“You’re Fired!”: The Common Law Should Respond with the Refashioned Tort of Abusive Discharge

William R. Corbett†

An at will prerogative without limits could be suffered only in an anarchy, and there not for long—it certainly cannot be suffered in a society such as ours without weakening the bond of counter balancing rights and obligations that holds such societies together. Thus, while there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.¹

I. INTRODUCTION ........................................................................................ 64
II. EMPLOYMENT AT WILL AND EXCEPTIONS ............................................ 72
   A. “For Good Reason, Bad Reason, or No Reason at All” .............. 72
   B. Exceptions—Employees Not Terminable at Will and
      Employees at Will Who Are Not Terminable for Certain
      Bad Reasons.............................................................................. 75
      1. Employees Who Are Not Terminable At Will:
         Contractual and Statutory Protections......................... 76

I. INTRODUCTION

Many people are terminated or discharged from employment in the United States every day.2 “You’re fired!” became the catchphrase of a former

2. For example, the number of layoffs and discharges in December 2018 was 1.7 million, representing 1.1 percent of all workers. See News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Job Openings and Labor Turnover – December 2018, (Feb. 12, 2019), https://www.bls.gov/news.release/archives/jolts_02122019.pdf [https://perma.cc/G8P8-J4UG]. Of course, many of these could not plausibly be characterized as “wrongful” or “abusive.” Given the state of the law in the United States, it would be very hard to estimate the number of alleged wrongful discharges. But see Samuel Estreicher & Jeffrey M. Hirsch, Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism, 92 N.C. L. REV. 343, 348 n.6 (2014) (estimating that employers have
television personality in the U.S. version of *The Apprentice*. Although some people may have been entertained, albeit somewhat perversely and sadistically, by a person with authority proclaiming employment termination to subordinates, termination from employment is far from a joking matter in the real world beyond “reality television.”

Employment is a matter of great significance in the United States. Termination ends gainful employment and potentially diminishes future income, jeopardizes standard of living and financial security, and sometimes ruins careers. The financial benefits of employment in the United States are not limited to salary or wages. Health care coverage and retirement plans often are linked to one’s job; thus, a person without a steady job may face difficulties in obtaining and maintaining adequate health insurance and/or adequately funded retirement savings plans. Because of employees’ dependence on employers for such benefits, “the risk of losing a job is significant over and above the loss of a paycheck.” This extensive degree of financial dependence of employees on their employers does not exist in nations that have free-standing safety nets and coverage plans. Beyond the multi-faceted financial difficulty created by job loss, discharge from employment can damage the physical and mental health of the person who terminated perhaps as many as 150,000 employees without cause in a year as early as 1983 and citing sources).


4. I vividly recall visiting the NBC studios in New York City during the height of popularity of *The Apprentice*. The paraphernalia for sale in the gift shop was dominated by coffee cups, tee-shirts, and other items imprinted with, “You’re fired!” I am ashamed to admit that I bought some tee-shirts to give out as best-course-grade prizes in my Employment Law and Employment Discrimination classes. It seemed amusing at the time. Now, as I write this Article, it seems less so.

5. See, e.g., Estreicher & Hirsch, supra note 2, at 346 n.1 (citing sources regarding the estimated lifetime loss of earnings caused by termination).


7. See Zimmer, supra note 6, at 21–24.

8. Id. at 24.


10. See, e.g., Kenneth A. Sprang, *After-Acquired Evidence: Tonic for an Employer’s Cognitive Dissonance*, 60 MO. L. REV. 89, 134 n.187 (1995). A pithy quote makes the point about the devastating effects of being fired: “It’s a recession when your neighbor loses his job; it’s a depression when you lose yours.” The original source of the quote is a bit murky; it has been called an economists’ joke and attributed to President Harry Truman. Harry S Truman, in OBSERVER, April 13, 1958; Richard A. Posner,
loses a job because many Americans identify so closely with their jobs. It is not an overstatement to say that termination from employment places in jeopardy many of the key elements of an American’s citizenship, and seen in this way, abusive terminations injure society at large. Termination deprives a person of one job and generally makes it more difficult to get another job. Consider, for example, the issue of discrimination against the unemployed—the view that one must have a job in order to be considered for a job vacancy.  

