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The Public Policy Exception to Employment at Will—When Should Courts Defer to the Legislature?

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The Public Policy Exception to Employment at Will—When Should Courts Defer to the Legislature?

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In recent years, the traditional common law rule that an employer could terminate an employee "for good cause, for no cause or even for cause morally wrong,"¹ known as employment at will, has come under attack.² To temper what they perceived as harsh and unjust results from the rigid application of an anachronistic rule,³ courts and legislatures carved out a variety of exceptions to the at will employment doctrine. The decline of this venerable doctrine has not been without side-effects; the exceptions have sacrificed the stability, predictability, and economic efficiency the rule provides.⁴

¹ Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), overruled on other grounds, Hutton v. Watters, 179 S.W. 134 (Tenn. 1915).

Professor Epstein has observed that [t]he simplest, and for some the most persuasive defense [of employment at will] is that the terms of an employment contract are the business of only the parties to it. Freedom of contract on this matter is no different from freedom of speech or freedom of action. Unless and until the contract in question poses the threat of harm to third parties . . . or is procured by fraud or sharp practice, then each person is his or her own best judge both of the private costs incurred by contracting and of the private benefits obtained from that contract. Individuals have the best knowledge of their own preferences and have the strongest possible motivation to make the best deal for themselves. A desirable contract is one in which each party to the agreement regards himself or herself as better
The American employment at will rule has been modified via statutory and judicial fiat.\(^5\) Congress and state legislatures have narrowed the at will rule through a variety of statutes, most of which seek to remedy discrimination of one form or another.\(^6\) By far, the most widely recognized juridical limitation on the rule is the public policy exception,\(^7\) which generally provides that an employer may not discharge an at will employee "if the purpose and intent is to frustrate and subvert clear public policy."\(^8\) Courts have struggled to define and determine what amounts to "clear public policy," utilizing an array of sources and theories. In determining the public policy for a particular jurisdiction, courts have sometimes disregarded or altered the legislature's intended remedy for a particular offense or action. Whether such disregard amounts to a usurpation of legislative authority is the focus of this Article.

\(^5\) Although most would agree that a trend away from employment at will exists, exactly how much the once venerable doctrine has eroded is subject to differing opinion. At least one attempt has been made to empirically measure the decline. The study, analyzing California case law, found the purported demise of the at will rule to be overstated. Lewis L. Maltby, The Decline of Employment At Will—A Quantitative Analysis, 41 LAB. L.J. 51 (1990).


\(^7\) Frank J. Cavico, Employment at Will and Public Policy, 25 AKRON L. REV. 497, 497 (1992)("The most widely-accepted and expansive approach employed by the courts emerges as the 'public policy' exception."); Brad Seligman, At-Will Termination: Evaluating Wrongful Discharge Actions, TRIAL, Feb. 1983, at 60, 61 ("The public policy limitation on at-will terminations is the most widely accepted of the new wrongful discharge causes of action."). See generally Note, Public Policy Exception, supra note 2 at 1931; Marsha Weisburst, Note, Guidelines for a Public Policy Exception to the Employment at Will Rule: The Wrongful Discharge Tort, 13 CONN. L. REV. 617 (1981); Brian F. Berger, Note, Defining Public Policy Torts in At-Will Dismissals, 34 STAN. L. REV. 153 (1981).

\(^8\) UNJUST DISMISSAL, supra note 2, at § 1.01.
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II. EMPLOYMENT AT WILL

A. History and Background

The concept of employment at will is unique to American civil jurisprudence.9 Originally, American courts and commentators relied heavily on English common law precedent, holding that the relationship between an employer and employee was one of master-servant.10 The English rule relied on by American courts stated that an employment contract of indefinite duration, absent reasonable cause for discharge, was presumed to extend for one year.11

9. For an excellent discussion of the history of employment at will, see Jay M. Feinman, The Development of the Employment at Will Rule, 20 Am. J. Legal Hist. 118 (1976). See also Janice R. Bellace, A Right of Fair Dismissal: Enforcing a Statutory Guarantee, 16 U. Mich. J.L. Rev. 207, 208-09 (1983)("The United States stands virtually alone among Western industrialized countries in failing to provide a remedy for employees wrongfully dismissed. . . . [T]he American practice of not guaranteeing workers a right of fair dismissal diverges from that of other industrialized countries."). Indeed, Canada and most Western European countries have enacted protections against "socially unwarranted dismissals." These protections include requirements of significant periods of notice prior to discharge (e.g., Canada, Germany and Italy), shifting of the burden onto the employer to prove that a discharge is for legitimate reasons (e.g., Great Britain), and mandated predismissal hearings (e.g., France). See generally Samuel Estreicher, Unjust Dismissal Laws: Some Cautionary Notes, 33 Am. J. Comp. L. 310, 311-23 (1985); Herbert L. Sherman, Jr., Reinstatement as a Remedy for Unfair Dismissal in Common Market Countries, 29 Am. J. Comp. L. 467 (1981).

