere to the at will rule.[81] Others find that the policy supporting management's unconstrained power to fire employees outweighs society's interest in preventing the discharge.[82] Finally, most courts quite properly find no societal mandate contravened by the discharge.[83]

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[80] As stated by the Supreme Court of Oregon, "At least some portions of the bench and bar are of the opinion that the court has been too unrestrained" in its exercise of its common law prerogative. Nees v. Hocks, 272 Or. 210, 215 n.1, 536 P.2d 512, 514 n.1 (1975).

[81] *See, e.g.*, Hinrichs v. Tranquilaire Hosp., 352 So.2d 1130 (Ala. 1977) (hospital employee refused to falsify medical reports). For analysis of the at will doctrine in Alabama, see 31 ALA. L. REV., *supra* note 3, at 446-56.

[82] *See, e.g.*, Percival v. General Motors Corp., 400 F. Supp. 1322 (E.D. Mo. 1975), *aff'd*, 539 F.2d 1126 (8th Cir. 1976); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974).

Geary involved a salesman fired for protesting the planned marketing of an unsafe product. A narrow majority accepted in principle the public policy limitation but refused to grant plaintiff a cause of action. Commentators roundly criticize the decision. *See, e.g.*, D. EWING, *supra* note 25, at 219-20; Summers, *supra* note 1, at 481; 1977 WIS. L. REV., *supra* note 8, at 799-802.

[83] *See, e.g.*, Daniel v. MAGMA Copper Co., 620 P.2d 699 (Ariz. Ct. App. 1980) (employee discharged for suing employer); Abrisz v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978) (employee in a position of trust made false statements concerning the employer in supporting fellow employee's claim for unemployment benefits); Scroghan v. Kraftco Corp., 551 S.W.2d 811 (Ky. Ct. App. 1977) (discharge for attending law school at night); Keneally v. Orgain, 606 P.2d 127 (Mont. 1980) (salesman fired for complaining of inadequate repair service in his sales area); Chin v. American Tel. & Tel. Co., 96 Misc. 2d 1070, 410 N.Y.S.2d 737 (1978) (employee fired for having committed crime outside of work); Yaindl v. Ingersoll-Rand Co. Stand. Pump-Aldrich Div., 422 A.2d 611 (Pa. Ct. App. 1980) (engineer ordered by company to investigate product was terminated by manufacturer department manager who disliked plaintiff's recommendations); Jones v. Keogh, 137 Vt. 559, 409 A.2d 581 (1979) (discharge for arguing over vacation time and sick leave); Ward v. Frito-

Several of these cases are poorly reasoned. In two cases employers fired workers who reported to the police unlawful activities by co-workers.[84] Neither court found grounds for a public policy limitation. Since curtailing crime is obviously a matter of strong public concern,[85] these cases exhibit an extreme lack of sensitivity to the public benefit derived from the employees' whistle blowing. In another case, the employer terminated an employee who protested fraudulent corporate dealings with the federal government.[86] The court apparently found both parties' interests to be equally significant.[87] It then held for the employer, apparently assuming that the public interest must outweigh the private interest in order to overcome the at will rule. However, the public policy limitation presumes that any established public interest should override private contract rights.[88] Thus the court here was in error.

Three cases establish important new principles in this area of retaliatory discharge law. They provide different analyses to determine whether or not a public mandate is present. These methodological advances should facilitate development of this most amorphous area of the law.

In 1975, the Oregon Supreme Court in *Nees v. Hocks*[89] held that the discharge of an employee for serving jury duty gave rise to the cause of action for retaliatory discharge. The court looked to language in the state constitution and statements of the legis-

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Lay, Inc., 95 Wis. 2d 372, 290 N.W.2d 536 (1980) (employees fired for living together though not married, a fact which caused "dissension" at the plant).

[84] Palmateer v. International Harvester Co., 85 Ill. App. 3d 50, 406 N.E.2d 595 (1980); Martin v. Platt, 68 Ind. Dec. 258, 386 N.E.2d 1026 (Ind. Ct. App. 1979).