In spite of the potentially devastating effects of termination to individuals and to society, the law of the United States generally accords employers the discretion to discharge employees for good or bad reasons under the employment-at-will doctrine. Even with that default rule, however, some firings just seem to be so bad, unfair, arbitrary, or abusive when Does a Depression or a Recession End?, THE ATLANTIC (Aug. 1, 2009). Although the quote often is attributed to President Ronald Reagan, he actually borrowed and modified the quote to make a different point to his political advantage: “A recession is when your neighbor loses his job. A depression is when you lose yours. And recovery is when Jimmy Carter loses his.” Jessica Ramirez, Economy: Are We in a Recession or Depression?, NEWSWEEK (Oct. 15, 2008).

11. See, e.g., PAUL C. WEILER, GOVERNING THE WORKPLACE 49 (1990) (positing that a person’s job “is valuable both because it generates the earnings which probably constitute the major financial support for the worker and his family, and because work is so important to the personal identity and sense of self-worth of the employee”); Cornelius J. Peck, Penetrating Doctrinal Camouflage: Understanding the Development of Wrongful Discharge, 66 WASH L. REV. 719, 719 (1991) (observing that Americans are often said to “describe themselves in terms of the jobs they hold”); Michael S. Knoll, Perchance to Dream: The Global Economy and the American Dream, 66 S. CAL. L. REV. 1599, 1608 (1993) (“For many Americans much of their identity is tied to their jobs and to their ability to provide for their families.”).

12. Professor Matthew Finkin succinctly chronicles the transition in the United States from an economy dominated by independent producers to an economy dominated by financially dependent employees. MATTHEW W. FINKIN, AMERICAN LABOR AND THE LAW: DORMANT, RESURGENT, AND EMERGENT PROBLEMS 3–15 (2019). Professor Finkin joins others in arguing that holding a job is a crucial attribute of economic citizenship. Id. at 97. Indeed, it was the idea that employers possess the power to end this crucial attribute of citizenship that prompted Professor Lawrence Blades to propose the tort of abusive discharge in his influential article in 1967. See Lawrence E. Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 COLUM. L. REV. 1404, 1404 (1967) (discussing the “threat to individual freedom posed by employer power”).

13. Professor Blades, in proposing the tort of abusive discharge, noted the constitutional limitations imposed on governmental employers, such as restrictions on firing employees for exercising their rights under the First Amendment. See Blades, supra note 12, at 1431–32.

14. It is common practice for prospective employers to ask for employment history on applications and to ask applicants to explain reasons for separation from prior jobs. On the phenomenon of “scarring,” see J. Hoult Verkerke, Legal Regulation of Employment Reference Practices, 65 U. CHI. L. REV. 115, 147 (1998) (“Scarring occurs when employers rely on labor market signals, such as prior employment history or employment references, to deny a job to someone who could be profitably employed.”).


16. See infra Part II for discussion of the employment-at-will doctrine.
that they should fall beyond the pale of what is permitted by law without redress.\textsuperscript{17} Indeed, there are exceptions to employment at will in U.S. law, all of which may be grouped under the umbrella term “wrongful discharge,” in the sense that they are legal bases for seeking redress for terminations notwithstanding the default rule of employment at will.\textsuperscript{18} Among the exceptions, there are a multitude of federal, state, and local statutes or ordinances that prohibit terminations for certain reasons or under certain circumstances.\textsuperscript{19} The common law, through contract and tort law, also limits employers’ prerogative to fire employees, but the common law has proven much more problematic, incoherent, and uncertain than the statutory exceptions.\textsuperscript{20} First, although there are a variety of contract and tort doctrines that ostensibly limit employment at will, none actually imposes significant limitations on employer prerogative in that plaintiff employees rarely recover under the various common law theories.\textsuperscript{21} While it is true that plaintiffs are more likely to recover for wrongful terminations in some states than in others, depending on the particular state’s adherence to a strong version of employment at will and the statutory and common law exceptions available in that state’s law, discharged employees do not fare well in the run of termination lawsuits.\textsuperscript{22} Second, beyond the paucity of employee recoveries under the various common law theories, the common law is not easily comprehensible or applicable.\textsuperscript{23} For example, it is difficult to identify a consensus understanding of breach of the covenant of good faith and fair dealing,\textsuperscript{24} and there are many different understandings and iterations of the tort of wrongful discharge in violation of public policy (WDVPP).\textsuperscript{25} It is unsurprising that contract law is ineffective at providing terminated employees redress, given that the employment-at-will doctrine fits principally under contract law,\textsuperscript{26} describing the default rule for duration of an employment agreement and absence of a good-cause limitation on

\textsuperscript{17} See, e.g., Stewart J. Schwab, Wrongful Discharge and the Search for Third-Party Effects, 74 TEX. L. REV. 1943, 1943 (1996) (“Even in the rough-and-tumble world of the at-will workplace, some injustices cry out for a judicial remedy.”).