10. However, court holdings were hardly uniform. UNJUST DISMISSAL, supra note 2, at § 2.03.

11. Blackstone articulated the English rule as:

If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the

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By the late nineteenth century, the English rule was displaced and the concept of employment at will was born. The genesis of the so-called American rule can be traced to Horace Gay Wood’s treatise on the law of master and servant. According to Wood, an employment contract was presumed to be terminable at will unless its duration had been specified by the parties. Although Wood’s formulation of the rule lacked authority and was an apparent departure from prior case law, at will employment was welcomed by American courts for its laissez-faire, free-market approach to employment contractual relationships.

Recently, however, courts have found that an inflexible application of the at will rule sometimes causes harsh results. The employment at will rule has suffered a barrage of criticism, as scholars have questioned the continued validity and viability of the rule in the modern workplace. To remedy this perceived injustice, courts and legislatures began devising creative exceptions to the rule.

B. Chipping Away at Employment at Will

As commentators began to question the merits of employment at will, courts discovered means of circumventing the doctrine through the use of common law theories. Although a number of different

revolutions of the respective seasons, as well when there is work to be done as when there is not.

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 425 (21st ed. 1847).

12. HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877). Wood wrote that:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof.... It is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.

*Id.*, at § 134, at 272.


15. Probably the first article to seriously question the validity of employment at will was Blades, supra note 2.

16. It is disputed when exactly the first case to modify the at will rule came down. Some, including Professor Larson, believe that Kouff v. Bethlehem-Alameda Shipyard, Inc., 202 P.2d 1059 (Cal. Ct. App. 1949), was the first to signal that
exceptions to the traditional rule have evolved,17 these exceptions can generally be categorized as sounding in either contract or tort.18

1. Contract Theories

Contract-based exceptions to employment at will have generally arisen in two contexts: (1) where courts are willing to infer obligations against an employer arising from employer representations or conduct; and (2) where courts imply in law a specific duty of good faith and fair dealing in the performance and enforcement of the employment contract.

a. Implied-in-Fact

A number of courts have evaded the restrictions of the at will rule by implying a contractual term that prevents an employer from discharging an employee except for good cause, based upon the acts and conduct of the parties, and interpreted in light of the surrounding circumstances. This theory rests on the traditional underpinnings of contract jurisprudence.

Although once uniformly rejected,19 a number of jurisdictions have embraced the doctrine of promissory estoppel in the context of employment cases.20 Generally, promissory estoppel is invoked in situa-
tions where employees have detrimentally relied upon promises of initial employment and job security made by the employer.21 In job security cases, courts are more likely to find implied contracts when the plaintiff is a professional or management level, tenured employee.22

Courts have also looked to collateral sources such as employee handbooks and oral representations to find implied contractual obligations. Declarations made in personnel materials, such as employment applications and interoffice memoraanda, have been held to bind the employer to promises regarding job security or discharge procedures.23

b. Good Faith and Fair Dealing

Several courts have departed from the at will rule by holding that a duty of good faith and fair dealing is implied in employment contracts.24 This exception to the traditional rule mandates that neither party to the employment agreement will do anything that will impair

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22. See A fight over the freedom to fire, BUS. WK., Sept. 20, 1982, at 116 (professional and management level employees gain most from expansion of implied contract doctrine).

Ironically, the exception for breaching the covenant of good faith and fair dealing suffers from the same problem as the public policy exception in that it is not easily defined. See Robert S. Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 VA. L. REV. 195, 262-63 (1968)("Good faith "functions to rule out many different forms of bad faith . . . [and] any general definition of good faith, if not vacuous, is sure to be unduly restrictive, especially if cast in statutory form.").
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the right of the other to receive the benefits of the agreement.25

For example, in the oft-cited Pugh v. See's Candies, Inc.,26 the
court held that an employee who was abruptly terminated after thirty-
two years of service with the employer could maintain an action for
breach of the implied covenant of good faith and fair dealing. The
court noted the longevity of the plaintiff's service and an implied
promise by the employer to refrain from acting arbitrarily in dealing
with its employees as the basis for the covenant.27

Some courts have found authority for this exception in the Uniform Commercial Code28 and the Restatement (Second) of Contracts.29
However, perhaps due to the potential breadth of the exception, a
number of jurisdictions still refuse to judicially impose a duty of good
faith and fair dealing in the employment context.30

2. Tort Theories

Tort-based attempts to abrogate employment at will are often pre-
ferred over contract theories by discharged employees, primarily be-
cause of the greater potential for large damage awards under tort
law.31 The most widely accepted tort-based limitation on the at will
rule is the public policy exception.32 This limitation focuses on the
concept that basic public policy overrides the freedom of contract em-
obody in the traditional at will rule. The public policy exception, the
focus of this Article, is explored in greater detail in Part III.