[85] "The express purpose of the Criminal Code is to investigate criminal activity and to apprehend criminals. Any obstruction of that purpose clearly obstructs public policy and must be removed. If allowed to go unchecked it will destroy the entire framework of justice." Palmateer v. International Harvester Co., 85 Ill. App. 3d 50, 58, 406 N.E.2d 595, 601 (1980) (Barry, J., dissenting). *See also* 1977 WIS. L. REV., *supra* note 21, at 777-78.

[86] Percival v. General Motors Corp., 539 F.2d 1126 (8th Cir. 1976).

[87] *Id.* at 1130.

[88] "The doctrine of abusive discharge . . . is implied by operation of law as an additional condition of the contract similar to the restrictions imposed by the Equal Employment Opportunity provisions of the Civil Rights Act of 1964. . . ." Chin v. American Tel. & Tel. Co., 96 Misc. 2d 1070, 1075, 410 N.Y.S.2d 737, 740 (1978). *See also* note 6 *supra*.

[89] 272 Or. 210, 536 P.2d 512 (1975).

lature and sister courts to determine the objective societal interest in the proper functioning of the jury system.[90] It determined that the jury system ranks "high on the scale of American institutions and citizen obligations."[91] Thus the employer's conduct caused public harm[92] which justified awarding damages to the at will employee.[93]

Three years later, in *Harless v. First National Bank*,[94] the West Virginia Supreme Court granted a cause of action to a bank employee fired for protesting employer violations of the state's Consumer Credit and Protection Act.[95] The case is unique because the court ruled in favor of an employee discharged for trying to aid third parties, bank credit consumers. The court found a public policy violation even though the employee had acted solely from a sense of moral duty and not to protect his personal interests.

The court examined the state act to determine whether protection of credit consumers constituted "a substantial public policy principle."[96] It looked at two factors: the size of the protected class and the comprehensiveness of the statutory scheme. The large size of the protected class implied that the act benefited the entire state.[97] The comprehensive regulation evidenced strong legislative concern for the act's successful implementation. Thus the court concluded that plaintiff's action furthered the state's public policy of protecting credit consumers.[98]

The 1980 New Jersey Supreme Court case of *Pierce v. Ortho Pharmaceutical Corporation*[99] involved discharge of a physician for refusing to certify an arguably dangerous drug for human testing.[100] The court held that codes of professional conduct

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[90] *Id.* at 218-19, 536 P.2d at 516.

[91] *Id.* at 219, 536 P.2d at 516.

[92] *Id.* at 216, 536 P.2d at 515.

[93] *Nees* has been followed on similar facts in Reuther v. Fowler & Williams, Inc., 255 Pa. Super. Ct. 28, 386 A.2d 119 (1978).

[94] 246 S.E.2d 270 (W. Va. 1978).

[95] W. Va. Code §§ 46A-1-101 to -8-102 (West 1980).

[96] Harless v. First Nat'l Bank, 246 S.E.2d 270, 276 (W. Va. 1978).

[97] The act protects "the vast majority of our adult citizens." *Id.*

[98] *Id.*

[99] 84 N.J. 58, 417 A.2d 505 (1980).

[100] Dr. Pierce's story is told in Kurtz, *Asserting Professional Ethics against Dangerous Drug Tests*, in A. Westin, *supra* note 19, at 107-17. For analysis of the case, see Feliu, *supra* note 17, at 180-87.

could be sources of public policy.[101] However, it concluded that plaintiff alleged no more than a controversy among experts and dismissed her claim.[102]

Courts should adopt the legal analyses of these three cases. *Nees* provides what may be termed a "protected institution" analysis. The *Nees* court looked to the community's legal institutions to find a strong societal interest in a successfully functioning jury system.[103] *Harless, Pierce* and possibly *Kelsay* provide a "protected class" analysis. All three cases found a strong societal interest in the regulation of the class based upon the comprehensive nature of the statutory coverage. Further, in *Harless* and *Kelsay,* the sheer size of the protected class suggested that the statute's conferred benefit promoted the welfare of the entire state. This "protected class" analysis of *Kelsay* offers an alternative explanation to the "legislative directive" analysis provided earlier.[104]