\textsuperscript{19} See infra Parts IV & V.


\textsuperscript{21} See, e.g., Estreicher & Hirsch, supra note 2, at 445 (describing the low probability of employees winning employment cases but the potential for large recoveries if victorious); Mark P. Gergen, A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation, 74 TEX. L. REV. 1693, 1726–37 (1996).

\textsuperscript{22} See sources cited supra note 21.

\textsuperscript{23} See infra Parts IV and V.

\textsuperscript{24} See, e.g., Peck, supra note 11, at 739–43; Bird, supra note 18, at 543–50.

\textsuperscript{25} See, e.g., Parker supra note 20, at 355–56.

\textsuperscript{26} See infra Part IV.B.
termination. Tort law, on the other hand, could have developed in a way that would have provided a meaningful limitation on employer prerogative to terminate. So far, it has not. This Article seeks to change that result.

I have argued that we need a reinvigorated common law of the workplace to augment the burgeoning body of employment law statutes, regulations, and ordinances at the federal, state, and local levels. More specifically, I have argued for more robust tort theories to be developed and brought to bear to protect workers’ rights and interests. This is the wheelhouse of tort law—recognizing duties to avoid inflicting potentially grave personal, property, economic, and relationship damage without a justification. For example, I argued for modification and development of the tort of invasion of privacy and the defenses associated with it to provide more protection of workers’ privacy interests and redress for violations of those interests in a world in which information technology increasingly is eroding privacy in the workplace and beyond. As a response to bad, abusive terminations (particularly terminations involving women), I proposed application of a stronger version of the tort of intentional infliction of emotional distress (“IIED”). Furthermore, I argued that the tort of wrongful discharge in violation of public policy (“WDVPP”) could be reconceptualized and deployed to provide greater protection of workers’ autonomy rights and interests.

In this Article, I build on my theme of arguing for a more robust common law of employment through innovations in tort law by proposing a reconceptualization of the tort theories that have been applied to terminations by recognition of a refashioned tort of abusive discharge. Professor Lawrence Blades’s proposal of the tort of abusive discharge in his important 1967 article has not been fully realized in the case law recognizing and developing the tort of WDVPP. That nebulous and vexing tort, recognized in different versions in various states, has proven largely impotent in providing a recovery for discharged employees. Commentators’ attempts to explain the

27. See infra Part IV. The 1970s and 1980s were a time of active experimentation and development in many state courts—so much so that commentators predicted the demise of employment at will. To borrow immortal words of Mark Twain, “The reports of [employment at will’s] death are greatly exaggerated.”


29. See infra Part V.


33. See infra Part V.A.
development of the tort, although helpful, provide little concrete guidance, and in my view do not move us toward a tort theory that can be reliably used to provide relief for truly bad terminations. IIED also has been applied to terminations, but its application has been even less efficacious than that of WDVPP. A tort is a terrible thing to waste. The tort theories applicable to wrongful discharge should be made both effective and coherent. Given the interests at stake and the extreme employment action at issue, it seems worthwhile to have a viable tort theory. Humbly, I attempt to take on the mantle of Professor Blades and propose a blending of WDVPP and IIED to create a refurbished hybrid tort of abusive discharge.