26. Id. at 926-27.
31. UNJUST DISMISSAL, supra note 2, at § 3.02. This, of course, includes punitive dam-
ages where available. See, e.g., Swanson v. Eagle Crest Partners, 805 P.2d 727 (Or.
Ct. App. 1991); Roberts v. Ford Aerospace & Communications Corp., 274 Cal.
32. See supra note 7 and accompanying text. However, several states have bucked
the trend, refusing to recognize a public policy exception. Hinrichs v. Tranqui-
laire Hosp., 352 So. 2d 1130 (Ala. 1977); DeMarco v. Publix Super Markets, Inc.,
384 So. 2d 1253 (Fla. 1980); Troy v. Interfinancial, Inc., 320 S.E.2d 872 (Ga. Ct.
App. 1984); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); Mur-
III. THE PUBLIC POLICY EXCEPTION TO THE AT WILL RULE

A. Generally

The cause of action for wrongful or retaliatory discharge in violation of public policy gained prominence in the seminal case Petermann v. International Brotherhood of Teamsters. Therein, the plaintiff was employed by the defendant labor union on an at will basis. The plaintiff alleged that he was ordered by his employer to perjure himself when he was subpoenaed to testify at a hearing before a committee of the state legislature. When the plaintiff refused to "make certain false and untrue statements in the testimony," as the plaintiff alleged, he was terminated.

The California appellate court held that the plaintiff had a right to damages for unlawful termination contrary to the state's public policy. As the court explained,

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, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.

The California court reasoned that, although the statute it relied upon provided for a criminal penalty, it was necessary to use the criminal statute in a civil manner to best effectuate what the court perceived as "the state's declared public policy against perjury."

Cases holding that a particular discharge violated public policy can generally be grouped into three classic patterns of public interest.

(1) Refusal to Commit an Unlawful Act

In this group of cases the employee has been terminated for her refusal to perform an act which she reasonably believes is unlawful. The archetypal example cited for this category is Petermann, where an employee was terminated for his refusal to give perjured testimony.


Because the at will rule was so firmly entrenched, most commentators recognized Petermann as a mere anomaly rather than the dawning of the trend in the modification of the American employment at will doctrine. The Law of Wrongful Discharge, supra note 3, at 723, 724 n.24.


35. Id. at 27.

36. Id.

37. Note, Public Policy Exception, supra note 2, at 1937. Another theory of categorizing public policy exception cases has evolved which distinguishes between internal and external public policy, thus centering on the third-party effects of the discharge. HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE §§ 5.8-.18 (2d. ed. 1987).

38. See supra notes 33-36 and accompanying text.
at a trial or administrative hearing.39 Others cases in this category have included termination for refusing to violate federal and state antitrust laws,40 the firing of an employee who refused to pump leaded gas into an automobile believing it to be a violation of the federal Clean Air Act41 and refusing to violate a state antiprostition statute.42

(2) Fulfilling a Public Obligation

A passel of courts have recognized a cause of action for employees terminated for performing an important public obligation. These courts have recognized that an overriding public interest exists in permitting employees to fulfill their duties as citizens. Jury duty,43 refusal to violate a professional code of ethics44 and whistle blowing45

42. Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984)(applying Arkansas antiprostition law to find that an employee was wrongfully discharged for refusing the sexual advances of her foreman).

For other examples in which courts have recognized the public policy exception where an employee is discharged for refusing to commit an unlawful act, see Sheets v. Teddy’s Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980)(insisting that employer comply with federal food and drug laws); Trombetta v. Detroit, T. & I.R.R., 265 N.W.2d 385 (Mich. Ct. App. 1978)(refusing to alter state mandated pollution reports); O’Sullivan v. Mallon, 390 A.2d 149 (N.J. Super. Ct. Law Div. 1978)(refusing to perform catherizations for which employee was not properly licensed); Harless v. First Nat’l Bank, 246 S.E.2d 270 (W.Va. 1978)(refusing to violate a consumer credit protection law).


Some courts have merely drawn upon state contempt laws to remedy situations where an employer terminates an employee for being absent for jury duty. See, e.g., People v. Vitucci, 199 N.E.2d 78 (Ill. Ct. App. 1964).


As one commentator opined:

There are several reasons to carve an exception to the at-will doctrine for professionals based on the codes of ethics. . . . [E]ach profession is based on distinctive knowledge and service to the community. Each helps shape our culture in significant ways. Law, medicine, and other professions play a direct role in the formation of public policy and its implementation. The practitioners in these highly trained professions possess specific skills needed to solve individual and communal
have all served as the basis for wrongful discharge claims in this category of public policy cases.

(3) Exercising a Right or Privilege

Another category encompasses those cases where an employee is terminated for exercising a legal right or privilege. Courts have protected such employees under the belief that the threat of discharge would have a chilling effect on the exercise of the specific right or privilege. Typical cases have involved the wrongful termination of employees for filing workers' compensation claims and occupational safety and health complaints.

B. Sources of Public Policy

Over the years, courts have struggled to place an exact definition on problems. They must be given the leeway to address these problems in a manner consistent with ethical standards. In addition, the at-will professional employee motivated by ethical concerns attempts to correct a problem at the risk of the substantial financial investment in his education, his long-term financial security, and his career standing and reputation. Even if fortunate enough to avoid dismissal (occupational capital punishment for the worker), the professional employee may encounter more subtle retaliatory actions, such as less desirable work assignments, loss of prestige, and decrease in promotional and pay opportunities.

