COMMENTS

PROTECTING THE PRIVATE SECTOR AT WILL EMPLOYEE WHO "BLOWS THE WHISTLE": A CAUSE OF ACTION BASED UPON DETERMINANTS OF PUBLIC POLICY

In the collective belief that public order requires adherence to law, society imposes upon the individual an obligation both to conform to the law and to see that others do as well.[1] At one time raising the "hue and cry"[2] was a proper means by which a private citizen brought to public attention the doings of a lawbreaker. Today, a more sophisticated society delegates much of the responsibility for its security to professional law enforcement agencies. Yet some residual of the old civic duty to "cry out" remains; for today's society still encourages its members to come forward with information about lawbreaking.[3]

A modern equivalent of the old "hue and cry" is "whistleblowing," the employee's public announcement of the real or imagined wrongdoing of his or her employer.[4] A relatively recent phenome-

1. *See generally* Roucek & Patrick, *Social Control*, in THE POLICE, CRIME AND SOCIETY 5 (C. Patrick ed. 1972). *See also* United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937), "It is a general rule of law that the duty rests on every citizen to communicate to his government any information he has of the commission of crimes against it . . . ." *Id.* at 641.

2. The "hue and cry" was the public uproar which a citizen was expected to initiate upon the discovery of a crime. It was a concept well engrained in English common law. *See* 4 W. BLACKSTONE, COMMENTARIES *292-94. For an example of its application in American law, see Bullard v. Bell, 4 F. Cas. 624 (C.C.N.H. 1817) (No. 2, 121).

3. Law enforcement agencies actively solicit and encourage citizen participation in law enforcement. In some special cases the refusal of a citizen to come forward with information respecting criminal wrongdoing may leave that citizen vulnerable to a charge of a negative misprision as, for example, misprision of felony. This is defined as "[t]he offense of concealing a felony committed by another, but without such previous concert with or subsequent assistance to the felon as would make the party concealing an accessory before or after the fact." BLACK'S LAW DICTIONARY 1152 (rev. 4th ed. 1968). For a discussion of the use of misprision in the context of employee whistleblowing, as well as its limitations, see Blumberg, *Corporate Responsibility and the Employee's Duty of Loyalty and Obedience: A Preliminary Inquiry*, 24 OKLA. L. REV. 279, 294 (1971) [hereinafter cited as Blumberg, *A Preliminary Inquiry*].

At the very least a citizen who witnesses a crime and remains silent is morally condemned by society. *See, e.g.*, A. ROSENTHALL, 38 WITNESSES (1964).

4. One widely used definition of whistleblowing is that of "the act of a man or woman who, believing that the public interest overrides the interest of the organization he serves,

non,[5] this particular form of citizen activism involves both public[6] and private[7] organizations. It has engendered no little controversy, being lauded as an important, if not essential, act of public responsibility,[8] and decried as a contemptable breach of organizational loyalty.[9]

The responsible whistleblower[10] should be viewed as working in the public's best interest. This is particularly true when the employer's wrongdoing is contrary to statute or common law.[11] Such employer activity, contravening as it does the expressed and sanctioned norms of social behavior, must be readily discovered and punished to be discouraged. By bringing such activity to light the whistleblower acts to further such objectives.[12] For these reasons the weight of opinion has

publicly 'blows the whistle' if the organization is involved in corrupt, illegal, fraudulent, or harmful activity." *Preface* to WHISTLE BLOWING, THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY at vii (R. Nader, P. Petkas, & K. Blackwell eds. 1972) [hereinafter cited as WHISTLE BLOWING].

5. It has been described as a phenomenon which arose in the 1960's. *See* BLOWING THE WHISTLE: DISSENT IN THE PUBLIC INTEREST 288 (C. Peters & T. Branch eds. 1972) [hereinafter cited as DISSENT IN THE PUBLIC INTEREST].

6. A celebrated case of whistleblowing by a public employee is that of Mr. Ernest Fitzgerald who brought to congressional and public attention the cost overruns of the C-5A air transport plane. For a description of the facts of this case, see Fitzgerald v. Seamans, 553 F.2d 220, 222-25 (D.C. Cir. 1977). Another example is that of Mr. Robert F. Sullivan, a General Services Administration (GSA) employee fired for making public GSA reports which indicated official misconduct in the awarding of government construction contracts. *See Civil Service 'anarchy,'* The Boston Globe, June 3, 1977, at 18, col. I. For other examples, see DISSENT IN THE PUBLIC INTEREST, *supra* note 5, at 182-94.

7. For case examples drawn from the private business sector, see WHISTLE BLOWING, *supra* note 4, at 75-89, 118-25, and 140-46.

8. "[W]histle-blowing has moved into a breach left by the failure of the traditional methods of institutional control—mechanisms like competition in business, government regulation, and political accountability, which are supposed to ensure that institutions are guided toward the public interest." DISSENT IN THE PUBLIC INTEREST, *supra* note 5, at 294.

9. "Some of the enemies of business now encourage an employee to be disloyal to the enterprise. . . . However this is labeled—industrial espionage, whistle-blowing or professional responsibility—it is another tactic for spreading disunity and creating conflict." Remarks of James M. Roche, former chairman of General Motors Corp., (*The Whistle Blowers*, TIME, Apr. 17, 1972, at 85) *reprinted in* C. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR 214 (1975) (footnote ommitted) [hereinafter cited as STONE, WHERE THE LAW ENDS].

10. The term "responsible whistleblower" is used here to differentiate the case of the irresponsible employee who, by groundless assertions and accusations, seeks to embarrass his or her employer for personal or other motives. For a discussion of "responsible" versus "irresponsible" whistleblowing, see WHISTLE BLOWING, *supra* note 4, at 225-26.

11. Whistleblowing is not limited to employee exposure of illegal activity. It may also encompass the exposure of what may be mere improprieties as, for example, particular business and governmental relationships which would tend to incite a suspicion of wrongdoing, or the formulation of policies which could be seen by some as detrimental to the public's interest. A recent example of this sort of whistleblowing is that of Mr. Robert D. Pollard, an engineer with the Nuclear Regulatory Commission who claimed that certain safety procedures in use at the nuclear power plants of Consolidated Edison of New York were inadequate. *See Hearings on Investigation of Charges Relating to Nuclear Reactor Safety Before the Joint Comm. on Atomic Energy*, 94th Cong., 2d Sess., vol. 1, at 97-134.

12. Some who have considered the issue of whistleblowing point to the drawbacks of relying totally upon the normal channels of state and federal regulatory efforts to insure legal compliance. To these commentators such reliance is both inefficient and unreliable and

been to encourage the whistle-blowing employee as a necessary element in the social control of organizations.[13]

The major obstacle to the encouragement of whistleblowing is the fact that an employee who publicizes his or her organization's wrongdoing runs the very real risk of being fired.[14] An employee who becomes aware of organizational wrongdoing is therefore placed in a difficult position. As a member of the general public he or she not only must suffer the consequences of the illegal activity for so long as it continues; but also, given an obligation to come forward and expose such activity, he or she must share in the blame which comes from silence.[15] On the other hand, as an employee, the potential whistleblower must consider the likelihood of job termination as a consequence of public declamations. The employee's dilemma is one of balancing a public interest against the potential of private loss,[16] with the employee losing either way.

Some restraints do exist to curb an employer's arbitrary use of the discharge power. For example, the employment relationship may be one fixed by contract[17] or, as in the case of civil service employees, defined by statute.[18] Frequently, however, the employment relation is one which is "terminable at will" where either the employee or the employer is free to unilaterally end the relationship at any time and for any reason.[19] The effect of such an employment relationship is that the "at will" employee, having no right to continued employment, has no remedy at law for his or her termination, no matter how wrong, malicious or unjustified such a termination may be.[20] This product of the common law[21] has, to some extent, been offset by statutes aimed at restricting certain types or arbitrary terminations.[22] Generally, however, the at will employee remains

requires the complement of whistleblowing. *See, e.g.*, STONE, WHERE THE LAW ENDS, *supra* note 9, at 209-14; DISSENT IN THE PUBLIC INTEREST, *supra* note 5, at 294.

13. *See generally* DISSENT IN THE PUBLIC INTEREST, *supra* note 5; WHISTLE BLOWING, *supra* note 4; Blumberg, *A Preliminary Inquiry, supra* note 3.

14. *See* DISSENT IN THE PUBLIC INTEREST, *supra* note 5, at 280; Blumberg, *A Preliminary Inquiry, supra* note 3.

15. *See* note 3 *supra* and accompanying text.

16. The harm which comes of being fired extends beyond the mere economic consequences of losing a job; it includes emotional and psychological harm as well. *See* Note, *Implied Contractual Rights to Job Security*, 26 STAN. L. REV. 335, 338-40 (1974) [hereinafter cited as *Job Security*].

17. An example of this is the situation where terms of employment set forth the duration of the employment relationship. For a discussion of such contracts and their impact upon the problem of employee termination, see Note, *Employment Contracts of Unspecified Duration*, 42 COLUM. L. REV. 107, 107 (1942).

18. *See, e.g.*, 5 U.S.C. § 7501 (1970) which defines the termination conditions for federal civil service employees.

19. *See* note 28 *infra* and accompanying text.

20. Throughout this comment, the term "at will" employee will be used to describe an employment relationship having these characteristics. *See* note 32 *infra* and accompanying text.

21. *See* notes 36-41 *infra* and accompanying text.

22. Examples of such statutes include the National Labor Relations Act, 29 U.S.C. § 158(a)(3), (4) (1970), which bars employment termination for union organizational activity or

vulnerable to a capricious or retaliatory discharge. It is this vulnerability which forms the principal obstacle to protecting and thereby encouraging the whistleblowing, at will employee.[23]

Recently, a few courts have acted to limit the common law doctrine of terminable-at-will employment in cases where employee termination would contravene some aspect of public policy.[24] These cases express a judicial willingness to curb, for social benefit, the employer's power of termination. This newly emerging concept affords the means both to protect and to encourage the whistleblowing, at will employee.[25] This comment will analyze these public policy exceptions and relate them to the situation of the whistleblower. The focus of this comment will be limited to the private sector employee[26] and to a discussion of the developing right of such an employee to bring a suit against the employer for a retaliatory discharge.[27] First, at will employment is discussed generally. Second, the developing public policy exceptions to the terminable-at-will doctrine are analyzed. Finally, the application of these exceptions to the more specific problem of the whistleblower is discussed. The result of this analysis is the conclusion that the present state of public policy exceptions, while limited in applicable scope, affords a proper means for protectinq the whistleblowing employee. However, to make the means a reality, judicial attitudes respecting the personal interests of the at will employment relationship must be recast in the public's interest.

I. EMPLOYMENT AT WILL

In the United States, an employment contract for an indefinite time period is presumed to be terminable at will: either party may terminate the relationship at any time and for any reason.[28] This fundamental proposi-

for filing charges or giving testimony under the Act, and Title VII of the Civil Rights Act of 1964 §§ 703(a), 704(a), 42 U.S.C. § 2000e-2(a), 3(a) (1970) which bars employment terminations on the basis of sex, race, creed or nationality and for participating in the Act's enforcement. *See* notes 56-60 *infra* and accompanying text.

23. *See* W. MOORE, THE CONDUCT OF THE CORPORATION 28 (1962). *See generally* Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967) [hereinafter cited as Blades, *Limiting the Abusive Exercise*].

24. Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970); Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal. Rptr 769 (1968); Petermann v. Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975). *See* text accompanying notes 63-150 *infra*.

25. *See* text accompanying notes 215-31 *infra*.

26. For an excellent analysis of the particular problems associated with the public or governmental sector employee who blows the whistle, see Comment, *Government Employee Disclosures of Agency Wrongdoing: Protecting the Right to Blow the Whistle*, 42 U. CHI. L. REV. 530 (1975).

27. "Retaliatory" discharge, as used in this comment, refers to the malicious discharge of an employee for some real or fancied offense perpetrated by him or her against the employer.

28. For an early statement of this rule, see 1 C. LABATT, COMMENTARIES ON THE LAW OF

tion of contract[29] is based upon two presumptions of law. First, absent a specific agreement as to the duration of employment, the only consideration upon which the contractual obligation is based is work for pay.[30] Second, the formation of the relationship rests upon the concept of freedom of contract, as no employee should be forced into particular labor; so no employer should be forced to hire a particular laborer or keep that laborer employed.[31]

By definition, then, an at will employee is subject to discharge at any time and for any reason.[32] This can, and does, breed harsh results.[33] Yet despite potential and actual employer misuse, the doctrine continues

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MASTER AND SERVANT § 159 (2d ed. 1913). Examples of its application or citation abound in American jurisprudence. Some representative examples are: Pearson v. Youngstown Sheet and Tube Co., 332 F.2d 439 (7th Cir. 1964), *cert. denied*, 379 U.S. 914; Hablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1959); Odell v. Humble Oil and Refining Co., 201 F.2d 123 (10th Cir. 1953), *cert. denied*, 345 U.S. 941; Comerford v. International Harvester Co., 235 Ala. 376, 178 So. 894 (1938); Marin v. Jacuzzi, 224 Cal. App. 2d 549, 36 Cal. Rptr. 880 (1964); May v. Sante Fe Trail Transportation Co., 189 Kan. 419, 370 P.2d 390 (1962); Reale v. International Business Machine Corp., 34 App. Div. 2d 936, 311 N.Y.S.2d 767 (1970); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974). *See generally* 53 AM. JUR. 2d, *Master & Servant*, §§ 34, 43 (1970).