34. See infra Part V.B.
35. See infra Part V.C.
36. Termination or discharge has been referred to as the capital punishment of employment. MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS 910 (4th ed. 1998); Paul Berks, Social Change and Judicial Response: The Handbook Exception to Employment-At-Will, 4 EMPLOYEE RTS. & EMP. POL’Y J. 231, 248 & n.59 (2000). I do not argue for the tort that I propose to be extended to other adverse employment actions. Although there are good arguments for such an extension, I do not advocate such an extension because I prefer to propose an incursion and limitation on employers’ prerogative regarding the most substantial and significant adverse employment action. Courts are reluctant to oversee employers’ personnel decisions even on the matter of termination. To subject all disciplinary actions to court review would be to make courts super personnel boards and to impinge too much on employer operational prerogative. Cf. Blades, supra note 12, at 1406. The Restatement takes the position that constructive discharge is covered by the tort, but it does not take a position on extending the tort to other wrongful discipline. See RESTATEMENT OF EMPLOYMENT LAW § 5.01 cmt. c (AM. LAW INST. 2015).
37. Professor Anita Bernstein’s insightful analysis on how new torts are made probably would not presage that my proposal will be successful, but I hope to improve the odds by presenting abusive discharge not as a new tort, but as a blending and repackaging of two torts that have been applied to terminations for over half a century. Moreover, I trace the lineage of this refashioned tort back to Professor Blades’s highly regarded article. Thus, there is nothing novel here, and I am not really the creator of the proposed tort. See Anita Bernstein, How to Make a New Tort: Three Paradoxes, 75 TEX. L. REV. 1539 (1997).
38. Why “abusive discharge” rather than “wrongful discharge” or some other moniker? First, “wrongful discharge” does not meaningfully and effectively distinguish the tort from wrongful discharge in violation of public policy. The reconceptualized tort should not be handicapped by the case law and analytical baggage that has enervated the public policy tort. See infra Part V.A. Second, I am trying to return from the ineffective tort theories applied to terminations today to a broader tort, similar to that proposed by Professor Blades. Although the tort I propose is not exactly what he proposed, it is intended to be broader than the public policy tort and to be supported by the prima face tort rationale relied upon by Blades. See infra Part V.A. The fundamental concept is that the tort will permit recovery when an employer abuses the right bestowed by employment at will—to discharge without a job-related reason. The concept is similar to the civil law tort doctrine of abuse of rights. Although that doctrine means different things in different civil law jurisdictions, generally it prohibits one who holds a right from exercising it against the interests of society or for the purpose of injuring another. See generally Michael Byers, Abuse of Rights: An Old Principle, A New Age, 47 MCGILL L.J. 389 (2002).

Louisiana, as a mixed civil and common law jurisdiction, recognizes the abuse-of-rights doctrine. See, e.g., Ballaron v. Equitable Shipyards, Inc., 521 So. 2d 481 (La. App. 4th Cir.), writ denied, 522 So. 2d 571 (La. 1988). However, because Louisiana has fully embraced the common law doctrine of employment at will, abuse of rights has not been an effective theory for terminated at-will employees. See id.; Walther v. National Tea Co., 848 F.2d 518 (5th Cir. 1988). Professor Perillo has suggested that American law does implicitly recognize the abuse of rights doctrine, and WDVPP is one manifestation of
I name the proposed tort “abusive discharge” rather than “wrongful discharge” or some other moniker for a couple of reasons. First, “wrongful discharge” does not meaningfully and effectively distinguish the tort from wrongful discharge in violation of public policy. The reconceptualized tort should not be handicapped with the case law and analytical baggage that has enervated the public policy tort. Second, I am trying to return from the ineffective tort theories applied to terminations today to a broader tort, similar to that proposed by Professor Blades. Although the tort I propose is not exactly what he proposed, it is intended to be broader than the public policy tort and to be supported by the prima facie tort rationale relied upon by Blades. The fundamental concept is that the tort will permit recovery when an employer abuses the right bestowed by employment at will—to discharge without a job-related reason. The concept is similar to the civil law tort doctrine of abuse of rights. Although that doctrine means different things in different civil law jurisdictions, generally it prohibits one who holds a right from exercising it against the interests of society or for the purpose of injuring another. Whereas Blades framed his tort based on wrongful motives, I would include wrongful motives and, borrowing from intentional infliction of emotional distress, egregious terminations that should not be tolerated by society. Terminations that are simply unfair would not be actionable under the tort I propose because such a broad standard of liability would eviscerate employment at will, and such a proposal would be futile because neither our legislatures nor our courts are willing to abandon employment at will. What courts may be willing to do is to impose a more significant limitation on employment at will, reflecting societal values regarding the importance of employment, and to adopt a tort theory that provides a more cogent analysis for the types of cases for which they permit recovery.