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[101] The court listed the following sources of public policy: "[L]egislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy." Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 417 A.2d 505, 512 (1980). This marks the first judicial approval of the notion that both administrative rules and professional codes of conduct are possible sources of public policy. However, the court immediately qualified these sources. It doubted the sufficiency of a public policy statement either in an administrative regulation concerned with technical matters or in provisions of a code of ethics designed to serve only the interests of a profession. In looking to these two sources, then, courts must make a case-by-case determination. *Id.*

[102] *Id.* at 74-75, 417 A.2d at 513. The majority feared that awarding plaintiff a cause of action on these facts would impair medical research. *Id.* at 74-76, 417 A.2d at 513-14. It noted in particular that the risk of the drug (saccharin) was controversial and uncertain. *Id.* at 74, 417 A.2d at 513. Also, there was no immediate danger of human injury since no testing could occur without prior Federal Drug Administration approval. *Id.*

[103] *See* text accompanying note 90 *supra.* The court summarized its reasoning as follows:

> These actions by the people, the legislature and the courts clearly indicate that the jury system and jury duty are regarded as high on the scale of American institutions and citizen obligations. If an employer were permitted with impunity to discharge an employee for fulfilling her obligation of jury duty, the jury system would be adversely affected. The will of the community would be thwarted.

Nees v. Hocks, 272 Or. 210, 219, 536 P.2d 512, 516 (1975).

[104] *See* text accompanying notes 72-79 *supra.*

Harless and *Kelsay* use quite similar analyses to derive a societal interest from the respective statutory schemes. Both noted that the act in question

Nees, Harless and *Pierce* expand the social philosophy of retaliatory discharge law. They extend the public policy limitation beyond the immediate scope of the employment relationship. They do this by allowing an employee to challange wrongful activity by employers not only *qua* employee, but as citizen,[105] moral being[106] and professional.[107]

CONCLUSION

A growing minority of jurisdictions provide at will employees in the private sector a cause of action where their retaliatory discharge violates public policy. Courts use the public policy limitation to protect society from unscrupulous employers who use the threat of discharge to coerce employees into societally harmful conduct. After twenty-two years, this common law reform of the at will rule has developed sufficiently to allow a comprehensive understanding of the law.

This comment urges adoption of the public policy limitation and proposes a framework upon which to organize the case law. It reviews the types of employee conduct that warrant judicial protection. It analyzes the various sources that courts look to in determining whether or not the discharge causes a public policy violation. Finally, it distinguishes between the rigid, *per se* aspects of the law and the areas open for growth in the future.

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constituted a comprehensive attempt to regulate a field. Harless v. First Nat'l Bank, 246 S.E.2d 270, 275-76 (W. Va. 1978); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 180, 384 N.E.2d 353, 356 (1978). The comprehensive nature of the coverage implied a strong legislative interest in the area regulated. Similarly, both legislative schemes protected a significant segment of the state's population. *Harless*: 246 S.E.2d at 275-76; *Kelsay:* 74 Ill. 2d at 181, 384 N.E.2d at 356. The sheer size of the class suggested that the public welfare of the state was at stake. Finally, the court in *Harless* noted that the act's strong enforcement measures emphasized the legislative intent in the success of the desired protection. 246 S.E.2d at 275-76.

Both cases issued in 1978—*Harless* on July 14, and *Kelsay* on December 4. *Kelsay* does not mention *Harless,* and the similarity of analysis of the two cases is all the more remarkable if each was written in ignorance of the other.

[105] Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

[106] Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978). *Accord,* Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 477, 427 A.2d 385, 388 (1980) (At will employees "are entitled to a modicum of judicial protection when their conduct as good citizens is punished by their employers.").

[107] Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980).

Hopefully, it will further coherent development of the public policy limitation.

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