Moreover, state licensure exerts tremendous pressure upon the at-will professional employee. The statutes grant regulatory bodies the power of admission and expulsion from the profession. A professional license may be revoked because of the violation of statutes that allow discipline because of "unprofessional" or "unethical" conduct. The disciplinary statutes are based on violations of codes of ethics and state-promulgated rules and regulations.


on the term "public policy." The vague and amorphous nature of the term is renowned, making it "perhaps the most expansive and widely comprehensive phrase known to the law." Determining what is to be regarded as public policy is undoubtedly the Achilles heel of the public policy exception.

While the inherent nature of the term prohibits precise definition, public policy includes general notions of goodness, justness and abstention from activity which is injurious to the public good. However, such sweeping language gives little comfort to courts attempting to narrow the clearly articulated public policy.

To narrow the potential expansiveness of the public policy exception, courts have limited the sources from which the public mandate may be derived. Some courts have recognized the public policy exception only where substantial and definite indications of public policy are present. Such courts generally look only to a jurisdiction's positive law as evidence of public policy. The specificity and clarity required by courts creates a continuum of sources from which public policy may be found, ranging from clear articulations of positive law found in constitutions and statutes, through the more nebulous bases such as those deemed to be public policy by judicial fiat.

A universally agreed upon source of public policy is state and federal constitutional provisions. Constitutions are considered funda-

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48. Many have compared it to attempts to place a precise definition on fraud. See, e.g., WILLIAM W. STORY, STORY ON CONTRACTS § 546 (1847)("It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud."); Maryland Casualty Co. v. Fidelity & Casualty Co., 236 P. 210, 212 (Cal. Dist. Ct. App. 1925)("The question, what is public policy in a given case, is as broad as the question of what is fraud.");


51. Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981). The Palmateer court noted that "[t]here is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively." Id.

52. Safeway Stores v. Retail Clerks Int'l Ass'n, 261 P.2d 721, 726 (Cal. 1953).

53. Wesburst, supra note 7, at 622; Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840 (Wis. 1983)("The public policy must be evidenced by a constitutional or statutory provision.").

54. In Palmateer, the court set forth the following hierarchy: "[Public policy] is to be found in the State's constitution and statutes, and, when they are silent, in its judicial decisions." Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981).
mental expressions of the policy of a jurisdiction. Moreover, constitutional amendments have been regarded as expressions of public policy.

Expressions of public policy have consistently been derived from statutory provisions. Both state and federal statutes serve as legitimate articulations of a jurisdiction's public policy, although some states reject the use of federal law as a manifestation of the public policy for a particular jurisdiction. Whether or not courts, in interpreting statutory provisions, adhere to the explicit and implicit intent of the legislature is another issue.

A minority of courts have found licensing regulations, administrative guidelines and municipal ordinances to be valid indicators of a jurisdiction's public policy. In so doing, such courts have focused less on whether the regulations bear a legislative imprimatur than on how strongly those regulations protect or benefit the citizenry.

In cases such as Palmateer v. International Harvester Co., courts have relied upon public policy rooted in general public standards and morals, without requiring plaintiffs to point to a specific source of positive law. The employee in Palmateer alleged that he was discharged for supplying information to a local law enforcement agency regarding his suspicion that a coworker had violated criminal laws, and for agreeing to gather further evidence and testify against the coworker if so requested. The Illinois Supreme Court reversed the dismissal of the plaintiff's wrongful discharge claim, holding that the plaintiff could maintain a valid cause of action by alleging that the discharge contravened public policy. The court stated that "[n]o specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime-fighters."

57. See infra Part IV.
59. UNJUST DISMISSAL, supra note 2, at § 6.03[2].
60. 421 N.E.2d 876 (Ill. 1981).
61. Id. at 879.
62. Id. at 880.
Ironically, it is in the cases involving the clearest articulations of public policy where courts appear to be the most willing to imply a private right of action via the public policy exception to employment at will. Courts that look to positive law sources of public policy such as constitutional or statutory provisions are more inclined to infer a private right of action, even where the positive law is completely silent as to the preferred means of enforcement, or where a private right of action is implicitly prohibited. However, courts have sought to give at least an aura of deference to the legislature in public policy matters by requiring discharged employees to point to some specific source of clearly mandated public policy, whatever that source may be. Whether courts actually defer or not is where the debate lies.

IV. THE INTERACTION BETWEEN THE JUDICIARY AND LEGISLATURE—WHO WINS THE TUG OF WAR?

In deciding whether a sufficiently lucid mandate of public policy exists to justify abrogating the at will rule, courts have examined how firmly entrenched and universally agreed upon the particular policy is. Where the public policy is clear, the legislature and judiciary can march in lock step when implementing that particular policy. However, in those cases where the public policy is not clear, courts must tread cautiously to avoid usurping the legislative prerogative in that particular sphere of policy. The interrelationship between the judiciary and legislature in dealing with the public policy exception to employment at will can generally be grouped into three categories.