29. *See* 9 S. WILLISTON, CONTRACTS § 1017 (Jager ed. 1967); RESTATEMENT (SECOND) OF AGENCY § 43 (1970). *See also* Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118, 124-25 (1976) [hereinafter cited as Feinman, *Employment At Will*]; Comment, *Employment At Will and the Law of Contracts*, 23 BUFF. L. REV. 211, 212 (1973) [hereinafter cited as *Contracts*]; *Job Security*, *supra* note 16, at 335.

30. *See* Blades, *Limiting the Abusive Exercise, supra* note 23, at 1419; Comment, *Employment Contracts Terminable At Will*, 63 KY. L.J. 513, 518-20 (1975).

31. This concept was stated by Mr. Justice Harlan:

> The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé.

Adair v. United States, 208 U.S. 161, 174-75 (1908).

32. The classic statement of the employment at will doctrine, and one of the earliest, is that of the Tennessee Supreme Court in Payne v. Western & Atlantic R. R. Co., 81 Tenn. 507 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915):

> [M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se*. It is a right which an employee may exercise in the same way, to the same extent, for the same cause as the employer.

Id. at 518-19.

33. *See, e.g.*, Hablas v. Armour & Co., 270 F.2d 71 (8th Cir. 1959) (an at will employee terminated after 43 years of service for no good reason not permitted to sue for damages nor to collect his contributions to pension funds); Clarke v. Atlantic Stevedoring Co., 163 F. 423 (C.C.E.D.N.Y. 1908) (black stevedores hired for permanent positions discharged to make jobs available for whites, held not to have a cause of action); Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960) (employee who, under advice of management that it was her duty to acknowledge her availability for jury duty, discharged for so doing and denied a cause of action for wrongful discharge). *See also* Odum v. Bush, 125 Ga. 184, 53 S.E. 1013 (1906); Skagerberg v. Blandin Paper Co., 197 Minn. 291, 266 N.W. 872 (1936). *See generally* Blades, *Limiting the Abusive Discharge, supra* note 23, at 1405-06; *Job Security, supra* note 16, at 335.

as a potent force in American labor relations,[34] marking this country as one of the few industrialized nations which fails to provide general job security for all employees.[35]

The terminable at will doctrine came to prominance during the last quarter of the 19th century.[36] First articulated by Wood in his 1877 treatise on master-servant relations,[37] this rule of law quickly found favor with American courts[38] and became firmly entrenched as the majority rule by the early part of the 20th century.[39] Various social and economic factors have been suggested for this rapid acceptance. Among those hypothesized are the 19th century's development of freedom of contract[40] and the concomitant socio-economic concepts of freedom of enterprise and laissez-faire.[41]

Under the at will doctrine neither the worker nor the employer-manager can bind himself to the other without explicit contractual terms.[42] In today's society, no less than in that of the 19th and early 20th centuries, such a doctrine comports with the concept that one should be free to pursue and maximize one's own opportunities.[43] With respect to

34. *See* Blumrosen, *United States Report*, in *Symposium: Comparative Labor Law and Law of the Employment Relation*, 18 RUT. L. REV. 428, 428 (1964); Blumrosen, *Workers Rights Against Employers and Unions: Justice Francis—A Judge for Our Season*, 24 RUT. L. REV. 480, 481 (1970); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 483 (1976) [hereinafter cited as Summers, *Time for a Statute*]; *Job Security, supra* note 16, at 337-40.

35. *See* Summers, *Time for a Statute, supra* note 34, at 508. *See also* Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HAST. L.J. 1435, 1446-47 (1975).

36. For detailed historical descriptions of the development of the doctrine of employment at will, see Feinman, *Employment At Will, supra* note 29; and *Job Security, supra* note 16, at 340-45.

37. H. WOOD, MASTER AND SERVANT § 134 (1877):

> 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. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.

Id.

Wood offered no policy grounds to justify this "rule" and the four cases which he cited did not support such a legal proposition. *See Job Security, supra* note 16, at 341-42.

38. *Job Security, supra* note 16, at 342.

39. *See* 1 C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 159 (2d ed. 1913) (the rule is applied "by the great majority of American Courts"). *See also* Harrod v. Wineman, 146 Iowa 718, 125 N.W. 812 (1910) (rule so well established that it requires no citation); 11 A.L.R. 470 (1921) (rule stated as that of the majority of American courts). *See generally Job Security, supra* note 16, at 342.

40. *See* P. SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 130-37 (1969). *See also Contracts, supra* note 29, at 212-13.

41. These 19th century wellsprings of 20th century American law are well documented. *See* J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 3-32 (1956). With respect to the particular issue of the at will employment doctrine, see SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE, *supra* note 40, at 136; Blades, *Limiting the Abusive Exercise, supra* note 23, at 1416; Feinman, *Employment at Will, supra* note 29, at 118; and *Job Security, supra* note 16, at 342-43.

42. *See* notes 28-31 *supra* and accompanying text.

43. *See, e.g.*, the statement of the Wisconsin Supreme Court in Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 153 N.W.2d 587 (1967), "The presumption [that employment is

the worker this means no involuntary servitude; with respect to the employer-manager this means a respect for management's responsibility and privilege to allocate resources so as to maximize profits.[44]

Modern criticism of the terminable-at-will doctrine centers upon the employer's absolute right to discharge the at will employee. Under this doctrine the employee is defenseless against the threat of discharge and therefore vulnerable to employer coercion and caprice.[45] Generally, the critics of the doctrine cite as sufficient reason for abolishing the doctrine one's dependence in a modern society upon continued employment. In support of this is the fact that a majority of the populace are wage earners, and of this majority a large segment are at will employees.[46] In addition, some critics go beyond the personal interest of the individual employee to earn a wage, and stress that the best interests of society as a whole are served by promoting stable work relationships.[47]

Although agreeing that the goal is to curb the absolute power of the employer to discharge the at will employee, the commentators are split as to the proper method which can be used to reach this goal. Some would have courts permit an employee's right of action for breach of contract should that employee be "wrongfully"[48] terminated.[49] Others suggest that courts should recognize a wrongful discharge as a tort.[50] At least one commentator, discouraged by judicial inability to ameliorate the common law doctrine, argues for its statutory repeal.[51]

Despite the efforts of these legal writers, most American courts have

terminable at will] is grounded on a policy that it would otherwise be unreasonable for a man to bind himself permanently to a position, thus eliminating the possibility of later improving that position." *Id.* at 393, 153 N.W.2d at 590. *See also* A. HIRSCHMAN, EXIT VOICE AND LOYALTY (1970); L. STESSIN & I. WIT, THE DISLOYAL EMPLOYEE 5 (1967).

44. The managerial viewpoint and rationale was succinctly stated by Werne. "Anglo-American common law establishes fully that the right of the employer to discipline his employees is a basic management prerogative. This authority flows from management's responsibility for the efficient functioning of the plant." 1 B. WERNE, ADMINISTRATION OF THE LABOR CONTRACT 370 (1963). *See also* G. TORRENIE, MANAGEMENT'S RIGHT TO MANAGE (BNA Operations Manual, rev. ed. 1968).

45. "It is the fear of being discharged which above all else renders the great majority of employees vulnerable to employer coercion." Blades, *Limiting the Abusive Exercise, supra* note 23, at 1406. *See also* Blumrosen, *United States Report*, supra note 34; Summers, *Time for a Statute, supra* note 34; *Job Security, supra* note 16.

46. *See* Blades, *Limiting the Abusive Exercise, supra* note 23. *See also* Summers, *Time for a Statute, supra* note 34; *Job Security, supra* note 16; Comment, *Towards a Property Right in Employment*, 22 BUFF. L. REV. 1081 (1973).

47. *See, e.g.*, Blumberg, *A Preliminary Inquiry, supra* note 3.

48. "Wrongful" termination, as used by both these commentators and herein, means a termination which is based upon "bad cause." *See, e.g.*, Payne v. Western & Atlantic R.R. Co., 81 Tenn. 507 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). That is, the employer is motivated by revenge or other malicious grounds to fire the employee. For an example of such a case, see Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974), discussed *infra*, text accompanying notes 111-24.

49. *See, e.g.*, *Job Security, supra* note 16; *Contracts, supra* note 29.

50. *See, e.g.*, Blades, *Limiting the Abusive Exercise, supra* note 23.

51. Summers, *Time for a Statute, supra* note 34.

been hesitant to recant the common law precept of termination at will.[52] Instead, courts faced with an employee's action for wrongful discharge usually seek other alternatives on which to permit a suit. Among these are a showing that the contractual employment relation is or was other than at will,[53] or that the employment relationship itself rests upon factors which preclude the exercise of the private interests of the employer.[54] Barring such findings, most American courts will deny an at will employee's cause of action for wrongful discharge.[55]

To date, the surest means of providing for the job security of the at will employee has been by legislative mandate. Within the last 40 years both federal and state statutes have sought to limit employer abuse of the discharge power. Among these have been the various labor relations acts passed to protect organized labor.[56] Statutes which bar employment

52. *Id.* at 489-91. *See also* Comment, *Towards a Property Right in Employment, supra* note 46, at 1090-91.

A few jurisdictions have realized, at least in theory, a right of action based upon a tort of malicious discharge. *See, e.g.*, Johnston v. Farmers Alliance Mutual Ins. Co., 218 Kan. 543, 545 P.2d 312 (1976); Wegman v. Dairylea Cooperative, Inc., 50 App. Div. 2d 108, 376 N.Y.S.2d 728 (1975). Most, however, do not. *See, e.g.*, Fawcett v. G.C. Murphy & Co., 46 Ohio St. 2d 245, 348 N.E.2d 144 (1976); Johnson v. Aetna Life Ins. Co., 158 Wis. 56, 147 N.W. 32 (1914). *See generally* Long, *Substantial Torts Relating to Employment* (1976) (paper delivered before the State Bar of Wisconsin, January 29-30, 1976) (copy on file at the offices of the Wisconsin Law Review). Others have permitted a limited exception to the termination-at-will rule for reasons of public policy. *See* note 24 *supra*.

53. *See, e.g.*, Foley v. Community Oil Co., Inc., 64 F.R.D. 561 (N.H. 1974); Bondi v. Jewels By Edwar, Ltd., 267 Cal. App. 2d 750, 73 Cal. Rptr. 494 (1968). *See generally* Note, *Employment Contracts of Unspecified Duration*, 42 COLUM. L. REV. 107 (1942); *Contracts, supra* note 29.

54. One such factor is the involvement of the government in the employment relationship. If the government is the employer then termination may involve questions of due process. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972). *Cf.* Perry v. Sindermann, 408 U.S. 593 (1972).

When the termination of the government employee is based upon whistleblowing, first amendment issues are brought into play. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968). *See generally* Comment, *Government Employee Disclosures of Agency Wrongdoing: Protecting the Right to Blow the Whistle*, 42 U. CHI. L. REV. 530 (1975). *See also* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

A variation on this theme occurs when a private sector employer, by virtue of his business, becomes identified with a governmental function. When this occurs the constraints upon a public sector employer enure to the private sector employer. *See, e.g.*, Holodnak v. Avco Corp., 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975). The issue in such cases is the amount of governmental contact or action required to warrant constitutional treatment of employment rights. That this is not a trivial problem can be seen in cases where the issue of private action being construed as governmental action is raised. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). *Cf.* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

55. *See* note 28 *supra*. A right of action against the employer should be differentiated from the well recognized right of a discharged employee to sue a third party for the tort of wrongful interference with the employment contract. *See generally* W. PROSSER, THE LAW OF TORTS § 129 (4th ed. 1971). *See also* RESTATEMENT OF THE LAW OF TORTS § 766 (1939); RESTATEMENT (SECOND) OF THE LAW OF TORTS: TENTATIVE DRAFT NO. *14*, § 766 (Apr. 15, 1969).

