Wrongful Discharge Law and the Search for Third-Party Effects

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Even in the rough-and-tumble world of the at-will workplace, some injustices cry out for judicial remedy. A secretary is fired when she is summoned for two weeks of jury duty.[1] Another worker is fired for refusing to perjure himself before a governmental agency investigating the company.[2] When victims sue on these compelling facts, the courts have responded. The question in these cases was how, not whether, the courts would recognize the claim. In the early cases the cause of action was vaguely worded,[3] but today most states (with the notable exception of New York and a few others)[4] specifically recognize the tort of wrongful discharge in violation of public policy.

Having recognized the wrongful-discharge cause of action, the challenge for most courts today is to define its limits. The underlying rationale, in the eyes of many commentators, is fundamental fairness—the law protects the weak.[5] Individual workers are thought to have no bargaining power to protect themselves from insensitive employers who do not appreciate the harm they inflict when they fire an employee. A proper role of law is to provide that protection. One problem with using a fairness-to-

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

2. *See* Petermann v. International Bhd. of Teamsters, 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

3. In *Nees*, the employee sued for prima facie tort. *Nees*, 536 P.2d at 513. In *Petermann*, the employee brought suit on a theory of good faith and fair dealing. *Peterman*, 344 P.2d at 28.

4. *See* Murphy v. American Home Prods. Corp., 448 N.E.2d 86, 90 (N.Y. 1983) ("[W]e conclude that recognition in New York State of tort liability for . . . wrongful discharge should await legislative action."). In addition, Georgia, Louisiana, and Mississippi do not recognize the tort. IRA M. SHEPARD ET AL., WORKPLACE PRIVACY 328 (2d ed. 1989).

5. *See, e.g.*, Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405, 1434-35 (1967) (urging the courts to create a tort of abusive discharge "to protect the economically dependent employee from employer power"); Gary Minda & Katie R. Raab, *Time for an Unjust Dismissal Statute in New York*, 54 BROOK. L. REV. 1137, 1150 (1989) ("Limitations of the employment at-will doctrine only require judges to interpret the at-will presumption in light of . . . fundamental principles of fairness."); *cf.* Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979) (using an equal protection rationale to argue for just-cause protection for employees).

employee rationale to understand wrongful discharge cases is that the rationale has no clear limits. The rationale never suggests when an employee should lose a case. For example, a worker is fired after telling the personnel director that the worker's boss was a past embezzler.[6] A production worker is fired after complaining that the company's product is unsafe.[7] While not as compelling as the perjury and jury-duty cases that spawned the tort of wrongful discharge, does not fairness demand a remedy here as well? Leading courts have rejected claims in these cases, but a fairness rationale cannot explain the rejection. The fairness rationale pushes for a blanket just-cause limitation on terminations, but cannot easily be used to rationalize the more nuanced approach to wrongful termination that the courts have taken.

On the other side, some commentators still bemoan the departure from strict employment at will. They suggest that legal interference with the contractual freedom to fire at will is, at best, a luxury we cannot afford in these competitive times[8] and, at worst, a misguided effort that actually harms employee interests.[9] They urge courts to maintain a strict employment-at-will doctrine. Courts that refuse to recognize wrongful discharge claims often articulate this fear of hampering efficient employer decision-making.[10]

Most courts, in considering the tort of wrongful discharge, have crafted a middle position. They recognize the tort, but attempt to cabin its domain by insisting that the discharge violate public policy rather than involve a mere private spat between employer and employee. As with any middle position, these line-drawing efforts lead to muddled opinions and contradictory holdings. This is especially so when courts are trying to limn a public-or-private line. It does not take great familiarity with critical legal studies thinkers, or even with the legal realists before them, to recognize that the public-or-private line is treacherous at best, and more than likely

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6. *See* Foley v. Interactive Data Corp., 765 P.2d 373, 375-76 (Cal. 1988) (affirming the dismissal of a claim of wrongful discharge in violation of public policy, although allowing a claim of breach of the implied covenant of good faith and fair dealing).

7. *See* Geary v. U.S. Steel Corp., 319 A.2d 174, 175 (Pa. 1974) (holding that the discharged employee had no right of action for wrongful discharge against his employer).

8. *E.g.*, Larry S. Larson, *Why We Should Not Abandon the Presumption that Employment is Terminable at Will*, 23 IDAHO L. REV. 219, 252 (1987).

9. *E.g.*, Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination: Rules and Economic Efficiency*, 38 EMORY L.J. 1097, 1144 (1989) (arguing that proponents of a wrongful discharge tort overlook benefits to employees related to mobility, compensation, and job creation); *cf.* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 953 (1984) (arguing that recent efforts to abolish the contractual employment-at-will doctrine "work to the disadvantage of both the employers and the employees whose conduct they govern," but recognizing the appropriateness of some tort claims of wrongful discharge in violation of public policy).

10. *See* Kumpf v. Steinhaus, 779 F.2d 1323, 1326 (7th Cir. 1985) ("Employment at will . . . keeps debates about business matters out of the hands of courts.").

incoherent. All law is public policy, or as Karl Klare put it, "there is no 'public/private distinction.'"[11] Certainly all regulation of the employment relationship—including when the law decides to give no remedy—is a matter of public concern. Even when the law decides to leave aspects of the employment relationship to the contracting parties, as it does with the at-will doctrine, that is a decision of public policy.

Nevertheless, I will argue in this Paper that a middle position is appropriate. Even in a world where the contract norm is employment at will, courts should recognize the tort of wrongful discharge in violation of public policy, and the tort should have limits. I will argue further that courts are on the right track in attempting a public/private distinction as the way to provide limits. I agree that the public-or-private language itself is unhelpful because all legal questions are public ones. Still, appropriate limits can be found by recalling a central purpose of tort law—to control the adverse effect on third parties created by contracting parties. The categorical distinctions courts make in wrongful discharge cases can be explained as furthering the search for third-party effects.

My analysis of the tort of wrongful discharge in violation of public policy is thus positive and normative. I will argue that, as a description of the essence of what the courts are about, the search for third-party effects is the driving force behind the tort. I recognize that the common law contains many conflicting strands in this area. Among my goals is the normative one of shaping and tightening this tort. Thus, as a normative matter, I will argue that the search for third-party effects is a better method of finding public policy than its leading alternative, which asks whether a legislative statute has been violated. At a more detailed level, I will argue that employees who are fired for refusing to perform an illegal act, fulfilling a public duty, or acting as an external whistleblower appropriately present stronger wrongful discharge claims than do employees fired for exercising a statutory right or acting as an internal whistleblower.

By limiting my inquiry to tort claims, I skirt many of the exciting developments in the common-law regulation of employee terminations.

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11. Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1361 (1982). Klare's larger quote reads:

> [I]t is seriously mistaken to imagine that legal discourse or liberal political theory contains a core conception of the public/private distinction capable of being filled with determinate content or applied in a determinate manner to concrete cases. *There is no "public/private distinction."* What does exist is a series of ways of thinking about public and private that are constantly undergoing revision, reformulation, and refinement. The law contains a set of imageries and metaphors, more or less coherent, more or less prone to conscious manipulation, designed to organize judicial thinking according to recurrent, value-laden patterns. The public/private distinction poses as an analytical tool in labor law, but it functions more as a form of political rhetoric used to justify particular results.

Id. (emphasis in original).

Foremost, this Paper would be irrelevant in a legal system that mandated good-cause protection for all employees.[12] Because any firing in violation of public policy is without good cause, the tort cause of action would be superfluous[13] (putting to one side the critical issue of remedies, which generally are greater in tort actions). If and when just-cause protection becomes universal, the tort of wrongful discharge can go in the dustbin of legal history. This Paper proceeds on the assumption that the law allows or condones an at-will contractual relationship. The question I address is the appropriate parameters of a tort of wrongful discharge, given that employment is at will.

Additionally, I put to one side the many contract-based erosions of employment at will, such as implied-in-fact contracts not to fire without cause, implied covenants of good faith and fair dealing, and enforceable representations in employee handbooks. These fascinating issues focus on the intent of the contracting parties and how courts should interpret the contract when it is silent about standards for termination. These developments are on the private side of the public-or-private distinction and illustrate the important public policies at stake in private matters. They are not the policies of concern in the tort of wrongful discharge in violation of public policy.

To sharpen the analysis of tort claims, I will assume that the parties want an at-will relationship. We can assume, as Richard Epstein has argued, that the parties had no incentive to alter the background assumption

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12. Thus, I don't expect many readers from Montana. Montana is the only state that has a general prohibition on terminating workers without "good cause." Montana Wrongful Discharge From Employment Act of 1987, MONT. CODE ANN. §§ 39-2-901 to -914 (1995). The Montana statute enumerates three types of wrongful discharge: (1) in retaliation for an employee's refusal to violate public policy or for reporting violations of public policy; (2) without good cause; and (3) in violation of the employer's own written personnel policies. *Id.* § 39-2-904. Discharges in category (1) are the subject matter of this Paper.

13. Montana formally separates terminations in violation of public policy from terminations without good cause, and thus could be interested in limning the contours of public policy as distinct from good cause. *See id.* The Model Employment Termination Act, in contrast, prohibits terminations "without good cause" without explicitly mentioning terminations in violation of public policy. MODEL EMPLOYMENT TERMINATION ACT § 3 (1991). The Model Act defines good cause as a reasonable basis related to an individual employee for termination in view of relevant factors and circumstances. *Id.* § 1(4). This definition of good cause implicitly grants a worker a remedy for any wrongful termination in violation of public policy. In addition, the comment to § 1 explicitly states that "an employer's violation of established public policy[] is inconsistent with the requirement of good cause for termination. Similarly, 'whistle-blowers' in various circumstances would be protected against retaliatory discharges." *Id.* § 1 cmt.

Further, the comment to the section that extinguishes all common-law claims declares that "by statutory enactment any state may provide separate, independent remedies for certain classes of terminated employees—for example, whistle-blowers and the victims of egregious violation of public policy." *Id.* § 2 cmt. For an argument that the Model Act insufficiently protects employees fired in violation of public policy, see Dawn S. Perry, *Deterring Egregious Violations of Public Policy: A Proposed Amendment to the Model Employment Termination Act*, 67 WASH. L. REV. 915 (1992).

of employment at will because the at-will relationship optimally deters shirking by the employee.[14] Or, if that gives the reader pause, let us suppose that the law presumes just cause as the penalty default rule,[15] but the parties have expressly, knowingly, willingly, and with due consideration expressly contracted for at-will employment. That is, the employee has signed something akin to the following clause: "In return for my wages, and other adequate consideration I have received, I agree that I can be fired for a good reason, a bad reason, or no reason at all." The central question of this Paper becomes: Accepting at-will employment as an allowable contractual arrangement, when should a court limit terminations because they violate public policy?[16]

I. Wrongful Discharge and the Public/Private Distinction

Courts limiting the tort of wrongful discharge have often emphasized that the discharge must violate some *public* policy, not merely be privately unfair or improper. An at-will employment contract allows the employer to fire for a (privately) bad reason. A leading case involving the public-or-private distinction is *Foley v. Interactive Data Corp.*[17] Foley, a branch manager of a bank subsidiary, told the company vice president that the FBI was investigating Foley's immediate supervisor for embezzlement at the supervisor's former employer. As often happens when underlings buck the corporate hierarchy, Foley was fired, rather than his supervisor. Foley sued for wrongful discharge in violation of public policy, claiming that he had a legal duty as an employee/agent to report relevant business information to management.[18] The California Supreme Court, however, saw no public interest barring the discharge, instead finding that Foley was only

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14. RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAW 154 (1992) ("The contract at will . . . works like a gyroscope, with a strong mechanism for self-correction against personal aggrandizement. . . . If the employee starts to sleep on the job or damage the inventory, the employer has all the more reason to look for a substitute in the open market.").