A. Conflict

A number of cases have arisen where courts have relied on their own interpretation of the legislature’s intent. However, in all actuality, the courts may have ignored the implicit intent of the legislature under the guise of deference. The quintessential example is where a statute prohibits the discharge of an employee for specified reasons but does not declare a private remedy. Legislative silence may indicate an intent not to provide for a private cause of action for wrongful discharge. In such cases, courts struggle with the issue of whether a private right of action may be implied in the prohibition.

Other examples where a court may have ignored the remedies adopted by the legislature exist. In Ambroz v. Cornhusker Square

63. Weisburst, supra note 7, at 622.

64. See, e.g., Kelsay v. Motorola, Inc., 384 N.E.2d 353 (1978). The Illinois Supreme Court held that the subsequent adoption of a criminal retaliation remedy in the state workers’ compensation provision did not imply the absence of a civil remedy, since the criminal sanction did not alleviate the plight of the discharged employee.
the plaintiff was employed as a security guard by the defendant. The plaintiff alleged that he was ordered to take a truth and deception (polygraph) examination by the end of the work day, or he would be terminated. Upon his refusal, the plaintiff was terminated. Subsequently, the plaintiff brought a wrongful discharge action, claiming that he was entitled to forego any polygraph examination under the Nebraska Licensing of Truth and Deception Examiners Act. The act states, in pertinent part:

No employer or prospective employer may require as a condition of employment or as a condition for continued employment that a person submit to a truth and deception examination unless such employment involves public law enforcement.

The remedy expressly provided by the state legislature was a misdemeanor violation of the state criminal code.

In holding that the plaintiff could recover damages for wrongful discharge, the Nebraska Supreme Court held that the statute was "a pronouncement of public policy on the issue of wrongful discharge." The supreme court found it inconsequential that the statute did not provide a private remedy for those wrongfully discharged in contravention of the act. After examining the legislative history of the act, the court determined that the legislature was, in effect, promulgating public policy which clearly and unambiguously prohibited an employer's use of a polygraph to deny employment.

Arguably, the Ambroz court ignored the implicit determination made by the Nebraska legislature in how the Truth and Deception Examiners Act was to be enforced. The legislative history clearly evinced that the only expressed remedy provided by the legislature under the act was a criminal sanction. Implicit in the legislature's wording of the statute was its rejection of a private cause of action by employees to enforce the act. Thus, the legislature had considered how it wanted the statute to be enforced, and chose not to provide for a private right of action. If this line of reasoning is correct, the court usurped the legislature's prerogative by permitting a private cause of action for violation of the Truth and Deception Examiners Act.

A similar case of legislative-judicial conflict arose in Frampton v.

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66. Id. at 900, 416 N.W.2d at 512.
68. Id. § 81-1932 (Reissue 1981). It was stipulated that the plaintiff, a security guard, was not involved in public law enforcement. Ambroz v. Cornhusker Square Ltd., 226 Neb. 899, 899, 416 N.W.2d 510, 512 (1987).
71. Id. at 903-04, 416 N.W.2d at 514.
72. Id. at 903, 416 N.W.2d at 514.
Central Indiana Gas Co.73 Therein, the employee was discharged for filing for workers' compensation benefits for an injury she sustained on the job. In holding that the employee had stated a cause of action for wrongful discharge, the Indiana Supreme Court looked to the state workers' compensation scheme in toto as evidence of "fundamental, well-defined and well-established [public] policy" as annunciated by the state legislature.74 The Indiana court proceeded on a frustration theory, concluding that

[i]f employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right.75

Nowhere within the state act or its legislative history was there any suggestion that the state legislature intended employees to have a private right of action to enforce the act. It is certainly foreseeable that an employer might terminate an employee for filing a workers's compensation claim. Accordingly, it is plausible to assume that the legislature, as indicated by its acquiescence, simply chose not to offer the remedy of a private action for wrongful discharge.

The specie of argument the Ambroz and Frampton courts relied upon was that they could not have reached another result without frustrating what appeared to be clear mandates of public policy. To do so, they reasoned, would in effect withhold with one hand what the state legislature had provided with the other.76 This argument is specious, for it rests on the assumption that the legislature would have intended that a private right of action exist under the respective statutes. Both cases involved statutes that squarely dealt with employment-related matters, where it is presumable that the state legislature would have provided for a private remedy had it wished. Ironically, courts such as Ambroz and Frampton that look to employment-related positive law, an area where legislatures are the most likely to fully consider the preferred remedies, appear more willing to imply a private right of action than cases outside of the employment context. Consequently, it appears as though the Ambroz and Frampton courts encroached upon the prerogative of the state legislature in determining the appropriate remedies for each particular offense.

This point is driven home in what is perhaps the most clear-cut example of judicial encroachment, found in the recent case of Hodges v. S.C. Toof & Co.77 Therein, the employee worked for over nineteen

73. 297 N.E.2d 425 (Ind. 1973).
74. Id. at 427.
75. Id.
77. 833 S.W.2d 896 (Tenn. 1992). To label Hodges as "perhaps the most clear-cut example" is not meant to exclude other "fine" examples of judicial encroachment.
years for the defendant employer, serving in various capacities including assistant warehouse supervisor. During his tenure, the employee had received some twenty merit raises and had a clean disciplinary record. The employee alleged that he was terminated for his three month absence from work while serving jury duty. At the employee’s trial, the jury found that the employee was discharged because of his lengthy jury service and awarded employee a substantial verdict.