56. One of the most important examples of such legislation is the National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-168 (1970 &

discrimination on the basis of sex, age, race, creed, or nationality likewise provide some employee leverage against unreasonable terminations.[57] In addition, direct protection is afforded by a host of statutes which ban employee discharges for narrowly defined reasons.[58] However, these legislative solutions have so far failed to adequately protect the at will employee. There are two reasons for this failure. First, the statutes themselves are too specific, curtailing only certain types of abuse.[59] Second, the statutes frequently limit enforcement to official rather than private action, thereby limiting their effectiveness.[60]

In order to insulate at will employees, including the whistleblowing employee, from employer intimidation, it becomes necessary (absent a requisite statute[61]) to develop within certain fact situations the legal right not to be terminated.

Sup. V 1975)) which, among other things, bars the discharge of employees who attempt to organize. To date 39 states and the District of Columbia have enacted similar legislation. *See* [1976] LAB. L. REP. (CCH) ¶ 47,000 *et seq*.

57. The two principal federal laws of this type are Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1970) and the Age Discrimination in Employment Act of 1967, § 4, 29 U.S.C. § 623 (1970). State laws setting forth equal employment opportunities have to date been passed in 49 states. *See* [1976] EMPL. PRAC. GUIDE (CCH) ¶¶ 20,000-29,336.

58. At the federal level such laws include the protection of employee job rights of one drafted into military service (50 U.S.C. § 459 (1970)) and a requisite showing for termination of otherwise qualified federal employees (5 U.S.C. § 7501 (1970)). Examples of state laws are the various workmen's compensation statutes. *See, e.g.*, Indiana, IND. CODE ANN. § 22-3-2-15 (Burns) (1974); Michigan, MICH. COMP. LAWS ANN. § 418.125 (1967); Texas, TEX. REV. CIV. STAT. ANN. art. 8307c § 1 (Vernon). Other specific examples are Connecticut's imposition of a penalty upon any employer who discharges an employee for reporting a violation of state employee safety codes (CONN. GEN. STAT. § 31-379 (1975)); California's prohibition of discharge for political reasons (CAL. LAB. CODE, § 1102 (West 1971)); and Florida's penal sanctions for threatening to discharge an employee for trading with, or failing to trade with, particular firms or persons (FLA. STAT. ANN. § 448.03 (Supp. 1977)). For a detailed listing of state laws regulating the employment relationship, see [1971] 4 LAB. REL. REP. (BNA) 1:35-:52.

59. *See* note 58 *supra*. Recently the state legislature of Connecticut considered legislation which would afford all employees having five or more years continued employment a right of arbitration when threatened with discharge. *See* Connecticut Proposed Labor Comm. Bill H.B. 8738, Conn. Gen. Ass., Jan. Sess. (1973), cited in Note, *A Remedy for Malicious Discharge of the At Will Employee: Monge v. Beebe Rubber Co.*, 7 CONN. L. REV. 758, 759 n.11 (1975). Such broad-based legislation, if ever enacted, would go a long way to the abrogation of the employment at will doctrine.

60. *Compare* ALASKA STAT. § 22.10.020 (1976) which permits a person injured or aggrieved by an act, practice or policy prohibited by the state's unlawful employment practices law (ALASKA STAT. § 18.80.220 (1976)), or by the state's unlawful discrimination practices law (ALASKA STAT. § 23.10.192 (1976)) to maintain a personal action and a court to grant both equitable and lawful relief and damages; *with* Indiana's provision which enforces the Indiana Civil Rights Law (IND. CODE ANN. §§ 22-9-1-1 to 22-9-1-13 (Burns 1974)) only through that state's Civil Rights Commission (IND. CODE ANN. § 22-9-1-6 (e), (j), and (k)(1) (Burns 1974)). *See also* note 95 *infra*. *See generally* [1971] 4 LAB. REL. REP. (BNA) 1:35-:52.

61. Even the existence of a statute which could encompass the situation of a terminated employee is no surety of success. The reason for this lies in the use of strict interpretation by courts so as to delimit the effectiveness of such statutes. *See* note 95 *infra*.

II. THE PUBLIC POLICY[62] EXCEPTION

A. General Parameters of the Exception

Within the last eighteen years, a handful of state courts have carved out an exception to the terminable-at-will doctrine which is based upon considerations of public policy.[63] The genesis of this exception was the California decision of *Petermann v. Teamsters Local 396*.[64] *Petermann* involved an employee of the Teamster's Union who alleged that the only reason for his termination was his refusal to commit perjury before a state legislative committee investigating union wrongdoing. In a unanimous opinion, the California Court of Appeals held that the termination gave rise to a cause of action for wrongful discharge.[65]

Citing no authority, the court stated that the right of an employer to discharge an at will employee must be limited "by consideration of public policy."[66] Having once established this premise the court went on to reason that state perjury laws reflected a public policy that truthful testimony within the legal system was a necessity. Given this policy, a failure to permit plaintiff's cause of action was viewed by the court as tantamount to encouraging criminal conduct and defeating the clear interests of the state.[67]

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62. The term "public policy" is a shorthand reference for a wide variety of factors used by courts to determine issues of law. Story wrote that, "[p]ublic policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day. . . that it is difficult to determine its limits with any degree of exactness." W. STORY, LAW OF CONTRACTS § 546 (2d ed. 1847). Sutherland labelled public policy as a "vague and indefinite concept that is not susceptible of application as a precise rule." 2A J. SUTHERLAND, STATUTORY CONSTRUCTION, § 56.01 (4th ed. 1973) [hereinafter cited as SUTHERLAND, STATUTORY CONSTRUCTION]. Sutherland went on to enumerate the principal factors involved in a judicial assessment of public policy:

> There are formal expressions and manifestations of public policy in the mandates, norms, and guidelines declared in federal and state constitutions, statutes, judicial decisions, and sundry other avenues through which the official decisions and actions of organized society are registered. In a larger and less formalized sense, countless manifestations of public mores, attitudes, and sentiments may be, in effect, judicially noticed as sources on the basis of which to declare public policy. Policy directives may be perceived, moreover, as imperitives derived from modern economic, social and political conditions.

Id. at 401 (footnotes omitted).

63. California, Petermann v. Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Indiana, Frampton v. Central Indiana 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 Hampshire, Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974); Oregon, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); and Texas, Texas Steel Co. v. Douglas, 533 S.W.2d 111 (Tex. Ct. App. 1976). In addition to these six states, four others, while rejecting on the pleadings a public policy argument, have not rejected the concept outright: Louisiana, Stephens v. Justiss-Mears Oil Co., 300 So.2d 510 (La. App. 1974); New York, Wegman v. Dairylea Cooperative Inc., 50 App. Div. 2d 108, 376 N.Y.S.2d 728 (1975); Pennsylvania, Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974); and Kansas, Johnston v. Farmers Alliance Mutual Ins. Co., 218 Kan. 52, 551 P.2d 779 (1976).

64. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

65. *Id.* at 190, 344 P.2d at 28.

66. *Id.* at 188, 344 P.2d at 27.

67. It would be obnoxious to the interests of the state and contrary to public policy and

The *Petermann* decision is especially noteworthy for the three factors which the court interrelated to reach its decision. First, the plaintiff was essentially passive. He did nothing to place himself in the dilemma; it was the employer who forced the choice between termination or perjury. Second, the criminal statute involved did not specifically provide a right or remedy to an employee who suffered discharge for telling the truth. Any possible relief in the case would have to be created by judicial implication. Finally, the employer, through the exercise of his power of termination, sought to contravene a specific public policy which affected the administration of justice in the state. The court, in arriving at its decision, balanced these factors against the interest of the employer to freely discharge his employees. At stake was more than the interest of the employee not to be coerced to illegal action. The determinative factor was society's interest in obtaining truthful testimony.

The decision is also important for the manner in which the court defined public policy. The court did not arrive at its definition *in vacuo*. It grounded its determination upon specific legislative action.[68] The court clearly perceived its decision to be necessary to the proper effectuation of the legislative mandate.[69] Inherent in such an approach is a due regard for the legislative prerogative to set and define public policy.[70]

Subsequent cases, even when they fail to permit relief for the discharged employee, have tended to follow the *Petermann* court's balancing of the public and private interests.[71] The result, though neither well defined nor settled, is a developing body of law which predicates a general exception to the doctrine of terminable-at-will employment. It is this public policy exception which provides some hope for the conscientious whistle-blowing employee.

B. Defining the Parameters of the Exception

The cases which have developed the public policy exception to at will terminations have tended to fall into one of three categories, depending upon the source of the determinant of public policy. In the first category a particular statute exists which gives a right to the discharged employee but not a corresponding personal remedy. In this case a plaintiff

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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.

Id. at 188-89, 344 P.2d at 27.

68. The court relied upon those provisions of the California Penal Code which made perjury a crime, CAL. PENAL CODE §§ 118, 653(f) (West 1970). 174 Cal. App. 2d at 188, 344 P.2d at 27.

69. *Id.* at 189, 344 P.2d at 27.

70. *See* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 9 (1975); SUTHERLAND, STATUTORY CONSTRUCTION, *surpa* note 62, at 29. *See also* Note, *Contracts—Employee's Discharge Motivated by Bad Faith, Malice or Retaliation Constitutes a Breach of an Employers Contract Terminable At Will*, 43 FORDHAM L. REV. 300, 307-08 (1974).

71. *See* note 63 *supra*.

seeks an implied remedy.[72] In the second a statute defines a public policy which the employer has breached, but the statute fails to express either a right or a remedy for the discharged employee. The plaintiff in such a situation seeks judicial implication of both the right not to be discharged and a corresponding remedy.[73] Finally, there may be no legislative expression of a public policy to cover the circumstances of the discharged at will employee. Again judicial implication of a right and remedy is sought. The problem, however, is that in such a situation the entire weight of defining public policy is shifted to the judiciary.[74]

Each of these three possible categories influences the judicial determination of whether or not to create or apply a public policy exception to the terminable at will doctrine. If the discharged employee fails to bring his case within one of these alternatives he or she cannot invoke the exception.[75]

I. EXPRESS RIGHTS AND IMPLIED REMEDIES FASHIONED FROM LEGISLATIVELY DEFINED PUBLIC POLICY

Where a state law expresses a public policy by conferring rights upon employees yet does not directly provide for private remedies to protect those rights, then a remedy may be implied by the courts when an

72. *See, e.g.*, Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E. 2d 425 (1973); discussed *infra*, text accompanying notes 79-85.

Where a statute imposes a right and a corresponding duty, yet remains silent as to the means of enforcing the right, or otherwise fails to expressly provide for a private remedy courts may imply private actions so as to effectuate the law. What is required is statutory construction and interpretation. For this courts will look to the law, its expression of enforcement and the ends sought by the legislature. *See* SUTHERLAND, STATUTORY CONSTRUCTION, *supra* note 62, at § 45.05. In so doing courts will attempt to determine if the legislation clearly intends that a private remedy should be implied or, at the very least, that such a remedy is not precluded. *Id.* at § 55.03-.04. In addition, the individual who seeks such a private remedy must show himself to be among that class of individuals for whose benefit and protection the law was passed. *See generally* Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Comment, *Private Rights from Federal Statutes: Towards a Rational Use of Borak*, 63 NW. U.L. REV. 454 (1968); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963). *See also* 1 AM. JUR. 2d, *Actions*, § 73 (1962); 73 AM. JUR. 2d, *Statutes*, §§ 432-34 (1974).

The case law on the general concept of implied remedies is extensive. *See, e.g.* J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Molin v. Wisconsin Land & Lumber Co., 177 Mich. 524, 143 N.W. 624 (1913); New Rochelle v. Beckwith, 268 N.Y. 315, 197 N.E. 295 (1935); F.A. Strauss & Co., Inc. v. Canadian Pac. Ry. Co., 254 N.Y. 407, 173 N.E. 564 (1930); Posnanski v. Hood, 46 Wis. 2d 172, 174 N.W.2d 528 (1970); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

73. *See, e.g.*, Petermann v. Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), discussed in text accompanying notes 64-70 *supra*.

74. *See, e.g.*, Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974), discussed in text accompanying notes 111-24 *infra*; Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975), discussed in text accompanying notes 125-42 *infra*.

75. Unless, of course, the discharged employee is able to show that his or her case fits within the frame of a particular statute which defines both the rights and personal remedies involved in a particular employment relationship. *See* notes 56-60 *supra* and accompanying text.

employer has attempted to contravene that policy through the use of the discharge power. The implication of such a remedy requires both statutory construction and interpretation.[76] Two cases, one from Indiana[77] and the other from Michigan,[78] exemplify this approach.

The Indiana case, *Frampton v. Central Indiana Gas Co.*,[79] involved an employee who was discharged one month after she had filed a workmen's compensation claim against her employer. Although she was given no reason for her discharge, her action for damages alleged that the termination was in retaliation for the filing of the claim.[80] The Indiana Supreme Court decided the case on the pleadings. The court explicitly recognized an exception to the terminable at will doctrine where the employee's discharge was motivated solely by retaliation for the exercise of a statutory right and reversed the dismissal of her action.[81]

The statutory right involved in the *Frampton* case was the Indiana workmen's compensation law which prohibits employers from using any "device" to escape liability for its provisions.[82] At the time *Frampton* was decided, however, the statute did not provide for a right of private action for its breach.[83] Based on the allegations of the complaint, the court concluded that the actions of the employer were contrary to the express provisions of the statute and read "other device" broadly so as to include retaliatory discharge.[84] The result was that a private cause of action would lie, "in order for the goals of the act to be realized and for public policy to be effectuated."[85]

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76. See note 72 *supra*.

77. Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973).

78. Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976).

79. 260 Ind. 249, 297 N.E.2d 425 (1973).

80. *Id.* at 250, 297 N.E.2d at 426-27.

81. *Id.* at 253, 297 N.E.2d at 428.

82. IND. CODE ANN. § 22-3-2-15 (Burns 1974): "[N]o contract or agreement, written or implied, no rule, regulation or other device shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by this act."

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

84. The court's broad reading of the state workmen's compensation law comports with the usual treatment given to such legislation. *See* SUTHERLAND, STATUTORY CONSTRUCTION, *supra* note 62, § 54.05, at 362.

85. Frampton v. Central Ind. Gas Co., 260 Ind. 249, 251, 297 N.E.2d 425, 427 (1973).

This decision has been followed in Texas, Texas Steel Co. v. Douglas, 533 S.W.2d 111 (Tex. Ct. App. 1976), but limited as to the remedy permitted. *See* Smith v. Coffee's Shop for Boys and Men, Inc., 536 S.W.2d 83 (Tex. Ct. App. 1976) (held: no right exists to force an employer to rehire an employee discharged for filing a state workmen's compensation claim).

Louisiana, while not rejecting the decision of the *Frampton* court, has apparently distinguished it in Stephens v. Justice-Mears Oil Co., 300 So.2d 510 (La. Ct. of App. 1974). *Stephens* involved an employee who resigned his position as permanently disabled and filed a claim under Louisiana's workmen's compensation law. Nine months after filing his claim the employee was rehired, then fired after half a day's work. The employee brought an action for retaliatory discharge citing *Frampton* in support of his cause of action. Without expressing any opinion as to the correctness of the Indiana decision, the Louisiana Court of Appeals denied plaintiff's claim. Distinguishing it from *Frampton* on the basis that the employee had filed for compensation benefits nine months before his discharge, the court found no evidence of retaliation. *Id.* at 511.

The Michigan decision of *Sventko v. Kroger Co.*,[86] like *Frampton*, presented the issue of whether a private action should be permitted an at will employee discharged for having filed a claim under a state workmen's compensation law. As in *Frampton*, the *Sventko* court was faced with a statute which did not expressly provide for a private right of action for the statute's breach. In deciding that the employee could bring his suit, the Michigan Court of Appeals followed the reasoning of the *Frampton* court. First, the court assumed that the terminable at will rule could be overcome for reasons of public policy.[87] Given this premise, the court concluded that Sventko's discharge presented such a reason because it worked to defeat the public policy of the state as expressed in the workmen's compensation law.[88]

The concurring opinion in *Sventko* details the court's rationale and provides an important insight into the theory of a public policy exception. First, it explicitly cites the *Petermann* and *Frampton* decisions for the validity of an exception.[89] Second, the opinion carefully distinguishes these decisions and *Sventko* from decisions which had denied plaintiffs an exception to the terminable-at-will doctrine.[90] The distinguishing feature, according to the concurring opinion, was the scope of the public policy involved.[91] The *Petermann* and *Frampton* decisions, like *Sventko*, involved clear expressions of public policy declared by the legislature.[92] This was viewed as being in contradistinction to "vaguely expressed" public purposes which were alleged in the other cases and which lacked the legitimacy of legislative action.[93] The concurring opinion states then that the clear expression of important public policy warrants the abrogation of the common law concept of termination at will.[94]

86. 69 Mich. App. 644, 245 N.W.2d 151 (1976).

87. "[A]n employer at will is not free to discharge an employee when the reason for the discharge is an intention on the part of the employer to contravene the public policy of this state." *Id.* at 642, 245 N.W.2d at 153.

88. *Id.* at 648, 245 N.W.2d at 153.

89. *Id.* at 651, 245 N.W.2d at 155 (Allen, J., concurring). In addition to these two cases, the concurring opinion also cited Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) and Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) for the same proposition. *Id.*

90. *Id.* The decisions with which *Sventko* was compared were Percival v. General Motors Corp., 539 F.2d 1126 (8th Cir. 1976), and Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974). In both of these cases the plaintiffs, discharged employees, were denied a cause of action for wrongful discharge. *See* text accompanying notes 153-78 *infra*.

91. "The case before us does not . . . involve some vaguely expressed public purpose. Instead, it concerns a longstanding statute whose clear purpose . . . would obviously be violated assuming . . . the allegations in plaintiff's complaint are true." Sventko v. Kroger Co., 69 Mich. App. 644, 651-52, 245 N.W.2d 151, 155 (1976) (Allen, J., concurring).

92. *Id.*

93. *Id.*

94. The case was not without a dissent which strongly objected to such "judicial legislation." *Id.* at 653, 245 N.W.2d at 156 (Danhof, C.J., dissenting). The reasoning of the dissent was that given the common law respecting termination at will an express statutory mandate should be required for its abrogation. *Id.* at 651-52, 245 N.W.2d at 155-56 (Danhof, C.J., dissenting). This is the familiar "rule" of statutory construction frequently phrased as a precept that "statutes in derogation of the common law should be strictly construed." *See*

The *Frampton* and *Sventko* decisions stand for the proposition that a private right of action may be implied where an employer, by the use of the discharge power, acts to thwart a clear statutory expression of a public policy which has conferred rights upon the employee. A private remedy will then be permitted when it can be shown that to do so will further the intent of the legislature.[95]

2. IMPLIED RIGHTS AND IMPLIED REMEDIES FASHIONED FROM LEGISLATIVELY DEFINED PUBLIC POLICY

Where a state law expresses a public policy but provides neither a right nor a remedy, then both may be implied upon the grounds of expediting that expressed public policy.[96] This situation arises in one of two ways: either the employer has acted to contravene an expressed public policy which does not directly bear upon the employment relationship; or the employer has acted to contravene a policy which, though directed at some facet of the employment relationship, does not expressly cover this action of the employer. In both cases an employer has acted to subvert some specific mandate of public policy.

The seminal case for implying both a right and a private remedy for the first situation was *Petermann v. Teamsters Local 396*.[97] In that case

SUTHERLAND, STATUTORY CONSTRUCTION, *supra* note 62 at § 61.01. For alternative analyses of the problem of strict construction requisite to the abrogation of common law more in keeping with that of the majority of the *Sventko* court, see Landis, *Statutes And the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (1934); Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

95. That this is not a trivial hurdle can be shown by two cases; Johnson v. United States Steel Corp., 348 Mass. 168, 202 N.E.2d 816 (1966), and Fawcett v. G. C. Murphy & Co., 46 Ohio St. 2d 245, 348 N.E.2d 144 (1976). In *Johnson* the Massachusetts Supreme Court denied the claim of a discharged employee who alleged that his discharge was based solely upon his age and was therefore in violation of Massachusetts law. (*See* MASS. GEN. LAWS. ANN. ch. 149, § 24A (West 1976)). The court arrived at its decision on the basis of both the doctrine of termination at will and an interpretation of the statute in question. With respect to the latter, the exclusive remedy for the wrongful act of the employer was that expressed by the statute—administrative action. Therefore, it was held, no private action could be maintained. Johnson v. United States Steel Corp., 348 Mass. 168, 170, 202 N.E.2d 816, 818 (1966).

The *Fawcett* case involved employees who sought and were denied damages for wrongful or unjust discharge despite a state law which declared that: "[n]o employer shall . . . discharge without just cause any employees between the ages of forty and sixty-five who are physically able to perform the duties and otherwise meet the established requirements of the industry and laws pertaining to the relationship between employer and employee." OHIO REV. CODE ANN. § 4101.17 (Page 1973). Upholding the dismissal of the suit, the Ohio Supreme Court noted that this statute was penal and that responsibility for its enforcement legally rested with the state's Department of Industrial Relations. Since a remedy already existed by way of appeal to this agency and the enforcement of the statute was thereby insured, the court saw no legislative intimation that a civil remedy should be implied. Fawcett v. G. C. Murphy & Co., 46 Ohio St. 2d 245, 248-49, 348 N.E.2d 144, 146-47 (1976).

96. *See, e.g.*, Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970), discussed in text accompanying notes 99-105 *infra*; Petermann v. Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), discussed in text accompanying notes 64-70 *supra*.

97. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

the discharged employee successfully sought to base his case for damages upon a state statute respecting perjury. His employer, by threatening the plaintiff with discharge, sought to contravene an express mandate of public policy which did not directly deal with employment relationships.[98]

The second situation is exemplified by the California case of *Montalvo v. Zamora*.[99] In *Montalvo* members of a family of non-union farmworkers were fired for having hired an attorney to negotiate wages with their employer. This negotiative effort was aimed at collecting the difference between the wages these workers had been paid and the wage rate set by law.[100] The discharged employees brought an action for damages against their employer. At issue was the interrelation of two provisions of the California Labor Code, one which guaranteed the right of employees to engage in collective bargaining,[101] and the other which guaranteed certain employees a minimum wage.[102] Neither statute expressly covered the plaintiff's situation, nor provided for a private remedy.

The California Court of Appeals reversed the dismissal of plaintiffs' claim, and held that non-union employees had a right to hire counsel for employment negotiations, and that this right was enforceable by private actions.[103] The effect of the decision was to declare that the statutory right to collectively bargain implied the right of all employees to bargain or to negotiate through third parties. Moreover, an employer who attempted to defeat this right through the use of the discharge power would have to defend himself in a personal action for wrongful discharge.

The *Montalvo* court relied upon the *Petermann* decision for the proposition that violations of public policy by an employer could justify private civil actions.[104] To the *Montalvo* court, the public policy was twofold: there was an express policy favoring collective bargaining and there was an express policy regarding minimum wages. The fact that, on its face, the statute guarantying the right of collective and representative bargaining applied only to unionized labor was held immaterial; for at issue was the protection of the right of an employee to a minimum wage. The specific right set by the legislature to a minimum wage justified the implied right of representative negotiation for the non-union employee. In this manner the court read the collective bargaining statute broadly[105] so

98. *See* notes 64-70 *supra* and accompanying text.

99. 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970).

100. The wages involved amounted to less than $37 and were owed to the mother of the family under a state statute which fixed the minimum wages of female workers. *Id.* at 72, 86 Cal. Rptr. at 402.

101. CAL. LAB. CODE § 923 (West 1971).

102. CAL. LAB. CODE § 1199 (West 1971).

103. Montalvo v. Zamora, 7 Cal. App. 3d 69, 75, 86 Cal. Rptr. 401, 404 (1970).

104. *Id.* at 76, 86 Cal. Rptr. at 405.

105. Such a reading of the statute might be styled as using the "equity" of the statute in order to fulfill its purpose. *See* SUTHERLAND, STATUTORY CONSTRUCTION, *supra* note 62, at ch. 54 and § 45.09. *See also* text accompanying notes 228-29 *infra*.

as to conclude that a public policy exception to termination at will was justified.

Petermann was based upon a general public policy, clearly articulated by statute, which went beyond the employment relationship—the need for truthful testimony. *Montalvo* was based upon a public policy which was defined by the court through the interpretation of statutes which dealt with specific aspects of the employment relationship—wages and collective bargaining. These two cases show that a cause of action for retaliatory discharge will depend upon how the statutory policy is invoked. If it is a general statutory policy which does not expressly touch upon the employment relationship, as was observed in *Petermann*, the plaintiff must show something more than a mere personal stake in the action. He or she must show that the denial of the action will adversely impact a broad social need represented by the public policy involved. Where the defined public policy does concern the employment relationship but does not speak directly to plaintiff's situation, as was observed in *Montalvo*, a different perspective is required. The discharged employee must relate his or her situation to some express right conferred upon employees *qua* employees.

The *Petermann* and *Montalvo* cases exemplify the implication of both a right and a remedy. The analysis used in arriving at such an implication is fundamentally the same as when only the remedy need be implied.[106] In the former situation there is, however, a further refinement. Where both the right and the remedy are to be implied the court must be in a position to rationalize a broad reading of the policy-setting statute(s) involved.[107]

3. JUDICIALLY FASHIONED PUBLIC POLICY

Legislation is the strongest indicator of the existence of public policy.[108] In the absence of any relevant legislation respecting the right of an employer to discharge an employee, courts must fill the gap if they are to entertain an action for wrongful discharge. Courts in such a position have responded in one of two ways. They have either modified the doctrine of termination at will[109] or they have created a narrowly defined exception to its precepts.[110]

The New Hampshire Supreme Court, in *Monge v. Beebe Rubber Co.*,[111] modified the concept of termination at will. In *Monge* the

106. *See* text accompanying notes 76-95 *supra*.