15. For a description (ultimately rejected) of an information-forcing just cause default rule, see J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 885-90 (1995).

16. In the major case of Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988), the California Supreme Court agreed that the tort of wrongful discharge should be viewed independently of any contractual claims. *Id.* at 377. The court explained:

> What is vindicated through the cause of action is not the terms or promises arising out of the particular employment relationship involved, but rather the public interest in not permitting employers to impose as a condition of employment a requirement that an employee act in a manner contrary to fundamental public policy.

Id. at 377-78 n.7.

17. 765 P.2d 373 (Cal. 1988).

18. *See id.* at 375-79.

trying to serve the private interest of his employer.[19] As the court summarized: "When the duty of an employee to disclose information to his employer serves only the private interest of the employer, the rationale underlying [the tort of wrongful discharge in violation of public policy] is not implicated."[20]

Other courts have been similarly doctrinaire in dismissing wrongful discharge cases for involving private rather than public issues. *Green v. Bryant*[21] provides a striking example. In *Green*, an employee was brutally beaten and raped off-work by her estranged husband.[22] Apparently to avoid dealing with the problem, the employer fired her because of the incident. The firing was insensitive, to say the least. The court dismissed a wrongful discharge claim, however, reasoning that the tort does not exist simply to protect the employee, and concluding that the discharge did not cause a public harm.[23]

In determining whether a particular discharge implicates a public policy, courts sometimes examine whether the parties could have lawfully circumvented the supposed public policy through a private contract.[24] If so, no public policy claim exists. But if the contract would be unenforceable, a tort claim will lie. For example, because a court would not enforce a private contract that directed the employee, upon pain of discharge, to violate the antitrust laws, such a discharge would create a tort claim of wrongful discharge in violation of public policy.[25] Similarly, an employment contract demanding perjury would be equally void as against public policy, so an employee fired for refusing to commit perjury would have a tort claim.[26] But if a private agreement would be permissible, as in *Foley*,[27] the employee cannot claim that the employer discharged him in violation of public policy.

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19. *Id.* at 380.

20. *Id.*

21. 887 F. Supp. 798 (E.D. Pa. 1995) (applying Pennsylvania law).

22. *Id.* at 800.

23. *Id.* at 803.

24. *E.g.*, *Foley*, 765 P.2d at 380 n.12 (explaining that a private employment contract in which the employee agreed not to disclose sensitive information about other employees would be enforceable despite the state's contrary public policy); Hayes v. Eateries, Inc., 905 P.2d 778, 787 (Okla. 1995) (denying the wrongful discharge claim of an employee who had been fired for reporting his supervisor's embezzlement because no public policy "would forbid an employer from making an informed business decision that its employees are prohibited from reporting crimes against the interest of the employer").

25. *See* Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1331-35 (Cal. 1980) (holding that an employer who discharged an employee for refusing to violate antitrust laws subjected himself to tort liability because the employee had no obligation to comply with an unlawful instruction from his employer).

26. *See* Petermann v. International Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) (holding that public policy prevented an employer from firing an employee who refused to commit perjury).

27. *See supra* note 24.

Shifting the inquiry away from public policy to enforceable contract terms is helpful, yet still conclusory. The shift is helpful because the question of whether an employee's discharge violates public policy seems vague and hard to answer, while it seems relatively easy to uphold a contract requiring employees, upon pain of discharge, to keep their mouths shut about whether coworkers are deceiving their employer. However, declaring such a contract to be enforceable draws a contract-law conclusion rather than sets forth a rationale; it is no more explanatory than the tort-law conclusion that the discharge itself does not violate public policy. It is an easy conclusion to reach because the common law rarely interferes in the bargains between employer and employee. The real question is: why not?

Simply declaring the contract to be private provides an unpersuasive label.[28] I agree with the criticisms of the public/private distinction emphasized by Mark Kelman: the state is "inextricably involved" in the supposedly private realm of employment contracts, and "coercion and choicelessness can readily exist" in this realm.[29] But I also agree with Ruth Gavison, who argues in a different context that the public/private distinction, despite dangers of being indeterminate or conclusory, has meaning.[30] In other words, while all employment terminations are public, some are more public than others. Rejecting a simplistic public/private label does not mean that all discharged plaintiffs must win. Rather, one must search for better positive and normative explanations for the decisions.

Underlying the "private" label is the notion that the employer is in the best position to weigh whether the information the employer gains from co-worker tattling is worth the cost of breakdowns in the corporate chain of command and reduced trust among coworkers. As the Oklahoma Supreme Court explained in rejecting the complaint of an employee fired for internally reporting embezzlement by his supervisor, "[a]n employer's internal policies on how to deal with the actual affirmative reporting of crimes where the employer is the victim of the crime . . . simply [do] not implicate to a sufficient degree" the public policy requirement.[31] The wrongful discharge tort "does not protect an employee from his employer's

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28. *Cf.* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 616 (1982) ("Everything is public from some points of view; everything is private from other points of view. The label 'public' is, these days, more likely to represent another name for the conclusion . . . than it is to represent an actually operative element in the analysis.").

29. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 103 (1987).

30. *See* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 44 (1992) (arguing that "the all-out fight against the vocabulary of public and private is unjustified, because the terminology is uniquely suited, precisely because of its richness and ambiguities, to make and clarify many of feminism's most fundamental claims").

31. Hayes v. Eateries, Inc., 905 P.2d 778, 788 (Okla. 1995).

poor business judgment, corporate foolishness or moral transgressions."[32] Outside interests must be harmed.

The search for third-party effects, I will argue, captures this thought process in a less conclusory way than resorting to a public/private mantra. Certainly, customers and other outsiders may be hurt if a bank subsidiary employs a known embezzler, as in *Foley*. But two arguments suggest that third-party effects are minimal here. First, Foley only alleged past embezzlement.[33] The supervisor might be a reformed embezzler, an inquiry best made by the employer. Second, the employer will suffer most of the damage if its supervisor embezzles, whether through loss of reputation or through replacing the funds.

In summary, a court labeling a dispute as private gives a conclusion rather than a reason for denying the wrongful discharge claim. But on the continuum of cases that affect third parties, the discharges labeled private have weaker, less obvious, and more indirect third-party effects than the discharges that are labeled as violative of public policy. The courts are coherent, if not clear. As we move away from the public/private label toward a more direct search for third-party effects, or toward the details of the wrongful discharge doctrine, the coherence increases. Let us turn now to those details.

II. Third-Party Effects and Tort Protection for Wrongful Discharge

The earliest erosion of the at-will doctrine—and still the most compelling exception to it—evolved from a tort rationale. While recognizing that employees and employers could contract to allow firings for no reason or even a bad reason, the courts entertained causes of action complaining of firings done in violation of public policy. The key articulated element was that the firing implicate a public concern, rather than merely be a private overreaching by the employer. This appropriately reflects the predominant efficiency rationale for tort law—the control of externalities. In other words, tort law should intervene in contractual relationships to ensure that the parties consider the costs they impose on outsiders.

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32. *Id.*

33. Foley v. Interactive Data Corp., 765 P.2d 373, 375 (Cal. 1988). In Collier v. Superior Court, 279 Cal. Rptr. 453 (Cal. Ct. App. 1991), an employee was fired after reporting to top management about an ongoing scheme operated by fellow employees to give huge quantities of promotional records to outsiders, who could then sell them as valid records. *Id.* at 453-56. The scheme allegedly deprived recording artists of royalties and included bribery, kickbacks, embezzlement, and tax evasion. *Id.* The court distinguished *Foley* as reporting only past criminal conduct at a previous job. *Id.* at 455-57. While that past information served only the private interest of the employer, the *Collier* court found that Collier's report also served "the public interest in deterring crime and . . . the interests of innocent persons who stood to suffer specific harm." *Id.* at 455.

The earliest case is *Petermann v. International Brotherhood of Teamsters*,[34] decided in 1959. Petermann was an employee of a union being investigated by a state agency for corruption. When Petermann refused to perjure himself on behalf of his employer, he was fired.[35] The court recognized that Petermann was an at-will employee who by contract could be fired for any reason, including a bad reason, but held that firing someone for refusing perjury was too bad a reason for the at-will doctrine to countenance.[36] The *Petermann* court declared that it had found an implied term of the employment contract against such discharges, and thus the parties did not really intend to allow a firing on this ground.[37] Today, it is easier to understand *Petermann* as recognizing the tort of wrongful discharge in violation of public policy, and later cases expressly declared a tort rationale.[38] Regardless of the terms of the contract, an employer cannot fire an employee who refuses to commit perjury. Truthful testimony benefits third parties—here, the persons protected by the agency's investigation.

An equally compelling situation occurs when an employee is fired for missing work because of jury service. The Oregon Supreme Court in *Nees v. Hocks*[39] used a simple syllogism to find a cause of action to prevent this type of discharge. The court's major premise was that our system of justice needs citizens, including employed citizens, to serve on juries. Its minor premise was that citizens will be reluctant to serve if the law allows employers to fire them for doing so.[40] The court then concluded that to further our system of justice, the law must give a remedy to employees fired for performing jury service.[41] The value to third parties—the participants in the justice system—is obvious.

As a third example, consider the third-party effects when a bartender is fired for refusing to serve liquor to a visibly intoxicated patron who will drive home. Other drivers, not privy to any contractual relationship between employer and employee or customer, are thankful for the bartender's actions. In *Woodson v. AMF Leisureland Centers, Inc.*,[42] the court had

34. 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

35. *Id.* at 26.

36. *Id.* at 27-28.

37. *Id.* at 27.

38. *See, e.g.*, Khanna v. Microdata Corp., 215 Cal. Rptr. 860 (Cal. 1985) (holding that an action for wrongful termination sounds in contract and tort); Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1335 (Cal. 1980) (holding that "an employee's action for wrongful discharge . . . subjects an employer to tort liability").

39. 536 P.2d 512 (Or. 1975).

40. *Id.* at 516.