On appeal, the Tennessee Supreme Court examined recent modifications in the state’s jury duty law. Approximately one year before the employee’s termination in Hodges, the Tennessee legislature had amended its law dealing with jury duty to provide that:

1. No employer shall discharge or in any manner discriminate against an employee for serving on jury duty if such employee, prior to taking time off, gives the required notice . . . to the employer that such employee is required to serve.

2. (A) Any employee who is discharged, demoted, or suspended because such employee has taken time off to serve on jury duty is entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer.

2. (B) Any employer who willfully refuses to rehire, or otherwise restore an employee or former employee commits a misdemeanor.

The legislature obviously perceived a problem, or potential problem, and provided express remedies for a wrongfully discharged employee. However, the supreme court held that the statutory scheme was not the sole and exclusive relief available to the discharged employee, because the amendments did not expressly state that they were to be the exclusive remedy. “Had the Legislature intended to limit relief to the statutory remedies, it could easily have done so.”

Hodges presents a case where the legislature pronounced directly on a subject, provided specific remedies, and yet the court was still willing to override the statutory scheme by implying a private right of action for damages, in addition to the backpay and reinstatement remedies expressly provided for by the legislature. This represents a serious usurpation of the legislative function by the judiciary.

B. Tenuous Conflict—Reaching to Find Public Policy

Another category of cases encompasses those in which a state legis-

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78. 833 S.W.2d at 898.
79. Id.
82. Id. (footnote omitted).
Employment at Will

The Oregon Supreme Court in *Nees v. Hocks*[^83] held that an employee had stated a cause of action for wrongful discharge, although no state statute specifically addressed the public policy involved. In *Nees*, the employee was allegedly terminated because she served on jury duty against the wishes of her employer. The court stretched to find a source of public policy, finding it expressed only indirectly in an Oregon constitutional provision for trial by jury[^84], and state statutes which established exemptions[^85] and deferments[^86] for jury duty, as well as a penalty scheme for failure to appear[^87]. The court resolved the fact that it could not point to a specific mandate of public policy by balancing the community's interest in having its citizens available to serve jury duty against the employer's interest in setting his own standards for discharge. The court concluded that "there can be circumstances in which an employer discharges an employee for such a socially undesirable motive that the employer must respond in damages for any injury done."[^88]

*Nees* presents a situation where the Oregon legislature, which had spoken on specific jury duty issues such as exemptions, deferments and penalties for failure to appear, certainly could have addressed the issue of private rights of action, had it intended such a mode of enforcement to exist. However, unlike the *Ambroz-Frampton-Hodges* line of cases[^89], it is conceivable that the state legislature in *Nees* simply did not think to address the issue of private rights of action. However, by holding that a private cause of action via the public policy exception existed, the *Nees* court may have ignored the implicit intent of the legislature and encroached upon its policy-making prerogative.

If the Oregon legislature had intended to create a private right of

[^83]: 536 P.2d 512 (Or. 1975).
[^84]: The state constitutional provision the court relied upon provided that:

In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

OR. CONST. art. VII, § 3.
[^86]: Id. § 10.055 (1975)(current version at OR. REV. STAT. § 10.055 (1991)).
[^87]: Id. § 10.990 (1975)(current version at OR. REV. STAT. § 10.990 (1991)).
[^89]: See supra section IV.A.
action for wrongful discharge for absence due to jury service, the legislature clearly could have followed the lead of states like Wisconsin that have provided such remedies. The State of Wisconsin expressly enacted a statutory provision which prohibits the discharge or discipline of an at will employee for absence from work due to jury service. Thus, Nees presents an example of where a conflict may have occurred between the legislature and the judiciary in their roles as policy making bodies.

C. Absence of Conflict

Although today they represent the exception rather than the rule, a minority of courts have rightly deferred to the elected policy makers of the state—the state legislature—in situations where a private right of action has not been expressly provided for by the legislature. For instance, the Court of Appeals for the State of New York was unable to find a clear mandate of public policy to justify an abrogation of the employment at will doctrine via a wrongful discharge action in Murphy v. American Home Products Corp. The plaintiff in Murphy was terminated after twenty-three years of employment with the defendant in various capacities. Plaintiff claimed that he was fired for two reasons: (1) because of his disclosure to top management of alleged accounting improprieties on the part of corporate personnel; and (2) his age, which was fifty-nine. He alleged abusive discharge, intentional infliction of emotional distress, prima facie tort, breach of covenant of good faith and fair dealing and age discrimination.

On appeal the court reinstated plaintiff’s age discrimination claim, but dismissed all other claims against the defendant. Noting that “such a significant change in our law is best left to the Legislature,” the court declined to recognize a public policy exception to employment at will.