I do not presume that my proposal for a refurbished tort theory applicable to terminations is a panacea for the insecurity and hardships workers face because of employment at will. A more comprehensive solution


39. See infra Part V.A.

40. Id.

41. See generally Michael Byers, Abuse of Rights: An Old Principle, A New Age, 47 MCGILL L.J. 389 (2002). Louisiana, as a mixed civil and common law jurisdiction, recognizes the abuse-of-rights doctrine. See, e.g., Ballaron v. Equitable Shipyards, Inc., 521 So. 2d 481 (La. App. 4th Cir. 1988), writ denied, 522 So. 2d 571 (La. 1988). However, because Louisiana has fully embraced the common law doctrine of employment at will, abuse of rights has not been an effective theory for terminated at-will employees. See id.; Walther v. National Tea Co., 848 F.2d 518 (5th Cir. 1988). Professor Perillo has suggested that American law does implicitly recognize the abuse of rights doctrine, and WDVPP is one manifestation of that recognition. See Joseph M. Perillo, Abuse of Rights: A Pervasive Legal Concept, 27 PAC. L.J. 37, 54–57 (1995). I am grateful to Professor Matthew Finkin for suggesting consideration of the abuse-of-rights doctrine.
could be states enacting wrongful discharge statutes, but so far only one state has done that, and no others seem likely to do so in the foreseeable future. Furthermore, I recognize that employees face a number of obstacles to recovering in private lawsuits based on common law theories, including securing adequate representation and often being bound to arbitration.\(^{42}\) However, many of these obstacles also apply to some extent to many statutory claims. Thus, a more robust tort theory is not a complete, perfect, or necessarily even the best, solution to the employment insecurity faced by most workers. Nonetheless, incremental improvement is worthwhile. Society, employees, and the law would be better served by a new tort theory that is cogent, that provides some prospect for recovery, and that openly declares a societal value that some terminations are intolerable to society than by the current tort theories applied to terminations. Moreover, proposals for incremental improvements in the law can spark larger changes by starting a discussion and provoking a reassessment of the existing law. Professor Blades’s proposal in 1967 played a role in spurring a period of creative and energetic development of common law. That common law development, in turn, played a role in the proposal and enactment of legislation. Admittedly, the employment law landscape has changed since the 1970s and 1980s, but it is possible that common law innovation again could spark a reassessment and adjustment of employment at will. Indeed, employment at will could be more vulnerable today than it was in 1967.\(^{43}\) At a minimum, tort law applied to a matter as important as termination from employment can be and should be better than it is.

Part II discusses employment at will and exceptions to employment at will. Part III considers American exceptionalism regarding the law of employment termination and proposals to end the rogue status of the United States by statutorily abolishing or limiting employment at will. Part IV discusses the common law limitations on employment at will and the features of contract law that prevent it from providing a credible check on employment at will. Part V discusses the inadequacy of existing tort law to provide appropriate limits on employment at will. Part VI proposes a refurbished tort of abusive discharge fashioned largely from the tort theories of IIED applied to termination and WDVPP. I conclude that the time has come for courts again to develop a common law restriction on employment at will—the tort of abusive discharge.

\(^{42}\) Professor Clyde Summers was not an advocate for the common law theories that emerged during the 1970s and 1980s. See Clyde Summers, Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals, 141 U. Pa. L. Rev. 457, 472 (1992) (“Common law remedies for wrongful discharge, however ‘wrongful’ is substantively defined, have little to commend them.”) [hereinafter Summers, Effective Remedies].

\(^{43}\) It is difficult to assess this proposition. There are many more exceptions to employment at will than there were in the 1970s and 1980s. It is not clear whether that makes employment at will more or less susceptible to change.
II. EMPLOYMENT AT WILL AND EXCEPTIONS

A. “For Good Reason, Bad Reason, or No Reason at All”

The United States is known in the world as a hire-and-fire society. The signature feature of the nation’s employment law is the employment-at-will doctrine, which provides that employers may fire employees “for a good reason, a bad reason, or no reason at all.” Imagine that—terminating an employee for no reason at all! Beyond the legal right to fire for any reason at any time, employers generally also may fire most at-will employees without following procedures, without giving notice, and without providing severance pay. It is important to recognize that, while employment at will is thought of as the basic and default employment termination law of the

---


45. “Signature” in the sense that we have it, and no one else does—at least not the extreme version that we do. See infra Part III.A. The Restatement of Employment Law recognizes the centrality of employment at will to the employment law of the United States. See RESTATEMENT OF EMPLOYMENT LAW § 2.01 (2015).