107. For an example of a plaintiff's failure to provide sufficient support for such statutory construction, see Becket v. Welton Becket & Assoc., 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974); discussed in text accompanying notes 195-98 *infra*.

108. *See* SUTHERLAND, STATUTORY CONSTRUCTION, *supra* note 62, § 56.01, at 401. *See generally* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 7-12 (1975).

109. *See* Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

110. *See* Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

111. 114 N.H. 130, 316 A.2d 549 (1974).

plaintiff alleged that she had been discharged for having refused the advances of her foreman. The case came to the court on appeal from a judgment which granted plaintiff's jury award of damages for malicious discharge and breach of the employment contract.[112]

The court, in partially affirming the judgment,[113] stated that, "a termination by the employer of a contract for an employee at will which is motivated by bad faith or malice or based on retaliation is not [sic] the best interest of the economic system or the public good and constitutes a breach of the employment contract."[114] Beyond citation to the *Petermann* and *Frampton* decisions, the court offered neither a statutory nor a common law basis for this bald assertion.[115] Instead, the court rested its decision upon the premise that society, as a whole, held an important interest in the employment relationship,[116] an interest at variance with a notion of termination at will weighted heavily in favor of the employer.[117]

The court defined society's involvement in the employment relationship as one which required a balancing of interests: "In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interests of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two."[118] This balance is to be maintained by curtailing the employer's right of discharge. An employer should not be free to terminate an at will employee for any reason. In New Hampshire, then, the right of termination is restricted by *Monge* to discharges for good cause or for no cause only.[119]

The dissent in *Monge* opposed this "broad new unprecedented law."[120] Like the dissent in *Sventko*,[121] the *Monge* dissent was of the opinion that no long-standing common law doctrine such as that of termination at will should be rescinded or circumscribed without some

112. *Id.* at 130, 316 A.2d at 550.

113. The case was affirmed as to damages arising out of the breach of the employment contract but was reversed on the issue of damages for mental suffering. The reversal was on the ground that such damages were not permitted under plaintiff's contract theory. *Id.* at 134, 316 A.2d at 552.

114. *Id.* at 133, 316 A.2d at 551.

115. *Id.* These two cases did not support such a sweeping reformation of the termination-at-will doctrine. *See* the remarks of Justice Grimes, *id.* at 135-36, 316 A.2d at 553 (Grimes, J., dissenting). *See also* text accompanying notes 64-70 and 79-85 *supra*.

116. Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974).

117. *Id.* at 132, 316 A.2d at 551.

118. *Id.* at 133, 316 A.2d at 551.

119. *Id.* For the declaration of the three grounds under which an employer may lawfully terminate an at will employee under the classic formulation of the doctrine of termination at will, see Payne v. Western & Atlantic R. R Co., 81 Tenn. 507 (1884), quoted at note 32 *supra*.

120. Monge v. Beebe Rubber Co., 114 N.H. 130, 135, 316 A.2d 549, 553 (1974) (Grimes, J., dissenting).

121. Sventko v. Kroger Co., 69 Mich. App. 644, 653, 245 N.W.2d 151, 156 (1976) (Danhof, C.J., dissenting); discussed at note 94 *supra*.

expressed legislative direction.[122] In support of this position the dissent cited the *Petermann* and *Frampton* decisions. Both of these, according to the dissent, rested firmly upon some clearly expressed legislative mandate of public policy, a requisite basis lacking in the majority's opinion.[123]

To date, no other state court has accepted the broad economic and social arguments of the *Monge* decision to work a change in the termination-at-will doctrine. Nor has any other court attempted so radical a redefinition of the contractual relationship which exists between the at will employer and the employee.[124]

The Oregon decision of *Nees v. Hocks*[125] typifies an alternative approach to that of *Monge*. Rather than excising the power to discharge for "bad" cause, the Oregon Supreme Court defined a narrow exception to the termination-at-will doctrine which was based upon a specific public policy. In *Nees* the court confronted the situation of an at will employee who was terminated because she had served on a jury. The employee brought suit for a wrongful discharge and won a jury verdict. In awarding both compensatory and punitive damages, the jury found that her discharge had been motivated solely by her having taken time off from work to serve as a juror.[126]

On appeal, the Oregon Supreme Court stated 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."[127] As authority for this proposition the court cited to both the *Petermann* and *Frampton* decisions.[128]

Once recognizing that public policy exceptions to the termination at will doctrine can exist, the court went on to consider whether plaintiff's discharge was among those socially undesirable motives for which such an exception could be invoked. The court's analysis centered upon the community's interest in the jury system as a part of the social legal order.[129] At issue was the question of how the fear of discharge would affect this interest. In the absence of applicable state statutes, the court noted foreign law which specifically protected the employee-juror.[130] The court concluded that to permit the discharge of an employee for jury duty

122. Monge v. Beebe Rubber Co., 114 N.H. 130, 135-36, 316 A.2d 549, 553 (1974) (Grimes, J., dissenting).

123. *Id.*

124. An additional aspect of the *Monge* decision worthy of note is that, unlike most cases which deal with the public policy exceptions to termination at will, the issue was decided on the merits. For a discussion of this aspect of the case, see note 142 *supra*.

125. 272 Or. 210, 536 P.2d 512 (1975).

126. *Id.* at 211-12, 536 P.2d at 512-13.

127. *Id.* at 218, 536 P 2d at 515.

128. *Id.* at 216-17, 536 P.2d at 515.

129. *Id.* at 218-19, 536 P.2d at 516.

130. *Id.* at 219, 536 P.2d at 516. Specifically, the court noted a Massachusetts statute which makes an employer liable to a citation for contempt of court for interference with an employee's jury duty (*see* MASS. GEN. LAWS. ANN. ch. 268, § 14a (Michie/Law. Co-op 1968)) and Illinois case law to the same effect.

without imposing a risk of civil action would work to defeat "the will of the community" and would impose unacceptable risks to the integrity of the legal system.[131]

In reaching its conclusion the *Nees* court carefully distinguished the jury duty situation from situations which involve purely private employment interests.[132] The only reason for redefining the private interests inherent in the at will employment relationship was the involvement of an important community interest.[133] Here this requisite showing was made on the basis of the need for a public policy respecting jury duty.

By explicitly limiting the public policy exception to a specific showing of a social detriment caused by the discharge, the Oregon approach to public policy is nearer to that of California[134] and Indiana[135] than that of New Hampshire.[136] An Oregon plaintiff, in order to qualify for the public policy exception, must point to something more than a mere personal interest. The plaintiff must show that the action of the employer harmed not only the plaintiff but society as well, by circumventing a specific public policy. This is a far narrower application of a public policy exception than that used by the *Monge* court.[137]

The fact that the Oregon court chose to so limit its public policy exception may rest upon the absence of a state statute that defined the public policy involved. The court, by the limitation, showed a deference to the legislature's prerogative to set public policy.[138] The necessary impetus for the court to invade this legislative prerogative as much as it did may rest upon the fact that the case situation went to the integrity of the legal system. By limiting the exception as it did, the court thus minimized its involvement in the declamation of public policy. As a result, the question of expanding the public policy exception is left open.[139] In this manner the potential for encroachment upon the legisla-

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

132. *Id.* at 216-18, 536 P.2d at 515.

133. *Id.* In clarifying the distinction between the "purely private" and the action which involved a general public interest, the court cited as examples of the "purely private" Becket v. Welton Becket & Assoc., 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974) and Campbell v. Ford Industries, Inc., 266 Or. 479, 513 P.2d 1153 (1973). For a discussion of these cases, see text accompanying notes 182-98 *infra*.

134. *See* Petermann v. Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959). *See also* Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1970).

135. *See* Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973).

136. *See* Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

137. *See* text accompanying notes 111-24 *supra*.

138. This is the normal stance of a court given the theory of separation of powers. *See* SUTHERLAND, STATUTORY CONSTRUCTION, *supra* note 62, at 29. *See also* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES xvii, 1-3, 9 (1975), regarding the special responsibilities of courts to ascertain legislative meaning within a system where, with respect to "lawmaking" by statute, courts are subordinate to the legislature.

139. With respect to the *Nees* decision, the further expansion would be to cases which did not involve the specific question of an employer acting to discourage jury participation on the part of his employees. Compare this case-by-case approach with the broad redefinition of the employment relationship expressed in the holding of Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974), discussed in text following note 118 *supra*.

tive sphere is further reduced.[140]

The *Nees* court was careful to point out that the exception to the terminable at will doctrine was being permitted to prevent a particular type of invasion upon a specific aspect of public policy. The exception did not rest upon the employment relation *per se*; rather, it rested upon the fact that the relation was abused and that this abuse worked to the detriment of the legal system.[141] This narrow approach is distinguishable from that of the *Monge* court which found, within the employment relationship itself, the requisite determinant of public policy.[142]

These two distinct approaches to the problem of judicially fashioned public policy exceptions have their respective advantages and disadvantages. The broad approach, as exemplified by the *Monge* decision, represents a large scale reapportionment of legal rights within the employment relationship.[143] Such an approach leads to a general rule that certain discharges will not be permitted irrespective of the impact such terminations may have upon society. This approach, including as it does a broad range of possible discharge circumstances, has the advantage of offering to employees a modicum of job security. It places upon an employer the burden of showing that a particular discharge was for some reason other than a malicious or "bad" cause. Its major drawback, the employers' interests aside, lies in the absence of legislative input for such a sweeping change of legal relationships.

The more narrow approach, as exemplified by the *Nees* decision, confronts the problem of an absence of legislative action by a rigid

140. A subsequent Oregon decision has limited the exception to cases which involve only legislatively set determinants of public policy. Campbell v. Ford Industries, Inc., 274 Or. 243, 546 P.2d 141 (1976). *See* text accompanying notes 182-94 *infra*.

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

142. Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551-52 (1974).

This distinction may well rest upon the respective legal theories presented by the plaintiffs of these two cases. Like *Monge, Nees* was decided on the merits. However, where plaintiff's case in *Monge* rested upon contract theory, Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974), that of *Nees* rested upon tort. Nees v. Hocks, 272 Or. 210, 210, 536 P.2d 512, 512 (1975). In the former, the employment contract itself was at issue; in the latter, the focal point was the injury done to society. The injury done to the plaintiff, though arising out of the employment relationship, was viewed by the *Nees* court as an injury perpetrated upon society and its need for maintaining the integrity of the jury system.

The distinction as to which legal theory, contract or tort, should be the basis for an employee's action for wrongful discharge has other ramifications as well. Most important of these is the delineation of the requisite elements of proof and the scope of permissible damages. With respect to the latter, *Monge* serves as an interesting example. In *Monge* the contract nature of the case operated to bar plaintiff's recovery for tort damages due to mental suffering. Monge v. Beebe Rubber Co., 114 N.H. 130, 134, 316 A.2d 549, 552 (1974). *See* note 113 *supra*. The problems of proof attendant to various legal theories, and concomitant assessment of damages, while beyond the scope of this Comment, are not trivial. For a detailed analysis of these problems, see Blades, *Limiting the Abusive Exercise, supra* note 23, at 1427-31.

143. *See* text accompanying notes 111-19 *supra*.

definition as to the applicability of a public policy exception.[144] However, this judicial deference to the legislative function, usurping it only to cure a specific evil, is offset by uncertainty. The approach rests upon a judicial perception of what is proper public policy within the context of narrow fact situations. A policy of broad-based employment security is thus eschewed. In addition, the narrow approach is open to conflicting judicial results.[145] Moreover, by requiring continued litigation as to its applicability to differing aspects of social concerns, the narrow approach, and its resulting case-by-case method of application, mitigates against judicial economy.[146]

In summary, the establishment of a public policy exception to the termination-at-will doctrine represents a private concern becoming a public concern. By its operation, the private employment relationship, with the employer's right to terminate that relationship, becomes subordinated to the public interest. The degree to which this interest is subordinated varies with the determinant of public policy invoked, be it legislative or judicial.[147]

This subordination of private interests is not lightly undertaken. Court decisions which permit this subordination by means of a public policy exception exhibit a concern for the private interests involved. In each case the courts have demanded a demonstrable nexus between the employee's personal interest in job security and society's interest in the maintenance of certain norms of behavior. The employee-plaintiff must show that his or her discharge, if permitted to go without redress, will work a harm upon society through a violation of public policy.[148]

144. *See* text accompanying notes 125-37 *supra*.

145. This point, at least with respect to the issue of employer interference with employees' jury duty, is demonstrated by the California decision of Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960). The plaintiff in *Mallard* was discharged for merely completing a jury service questionnaire which indicated her willingness to serve. The California Court of Appeals, while labelling the action of the employer as "reprehensible," denied plaintiff's cause of action for wrongful discharge. *Id.* at 394, 6 Cal. Rptr. at 174. The court went on to declare that the proper means of effectuating employer deference to the jury system was through statute and not judicial fiat. *Id.* at 396, 6 Cal. Rptr. at 175.