The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability. Standards should doubtless be established applicable to the multifarious types of employment and the various circumstances of discharge. If the rule of nonliability for termination of at-will employment is to be tempered, it should be accomplished through a

91. 448 N.E.2d 86 (N.Y. 1983).
92. Id. at 87.
93. Id. at 88.
94. Id. at 89.
principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants. 95

Arguably, through its failure to enact a statutory provision which protected employees from discharge for reporting improprieties internally to company management, the New York legislature tacitly chose not to abrogate the at will rule by providing for a private cause of action. Realizing this, the New York court chose to defer to the legislature in the declaration of public policy. Certainly the court could have hung its hat on general declarations of positive law or general standards or morals to serve as the basis for a public policy in Murphy. However, it chose not to.

The decision of whether or not to create an exception to the employment at will rule is best left to the elected officials in the state legislature, due to their accountability and sensitivity to pertinent political issues. 96 Unlike legislatures, courts are ill-equipped to serve as pronouncers of public policy in the employment arena; they are confined to the facts of the specific case at hand and often fail to fully consider the broader policy ramifications inherent in their decisions. Legislatures, through their vast resources and ability to deliberate, 97 are better able to grasp the broader implications of enacting exceptions to employment at will.

Allowing legislatures, rather than courts, to determine whether to allow a public policy exception and the appropriate remedies thereun-

95. Id. at 89-90.
96. We would be wise to heed the words of Publius. In The Federalist No. 47, James Madison quoted Montesquieu to emphasize the importance of separate duties for the different branches of government: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." THE FEDERALIST OR THE NEW CONSTITUTION 247 (Ernest Rhys ed. 1929)(emphasis in original).
97. Making his case for congressional term limits, political commentator George Will waxed eloquent on the deliberative spirit of our nation's representative legislature.

Remember, a republic is a society presumed to have a broad diffusion of thoughtfulness. In a republic, persuasion rather than inspiration—reason rather than emotion—is supposed to move the citizenry... A deliberative legislature, composed of people exercising judgment, can do what leaders are supposed to do. It can inspire people by the dignity of its deliberations. It can persuade by the gravity of its procedures as well as the plausibility of its conclusions. This is the noble power possessed by ordinary people who take up the republican task of deliberating for the community, in public. Let us call these deliberating people "leaders." Let us call what they do "leadership." But let us not lose sight of the fact that what they are doing is deliberating. What they are exercising is judgment.

der is more economically efficient. Litigation is costly, time consuming, and results in a great deal of uncertainty among parties concerning how they should tailor their behavior to avoid legal liability.\footnote{98}{The current system, which has evolved through judicially created exceptions, is expensive, time consuming, and does not serve either party well." Cheryl S. Masingale, \textit{At-Will Employment: Going, Going . . .}, 24 U. RICH. L. REV. 187, 187 (1990).}

Moreover, allowing courts to create private rights of action via the public policy exception to employment at will creates a perverse incentive for legislatures, encouraging legislative abstention in the arena of employee rights. Instead, courts should invite legislative action and responsibility by devising incentives for the legislature to step up to the plate and assume its role as the policy making body of a jurisdiction.\footnote{99}{See ROBERT H. BORK, \textit{The Antitrust Paradox: A Policy at War with Itself} 83 (1978)("Courts that refuse to make basic policy choices for the legislature thereby force the legislature to face and decide questions they had previously been content to leave unanswered. In this way the courts help focus the issues to be addressed and make the legislative process more responsible.").}

Consequently, courts should rightly defer to the legislature in such matters since the alternative serves only to blur the qualitative differences that exist between the legislature and the judiciary.\footnote{100}{As Judge Bork observed, legislative bodies "cannot delegate to the judiciary the basic political decisions of the society." \textit{BORK, supra} note 99, at 83.}

The aforementioned discussion brings us to the thesis of this Article, \textit{viz.}, that the optimum solution is the implementation of a strong presumption in favor of allowing the legislature, not the judiciary, to create exceptions to employment at will.

V. SUGGESTED GUIDELINES FOR COURTS

Hard cases present tough choices for courts.\footnote{101}{Or, as Justice Holmes observed, "Great cases, like hard cases, make bad law." \textit{Northern Sec. Co. v. United States}, 193 U.S. 197, 400 (1904)(Holmes, J., dissenting).} However, to avoid infringing upon the policy-making authority of the representative legislature, courts should give full consideration to whether the issue of private enforcement of public policy is best left to the legislature. A systematic approach to analyzing these issues is needed. This Article proposes that a strict presumption against implying a private right of action exist, one that can only be overcome through the establishment of a clear legislative mandate. The factors presented in the United...
States Supreme Court case of *Cort v. Ash* serve as useful guidelines for courts to use in determining whether a legislature has expressly or impliedly intended to create a private remedy in the form of a public policy exception to employment at will.