47. The last part of this statement of EAW that employers may fire for no reason at all appears hyperbolic. People do not do anything for no reason at all. Professor Weiler contends that employers do not wish to fire employees without a good, job-related reason because of the losses that result to the business. See WEILER, supra note 11, at 59. Actually, however, “no reason at all” is the part of the statement that best explains how employment at will operates in litigation. For termination of at-will employees, employers are not required, when sued for discharge, to provide a reason for the termination. If the former at-will employee claims that she was terminated for an illegal reason, the initial burden of production is on the plaintiff to present evidence of the reason. See, e.g., Cynthia Estlund, Wrongful Discharge Protections in an At-Will World, 74 TEX. L. REV. 1655, 1669–70 (1996) (stating that “[p]roof of a wrongful discharge requires the plaintiff to prove a particular unlawful motive on the part of the employer, of whom the law otherwise requires no reason at all”); Arthur S. Leonard, A New Common Law of Employment Termination, 66 N.C. L. REV. 631, 645–46 (1988).

Consider, for example, the McDonnell Douglas pretext analysis for disparate treatment employment discrimination claims. The initial burden is on the plaintiff to establish a prima facie case, after which the burden of production shifts to the defendant employer to articulate a “legitimate, nondiscriminatory reason” for the adverse employment action. See generally SANDRA F. SPERINO, MCDONNELL DOUGLAS: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW (2018).

48. See, e.g., Rachel Arnow-Richman, Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination, 66 FLA. L. REV. 1513, 1522 (2014) (“Although it is generally thought of and treated as a single rule, employment at will is a multipart doctrine from which three distinct principles can be derived . . . .”).
United States, employment at will is not federal law; it is state law, with forty-nine states adhering to it, most by case law, but some by statute.

The genesis of employment at will in the United States has been fertile ground for discussion and debate among scholars. Rather than going into extensive detail in attempting to clarify the origins of the doctrine, I offer a few observations. Poor, beleaguered Horace Gay Wood, a lawyer and treatise writer who has become the Aaron Burr of employment law, bears the brunt of criticism from employment-at-will detractors for pronouncing employment at will in his treatise on master and servant in 1877 and citing authority that did not clearly support the rule. While Mr. Wood undeniably wrote in his treatise that employment at will was the American rule, blaming

49. It is not easy to classify employment at will. It may be considered a doctrine, a rule, or an evidentiary presumption. It seems most accurate to characterize it as an evidentiary presumption—a rebuttable presumption that applies unless and until the plaintiff presents evidence that she had an employment agreement that differs from the default at-will arrangement. The Restatement labels it a “default rule” of contract law and a “rebuttable presumption.” See RESTATEMENT OF EMPLOYMENT LAW § 2.01 cmt. b (2015); see also Arnow-Richman, supra note 48, at 1522; David J. Walsh & Joshua L. Schwarz, State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales, 33 AM. BUS. J. 645, 668 (1996). However, courts in most states apply such a strong version of the presumption that it approaches a rule of substantive law. See, e.g., Parker, supra note 20, at 349–52.

50. Montana is the lone state to have enacted a statutory abrogation of employment at will—the Montana Wrongful Discharge from Employment Act, discussed below. See infra Part III.B. Puerto Rico and the U.S. Virgin Islands also do not follow employment at will. See generally Jorge M. Farinacci-Fernós, The Search for a Wrongful Dismissal Statute: A Look at Puerto Rico’s Act No. 88 as a Potential Starting Point, 17 EMPLOYEE RTS. & EMP. POL’Y J. 125 (2013).


52. The Arizona Employment Protection Act states that the employment relationship is contractual and is presumed to be at will, but can be modified by a writing signed by the parties. ARIZ. REV. STAT. § 23–1501 (2019). Georgia and Louisiana courts have recognized statutes as codifying employment at will. See, e.g., Land v. Delta Air Lines, Inc., 203 S.E 316, 317 (Ga. Ct. App. 1973) (citing GA. CODE ANN. § 34–7-1); Quebedeaux v. Dow Chem. Co., 820 So. 2d 542, 545 (La. 2002) (citing LA. CIV. CODE ART. 2747).

53. Like Burr, who is remembered only for killing Alexander Hamilton in a duel, Wood, a prolific treatise writer and lawyer, is known almost exclusively for penning the rule of employment at will in his Master-Servant treatise. See, e.g., Theodore St. Antoine, You’re Fired!, 10 HUM. RTS. Q. 32, 33 (1982) (describing the at-will rule as having “spr[u]ng full-blown . . . from [Wood’s] busy and perhaps careless pen”). Mr. Wood likely will fare no better in the unlikely event a playwright ever writes a play about employment at will. See HAMILTON: AN AMERICAN MUSICAL (2015).