41. *Id.*

42. 842 F.2d 699 (3d Cir. 1988) (applying Pennsylvania law). The *Woodson* court relied on a state dram-shop statute that prohibited bars from serving intoxicated patrons. *Id.* at 702. Under a third-party effects analysis, a wrongful discharge claim should lie even in states without such a statute because the third-party effects are equally present.

no trouble recognizing a wrongful discharge claim of the bartender, complete with punitive damages.[43]

The third-party effects of at-will contracts seem obvious in situations like *Petermann*, *Nees*, and *Woodson*. Still, it is worth pausing over these cases to see the nature of the third-party effect as a test for less compelling cases. Imagine in these cases that the employer explained at the initial job interview, "This job pays extra-high wages because it is potentially dangerous. It may require you to be convicted of perjury, or to be held in contempt of court for refusing jury service, or simply to violate your moral beliefs against enabling drunk drivers. But the value to this company of perjury, or constant attendance, or serving customers, outweighs these high wages; that is why we offer the job." The employee then asks: "What happens if I don't agree to this perjury term, or refusing-jury-service term, or must-serve-drunks term?" "If you refuse the term now," the employer replies, "you won't be hired. If you refuse to perform later, you will be fired." If the employee accepts the job with this understanding, presumably it is because the high wages and other aspects of the job are worth the expected criminal/moral penalties from perjury, or refusing jury service, or serving drunks. Thus, the employer and employee are jointly better off with these conditions than without. But even as valiant a freedom-of-contract buff as Professor Epstein would refuse to enforce such contracts.[44] The rationale is simple. The parties, while furthering their own self-interests, are ignoring the effects of their deal on others. Because the private contract has substantial adverse third-party effects, we refuse to enforce it.

In theory, under this imaginary bargaining story, an employee taking the job agrees to commit perjury, or to refuse jury duty, or to serve drunks. If the employee maintains his end of the bargain, the investigating agency hears perjured testimony, the jury pool lacks a member, and a drunk-driving accident occurs. The employee keeps his job, and no wrongful discharge suit is filed. What the tort of wrongful discharge allows, however, is for the employee to change his mind. He can renege on the Faustian deal without fear of losing the job.

In practice, employers and employees rarely expressly negotiate over job duties that violate the public interest. Even if they did, their agreement rarely would call for civic-minded action by the employee. A public-goods problem exists here. An employee acting in the public interest gets only a small share of the social benefit created. The public-good activity,

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43. *Id.* at 703.

44. *See* Epstein, *supra* note 9, at 952 n.11 (supporting the *Petermann* result in arguing that contracts such as a murder contract or contract to commit perjury should not be enforced).

therefore, will be underproduced unless tort law intervenes.[45] The wrongful discharge tort gives the employee some backbone to look at the overall social interest. The employee deciding whether to testify against his employer or to take time off to perform jury duty knows that, if he is fired, he will be compensated with tort damages. Of course, compensatory damages at best put him in the same position had he not testified or been a juror (and thereby not been fired). If the employee recognizes that he may not win his lawsuit because of the vagaries of trial, or recognizes that he must generally pay attorney fees out of his damage award, he may rationally decide to commit perjury or to reject jury duty. Perhaps an employee's sense of morality is enough to let him take the plunge. Tort law attempts to tip the balance by adding the possibility of punitive damages.

Certain classes of workers may be able to resist the Faustian deal without the wrongful discharge tort. Lawyers in some states, for example, have an ethical obligation to reveal serious client improprieties,[46] even if they will be fired for doing so. In *Balla v. Gambro, Inc.*,[47] an in-house counsel was fired after reporting that his employer's kidney dialysis machines were unsafe.[48] The court rejected the lawyer's suit for wrongful discharge in violation of public policy, even though a nonlawyer employee could have sued in the same situation. The non-lawyer employee needs a wrongful discharge claim to prevent a "Hobson's choice" between complying with the employer's command for silence and risking his job by reporting the employer's misconduct.[49] But a lawyer faces no Hobson's choice, declared the court, when the ethical rules mandate disclosure. Because of this mandatory ethical requirement to do the right thing, a lawyer does not need a wrongful discharge tort to bolster her resolve.[50]

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45. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971).

46. *E.g.*, ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1990); TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 1.05(e) (1990).

47. 584 N.E.2d 104 (Ill. 1991).

48. *Id.* at 105-06. This statement of the facts fails to address whether the employee reported wrongdoing to company officials or outside authorities, an important distinction in whistleblowing cases discussed in detail *infra* subpart II(D). In this case, Balla reported his concerns to the company president, was fired, and then contacted the federal Food and Drug Administration. *Id.* at 106.

49. *Id.* at 109.

50. *Id.* Courts in other jurisdictions have rejected the *Balla* holding. *See, e.g.*, General Dynamics Corp. v. Superior Court, 876 P.2d 487, 494 (Cal. 1994) (holding that in-house counsel may sue an employer in tort for wrongful discharge because to deny such a claim would "expand upon the nature of the attorney's responsibilities in a direction with which we differ"); GTE Products v. Stewart, 653 N.E.2d 161, 166 (Mass. 1995) (concluding that the "public interest is better served if in-house counsel's resolve to comply with ethical and statutorily mandated duties is strengthened by providing judicial recourse when an employer's demands are in direct and unequivocal conflict with these duties"). One unique feature of *Balla* is that Illinois is one of the few states that mandate that lawyers disclose information about future acts of clients that will result in death or serious bodily injury. *See* ILL. RULES

A. Categorizing the Third-Party Effect: Pigeonhole Analysis

The common law gradually creates categories from compelling cases like *Petermann* and *Nees*. It is becoming hornbook law[51] that the tort of wrongful discharge in violation of public policy prohibits firing an employee because the employee has (1) refused to commit an unlawful act;[52] (2) fulfilled a public obligation;[53] (3) exercised a legal right under state law; or (4) reported illegal activity (whistleblowing). The third-party effects analysis in category (4) cases, concerning whistleblowers, is sufficiently complex that it warrants separate discussion below.[54] Let me now sketch how the other categories further the search for third-party effects.

Third-party effects analysis strongly supports categories (1) and (2), of which *Petermann* and *Nees* are leading examples. Most (but not all) criminal laws protect outside parties, and thus an employee refusing to commit a crime generally protects third parties. Similarly, an employee fulfilling a public obligation generally benefits third parties. An employee who can fit his case into one of these pigeonholes has a strong claim.

Category (3), upholding claims when the employee is fired for exercising a legal right, is harder to justify on third-party effects grounds. A classic situation, exemplified by *Frampton v. Central Indiana Gas Co.*,[55] occurs when the employee is fired after filing a workers' compensation claim against the employer. The *Frampton* court said that without a tort remedy, employees would be coerced into not exercising their right to compensation.[56] One must strain to find a third-party effect

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OF PROFESSIONAL CONDUCT Rule 1.6(b) (1990) ("A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily injury."). Most lawyer codes permit, but do not require, a lawyer to disclose such information. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS §§ 117A, 117B (Tentative Draft No. 3, 1990). In states that do not compel lawyers to disclose, lawyers may need a wrongful discharge action to encourage them to do the right thing.

51. *See, e.g.*, MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 543 (1994).

52. Several cases parse the "illegal act" line. *Compare* Phipps v. Clark Oil & Ref. Corp., 396 N.W.2d 588 (Minn. Ct. App. 1986) (recognizing a wrongful discharge claim when a gas station attendant was fired for refusing to pump leaded gas into an automobile equipped only for unleaded gas in violation of the Federal Clean Air Act), *aff'd*, 408 N.W.2d 569 (Minn. 1987) *with* Schwartz v. Michigan Sugar Co., 308 N.W.2d 459 (Mich. Ct. App. 1981) (rejecting a wrongful discharge claim when a company safety director was fired for rigorously enforcing state occupational safety requirements without first pursuing administrative remedies).

53. Several cases parse the "public obligation" line. *Compare* Girgenti v. Cali-Con, Inc., 544 A.2d 655 (Conn. App. Ct. 1988) (recognizing the wrongful discharge claim of a movie theater employee who was fired after he called the police and emptied the theater because he feared there was an intruder in the projection room) *with* McIntire v. State, 458 N.W.2d 714, 720 (Minn. Ct. App. 1990) (denying the wrongful discharge claim of a state employee fired after making public statements critieal of agency management).

54. *See infra* subpart II(D).

55. 297 N.E.2d 425 (Ind. 1973).

56. *Id.* at 427.

in the workers' compensation scenario. The employee has suffered medical expenses and temporary or permanent loss of earnings, which workers' compensation will partially reimburse. If he files a claim, the employer's workers' compensation taxes will rise. All these costs are borne directly by the employer or employee. Unlike the perjury cases or public-obligation cases, the parties in these legal-right cases bear all of the social costs involved in deciding whether to fire the worker on these grounds.[57]

Perhaps because third-party effects are hard to find when employees are fired for exercising a legal right, courts are often stingy in allowing cases into this category. For example, in *DeMarco v. Publix Super Markets, Inc.*,[58] the daughter of a grocery store employee was injured by an exploding soda bottle while shopping at the store. The employer fired the employee after he refused to withdraw his daughter's lawsuit against the store.[59] The court rejected the claim that the firing interfered with a grocery store employee's right of access to the courts.[60] In another case, a company fired a worker for writing a letter to the editor in the local newspaper criticizing management.[61] The court rejected the claim that this was a wrongful discharge in violation of the employee's state constitutional right to speak, write, and publish freely.[62] In yet another attempted application of the legal-right wrongful discharge doctrine, a bank manager was fired for fighting back when physically attacked by a subordinate.[63] The employee tried to claim that he was wrongfully fired for engaging in his right to self-defense, but the court rejected the claim.[64]

Like any rule-based approach, a pigeonhole analysis will sometimes reach results at odds with the broader goals—be they fairness or third-party effects—that motivate the pigeonholes. Courts adopting this pigeonhole analysis will frequently reject a sympathetic claim that cannot fit within one of the pigeonholes. Sometimes this is consistent with third-party effects

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57. *See* Epstein, *supra* note 9, at 952 n.11 ("The [*Frampton*] case is more difficult both because there is less justification for the coercive character of compensation, since no third-party interests are at stake, and because in all events the worker is entitled to file his claim and will do so if its value exceeds the gains he expects from the employment contract.").

58. 360 So. 2d 134 (Fla. Dist. Ct. App. 1978).

59. *Id.* at 135.

60. *Id.* at 136. *Accord* Boykins v. Housing Auth., 842 S.W.2d 527, 530 (Ky. 1992) (finding that despite the "open courts" clause in the Kentucky Constitution, an at-will employee of the Louisville housing authority who was fired for pursuing a negligence lawsuit on behalf of the employee's infant son injured in an apartment owned by the housing authority had no claim of wrongful discharge in violation of public policy). *But see* Fulford v. Burndy Corp., 623 F. Supp. 78 (D.N.H. 1985) (refusing to dismiss a wrongful discharge claim filed by an employee who was fired for filing a tort suit against his supervisor when the supervisor's dog had bitten the employee's son).

61. Schultz v. Industrial Coils, Inc., 373 N.W.2d 74, 75 (Wis. Ct. App. 1985).

62. *Id.* at 77.