A. Is the Employee One of the Class for Whose Especial Benefit the Policy Exists?

Before recognizing a private right of action in the name of public policy, courts should address whether or not the discharged employee is a member of the class of persons the policy was intended to benefit. One of the clearest examples of public policy decisions intended to benefit a particular class are those cases barring terminations for the filing of a workers' compensation claim. For example, in *Frampton*, the court held that permitting an employer to terminate an employee for exercising a right granted by the workers' compensation act would clearly frustrate the purpose of the act. Since the injured employee seeking compensation is the focus of any workers' compensation scheme, an employee who has been terminated for allegedly seeking such compensation is clearly in the class of persons for whose benefit the policy was enacted. The workers' compensation specie of problem presents a clear case for this element, which helps explain why a majority of jurisdictions have recognized the public policy exception for those employees discharged for asserting compensation rights.

B. Is There Any Indication of Implicit or Explicit Legislative Intent to Either Create or Deny a Private Right of Action?

Courts should inquire into the intent of the legislature in the particular sphere of policy involved before abrogating the employment at will rule through the establishment of a public policy exception.

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103. *Id.* at 78.
104. *See supra* notes 73-75 and accompanying text.
106. In determining the intention of a particular law, courts should view legislative history skeptically. This author is persuaded by Justice Scalia's recent appraisal of legislative history, where he mocked what he perceived to be the majority's view that "the oracles of legislative history, far into the dimmy past, must always be consulted." *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1567 (1993)(Scalia, J., concurring). Scalia further declared that [t]he greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: "The law as it is passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself: . . ."
As previously discussed, the courts in *Ambroz*, *Frampton* and *Hodges* arguably ignored the implicit intent of the legislature regarding how the relevant provisions were to be enforced. In these cases, the legislature was silent on whether the respective statutes could be enforced privately through wrongful discharge actions. However, legislative silence alone should not be indicative of an intent, or lack thereof, to provide for a private right of action.

For example, it is well settled that the existence of a criminal penalty does not preclude the implication of a private cause of action for damages. However, the existence of only a criminal remedy without anything more serves as evidence that the legislature intended the criminal remedy to be the sole means for enforcing the provisions of the statute.

In those instances where it is unclear or ambiguous as to whether a private right of enforcement can be implied, courts should weigh on the side of caution, with a "tie" going to the legislature. This would achieve two objectives. First, it would encourage legislatures to be more specific in drafting statutes to include the intended remedies and means of enforcement. This problem is currently being viewed in the debate surrounding the Civil Rights Act of 1991, where the issue of retroactivity was left open for the courts to decide. Second, encouraging the legislature to expressly establish a statute's intended remedies and means of enforcement would cut numerous costs. For example, transaction costs could be decreased by eliminating the need to litigate whether or not a pri-

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But not the least of the defects of legislative history is its indeterminacy. If one were to search for an interpretive technique that, on the whole, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.

*Id.* (citation omitted)(emphasis in original).

107. See supra section IV.A.


C. Is It Consistent with the Underlying Purposes of the Legislative Scheme to Imply Such a Remedy for the Plaintiff?

Before overcoming the presumption against implying a private right of action, courts should determine whether it would be inconsistent with the general purpose of the statute to permit it to be enforced privately.

Arguably, the implication of a private remedy under a workers' compensation statute is inconsistent with the purposes of the act. Why would a legislature implement a workers' compensation scheme without providing employees who are retaliatorily discharged with a private right of action? Clearly, it was foreseeable to the legislature that an employer could evade its legal obligation to provide compensation to an injured employee by simply terminating the employee. The legislature may have felt that such an omission was rational, considering the potential damage to reputation, good will and employee morale that employers would undoubtedly experience. The legislature may have concluded that this loss to employers for terminating such employees was an adequate disincentive for employers. Moreover, the legislature may have chosen not to provide a private remedy for fear of a possible flurry of lawsuits alleging wrongful discharge for filing for workers' compensation benefits. Hence, it is clearly plausible that the legislature intended that no private right of action exist.

Therefore, courts must carefully examine the entire legislative scheme before implying that the legislature intended a public policy exception to exist.

VI. CONCLUSION

The time-honored doctrine of employment at will has been eroded in recent years, as states have created various exceptions to the once bedrock principle. The most widely recognized of these is the public policy exception, which rests on the principle that an employer may not discharge an employee if the purposes behind the discharge frus-


114. "To fire capriciously . . . is exceedingly costly to the firm because of its effects on the morale of the remaining workers." FORBIDDEN GROUNDS, supra note 4, at 155.
trate clearly mandated public policy. What amounts to "clearly mandated public policy" is the crux of the public policy exception.

In a representative democracy, the legislature is the proper body for determining the public policy of the jurisdiction, as well as the remedies and means of the enforcement of its legislation. Courts simply do not possess the fact-finding and deliberative faculties that are available to the legislature. Consequently, courts should give tremendous deference to the legislature in matters of public policy. A strong presumption against implying a private right of action via the public policy exception to employment at will should exist. This presumption could only be overcome through the satisfaction of the factors announced in Cort v. Ash. The analytical structure proposed by this Article will serve to encourage forthright discussion and analysis before abrogating employment at will through the judicial creation of a public policy exception.