146. In this context one should also note that the case-by-case approach, mandating litigation to determine employee rights, would tend to disfavor those who could not afford to bring such cases. This would generally be the discharged employee, an individual who would most probably be out of work and without adequate assets to support legal efforts on his or her behalf. However, this disadvantage might well be offset by an "embarassment" factor. An employer, particularly a large, nationally known corporation, might be willing to settle rather than suffer public embarrassment by being accused and shown guilty of egregious employment practices.

147. *See* text accompanying notes 76-146 *supra*.

148. *Id.* A case which exemplifies a plaintiff's failure to adequately establish this nexus is Paterson v. Philco Corp., 252 Cal. App. 2d 63, 60 Cal. Rptr. 110 (1967). The plaintiff in *Paterson* was terminated because of a falsely filed performance report. The report was filed by a fellow employee who sought plaintiff's termination. The plaintiff brought suit against the corporation for damages. In denying the cause of action, the court held that absent a statute or a showing of a specific public policy violation on the part of the employer in terminating the plaintiff, the employer had a legal right to effect the discharge. *Id.* at —, 60 Cal. Rptr. at 113.

Moreover, the exception is invoked only when the employer seeks to circumvent some specific aspect of social policy involving either the general public,[149] or the employment relationship.[150]

III. WHISTLEBLOWING AND THE PUBLIC POLICY EXCEPTION

A. State of the Law

Private sector, at will employees who have been discharged for "blowing the whistle" on their employers have not fared well in the courts. The few cases which have considered this issue[151] have declined to grant such an employee a right of action for his or her resulting discharge.[152] In their treatment of the interests involved, these cases highlight the narrow limits of the current public policy-based exceptions to the doctrine of termination at will.

The case of *Geary v. United States Steel Corporation*[153] exemplifies the approach now prevalent respecting discharged whistleblowers. The plaintiff in *Geary* was a sales representative with fourteen years experience who bypassed his superiors in an effort to have what he considered to be an unsafe product withdrawn from the market. In doing this he notified both customers and high corporate officials of his firm.[154] Dis-

149. *See, e.g.*, Petermann v. Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (importance of truthful testimony); Nees v. Hocks, 272 Ore. 210, 536 P.2d 512 (1975) (the importance of an unencumbered jury system).

150. *See, e.g.*, Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970) (discharge power not to be used to prevent employees from hiring counsel to negotiate employment-related problems); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (discharge power not to be used to circumvent state workmen's compensation system); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976) (discharge power not to be used to circumvent state workmen's compensation system).

151. In order to present a sufficient group of cases, a strict adherence to the definition of whistleblowing was impossible. The cases collected involve both public and internal whistleblowing as well as efforts of employees to gain information rather than to disclose it. For the purpose of analysis, these cases present the same issue as that of the discharged whistleblower: the attempt to gain a public policy exception to the termination at will doctrine in the absence of some actual coercion on the part of the employer to have the employee contravene public policy.

152. Percival v. General Motors Corp., 539 F.2d 1126 (8th Cir. 1976); Marin v. Jacuzzi, 224 Cal. App. 2d 549, 36 Cal. Rptr. 880 (1964); Campbell v. Ford Indus., Inc., 274 Or. 243, 546 P.2d 141 (1976); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974).

In addition, there are cases which denied a cause of action to discharged at will employees on grounds not directly related to whistleblowing and issues of public policy. *See, e.g.*, Wegman v. Dairylea Cooperative, Inc., 50 App. Div. 2d 108, 376 N.Y.S.2d 728 (1975). The plaintiff in *Wegman* alleged that he was discharged for failure to authorize or participate in the illegal grading of milk products. The New York Court of Appeals dismissed the case on the grounds that it was improperly pleaded and gave permission to plead over. *Id.* at 115, 376 N.Y.S.2d at 736-37. *See also* Johnston v. Farmers Alliance Mutual Ins. Co., 218 Kan. 543, 545 P.2d 312 (1976). The plaintiff in *Johnston* claimed that he was discharged for having reported an internal embezzlement scheme to company officials. His case was dismissed on the grounds that the action sounded in tort and that the appropriate statute of limitations had run prior to the commencement of his action. *Id.* at 547-48, 545 P.2d at 316-17.

153. 456 Pa. 171, 319 A.2d 174 (1974).

154. *Id.* at 173-74, 319 A.2d at 175.

charged for these efforts, he brought suit against his former employer, alleging that his dismissal was wrongful, retaliatory, and against public policy.[155] He pleaded his case in tort and sought both compensatory and punitive damages.[156] The case came to the Pennsylvania Supreme Court on plaintiff's appeal from the dismissal of his action. The high court sustained this dismissal.[157]

The narrow ground of the decision was that the plaintiff had not properly pleaded his case so as to permit a public policy-based exception to his termination.[158] In reaching this decision, the court noted two things. First, the plaintiff had failed to allege a specific intent on the part of the employer to cause him harm by the discharge.[159] Plaintiff's tort action was therefore defective. Second, and more importantly, the plaintiff had failed to allege that the threat of discharge was used to coerce him to unlawful activity.[160] It was upon this second factor that the court concentrated in its discussion of public policy exceptions to the doctrine of termination at will.

While noting that a public policy exception to the doctrine of termination at will may in certain cases be permissible,[161] the court was of the opinion that Geary's allegations presented no question of the circumvention of a clear mandate of public policy so as to warrant the invocation of an exception. The plaintiff's situation was compared by the court to cases which had granted exceptions for public policy reasons.[162] These exceptions exhibited both employee coercion and important, clearly defined determinants of public policy, elements missing from Geary's allegations.[163]

The court went on to catalogue further reasons for denying plaintiff a public policy exception. Noting that the plaintiff had bypassed his

155. *Id.* at 181, 319 A.2d at 178.

156. *Id.* at 174, 319 A.2d at 175.

157. *Id.* at 185, 319 A.2d at 180. The court did so over a vigorous dissent. *Id.* at 185-94, 319 A.2d at 80-85 (Roberts, J., dissenting).

158. *Id.* at 181, 319 A.2d at 178.

159. *Id.* at 180, 319 A.2d at 178.

160. *Id.*

161. That the court did not reject the concept of a public policy exception for the terminated at will employee is explicit in the narrowness of its holding: "We hold only that where the complaint itself discloses a plausible and legitimate reason for terminating an at will employment relationship and no clear mandate of public policy is violated thereby, an employee at will has no right of action against his employer for wrongful discharge." *Id.* at 184-85, 319 A.2d at 180.

162. The cases cited for the proposition that the public policy exception would pertain only for a clear, legislatively expressed mandate of public policy were: Petermann v. Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959); Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960); Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961); Patterson v. Philco Corp., 252 Cal. App. 2d 63, 60 Cal. Rptr. 110 (1967); Montalvo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970); and Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973).

163. Geary v. United States Steel Corp., 456 Pa. 171, 183-84 n.16, 319 A.2d 174, 180 n.16 (1974).

superiors, the court stated that an employer has a legitimate interest in enforcing his own operating procedures.[164] In addition, the court was of the view that to permit a cause of action absent both the coercive element and a clear mandate of public policy would work a twofold evil. It would inhibit critical decisionmaking functions of management by permitting a public forum for employee disagreements.[165] It would also work, through the mutuality concept inherent in the employment relationship,[166] the "ironic" result of giving to employers a comparable cause of action with which to harass key employees.[167] That is, it would permit an employer's suit for breach of relations should an at will employee decide to unilaterally terminate the employment relationship.

Through dicta, however, the court left open the possibility of a successful suit which does not allege a breach of a clear mandate of public policy. The hypothetical situation presented was that of an employee so positioned within an organization that he or she had to exercise "independent expert judgment" in matters involving the organization's impact on the public safety.[168] If there was a real potential for the serious abuse of the discharge power so as to inhibit this public safety-oriented judgment, a public policy exception might then be permitted.[169]

The case of *Percival v. General Motors Corp.*[170] presents issues similar to those raised in *Geary*. At the time of his resignation the plaintiff in *Percival* had been an employee of General Motors for twenty-seven years and had risen to head that corporation's mechanical development department. In bringing an action for wrongful discharge the plaintiff alleged that he had been forced to resign[171] in retaliation for his efforts to correct what he termed were incidents of corporate "lying" with respect to securities offerings.[172]

The federal district court denied the claim and refused to accept plaintiff's argument that the "newly emerging theory" of public policy exceptions for wrongful discharge was applicable to his situation.[173] The court based its decision upon the proposition that no right of action would lie "where no clear mandate of public policy was violated."[174] The

164. *Id.* at 182-83, 319 A.2d at 179-80.
165. *Id.*
166. *See* text accompanying notes 29-31 *supra*.
167. Geary v. United States Steel Corp., 456 Pa. 171, 178-79 n.8, 319 A.2d 174, 177 n.8 (1974).
168. *Id.* at 181, 319 A.2d at 178.
169. Geary v. United States Steel Corp., 456 Pa. 171, 181, 319 A.2d 174, 178-79 (1974). *Cf.* Percival v. General Motors Corp., 539 F.2d 1126 (8th Cir. 1976): "[A] large corporate employer . . . except to the extent limited by statute or contractual obligations, must be accorded wide latitude in determining whom it will employ and retain in employment in high and sensitive managerial positions . . . ." *Id.* at 1130. *See* text accompanying notes 170-78 *infra*.
170. 400 F. Supp. 1322 (E.D. Mo. 1975), *aff'd*, 539 F.2d 1126 (8th Cir. 1976).
171. Percival v. General Motors Corp., 400 F. Supp. 1322, 1323 (E.D. Mo. 1975).
172. *Id.*
173. *Id.* at 1323-24.
174. *Id.* at 1324. For this proposition the court cited Geary v. United States Steel Corp.,

plaintiff's allegation as to corporate wrongdoing—the circumvention of securities laws—was considered by the district court as an insufficient breach of public policy.[175]

In affirming this decision, the Eighth Circuit Court of Appeals[176] noted that while there was some support for the theory that a discharge could be actionable as against public policy, there were also strong arguments against such a view. The employer's right to determine who shall be employed and for what purpose formed the basis of these counter arguments.[177] The public policy exception was viewed as being limited to situtations where a discharge was "motivated by the fact that the employee did something that public policy encourages or that he refused to do something that public policy forbids or condemns."[178]

Geary and *Percival* are disturbing opinions. Their use of such terms as "clear mandate" or "expressed" policy, if taken as those terms are conventionally used,[179] refers to legislatively defined public policy. If this is how the *Geary* and *Percival* courts mean to limit the exception, then they have, by inference, rejected the application of the public policy exception to cases which present non-legislatively defined public policy issues.[180] Second, both cases emphasize the importance of the private interest involved in the employment relationship. Only a strong and clear public interest can be permitted to intervene to upset this private interest.[181] Finally, while both decisions speak of the requisite of a clear

456 Pa, 171, 319 A.2d 174 (1974). The court also cited the analogous case of Marin v. Jacuzzi, 224 Cal. App. 2d 549, 36 Cal. Rptr. 880 (1964). *Marin* involved a shareholder-employee who filed an accusation with the California Department of Investment to the effect that his employer had violated the state securities act. Terminated for this action, the employee brought suit for retaliatory and malicious interference with the employment relationship. *Id.* at —, 36 Cal. Rptr. at 881-82. The court dismissed the action without discussing the public policy exception. Instead, the court based its dismissal upon the holding that the defendant was, by virtue of his corporate status, immune from action for malicious interference with the employment relationship. *Id.* at —, 36 Cal. Rptr. at 883. For this reason, *Marin* does not properly belong under that class of cases which involves the public policy exception to termination at will. *See* note 55 *supra*.

175. Percival v. General Motors Corp., 400 F. Supp. 1322, 1324 (E.D. Mo. 1975).

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

177. *Id.* at 1130.

178. *Id.* at 1129-30.

In addition, the appeals court noted that district courts should not be required to predict future developments of state law. *Id.* at 1130. The applicable state law of the case was that of Michigan. In that the *Sventko* case was not published until two months after the appellate review, there was no state law on point to be applied by the federal courts. As a practical matter, the conservative stance of the Eighth Circuit to, in effect, maintain the status quo of a state's termination-at-will doctrine should be noted. It marks the view that the federal bench will, where the state law is silent on the subject, leave to state courts the resolution of exceptions to the termination-at-will doctrine.

179. *See* SUTHERLAND, STATUTORY CONSTRUCTION, *supra* note 62, at § 56.01.