63. McLaughlin v. Barclays Am. Corp., 382 S.E.2d 836 (N.C. Ct. App.), *cert. denied*, 385 S.E.2d 498 (N.C. 1989).

64. *Id.* at 840.

analysis. For example, in *Johnson v. National Beef Packing Co.*,[65] a worker injured his shoulder, refused to continue working, and was fired. The worker was not asked to do anything illegal and was not performing a civic duty.[66] Nor was the worker exercising a legal right by refusing to work. Thus, the facts cannot fit in the first three pigeonholes of the wrongful discharge doctrine. Finding no pigeonhole, the court denied the claim of wrongful discharge.[67] The *Johnson* decision is consistent with third-party effects analysis. The worker suffers by working while injured, and the employer gains from his working. All the gains and costs, however, are confined to the employer and worker. Third parties are not directly affected. Thus, no wrongful discharge claim exists.

In other cases, third-party effects may exist even when the facts do not fit a particular pigeonhole. When that occurs, courts following pigeonhole analysis will be led astray. Consider the case of *Thomas v. Zamberletti*.[68] There, a worker scheduled to work at 3:00 p.m. was in a car accident at 1:00 p.m. and was taken by ambulance to a hospital, where he was not released until 5:00 p.m.[69] When he was fired for not reporting to work on time, the worker filed suit for wrongful discharge, asserting that "it is the public policy of the State of Illinois for injured persons to receive medical attention, particularly in an emergency situation."[70] Perhaps so, but the employee was not asked to do an illegal act, nor was he performing a civic duty or exercising a legal right. Because the facts fit no pigeonhole, the court denied the claim. The worker might have had better luck if the court had considered the third-party effects of the employer's insistence that the worker forego medical treatment. Given the byzantine system of overlapping and subsidized medical payments in this country, and assuming that immediate treatment might well prevent more costly treatment later, outsiders might be harmed by the employer's demand. In that case, a wrongful discharge claim would be proper. On balance, though, the subsidized hospital argument stretches third-party effects too far. *Zamberletti* was probably correctly decided under the third-party effects model.

B. Searching for Public Policy: The Misguided Demand for Statutory Violations

As the name of the tort implies, the central question in deciding a case of "wrongful discharge in violation of public policy" is whether a public

65. 551 P.2d 779 (Kan. 1976).
66. *Id.* at 781-83.
67. *Id.*
68. 480 N.E.2d 869 (Ill. App. Ct. 1985).
69. *Id.* at 870.
70. *Id.*

policy has been violated. But what constitutes public policy? The pigeonhole analysis discussed above helps narrow the inquiry: public policy concerns an illegal act, a civic duty, or a legal right. But even if a pigeonhole analysis is used to frame the inquiry, the search for public policy can be wide or narrow.

Some courts acknowledge that the search for public policy is open-ended. In the leading case of *Palmateer v. International Harvester Co.*,[71] the Illinois Supreme Court emphasized the broad nature of public policy:

> There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions.[72]

Other courts have agreed that, in deciding whether a discharge was against public policy, they should look to the purpose underlying relevant statutes or regulations as well as to the common law. As the Hawaii Supreme Court declared, "[C]ourts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy."[73] Perhaps the extreme expression of the open-ended view was articulated by an intermediate Missouri court when, in the course of upholding a discharge as wrongful, it declared that "'[p]ublic policy' is that principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good."[74]

Many jurisdictions are troubled by the malleability of the term public policy,[75] and have demanded that the employee point to the violation of a specific statute or regulation before a discharge could be held to violate public policy.[76] Indeed, the recent trend seems to be toward this

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71. 421 N.E.2d 876 (Ill. 1981).

72. *Id.* at 878.

73. Parnar v. Americana Hotels, Inc., 652 P.2d 625, 631 (Haw. 1982).

74. Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859, 871 (Mo. Ct. App. 1985).

75. The Maryland Supreme Court noted:

> [T]he Court has not confined itself to legislative enactments, prior judicial decisions or administrative regulations when determining the public policy of this State. We have always been aware, however, that recognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of a given case, and that declaration of public policy is normally the function of the legislative branch.

Adler v. American Standard Corp., 432 A.2d 464, 472 (Md. 1981).

76. For an argument that "when a court explains a decision by public policy, the court must identify some public source for that policy, rather than assert a preferred policy of its own making," see Hans A. Linde, *Courts and Torts: "Public Policy" Without Public Politics?*, 28 VAL. U. L. REV. 821, 845 (1994). In this thoughtful, general analysis of how courts find public policy, Judge Linde

narrower approach. In *Gantt v. Sentry Insurance*,[77] for example, the California Supreme Court cautioned against a sweeping search for public policy. While the court upheld a $1.34 million wrongful discharge judgment for a manager who had been terminated after testifying truthfully in an administrative investigation about an employee's sexual harassment claim,[78] it emphasized the narrowness of its inquiry:

> A public policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among the interests of employers, employees and the public. The employer is bound, at a minimum, to know the fundamental public policies of the state and nation as expressed in their constitutions and statutes; so limited, the public policy exception presents no impediment to employers that operate within the bounds of law. Employees are protected against employer actions that contravene fundamental state policy. And society's interests are served through a more stable job market, in which its most important policies are safeguarded.[79]

Understandably, one might fear that a broad view of public policy will cause judges in wrongful discharge cases to undertake freewheeling searches for discharges against public interest. A demand that employees point to violations of specific statutes, however, can lead to awkward or even tortured analysis. For example, in *Lucas v. Brown & Root, Inc.*,[80] an employee was fired for refusing the sexual advances of her supervisor.[81] The court upheld her claim for wrongful discharge in violation of public policy, but only because it found a statute that the employee was being asked to violate—namely, the criminal statute against prostitution.[82] Such a strained inquiry seems to distract from the real concerns. The viability of a wrongful discharge tort should not turn on whether acceptance of sexual advances would violate the criminal law.[83]

Even when the employee's facts are less compelling, the demand for a specific statutory violation can sidetrack the case from the real issues.

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discusses several examples from the tort of wrongful discharge, including the *Gantt* decision of the California Supreme Court. *Id.* at 845-47. A discussion of the *Gantt* case occurs *infra* at notes 77-79 and accompanying text.

77. 824 P.2d 680 (Cal. 1992).

78. *Id.* at 681-82.

79. *Id.* at 688.

80. 736 F.2d 1202 (8th Cir. 1984).

81. *Id.* at 1206.

82. *Id.* at 1205.

83. A third-party effects perspective might question the holding as well as the rationale of *Lucas*, because third parties do not seem to be affected here. Perhaps the fact that the employee has a clear claim under Title VII ameliorates the fact that the wrongful discharge tort claim is harder to justify. *See* 42 U.S.C. § 2000e (1994). For a further discussion of sexual harassment and third-party effects analysis, see *infra* notes 174-84 and accompanying text.

Consider *Scroghan v. Kraftco Corp.*[84] In *Scroghan*, an employee was fired from his day job when he announced that he planned to attend law school at night.[85] Today, the employee might have a privacy claim,[86] but at the time, the tort of wrongful discharge in violation of public policy seemed to frame the claim. The employee tried to fit his claim within the exercising-a-statutory-right pigeonhole by pointing to the National Defense Education Act of 1958, which subsidized higher education.[87] The court ignored this statute, reasoning along third-party effect grounds that the employee had not alleged a public interest but merely a private concern.[88] The search for a statute was a distraction.

The analysis can become comical when courts demand that employees show a violation of public policy through a specific statute. The well-known case of *Wagenseller v. Scottsdale Memorial Hospital*[89] provides an example of such silliness. In *Wagenseller*, a nurse went on an eight-day rafting trip down the Colorado River with her supervisor and several nonemployees. The nurse refused to join her rafting companions in the skit "Moon River," which the cast concluded by mooning the audience. Apparently, the nurse's reticence strained relations with her supervisor. Several months later, the supervisor fired the nurse, allegedly because of this mooning incident.[90] The court first undertook the analysis used by courts that insist on a statutory violation; it asked whether the nurse had been fired for refusing to do an illegal act.[91] This boiled down to the question of whether the mooning violated the Arizona statute against indecent exposure of the anus or genitals in a way that would offend or alarm another person.[92] Just as the nurse was embarrassed on the river, the Arizona Supreme Court was embarrassed in having to conduct the inquiry. The court conceded in a footnote that it was not an expert in the art of mooning, and found it "unseemly and unnecessary" to determine whether mooning would expose the anus or genitals, or whether the other people on the rafting trip would have been offended.[93] Instead, the court ratified a somewhat broader inquiry into public policy, and upheld the nurse's claim of wrongful termination on the grounds that she was being

84. 551 S.W.2d 811 (Ky. Ct. App. 1977).

85. *Id.* at 812.

86. Several states have prohibited employers from firing workers for lawful, off-work activity. *See, e.g.*, N.D. CENT. CODE § 14-02.4-03 (1991).

87. *Scroghan*, 551 S.W.2d at 812.

88. *Id.*

89. 710 P.2d 1025 (Ariz. 1985).

90. *Id.* at 1029.

91. *Id.* at 1035.

92. *Id.*

93. *Id.* at 1035 n.5.

asked to violate the public policy embodied in the indecent exposure statute.[94]

Preferable to the court's titillating analysis in *Wagenseller* would have been an approach that focused directly on whether firing the employee for refusing to moon would have third-party effects. Central here is whether the other people on the rafting trip would have been offended or alarmed.[95] Courts should make actionable an employer's insistence, on pain of firing, that an employee offend or alarm third parties; the *Wagenseller* court failed to take into account third-party considerations. Ironically, the Arizona indecent exposure statute—with its insistence that a violation occurs only when other people are offended or alarmed—similarly focuses on third-party effects. Thus, if the court had conducted a closer inquiry into whether the employee was being asked to violate the statute, it would have come closer to asking whether the firing affected third-party interests.

Ideally, courts should focus their inquiry on whether third parties (or the public at large) are affected in ways not considered by the employer or employee. Yet many courts apparently use a violation of a statute as a proxy for finding a third-party effect. The justification for such a proxy must be that the legal process costs of directly inquiring into third-party effects are too high. Such an inquiry, however, is no more difficult or nebulous than many tasks courts regularly perform. It is more justifiable, therefore, to directly entertain claims that the discharge violated third-party interests, rather than insist on a violation of a statute.

C. *Employees as Private Attorney Generals*

The public policies furthered by the wrongful discharge tort generally do not involve protection of workers. Rather, the policies are "extrinsic" to the labor market.[96] Thus, the tort might discourage perjury in governmental investigations[97] or might improve the functioning of the jury system.[98] The extrinsic nature of the public policy is particularly evident

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94. *Id.* For a case that reaches a different result on similar facts, see Madani v. Kendall Ford, Inc., 818 P.2d 930, 931-33 (Or. 1991) (finding no wrongful discharge in violation of public policy when a car salesperson was fired for refusing his supervisor's order to pull down his pants and expose himself in view of coworkers and customers, but suggesting a different result would have been possible if the complaint had specified that the supervisor's order forced the employee to violate a criminal law).

95. Although the trial court made no finding on this point, it seems unlikely.

96. The term "extrinsic policies" was formulated by James W. Hubbell, *Retaliatory Discharge and the Economics of Deterrence*, 60 U. COLO. L. REV. 91, 103 (1989).

97. *See* Petermann v. International Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) (effectuating the state's policy against perjury by upholding the wrongful discharge claim of an employee who refused to commit perjury).

98. *See* Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975) (holding an employer liable for discharging an employee for serving on a jury).

in whistleblower cases. Whether the whistle is blown on environmental pollution,[99] financial irregularities,[100] or unsafe products,[101] the policies furthered by entertaining a wrongful discharge claim are external to the labor market.

A court that allows a claim of wrongful discharge in violation of express statutory policy can be viewed as supplementing whatever remedies or penalties the legislature has expressly provided in enacting the statute. The general issue of when courts should imply private remedies for individual statutes arises in many fields. In *Cort v. Ash*,[102] the Supreme Court articulated three factors to be used in determining whether a private cause of action exists for violation of statutes: (1) is the plaintiff one of the class for whose special benefit the statute was enacted?; (2) is there any indication of express or implied legislative intent to create or deny a remedy?; and (3) would implying a private remedy be consistent with the underlying statutory scheme?[103] In later cases, the Supreme Court emphasized that the central inquiry is whether the legislature intended to supplement enforcement through private action.[104] Phrased this way, the inquiry is often likely to disfavor finding a cause of action; the legislature will not have intended to supplement enforcement through private action, simply because it did not confront the issue. But the inquiry into legislative intent can be phrased in a way more compatible with finding wrongful discharge causes of action; a court could ask whether the legislature intended that the statute preclude a common-law tort action. In most cases one will not find legislative intent to preclude, again because the legislature did not focus on the question.

Occasionally, courts expressly follow *Cort v. Ash* in denying wrongful discharge claims. In *Greenlee v. Board of County Commissioners*,[105] for example, the Kansas Supreme Court discussed *Cort* principles in holding

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99. *See* Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1344-46 (3d Cir. 1990) (holding that the public policy exception to Pennsylvania's employment-at-will doctrine did not apply to an employee who was discharged after reporting alleged air and water pollution to his superiors).

100. *See* Adler v. American Standard Corp., 830 F.2d 1303, 1305-07 (4th Cir. 1987) (holding that the discharge of an employee to prevent disclosure of commercial bribery and alteration of records did not violate Maryland public policy).

101. *See* Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367, 1374 (9th Cir. 1984) (upholding the wrongful discharge claim of an employee fired for reporting the shipment of adulterated milk to health authorities), *cert. denied*, 471 U.S. 1099 (1985); Balla v. Gambro, Inc., 584 N.E.2d 104, 107-08 (Ill. 1991) (refusing to recognize a retaliatory discharge action by an in-house attorney fired for threatening to stop his employer's sale of unsafe kidney dialysis machines).

102. 422 U.S. 66 (1975).

103. *Id.* at 78.

104. *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979) ("The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.").

105. 740 P.2d 606 (Kan. 1987).

that the legislature did not intend to create a wrongful discharge action for a county's violation of a state budget statute.[106] The county had been running a deficit in violation of the state cash-basis law and budget law, and as a result had to fire an employee for lack of funds.[107] When the employee filed a wrongful discharge claim alleging violation of statute, the court denied relief and held that the purpose of the statutes was to protect the public from overspending by the government, not to give job security to county employees. The statutes gave legislative remedies but did not contemplate a private cause of action.[108]

More commonly, courts implicitly follow a *Cort v. Ash* analysis when deciding whether a discharge in violation of a statute gives rise to a wrongful discharge claim. If the statute in question was designed to protect workers, then these courts will have little difficulty in condoning the wrongful discharge tort as an additional remedy when an employer violates the statute. For example, consider a state statute that makes it a criminal misdemeanor for an employer, except in narrow circumstances, to force an employee to take a polygraph test. Can an employee bring a wrongful discharge claim when he is fired for refusing to take an illegal polygraph test, or is criminal prosecution of the employer the only sanction behind the statute? The Nebraska Supreme Court, confronted with this issue in *Ambroz v. Cornhusker Square Ltd.*,[109] had little trouble upholding the employee's cause of action.[110] It emphasized, in a manner consistent with the first factor of *Cort v. Ash*, that the purpose of the criminal statute was to protect employees such as the plaintiff.[111]

Also in the category of wrongful discharge cases that implicitly interpret worker-protective legislation are the many cases upholding wrongful discharge claims of workers fired for filing workers' compensation claims. Although some workers' compensation statutes have an express antiretaliation provision,[112] when the statute is silent courts have readily inferred a private wrongful discharge action, complete with punitive damages. As the Kentucky Supreme Court explained in its leading case, *Firestone Textile Co. Division v. Meadows*,[113] the public policy of protecting workers who file workers' compensation claims from wrongful discharge is "implicit in an act of the legislature," and thus gives rise to a

106. *Id.* at 608-09.

107. *Id.* at 607.

108. *Id.* at 610.

109. 416 N.W.2d 510 (Neb. 1987).

110. *Id.* at 514.

111. *See id.* ("The statute speaks for itself in language that is clear and unambiguous and specifically prohibits an employer's use of the polygraph to deny employment.").

112. *E.g.*, MASS. GEN. LAWS ANN. ch. 152, § 75B(2) (West 1988); MICH. COMP. LAWS ANN. § 418.301(11) (West 1985); MO. REV. STAT. § 287.780 (1986).

113. 666 S.W.2d 730 (Ky. 1983).

wrongful discharge cause of action.[114] As previously discussed, a third-party effects analysis would question the validity of these wrongful discharge claims. Courts nevertheless allow the claims for two reasons. First, the implicit legislative intent to protect such workers seems obvious. Second, the firings seem particularly outrageous. Indeed, the *Meadows* court analogized these wrongful discharge cases to cases of outrageous conduct and invasion of privacy.[115]

Justifying a tort action as a supplemental remedy is a little harder when the statute regulates employers for non-labor-market goals. For example, Tennessee has enacted a jury service statute that imposes criminal sanctions on an employer who fires employees for performing jury duty and expressly gives the fired employee the remedies of reinstatement and lost wages.[116] In *Hodges v. S.C. Toof & Co.*,[117] an employee fired for performing jury duty brought a common-law wrongful discharge suit, seeking damages far in excess of the lost wages provision of the statute.[118] The Tennessee Supreme Court recognized the tort action and affirmed an award of $200,000 in compensatory damages.[119]

When a statute does not expressly touch the labor market, the remedies provided by a wrongful discharge action may far exceed the penalties envisioned by the legislature. If the legislature kept penalties low in order to avoid a chilling effect on desirable conduct, or because it wanted a graduated penalty scheme with related offenses, or simply because the prohibited conduct is not especially venal, recognition of a wrongful discharge claim when employees are fired for refusing to violate the statute may distort the legislative balance. On the other hand, the government often has difficulty detecting corporate violations of many statutes.[120] Whistleblowing employees are ideally situated to spot violations. Giving them a wrongful discharge claim, whereby they receive compensation if their whistleblowing costs them their job, reduces the

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114. *Id.* at 732.

115. *See id.* at 733 (describing the cause of action for wrongful discharge as "another facet of compensation for outrageous conduct . . . , interference with prospective advantage . . . , and invasion of privacy").

116. TENN. CODE ANN. § 22-4-108(f) (1994).

117. 833 S.W.2d 896 (Tenn. 1992).

118. *Id.* at 898.

119. *Id.* at 902. The court vacated a punitive damages award of $375,000, but only to make sure that the jury had been instructed on and had followed the clear and convincing evidence standard necessary for punitive damages. *Id.* The court expressly held that punitive damages would be allowed if a jury followed the clear and convincing evidence standard. *Id.* Thus, Tennessee courts will uphold both compensatory and punitive damage awards in jury duty wrongful discharge cases, even though the jury duty statute only calls for reinstatement and reimbursement for lost wages and benefits.

120. *See* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 835 (1992) (noting that many corporate crimes, such as securities fraud, government procurement fraud, and some environmental crimes, cannot be readily detected by the government).

disincentive to blow the whistle on their employer. The wrongful discharge action effectively furthers the legislative goals.

Perhaps this approach calls for case-by-case balancing.[121] For each whistleblower, a court could evaluate the likelihood of detecting the statutory violation in other ways (such as through the police) and the seriousness of the reported violation. After weighing the importance of the disclosure to society, the court could balance this against the costs of burdening employment contracts with dismissal rights, as well as the costs of altering internal corporate procedures for reporting company problems.

In general, courts have shied away from case-by-case balancing.[122] But a rule-based decision can go one of two ways: courts can generally allow the tort whenever a violation of a statute is shown, or generally deny the tort. The issue is sharply confronted when an employee is fired for refusing to engage in (or reporting to authorities) a clear, but trivial, violation of a statute. For example, suppose an employee reports to the police that a coworker stole a two-dollar screwdriver from the company, or parked a company car in an illegal parking place for two minutes. When the goody-goody employee is fired, how should a court treat the inevitable wrongful discharge claim? Must a company tolerate a worker who shows such a lack of proportion that he brings police scrutiny on the company for such trivial matters? To put it another way, can the company's business judgment about how to handle this personnel problem override the legislature's determination that the problem was a crime to be resolved by the criminal justice system? Or, given that the employer has the contractual right to fire the worker for a bad reason, is this such a bad reason for firing that courts should give a remedy for it? The Illinois Supreme Court in *Palmateer v. International Harvester Co.*[123] answered the last question affirmatively, finding a wrongful discharge cause of action in this context.[124]

An approach that highlights the search for third-party effects would not be swayed simply by the violation of a statute. This approach would distinguish between whistleblowing on a two-dollar theft against the company and illegal parking by the company employee. Theft is the unconsented taking of property, so if the company chooses not to complain about the

121. One commentator has come close to urging this approach. *See* Hubbell, *supra* note 96, at 129 ("Retaliatory discharge claims will be ideally suited to enforce some laws and poorly suited to enforce others.").

122. Courts have made an exception in some cases of whistleblowing, and thus predicting case outcomes has become more difficult as courts engage in case-by-case balancing. For a discussion of the factors that courts balance in whistleblowing cases, see *infra* subpart II(D).

123. 421 N.E.2d 876 (Ill. 1981).

124. *Id.* at 880 (discussing the hypothetical of being fired for reporting the theft of a two-dollar screwdriver and suggesting that a wrongful discharge action would lie on those facts).

worker's theft of the two-dollar screwdriver, arguably no violation of the law has occurred. Certainly the theft has no importance independent of the employer's concern for whether employees take company property. Because no third-party effects exist, no wrongful discharge claim should lie.[125] The parking violation, in contrast, is an external violation of law by a company employee, regardless of whether the company fires the violator or the whistleblower. The parking harms other drivers who cannot park in the illegally occupied space. External violations affect third parties, but employee thefts do not.

Still, the question arises as to whether the third-party effects approach would allow a wrongful discharge claim whenever third-party effects are found, no matter how trivial they might be. In an ideal balancing test, the value of the third-party effect should be part of the calculus. Reporting a trivial violation of the law, for example, would not be enough to tip the balance toward the employee. Evaluating the level of public good is difficult, of course. It is understandable, therefore, that in a second-best world a court might find for the employee whenever the court sees third-party effects, however minor, from the discharge.