180. The *Geary* court's limitation on this precept, that the safety of the public may require the application of a public policy exception despite a lack of legislative mandate, has been noted. *See* notes 168-69 *supra* and accompanying text. However the court itself severely limited such an eventuality. *Id.*

181. *See* text accompanying notes 161-63 and 174-78 *supra*.

mandate of public policy before the exception can be applied, they leave undefined the limits of this concept. In place of definition, we have only the negative implication of their respective fact situations.

What comes out of both decisions is a highlighting of three key factors necessary for the invocation of a public policy exception. These are: (1) a direct link or nexus of the employee's position and the public policy effected; (2) the potential for the employer's use of coercion through this direct link to negative the policy; and (3) the relative importance of the policy so affected. It is to the last factor, that of the importance of the policy whose fulfillment is at stake, that the courts' concern for clearly mandated public policies appears directed.

The difficulty inherent in determining the interrelationship of these three factors so as to permit the invocation of a public policy exception is exemplified by a recent decision of the Oregon Supreme Court, *Campbell v. Ford Industries*.[182] *Campbell* presents the situation of a discharged employee pointing to a "clear mandate" of legislative policy which bears upon his discharge. The plaintiff in *Campbell* was an employee-stockholder who was discharged for requesting information of the company as to the value of his stock and as to whether any of the company's officials were engaged in corporate misdealing.[183] In his wrongful discharge action, the plaintiff cited specific state laws which guaranteed stockholders access to corporate information.[184] According to the plaintiff, denying him an action would have a detrimental effect upon these express provisions of public policy.[185] The Oregon Supreme Court unanimously held that these allegations did not suffice for a cause of action.[186]

In arriving at its holding, the court was forced to consider the public policy exception of *Nees v. Hocks*.[187] The plaintiff argued that the *Nees* decision stood for the proposition that, in Oregon, an action for wrongful discharge would lie where an employee was discharged for having exercised any specifically legislated right.[188] The court refused to adopt such an expansive reading of *Nees*. Instead, the court distinguished that case from the plaintiff's on two grounds: the nature of the interests involved and the relation of those interests to the employment relationships.

182. 274 Or. 243, 546 P.2d 141 (1976).

183. *Id.* at —, 546 P.2d at 144.

184. *Id.* Specifically cited was OR. REV. STAT. § 57.246 which provides for the conditional examination of the books and records of a corporation by stockholders. *Id.* at — n.2, 546 P.2d at 143-44 n.2.

185. *Id.* at —, 546 P.2d at 145. The facts of this case had come before the court earlier. *See* Campbell v. Ford Indus., Inc., 266 Or. 479, 513 P.2d 1153 (1973). In the earlier case, which was pre-*Nees*, the court held that the plaintiff's action for damages arising from the wrongful discharge must be denied under the state's then existing law. *Id.* at 487, 513 P.2d at 1157.

186. Campbell v. Ford Indus., Inc., 274 Or. 243, —, 546 P.2d 141, 147 (1976).

187. 272 Or. 210, 536 P.2d 512 (1975). *See* text accompanying notes 125-42 *supra*.

188. Campbell v. Ford Indus., Inc., 274 Or. 243, —, 546 P.2d 141, 144-45 (1976).

First, with respect to the nature of the interests involved, the court was of the opinion that plaintiff's situation presented a question of private as opposed to general public interests.[189] Acknowledging that the plaintiff had a statutory right, as a stockholder, to request and receive the information sought,[190] the court stated that the purpose of the law was to protect the private interests of stockholders rather than that of society as a whole.[191] Second, the court was of the opinion that the plaintiff's action in this case, as opposed to that of the plaintiff in *Nees*, did not bear any "direct relation to his rights as an employee."[192] The plaintiff was acting as a stockholder and not as an employee when he requested the information.[193] The termination then did not bear upon any act involving tbe employment relationship.[194]

In its analysis of the private as opposed to the public interest, *Campbell* is similar to the California decision of *Becket v. Welton Becket & Associates*.[195] *Becket* involved two brothers who were coexecutors of their father's estate as well as officials in their father's firm. One brother, as executor, brought an action against the other for breach of fiduciary duty, corporate waste, and usurpation of the business enterprise. The defending brother, as president of the firm, threatened to discharge the plaintiff if the complaint was pressed. The plaintiff then brought a second action to restrain his brother from proceeding with the threatened discharge. The argument made was that to permit such a termination would work to endanger the state's public policy respecting the statutorily defined duties of executors.[196]

In denying the plaintiff's cause of action for wrongful discharge, the California Court of Appeals stressed the private nature of the action and the fact that the plaintiff could point to no specific public policy statute which the defendant would violate by discharging the plaintiff.[197] This lack of a direct link in the plaintiff's case was distinguished from those cases in which the public policy was "evidenced by either a criminal statute or a statute designed to specifically protect the rights of the employee *vis-à-vis* the employer."[198]

Campbell and *Becket* show that an employer's breach of a public policy, even one legislatively mandated, will not of itself suffice to permit an exception. As with *Percival* and *Geary*, these decisions show

189. *Id.* at —, 546 P.2d at 145.
190. *See* note 184 *supra*.
191. Campbell v. Ford Indus., Inc., 274 Or. 243, —, 546 P.2d 141, 145-46 (1976).
192. *Id.* at —, 546 P.2d at 146.
193. *Id.* In passing on this point the court noted that had the plaintiff been a member of an employee stock purchase plan the case might have turned out differently. *Id.*
194. *Id.*
195. 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974).
196. *Id.* at 819, 114 Cal. Rptr. at 532-33.
197. *Id.* at 821, 114 Cal. Rptr. at 534.
198. *Id.*

that the breach must directly bear upon the employment relationship, preferably through some showing that the employee himself has been coerced to circumvent the public policy. Moreover, these decisions highlight the importance of judicial perceptions as to what is or is not an important enough public policy to warrant its use as a proper determinant upon which to base an exception.

B. Providing an Exception for the Whistleblower

1. THE DETRIMENTAL IMPACT OF JUDICIAL ATTITUDES RESPECTING PRIVATE INTERESTS

Existing concepts of the private interests involved in the at will employment relationship weigh heavily against the expansive development of an exception to the doctrine of termination at will. In order to permit an exception to this doctrine it is necessary to redefine these interests. Yet it was these very interests which gave rise to the doctrine,[199] and their continuing importance cannot be slighted. The personal interests of the employer and the employed, expressed in such terms as "economic freedom" or "freedom of contract" and manifested by such legal doctrines as "mutuality," have become deeply engrained upon our law, and represent fundamental social values.[200]

Judicial perceptions as to the importance of the personal interests involved in the at will employment relationship are clearly reflected in cases which treat public policy exceptions. First, they are reflected in the very concept that an exception will be granted only in the public's interest. Second, they are reflected in arguments raised against the expansion of public policy-based exceptions to the doctrine of termination at will.[201] Finally, and with telling effect, they are reflected in the limited

199. *See* text accompanying notes 36-44 *supra*.

200. *See* notes 28-31 and 36-44 *supra* and accompanying text.

201. One such argument is that an employer's ability to effectively manage would be seriously crippled by the threat of such suits. An employee, given such a weapon, could hold the employer hostage, subject him to harassment, or force the managerial decisionmaking process into a public forum. *See* Becket v. Welton Becket & Assoc., 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974); Campbell v. Ford Indus., Inc., 274 Or. 243, 546 P.2d 141 (1976); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974).

An alternative argument is that to permit such an action would work to further an employer's power through the use of an analogous action against an employee. Resting upon the concept that at will employment creates mutual interests, this argument posits that to permit liability for a wrongful firing might likewise permit liability for a wrongful quitting. This view has been proposed by only one court. *See* Geary v. United States Steel Corp., 456 Pa. 171, 178-79 n.8, 319 A.2d 174, 177 n.8 (1974). The argument appears farfetched. The focus of an exception, if permitted, rests upon what a court perceives to be the public's best interest, not upon the interests of the employer or the employed.

Finally, there is the argument that to permit such an action would raise the question of the scope of equitable relief. *See* Becket v. Welton Becket & Assoc., 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974); Smith v. Coffee's Shop for Boys and Men, Inc., 536 S.W.2d 83 (Tex. Ct. App. 1976). To force an employer to maintain or rehire an employee, rather than to pay damages, appears to strike at the very heart of the employer's interests. *See* note 202 *infra*.

scope permitted to the formulation of these exceptions.[202]

The limiting of the operative scope of the exception has been done within a framework which involves the relation of the employment situation to a furtherance of social welfare. In the first place, this relation has been judicially translated into a requirement that to invoke the exception the employee-plaintiff must demonstrate a nexus of the employment situation and the protection of an important societal interest.[203] Second, this relation has been refined to a requirement that the nexus be direct. That is, the suffered discharge must be a material element affecting some aspect of social welfare.[204] Finally, there has been a marked trend to limit exceptions to cases in which the issue of social welfare is presented in clear, legislatively mandated terms of public policy.[205]

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202. In addition to these concepts, there is the view that to permit an action for the terminated whistleblower would pose serious practical problems of litigation. A catalog of some of these was given by the *Geary* majority and included the difficulty of proof, the assessment of damages, and the burden to courts which might come about through the recognition of a new cause of action. Geary v. United States Steel Corp, 456 Pa. 171, 181, 319 A.2d 174, 179 (1974). *See also* Blades, *Limiting the Abusive Discharge, supra* note 23, at 1427-31.

With respect to the problem of proof, that a plaintiff must show that the sole cause of his or her termination was a malicious attempt to thwart a public policy, we have the *Monge* and *Nees* decisions. Decided on the merits, both cases serve as examples of terminated at will employees meeting the necessary requisites of proof. *See* note 142 *supra*. With respect to the attendant problem of assessing damages, these two cases again show that such computation is possible. *See* notes 113 and 142 *supra*. Though dealing with non-whistleblowing employees, *Monge* and *Nees* show that the problems attendant to employee suits for damages are not insurmountable. *See also* Blades, *Limiting the Abusive Exercise, supra* note 23, at 1427-31.

The fear that to permit causes of action for the terminated whistleblower would operate to open upon courts floodgates of litigation is inherently unreasonable. The real issue behind such an argument is the prevention of spurious litigation. This can be accomplished through presently existing mechanisms which have developed within the public policy exceptions. Among these is the burden upon the plaintiff employee to show that the sole reason for the termination was the wrongful act of the employer, and the usual limitation upon the invocation of the exception that it be limited to clear and important mandates of public policy. *See* text accompanying notes 62-150 *supra*.

An additional concern may be that to permit the exception would raise the spectre of equitable relief, a suit for reinstatement or an injunction against discharge. *See, e.g.*, Becket v. Welton Becket & Assoc., 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974). A court faced with such a suit and permitting the cause of action, would be forced to consider the consequences of ordering what would be, in effect, an involuntary hiring. Such an outcome, assuming the possibility of its implementation, would pose a serious threat to the concepts of economic freedom. *See* text accompanying notes 199-200 *supra*. However, there is a growing body of case law involving suits by governmental employees for reinstatement after wrongful discharge. In such cases courts have undertaken a balancing test to determine the practicality of the reinstatement. *See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968).

203. *See, e.g.*, Percival v. General Motors Corp., 539 F.2d 1126, 1129-30 (8th Cir. 1976); Geary v. United States Steel Co., 456 Pa. 171, 180, 319 A.2d 174, 178 (1974). *See also* Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

204. *See* Campbell v. Ford Indus., Inc., 274 Or. 243, —, 546 P.2d 141, 146 (1976). *See also* Percival v. General Motors Corp., 539 F.2d 1126, 1129-30 (8th Cir. 1976); Geary v. United States Steel Co., 456 Pa. 171, 319 A.2d 174 (1974).

205. *See, e.g.*, Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal.

The trend to limit the applicable scope of public policy exceptions has been most pronounced in cases which involve whistleblowers. Of particular importance in this regard has been the refinement that the nexus of employment and public policy must be direct. The effect of this requirement has been that the whistleblower must show something more than an employer's breach or attempted breach of public policy, the whistleblower's attempt to prevent such a breach, and the resulting, even retaliatory, discharge.[206] He must also show that the discharge or its threat was an aspect or material factor of the employer's attempt to circumvent public policy.[207] This development implies that courts will look more favorably upon the passive victim of employee coercion than upon the employee who, absent such coercion, blows the whistle.[208] In one case the employee is viewed as a helpless victim placed in the dilemma of choosing between discharge or acting against public policy.[209] In the other the employee is apparently viewed as having willingly placed himself or herself in danger of termination.[210]

Given this requirement, a key element in the presentation of a discharged whistleblower's case is the set of circumstances surrounding

Rptr. 769 (1961); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976); Campbell v. Ford Indus., Inc., 274 Or. 243, 546 P.2d 141 (1976). *Cf.* Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (permitting a general cause of action for a bad cause discharge).

206. *See, e.g.*, Campbell v. Ford Indus., Inc., 274 Or. 243, 546 P.2d 141 (1976).