New York has taken a more extreme position, refusing to recognize any tort claim of wrongful discharge in violation of public policy, even when the violation of the statute is clear and serious. In *Murphy v. American Home Products Corp.*,[126] the court declared that recognizing these inroads is a legislative function, not a judicial one.[127] In effect, the *Murphy* court took a rigid *Cort v. Ash* approach, demanding explicit proof that the legislature intended to create a cause of action for harmed employees in every statutory violation. The court noted that the legislature had prohibited retaliatory discharge in specific areas, including jury service and testifying before agencies investigating discrimination claims against the employer, but had declined to expand the list of statutory policies for which a wrongful discharge claim would lie.[128] In so doing, the *Murphy* court did not reject the third-party effects approach. Rather, it left the task of determining third-party effects to the legislature. The New York court probably unduly glorified the legislature's ability rationally to assess the merits of the issue, and was too modest about its own abilities. If courts, in deciding a wrongful discharge cause of action, focus on whether the firing has significant third-party effects, courts should be competent to the task.

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125. For a vigorous argument that whistleblowing of theft against the company involves no third-party effects if the company refuses to complain, and thus should not lead to a wrongful discharge claim, see Belline v. K-Mart Corp., 940 F.2d 184, 190-92 (7th Cir. 1991) (Easterbrook, J., dissenting).

126. 448 N.E.2d 86 (N.Y. 1983).

127. *Id.* at 89-90.

128. *Id.* at 90 & n.1.

Whether the legislature or judiciary should decide the propriety of wrongful discharge claims is often confused with whether such cases should be decided by rule or case-by-case. Courts have created some categorical rules. For example, any employee fired for performing jury service will be allowed to bring a wrongful discharge claim without showing a third-party effect in his individual case. Whether created by a court (as by the Oregon Supreme Court in *Nees v. Hock*) or by legislature (as in New York), a rule exists that firing any employee for performing jury service violates public policy in every case.[129]

D. The Special Category: Whistleblowers

Whistleblowers have figured prominently in many wrongful discharge cases. It is often difficult to distinguish whistleblower cases from those in which the employee is fired for refusing to commit an unlawful act, for exercising a legal right, or for fulfilling a public duty. Whistleblower cases are generally more problematic,[130] and an employee has a greater chance of winning a wrongful discharge case by fitting into another category. In this subpart I will sketch the factors that make a whistleblowing claim more or less compelling to the courts. I will argue that these factors are methods of searching for third-party effects.

First, given comparable illegal activities by the firm, courts are more likely to protect employees who blow the whistle to outside authorities rather than keep the issue within the company. The major common-law cases protecting whistleblowers involve employees who reported, or threatened to report, violations to outside authorities rather than those who merely complained to company managers. For example, in its leading whistleblower case, the Arkansas Supreme Court protected an employee who was fired after reporting his company to the federal General Services Administration for pricing violations on government contracts.[131] The court emphasized "the established public policy favoring citizen informants or crime fighters,"[132] and cited many of the major external whistleblower

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129. Cases at the margin, which are not clearly covered by the rule, do exist. For example, suppose an employment contract calls for a nurse to make best efforts to avoid jury duty, and the jurisdiction generally allows essential medical personnel to be exempted from jury duty if they wish. If a nurse who was called for jury duty refused to invoke the exemption, could the employer lawfully fire her? This is an open question. More to the point, it may well have to be answered on a case-by-case basis by asking the extent of the employee's efforts to avoid jury duty and the degree to which she is an essential employee.

130. *See* Martin H. Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REFORM 277, 280 (1983) ("The law is in utter disarray . . . over whether and when an employee discharged for whistleblowing has a cause of action against his employer.").

131. Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380 (Ark. 1988). An unusual aspect of this wrongful discharge case is that the court limited the successful plaintiff to contract damages. *Id.* at 386.

132. *Id.* at 386.

cases, including *Garibaldi v. Lucky Food Stores, Inc.*,[133] *McQuary v. Bel Air Convalescent Home, Inc.*,[134] *Palmateer v. International Harvester Co.*,[135] and *Wagner v. City of Globe*.[136]

By contrast, whistleblowing employees may have no claim if they merely tell inside management of the violation—even when the violation would clearly harm the public. For example, in *Geary v. United States Steel Corp.*,[137] a salesman reported to his immediate supervisors that a "tubular product" was dangerous to users. After being told to "follow directions," the salesman instead informed the company vice president. The company eventually withdrew the product from the market, but also fired the salesman.[138] The Pennsylvania Supreme Court rejected his wrongful discharge claim, emphasizing that the salesman's duties did not include product safety and that the company had a "legitimate interest in preserving its normal operational procedures from disruption."[139] In other words, a whistleblower bucking the internal corporate hierarchy deserves no protection on public policy grounds.[140]

Third-party effects analysis helps explain the greater reluctance of courts to protect internal whistleblowers. Although the company illegality

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133. 726 F.2d 1367 (9th Cir. 1984) (finding that an employee who warned health authorities about a shipment of spoiled milk stated a "whistle blowing" claim under California law of wrongful discharge in violation of public policy), *cert. denied*, 471 U.S. 1099 (1985).

134. 684 P.2d 21 (Or. Ct. App.) (holding that an employee who was fired after threatening to report patient abuse to state authorities stated a valid wrongful discharge claim), *cert. denied*, 688 P.2d 845 (Or. 1984).

135. 421 N.E.2d 876 (Ill. 1981) (recognizing a wrongful discharge claim brought by an employee who was fired for reporting the criminal activities of a fellow employee to a law enforcement agency).

136. 722 P.2d 250 (Ariz. 1986) (recognizing a wrongful discharge claim brought by a police officer who was fired for informing a magistrate about illegal detention of prisoners).

137. 319 A.2d 174 (Pa. 1974).

138. *Id.* at 175.

139. *Id.* at 180. *See also* Smith v. Calgon Carbon Corp., 917 F.2d 1338 (3d Cir. 1990) (applying Pennsylvania law and overturning a jury verdict of over $400,000 awarded to a low-level manager who had been fired after reporting to senior company officials that mid-level managers were covering up air and water pollution accidents caused by the company).

140. For a recent case that explicitly distinguishes internal from external whistleblowers, see Hayes v. Eateries, Inc., 905 P.2d 778 (Okla. 1995). In that case, an employee reported that his supervisor was embezzling from the company. *Id.* at 781. It was unclear whether the employee reported to the company or to outside officials. *Id.* at 785. Although it ultimately rejected both versions of the claim, the court separately discussed the possible internal and external whistleblower claims. *Id.* at 786-88. For another example of the internal/external distinction, see House v. Carter-Wallace, Inc., 556 A.2d 353 (N.J. Super. Ct. App. Div.), *cert. denied*, 564 A.2d 874 (N.J. 1989), in which the court upheld a summary judgment against a company vice president's wrongful discharge claim that he had been fired for internally protesting the distribution of contaminated tooth polish. *Id.* at 356. The court declared that "no New Jersey case has recognized a claim for wrongful discharge based solely on an employee's internal complaints about a corporate decision, where the employee has failed to bring the alleged violation of public policy to any governmental or other outside authority or to take other effective action in opposition to the policy." *Id.*

is the same, and thus the effect of the underlying company action on the public is the same, the effect on outsiders of firing the messenger differs. Presumably outside authorities will protect the public by responding to the whistleblower's information about illegal activity; giving judicial protection to whistleblowers who initiate contact with outside authorities encourages this link, and thus protects the public. By contrast, top management may or may not respond to the internal whistleblower's information about illegal activity. Management may ignore the information or attempt a coverup. Moreover, courts have great difficulty distinguishing "good" internal whistleblowers from disgruntled employees who are fired for not being productive team players. The latter fear is especially real when the employee's job description does not concern promoting compliance with the law. Internal company politics are the antithesis of third-party effects.

However, the contrast between external and internal whistleblowers cannot be drawn too sharply. Some internal whistleblowers receive judicial protection, even if they never threatened to report company illegality to outside authorities. For example, in *Sheets v. Teddy's Frosted Foods, Inc.*,[141] the Supreme Court of Connecticut recognized a wrongful discharge claim brought by a quality control inspector who was fired after calling his employer's attention to repeated violations of state food-labeling laws. Unlike the internal whistleblower in *Geary*, who had no wrongful discharge claim, Sheets's very job was to insure safe labeling of food.[142] Thus, Sheets was following his job description rather than bucking corporate hierarchy, making it easier for the court to recognize his claim, even though he did not disclose to outside authorities. Similarly, in *Harless v. First National Bank*,[143] the West Virginia Supreme Court of Appeals recognized the wrongful discharge claim of the office manager of a bank's consumer credit department who was fired for urging the bank to comply with state consumer credit laws.[144] Again, the nexus between the internal whistleblowing and job duties was close.

Even if courts look skeptically on internal whistleblower claims, they still must make fine distinctions between whether an employee was fired for mere internal whistleblowing, or was fired after refusing to act illegally. An employee fired for refusing to act unlawfully fits into a classic wrongful discharge pigeonhole, and his claim is easily justified on third-party effects grounds.[145] *Adler v. American Standard Corp.*[146]

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141. 427 A.2d 385 (Conn. 1980).

142. *Id.* at 389.

143. 246 S.E.2d 270 (W. Va. 1978).

144. *Id.* at 276.

145. *See supra* note 52 and accompanying text.

146. 830 F.2d 1303 (4th Cir. 1987). *Adler* has a complicated procedural history. Adler filed suit in federal district court. *Id.* at 1305. The court certified to the Maryland Court of Appeals the ques-

provides an illustration of the difficulty in distinguishing internal whistleblowers from employees refusing to commit an unlawful act. Adler was a middle manager responsible for analyzing the company's structure and proposing changes to enhance the accuracy of the intracorporate transmittal of information. He discovered numerous improper and possibly illegal practices in the company.[147] Before he could report these practices at a high-level managerial meeting, his immediate supervisors fired him.[148] The federal court of appeals emphasized that Adler was not an external whistleblower. There was "no allegation, claim or testimony that Adler threatened to report [illegal] activities to law enforcement agencies or to anyone outside the corporate group."[149] The court refused to protect a mere internal whistleblower. It overturned the million-dollar judgment on his behalf, declaring that wrongful discharge should be limited to "situations involving the actual refusal to engage in illegal activity, or the intention to fulfill a statutorily prescribed duty."[150]

Judge Butzner, dissenting, did not dispute that an internal whistleblower had no claim.[151] He argued, however, that Adler was fired on the eve of a meeting where he would announce that he would not engage in or condone future crimes.[152] In Judge Butzner's view, this meant he was fired for refusing to commit an illegal act, and thus was protected. As Judge Butzner explained:

> It is Adler's refusal to commit unlawful acts that distinguishes this case from those where whistle blowers, who did no more than accuse other persons of derelictions, were not given protection. Indeed, when a whistle blower is also the person who must decide whether a course of illegal conduct will continue, implicit in his disclosure of the illegality to his superiors is his renunciation of its continuance in the absence of any express intention to the contrary.[153]

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tion of whether Maryland recognized a cause of action for "abusive discharge," and, if so, whether Adler's complaints stated a claim. *Id.* The Maryland court held that abusive discharge was a valid tort in Maryland, but that Adler's allegations were too vague to state a violation of public policy. Adler v. American Standard Corp., 432 A.2d 464, 473 (Md. 1981). Adler then filed an amended complaint in federal district court, enumerating seventeen federal and state statutes that he claimed the company had violated. Adler v. American Standard Corp., 538 F. Supp. 572, 575 (D. Md. 1982). A jury awarded Adler $1.2 million in compensatory damages and another $1 million in punitive damages for the abusive discharge claim (plus damages for defamation). *Adler*, 830 F.2d at 1305. The district court granted a judgment notwithstanding the verdict on the punitive damages claim (and the defamation claim), but entered judgment for compensatory damages. *Id.* The court of appeals reversed, denying the award of compensatory damages. *Id.* at 1307.

147. *Adler*, 432 A.2d at 466.

148. *Adler*, 830 F.2d at 1306.

149. *Id.*

150. *Id.* at 1307.

151. *Id.* at 1308 (Butzner, J., dissenting).

152. *Id.* (Butzner, J., dissenting).

153. *Id.* (Butzner, J., dissenting).

While fine distinctions are always hard to justify, third-party effects would treat an employee fired for refusing to commit an illegal act more sympathetically than an internal whistleblower. The legislature presumably declared the act illegal in order to protect the public from wrongdoing. An employee who abides by the legislative command immediately furthers the public interest (at least until the employer finds another worker to do the dirty deed). By contrast, an internal complaint may go nowhere. If the company just sits on it, the public interest remains unaffected by the whistleblower's actions.

States vary concerning the scope of the protected whistle. Some states will protect an employee who reports any "violation of state or federal statute, or violation or noncompliance with a state or federal regulation."[154] Other states only protect whistleblowers disclosing acts affecting health and safety and do not protect employees disclosing mere financial illegalities. For example, New York's whistleblower statute, while covering both internal and external whistleblowers,[155] protects only employees who report a violation of law that "creates and presents a substantial and specific danger to the public health or safety."[156] In such states, the reporting of much white-collar crime is not protected.[157] Again, while the distinctions are subtle, they make general sense under the third-party effects approach, at least if a full case-by-case analysis is rejected in favor of a more categorical approach. Certainly, a billion-dollar financial fraud involving elderly pensioners can have greater harm on third parties than a trivial oil spill. But in general, companies have great internal incentives to police financial fraud, either to protect their shareholders or their reputation among creditors. Companies often cannot capture the gains from an action that protects public health or safety, and thus that factor often remains external to their calculus. Allowing a wrongful discharge action to be asserted by employees fired for blowing the whistle on actions against public health and safety is one small way to encourage companies to internalize these costs.

Interestingly, states are not always more sympathetic to a whistleblower who is correct than to one who merely acts in good faith. Consider the facts of *Johnston v. Del Mar Distributing Co.*[158] A shipping clerk was

154. *E.g.*, CAL. LAB. CODE § 1102.5 (West 1989).

155. *See* N.Y. LAB. LAW § 740 (McKinney 1988) (directing that disclosure may be to "a supervisor or to a public body").

156. *Id.*

157. *See* Remba v. Federation Employment & Guidance Serv., 545 N.Y.S.2d 140 (N.Y. App. Div. 1989) (finding that an employee who had been fired for reporting fraudulent billing practices was not protected by the New York whistleblower statute because these practices did not constitute a danger to the public health or safety to which the law applied), *aff'd*, 559 N.E.2d 655 (N.Y. 1990).

158. 776 S.W.2d 768 (Tex. App.—Corpus Christi 1989, writ denied).

told to package a semi-automatic weapon for U.P.S. delivery to a grocery store across the state and to label the contents "fishing gear."[159] This troubled the clerk, so she called the federal Bureau of Alcohol, Tobacco & Firearms. She was fired for doing so.[160] The court declared that "whether or not the requested act was in fact illegal is irrelevant," and recognized the wrongful discharge claim based on the employee's good faith reasonable belief that the mislabeling might be illegal.[161] If public policy prevents an employer from coercing an employee into violating the law, the court reasoned, that same public policy should protect the employee who "in good faith attempts to find out if the act is illegal."[162] Other states protect mistaken whistleblowers by statute. For example, Michigan protects reports of violations "unless the employee knows that the report is false."[163] Similarly, California protects disclosure when the employee "has reasonable cause to believe" a statute has been violated.[164] Maine protects a "good faith" reporting of violations.[165]

Some states take a harsher view, however, demanding that the company's actions in fact be illegal. For example, in *Remba v. Federation Employment & Guidance Service*,[166] the New York court rejected a whistleblower's claim because while the employee could show that he had a reasonable belief his employer had violated the law, he could not show an actual violation.[167] Similarly, in *Clark v. Modern Group Ltd.*,[168] the court rejected a wrongful discharge claim when the employee was fired after objecting to his company's method of reimbursing executives for auto expenses, which the employee reasonably believed violated federal tax laws but in fact did not.[169]

A third-party effects approach supports a distinction between employees correctly reporting illegality and mistaken employees acting in good faith. A company that violates the law harms outsiders. A company incorrectly suspected of violating the law does not harm others. A "fairness" approach to wrongful discharge cases, by contrast, might ignore

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159. *Id.* at 769.
160. *Id.*
161. *Id.* at 772.
162. *Id.* at 771.
163. MICH. COMP. LAWS ANN. § 15.362 (West 1994).
164. CAL. LAB. CODE § 1102.5 (West 1989). *But see* DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655 (9th Cir. 1992) (applying California law and holding that an employee had no wrongful discharge claim when he refused to work based on a mistaken belief that his employer's request to drive a trailer with expired registration papers was illegal).
165. ME. REV. STAT. ANN. tit. 26, § 833 (West 1988).
166. 545 N.Y.S.2d 140 (N.Y. App. Div. 1989), *aff'd*, 559 N.E.2d 655 (N.Y. 1990).
167. *Id.* at 143.
168. 9 F.3d 321 (3d Cir. 1993).
169. *Id.* at 323.

the distinction and protect any employee acting in good faith, even if the outside public is not served thereby.[170]

In sum, a survey of whistleblowing cases shows a wide variety of distinctions being employed by the courts. Generally, the whistleblowing employee most likely to succeed in a wrongful discharge case is one who was fired for reporting to an outside law enforcement agency an actual violation of law that protects public health and safety. Less likely to succeed is an employee who was fired merely for reporting to internal company officials a suspected, but not actual, violation of the law regulating company finances. In general, the first firing is more likely to have harmed third parties than the second. In broad brush, then, the whistleblower cases can be seen as searching for third-party effects.

III. The Limits of Third-Party Effects Analysis

The central claims of this Paper are (1) courts are receptive to the tort of wrongful discharge in violation of public policy when the discharge adversely affects third parties, but (2) courts are reluctant to grant relief when the discharge harms only the employee. Third-party effects analysis thus justifies some claims and limits others.

Of course, many individual court decisions cannot be fit into a third-party effects framework. This is to be expected. The entire field of employment law is new, and states are moving at different paces. In a manner analogous to Rawls's reflective equilibrium,[171] a particular decision can sometimes be criticized for being inconsistent with the third-party effects theory;[172] in other cases, the clear wisdom of a particular case,

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170. A third-party effects analysis should not press the distinction too far. Employees thinking about blowing the whistle know whether they are acting in good faith, but cannot know whether they are correct. Given the many disincentives to blowing the whistle, a tort system that only protects correct whistleblowers may unduly chill whistleblowing, and thus fails to provide enough incentives to blow the whistle in cases in which third-party effects, from the employee's good faith perspective, exist.

171. John Rawls stated:

> We need to be tolerant of simplifications if they reveal and approximate the general outlines of our judgments. Objections by way of counterexamples are to be made with care, since these may tell us only what we know already, namely that our theory is wrong somewhere. . . . All theories are presumably mistaken in places. The real question at any given time is which of the views already proposed is the best approximation overall.

JOHN RAWLS, A THEORY OF JUSTICE 52 (1971).

172. A good example of a court which accepted wrongly, to my mind, a wrongful discharge claim without recognizing the lack of third-party effects can be found in Cilley v. New Hampshire Ball Bearings, Inc., 514 A.2d 818 (N.H. 1986). In *Cilley*, a supervisor fired a manager ostensibly for ordering employees to work on the manager's house while on company time. *Id.* at 819. The manager alleged that the real reason for his firing was that the supervisor was seeking "revenge" for the manager's refusal to lie to the company president to cover for the supervisor. *Id.* The court held that these allegations stated a claim for wrongful discharge in violation of the public policy supporting truthfulness. *Id.* at 821. These allegations involved nothing more than internal office bickering. If this trig-

despite its inconsistency with the third-party effects theory, reveals weaknesses in the theory.[173] But isolated inconsistent cases are less damaging to the theory than entire types of cases that appear inconsistent.

A major category of cases in which courts reach decisions inconsistent with third-party effects analysis are those involving sexual harassment. Indeed, one of the early cases in the modern wrongful discharge revolution, *Monge v. Beebe Rubber Co.*,[174] involved sexual harassment. In *Monge*, an employee was fired after refusing her supervisor's advances.[175] The New Hampshire Supreme Court held that, despite her being an at-will employee, the firing violated the employer's contractual duty to act in good faith.[176] Later New Hampshire cases have shifted the grounds for relief to the tort of wrongful discharge in violation of public policy.[177]

While for many years statutory protection against sexual harassment was unknown, now a worker fired for resisting sexual advances can generally point to the violation of a statutory right.[178] These cases thus fit within a traditional pigeonhole of wrongful discharge claims. While the "exercise of a legal right" pigeonhole is often problematic under a third-party effects approach,[179] the clear violation of a worker-protective statute explains the ease with which courts uphold wrongful discharge claims in these cases. The power of the sexual harassment claim is revealed by cases that uphold a wrongful discharge cause of action even when the alleged sexual harassment violates no statute. For example, in *Collins v. Rizkana*,[180] an employee was fired after protesting her employer's continual "groping and grabbing and touching."[181] This small veterinarian practice, however, had fewer than four employees and thus was not subject to Title VII or the parallel state statute prohibiting

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gers the public-policy tort, then little is left of an at-will relationship. The *Cilley* case can be justified by those urging a good cause or good faith standard for all employment terminations, but cannot be justified under a more limited regime that accepts at-will employment with a public-policy exception.

173. *See infra* text accompanying notes 180-84.

174. 316 A.2d 549 (N.H. 1974).

175. *Id.* at 550.

176. *Id.* at 551-52.

177. *See* Chamberlin v. 101 Realty, Inc., 626 F. Supp. 865 (D.N.H. 1985) (applying New Hampshire law and refusing to dismiss the wrongful discharge in violation of public policy claim of an employee who was fired after rejecting the company president's sexual advances).