207. *See* notes 179-82 *supra* and accompanying text.

208. *Compare* Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975), *with* Campbell v. Ford Indus., Inc., 274 Or. 243, 546 P.2d 141 (1976). *See also* Percival v. General Motors Corp., 539 F.2d 1126, 1129-30 (8th Cir. 1976) (presenting the view that public policy exceptions would be limited to situations where the employee, under threat of discharge, was motivated to act against public policy); Geary v. United States Steel Corp., 456 Pa. 171, 181, 319 A.2d 174, 178 (1974) (discussing the possibility of a successful suit by a whistleblower so positioned within an organization as to be subject to a real abuse of the discharge power to the endangerment of the public).

209. *See, e.g.*, Petermann v. Teamsters Local 396, 174 Cal. App. 2d 189, 344 P.2d 25 (1959); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1973). *Cf.* Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976). In these cases the choice was between termination and claiming a statutory right to workmen's compensation. *See* notes 79-95 *supra*.

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

Such views may well rest upon a perception that within the employment relationship there should be a bond of loyalty and that the one who would breach this loyalty, as for example, by blowing the whistle, should bear the consequences. A perceived duty of employees to be "loyal" has been expressed. *See* NLRB v. International Brotherhood of Electrical Workers, Local No. 1229, 346 U.S. 464, 472 (1953) ("There is no more elemental cause for discharge of an employee than disloyalty to his employer."). *See also* Patterson-Sargent Co. and United Gas, Coke & Chemical Workers Local 260, 115 N.L.R.B. 1627 (1956). Whether this perception is shared by state courts and, if so, what impact it may have had on the development of the public policy exception as applied to whistleblowers are matters for conjecture. Yet it is apparent that the courts have used whistleblowing cases as vehicles to limit the public policy exception.

his or her discharge. Given a particular fact situation, the terminated employee might be able to place the discharge within the existing framework of the law respecting public policy exceptions. For example, the employee might be able to show that the employer attempted to coerce the employee, under threat of discharge, to act contrary to law.[211] If such is the case, then the direct nexus has been established. What remains is a judicial determination that the public policy which the employer sought to contravene was of sufficient importance to warrant the restriction of the termination privilege.[212] It is at this stage that the limiting aspect of "clearly mandated" or "legislatively mandated" considerations of public policy comes into play.[213]

Frequently, however, the discharged whistleblower was not a passive employee placed in the position of having had to choose between discharge or coercion. Instead, he or she was more likely an employee who became aware of the employer's wrongdoing and, armed with this information, made a public disclosure.[214] This situation would permit an employer-defendant the argument that the resulting discharge did not affect the public policy which the employee sought to protect through disclosure. Moreover, the employer can present the discharge as a proper act carried out in the interests of promoting organizational discipline and, as such, well within the private zone of the employer's interest to hire and fire whomever he wishes.[215]

2. OVERCOMING THE DETRIMENTAL IMPACT OF JUDICIAL ATTITUDES RESPECTING PRIVATE INTERESTS

The essential problem which confronts the plaintiff-whistleblower is to show that what is, by definition, a private concern has become, through the retaliatory use of the discharge power, a public concern. This relation of the employment to the societal interest is the minimal nexus required for the successful invocation of an exception. Conceptually, it is the same problem as that faced by any discharged at will employee who attempts to make use of a public policy exception.[216]

Irrespective of whether or not the employee was discharged for having blown the whistle, all cases which seek to come under the rubric of a public policy exception pose the same question: Has the discharge of the at will employee worked to circumvent public policy as it relates to either the welfare of society or the employment relation? Cases which grant a public policy exception to terminated at will employees demon-

211. For an example of such a scenario, see notes 168-69 *supra* and accompanying text.
212. *See* notes 151-98 *supra* and accompanying text.
213. *See* notes 219-22 *infra* and accompanying text.
214. *See* note 4 *supra*.
215. *See, e.g.*, Percival v. General Motors Corp., 400 F. Supp. 1322 (E.D. Mo. 1975), *affirmed*, 539 F.2d 1126 (8th Cir. 1976); Campbell v. Ford Indus., Inc., 274 Or. 243, 546 P.2d 141 (1976); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974).
216. *See* notes 147-50 *supra* and accompanying text.

strate that the question is one which can be definitively resolved.[217] These cases point up the fact that where an important aspect of public policy is set against the private interests of the employment relationship, the latter will be subordinated to further the former. While these cases focus upon the control of employer behavior within the context of the employment relationship, their rationale depends upon a balancing of interests.

The success of the plaintiff-employees in cases which permit an exception rests upon judicially defined determinants of public policy. In its simplest guise, the question is one of whether the public policy at stake is of sufficient importance to warrant a public policy exception to the doctrine of termination at will. If a court determines that it is, it has decided that an invasion of the employer's right of termination is proper.[218]

The cases which would grant exceptions to the doctrine lean heavily upon two arguments. First, that the public interest involved is one strongly mandated by society. Second, that this policy should be broadly read and applied so as to protect the discharged employee. While these same arguments are available to the employee who has been discharged for blowing the whistle, they have inherent limitations.

The argument that the public policy which the whistleblower sought to protect was one strongly mandated by society is of critical importance. It is most easily accomplished if the policy has a clear legislative sanction.[219] That the legislature did not negative the social policy for which the employee blew the whistle will not suffice.[220] Absent a showing of legislative action, the plaintiff's case becomes far more problematical.[221] For, absent the legislative mandate, the plaintiff must ask the court to structure and define the policy. Barring important and pressing issues involving society as a whole,[222] a court will be loathe to so trespass upon this legislative prerogative.[223]

The argument that the public policy is one which encompasses the actions of the whistleblower is an argument for a broad application of the policy involved. In making this argument the plaintiff must stress that the act of blowing the whistle was one which comported with the policy and was necessary to its effectuation. There are two methods by which such

217. *See* text accompanying notes 62-150 *supra*.

218. *Id.*

219. *See, e.g.*, Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961); Petermann v. Teamsters Local 396, 174 Cal. App. 2d 189, 344 P.2d 25 (1959); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976).

220. Negative implication as it is applied to legislative acts is not generally favored. *See* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES, 181-82, 216 (1975).

221. *See, e.g.*, Percival v. General Motors Corp., 400 F. Supp. 1322 (E.D. Mo. 1975), *affirmed*, 539 F.2d 1126 (8th Cir. 1976). *See also* note 145 *supra* and accompanying text.

222. *See, e.g.*, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

223. *But see* Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974).

an argument can be made. The plaintiff can argue, irrespective of whether or not the policy is one which has been declared by the legislature, that the public policy involved is one which has an impact upon a broad spectrum of the society.[224] If the policy is one which is legislatively mandated, the plaintiff-whistleblower should also be prepared to argue that the "equity" or spirit of the statute requires a whistleblowing function.[225] By both of these methods the plaintiff should be attempting to show that permitting a discharge for blowing the whistle would work a positive harm upon society, and that the acceptance of the discharge would work only to further the employer's disregard for the specific public policy. In this manner the discharge is presented as being as much a contravention of public policy as the initial act of the employer which precipitated the whistleblowing.

These two arguments, that a particular policy is strongly mandated and that it should be broadly applied, have a common focus—the responsible control of private power. This control of power, particularly with respect to business behavior, has been an important concern of our society from very early days.[226] The public policy exception rests upon the premise that the private power to discharge an at will employee must be held subordinate to the public interest. Under its present formulation, with the direct nexus requirement, these exceptions have as their narrow basis the concept that both the employer and the employee have an obligation to refrain from acts which, within the employment relationship, contravene public policy. Expanding the scope of the exception through the two arguments so as to include the whistleblower would work to broaden this base. It would recognize employee whistleblowing as a proper adjunct to the control of business as well as employer behavior. Such a view, consistent with the philosophy that a citizen owes to society an obligation to see that others refrain from illegal behavior,[227] would

224. *Compare* Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (integrity of the jury system), *with* Campbell v. Ford Motor Co., 274 Or. 243, 546 P.2d 141 (1976) (stockholder access to information).

225. Professor Dickerson has defined equitable interpretation to be:

> A term of no fixed meaning, used variously to refer to (1) reading a statute extensively or restrictively to give effect to its purpose as revealed by the statute and its context, or (2) extending or restricting a statute, by judicial lawmaking, to give effect to a collaterally disclosed legislative purpose that is broader or narrower than that shown by the statute when read in its proper context. In its extensive aspect, it is sometimes identified with liberal interpretation.

R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 284 (1975). *See also* SUTHERLAND, STATUTORY CONSTRUCTION, *supra* note 62, at ch. 54 and § 45.09.

Although frequently rejected by courts as an unwarranted invasion of the legislative sphere, *id.* at § 54.03, the use of the spirit of a statute as an interpretive guide has been urged as a means to more fully integrate the legislative function into the development of judge-made law. *See* Landis, *Sources of Law, supra* note 94; Pound, *Common Law and Legislation, supra* note 94.

226. *See generally* J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970 (1970).

227. This responsibility is at least recognized in American law and society. *See* notes 1-3 *supra* and accompanying text.

remove the logical inconsistency which now exists in the public policy exception. For, if public policy is the basis of the exception, it makes little sense to use the direct nexus requirement to distinguish the whistleblower's case from that of others to whom the exception has been made applicable.

IV. CONCLUSION

There is a growing body of case law which permits at will employees a right to sue a former employer for wrongful discharge.[228] These exceptions to the doctrine of termination at will have as their premise the principle that, within limits, the personal interests of the at will employer to fire whomever he wishes, for whatever reason he wishes, must give way before important mandates of public policy.[229] Inherent in these cases is the concern for protecting the private interests of the employer; for, while the exceptions are made, they are not lightly employed. Restrictions have evolved in their use. The public policy which has been set against the employer's interests must be one of importance affecting either the employment relation itself or the welfare of the general public. The public policy must also be one which is clearly mandated, preferably through legislative action. Finally, there must be some connection or nexus between the employer's attempt to contravene that policy and the termination of the employee.[230]

At will employees who are discharged for having blown the whistle on their employers present instances for the application of the public policy exception. Like their counterparts to whom the exception has been made applicable, the whistleblowers present an issue of conflict. While they are employees and thereby within the sphere of the employer's interests, they are also members of society who share that society's interests. Moreover, these employees bring to the courts issues which center upon the control of private behavior for the good of society. Yet, rather than expanding the public policy exception concept to include such employees, courts have used their cases as a means of delimiting the concept. This has been done through the use of a "direct" nexus requirement; that is, that the termination itself must infringe upon the public policy which is invoked. Done in the name of protecting the private interests of the employer, such a restriction points up a judicial perception as to the relative importance of these private interests, a perception which appears more in keeping with 19th rather than 20th century needs.

It is submitted that such a refinement is unnecessary. The private

228. *See* text accompanying notes 62-150 *supra*.

229. In this regard, see especially the decisions of Petermann v. Teamsters Local 396, 174 Cal. App. 2d 189, 344 P.2d 25 (1959), discussed in text accompanying notes 64-70 *supra*, and Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975), discussed in text accompanying notes 125-42 *supra*.

230. *See* text accompanying notes 179-82 *supra*.

interests of the employer can be, and are, adequately protected through the more basic restrictions. A clear and important mandate, balanced against the employer's right of termination, should suffice, with the key element being the employer's power to circumvent important societal interests within some aspect of the employment relation.[231] For coupled to this is the burden upon the plaintiff-employee to show that the employer's attempt to circumvent public policy was of sufficient importance to warrant the invocation of the exception. No more should be required. The issue would be left to a definition of the sufficiency of the public policy determinates involved. And the cases which created the exception demonstrate that such definition is possible.

Exceptions to the established doctrine of termination at will which are based upon considerations of public policy afford then the means to resolve the conflict of public and private interests which surface in whistleblowing cases. To continue or enlarge upon the requirements such as by a demonstration of a nexus between employment and societal interests would work, as it already has,[232] against the societal interests. To the extent that the whistleblower can materially contribute to the responsible control of business behavior,[233] he or she should be encouraged. To this end the existing legal processes can and should be extended to include a right of action for a whistleblowing employee who suffers a retaliatory discharge. At the very least, these processes should not be restricted.

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231. *See, e.g.*, Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975). *See also* Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976).

232. *See* notes 151-98 *supra* and accompanying text.

233. While business is theoretically responsive to state and federal law as well as to constraints of public opinion, there is the view that such controls are either too complex or too ephemeral for the adequate protection of the public and that the gap must be filled by the whistleblower. *See* S. SETHI, UP AGAINST THE CORPORATE WALL: MODERN CORPORATIONS AND SOCIAL ISSUES OF THE SEVENTIES (2d ed. 1974); STONE, WHERE THE LAW ENDS, *supra* note 9; DISSENT IN THE PUBLIC INTEREST, *supra* note 5, at 294.