178. *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993) (holding that sexual harassment can violate Title VII even if it does not cause tangible psychological injury); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (holding that even when it does not lead to economic injury, sexual harassment violates Title VII's ban on sex discrimination); *see also* CAL. CIV. CODE § 51.9 (West Supp. 1996) (providing a cause of action for persons who have been sexually harassed within certain business relationships).

179. *See supra* notes 55-64 and accompanying text.

180. 652 N.E.2d 653 (Ohio 1995).

181. *Id.* at 655.

sexual harassment.[182] Even though no statute was violated, the Ohio Supreme Court held that the employee stated a claim of wrongful discharge against public policy.[183] In the court's reasoning, the legislature, in not subjecting small businesses to Title VII regulations, did not intend to grant small businesses a license to sexually harass their few employees, but only to relieve them of the procedural burdens of the statute.[184] A third-party effects analysis views the claim in *Collins* skeptically. If the *Collins* judgment is correct, it suggests a weakness in the theory.

More generally, a terminated employee with sympathetic facts can bring tort claims other than wrongful discharge in violation of public policy. These "collateral torts," as Professor Gergen has labeled them, include intentional infliction of emotional distress, interference with business relations, prima facie tort, defamation, and privacy claims.[185] While these torts have ambiguous and overlapping domains, a central feature of them is that they typically involve extreme harm to the particular employee, as opposed to third-party harm.

The absence of third-party effects is a major distinction between these collateral torts and the tort of wrongful discharge against public policy. If the collateral tort category is large, many employees would have successful tort cases even without showing third-party effects. Limiting public-policy torts would be unimportant and the third-party effects line would be uninteresting. Modern legal thinking does not care what tort title is placed on a set of facts, but only whether the plaintiff should win on some theory.[186]

Collateral torts in employment law, however, are just that—collateral. Indeed, precisely because the employee cannot show third-party effects that would justify interfering with the at-will relationship of contracting parties, courts are extremely hesitant to declare certain terminations outrageous, or an invasion of privacy, or the rest. Because of the lack of third-party effects, then, the collateral torts are of minor importance in employment law.

Consistent with this view, courts typically view collateral torts as backdoor claims of wrongful discharge in violation of public policy in situations where the front door is closed. The impatience of the New York

182. *Id.* at 659-60.

183. *Id.* at 657.

184. *Id.* at 660-61.

185. *See* Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation*, 74 TEX. L. REV. 1693, 1693 & n.1 (1996).

186. But see Bernard Rudden's wonderful article, *Torticles*, 6/7 TUL. CIV. L.F. 105 (1991-92), which describes the persistence of the common law in fragmenting and separately naming distinct categories of noncontractual liability.

Court of Appeals in *Murphy v. American Home Products Corp.*[187] with the collateral torts is palpable. In that well-known case, the court first refused to recognize a cause of action for wrongful discharge in violation of public policy, reasoning that such recognition was a job for the legislature.[188] But the plaintiff also brought claims of prima facie tort and intentional infliction of emotional distress, torts already recognized outside the employment context by the New York courts.[189] The *Murphy* court refused to allow the plaintiff to "evade" its rejection of a wrongful discharge claim or to "subvert the traditional at-will contract rule by casting his cause of action in terms of a tort of intentional infliction of emotional distress."[190] Similarly, the court refused to allow a prima facie tort claim "in circumvention of" its rejection of a wrongful discharge cause of action.[191]

Even courts more receptive to wrongful discharge actions find the collateral torts to be ancillary. For example, the West Virginia Supreme Court of Appeals has declared that "a claim for the tort of outrageous conduct is duplicitous to a claim for retaliatory discharge."[192] Because West Virginia employees discharged in violation of public policy can get compensatory damages for emotional distress as well as punitive damages,[193] there is nothing more for an emotional distress action to provide.

Occasionally, however, employer conduct is so outrageous that courts must recognize the tort of intentional infliction of emotional distress. In one well-known case, *Bodewig v. K-Mart, Inc.*,[194] a court recognized the emotional distress claim of a cashier who was forced into a humiliating strip search in an effort to locate a customer's missing cash.[195] In another case, *Wilson v. Monarch*,[196] the Fifth Circuit, applying Texas law, upheld the emotional distress claim (and the resulting $3.4 million jury award) of a sixty-year-old vice president who had been demoted to an entry-level warehouse supervisor with menial and demeaning duties, including sweeping up and cleaning the warehouse cafeteria.[197] This treatment eventually caused the plaintiff to be involuntarily hospitalized with a

187. 448 N.E.2d 86 (N.Y. 1983).
188. *Id.* at 89.
189. *Id.* at 90.
190. *Id.*
191. *Id.* at 91.
192. Harless v. First Nat'l Bank, 289 S.E.2d 692, 705 (W. Va. 1982).
193. *Id.*
194. 635 P.2d 657 (Or. Ct. App. 1981).
195. *Id.* at 661.
196. 939 F.2d 1138 (5th Cir. 1991).
197. *Id.* at 1145-46.

psychotic manic episode.[198] Still, the court expressed "real concern about the consequences of applying the cause of action of intentional infliction of emotional distress to the workplace."[199]

Courts are careful to limit workplace emotional distress claims to exceptional cases. The denial of one emotional distress claim in the face of sympathetic facts led a dissenting judge to wonder whether employees can ever succeed in such cases:

> The message that comes through in the case, and, I believe, is intended, is that the tort of intentional infliction of emotional distress does not exist in the employer-employee context; the limitations the majority places on the tort are such that it is virtually inconceivable that any employment case will ever qualify.[200]

Scholarly commentary, sometimes critical of the trend[201] and sometimes supportive,[202] has recognized that employees rarely can win emotional distress claims.[203]

Employee privacy claims also fare badly before the courts. Private-sector employees virtually never win an invasion of privacy claim unless the employer has contractually promised some measure of privacy. In a leading privacy case, *Rulon-Miller v. IBM Corp.*,[204] the court upheld a $300,000 jury verdict, including punitive damages, for an employee who had been fired for dating the manager at a competing firm.[205] Much of the court's rationale hinges on company memoranda showing that IBM held itself out as an employer that respected employee privacy.[206]

Similarly, despite extensive litigation, private-sector employees rarely win claims asserting that drug testing invades their privacy rights, absent

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198. *Id.* at 1141.

199. *Id.* at 1149. One reason for accepting an emotional distress claim in these cases is that a wrougful discharge claim is problematic for a basic reason—the workers quit rather than are discharged. They could claim "constructive discharge," meaning that no reasonable worker could tolerate the conditions. By not focusing on the discharge, an emotional distress claim does not distinguish quits from firings. If the worker stays on the job, however, an emotional distress claim becomes more difficult because the conduct is supposed to be so "outrageous" that a reasonable worker cannot tolerate it.

200. Kentucky Fried Chicken Nat'l Management Co. v. Weathersby, 607 A.2d 8, 24 (Md. 1992) (Bell, J., dissenting).

201. *See* Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 20-21 (1988) (blaming the courts and the cultural restraints placed on workers for the continued tolerance of authoritative abuse).

202. *See* Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387, 418-21 (1994) (arguing that the tort of intentional infliction of emotional distress should be restricted to wrongs committed outside the scope of the employment relationship).

203. *E.g.*, Austin, *supra* note 201, at 4; Duffy, *supra* note 202, at 391.

204. 208 Cal. Rptr. 524 (Cal. Ct. App. 1985).

205. *Id.* at 534.

206. *Id.* at 529-31.

an express or implied promise by the employer to respect privacy.[207] Courts have difficulty seeing how privacy claims can be based on public policy. As one court reasoned, "The right to privacy is, by its very name, a private right, not a public one."[208] Because the parties could have lawfully agreed that employees are subject to drug testing, the court reasoned, terminations for refusing a drug test cannot be against public policy.[209] West Virginia's Justice Brotherton put the issue succinctly in his dissent in one of the few private-sector drug testing cases that an employee has won on public policy grounds, asking "How can an attempt to create a drug-free environment be against the public policy of this State?"[210]

Many commentators have bemoaned the lack of success of private-sector employees in protecting privacy.[211] But the third-party effects model has an easy explanation. Courts rarely interfere with an employment relationship that is expressly at-will unless they see some adverse effect on third parties from the employer's actions. Employee privacy, by its very nature, inures to the employee and not to others.

Indeed, some state legislatures have passed legislation giving employees privacy protection that courts have been reluctant to give. Some legislation is specific to certain issues, such as the protection of smokers.[212] Other legislation is more general, prohibiting employers from making personnel decisions on the basis of workers' lawful activity away from work.[213]

IV. Conclusion

The public/private distinction courts often use in wrongful discharge cases is problematic. Even a private dispute between employer and em-

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207. *E.g.*, Webster v. Motorola, 637 N.E.2d 203 (Mass. 1994); Hennessy v. Coastal Eagle Point Oil Co., 609 A.2d 11 (N.J. 1992); Gilmore v. Enogex, 878 P.2d 360 (Okla. 1994) (all rejecting employee's wrongful termination claims). *But see* Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 626 (3d Cir. 1992) ("[B]ased on our prediction of Pennsylvania law, we hold that dismissing an employee who refused to consent to urinalysis testing . . . would violate public policy if the testing tortiously invaded the employee's privacy.").

208. Luck v. Southern Pac. Transp. Co., 267 Cal. Rptr. 618, 635 (Cal. Ct. App.), *cert. denied*, 498 U.S. 939 (1990).

209. *Id.* at 635.

210. Twigg v. Hercules Corp., 406 S.E.2d 52, 57 (W. Va. 1990) (Brotherton, J., dissenting).

211. *E.g.*, David N. King, *Privacy Issues in the Private-Sector Workplace: Protection from Electronic Surveillance and the Emerging "Privacy Gap"*, 67 S. CAL. L. REV. 441, 444 (1994); Laura B. Pincus & Clayton Trotter, *The Disparity Between Public and Private Sector Employee Privacy Protection: A Call for Legitimate Privacy Rights for Private Sector Workers*, 33 AM. BUS. L.J. 51, 54-55 (1995). *See generally* MATTHEW W. FINKIN, PRIVACY IN EMPLOYMENT LAW xxi (1995) ("[T]he law of employee privacy in the United States . . . is a mess.").

212. *E.g.*, W. VA. CODE § 21-3-19 (Supp. 1995).

213. *See, e.g.*, N.D. CENT. CODE § 14-02.4-03 (1991) (prohibiting discrimination because of "participation in lawful activity off of the employer's premises during non-working hours").

ployee is infused with the public interest. Despite the conclusory public/private label, however, courts are coherent in deciding when to interfere with express contractual arrangements by declaring that a discharge violates public policy. If an employee's conduct affects outside interests not considered by the employer or employee when creating their relationship, a discharge in retaliation may be actionable. In contrast, if the employer or employee incurs most of the harm from deterring the employee's conduct, a wrongful discharge claim does not lie. Much of wrongful discharge law can be understood as a search by the courts for these third-party effects. This is a coherent middle ground between never interfering with an at-will contract and insisting that any termination for a bad reason violates public policy.