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

HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272 (1877).
(or crediting) that statement for the genesis of employment at will goes too far.55 It is true that Wood’s treatise was cited as authority for the proposition,56 but it is hyperbole to brand it the origin of the rule.

Given that I am arguing for common law to be modified to place more substantial limitation on employment at will, it is worthwhile to consider briefly what forces gave rise to employment at will. Furthermore, it is appropriate to sketch the defenses of employment at will offered by its apologists. First, why did employment at will become the law of fifty states (before Montana defected in 1987)? There are several theories offered to explain this phenomenon. Three of the principal theories were propounded by Professors Sanford Jacoby, Jacob Feinman, and Andrew Morriss.57 The theories are more complex, but I offer a succinct and overly simplified capsule of each. Professor Feinman argued that the courts adhered to the rule to preserve the power of the capitalist owners of businesses in the face of the ascent of, and threat posed by, the middle-level managers.58 Morriss labels the Feinman theory as “crushing the middle class.”59 Professor Jacoby focused on the historical context of the struggle between employers on the one hand and stronger labor unions and mid-level managers with relatively higher social class standing on the other in Britain, yielding a presumed term contract in the courts. In contrast, the stronger employers and weaker labor unions and mid-level managers with relatively lower class standing in the U.S. yielded the at-will rule in the courts.60 Morriss calls the Jacoby theory “social class and weak unions.”61 Professor Morriss, examining the chronology of adoptions of the at-will rule by the various states, rejects the related theories of Feinman and Sanford and instead posits that the rule was

55. See, e.g., Peck, supra note 11, at 722. Professor Peck points out that the New York “Field Code” and other sources stated the rule of employment at will. Id. Professor Morriss has mapped the chronology of adoption of employment at will in the states and suggested several reasons why the courts adopted it. See Morriss, supra note 51. Professor Richard Bales, considering the state adoption progression described by Morriss, opined that “once the first underindustrialized states adopted the rule, other underindustrialized states would have been compelled to follow suit to remain economically competitive with the early adopters. Industrialized states would then have been compelled to adopt the rule, as well, to maintain their competitive advantage in the labor market . . . . The adoption of the at-will rule by a handful of underindustrialized states, therefore, precipitated an interjurisdictional race to the bottom.” Bales, supra note 54, at 455.


59. Morriss, supra note 51, at 693.


61. Morriss, supra note 51, at 694.
adopted by courts because it was administratively felicitous for courts that were (and are) ill-suited to determining employment disputes.\(^{62}\)

Regardless of the origin of the doctrine or the reasons for its adoption and proliferation, employment at will is the default rule in 49 states. Furthermore, the United States Supreme Court has stated that federal government employment is at will in the absence of contrary legislation,\(^{63}\) although many positions in public employment, both federal and state, do have procedural prerequisites and/or good cause protection.\(^{64}\) Whether employment at will needs to be preserved in the strong version that exists throughout the nation\(^{65}\) or it needs to be restricted by further statutory, regulatory or common developments will be discussed below.\(^{66}\)

**B. Exceptions—Employees Not Terminable at Will and Employees at Will Who Are Not Terminable for Certain Bad Reasons**

Although employment at will is the dominant principle regarding employment termination in the United States, it is subject to many qualifications and exceptions. These exceptions are often viewed as legal erosions of, or impingements on, employment at will.\(^{67}\) However, there are differences in these exceptions that cause me to divide them into two categories. First, there are employees who simply are not terminable-at-will employees. They may be made other than at-will employees either by contract or by statute. Second, there are at-will employees who cannot be fired for certain bad reasons or under certain circumstances as defined by either statute (or ordinance) or tort law.

**1. Employees Who Are Not Terminable At Will: Contractual and Statutory Protections**

The common law of contracts recognizes employment contracts that are not at will. Employees are not at will if they have an individual contract or are covered by a collective bargaining agreement that provides for terms other than at-will termination, such as a good-cause requirement for discharge or a specified term of employment. A very small percentage of

---

62. Id at 695–96.


65. Although employment at will is a strong default principle in 49 states, the strength of employment at will does vary among the states. For example, states recognize different statutory, contract, and tort exceptions to employment at will. Moreover, states differ regarding their interpretations of contract and tort exceptions, such as wrongful discharge in violation of public policy. See infra Part V.A.

66. See infra Part III.A, III.B.

67. See, e.g., Leonard, supra note 47, at 632 (stating that employment at will “has experienced great erosion”).
workers in the U.S. have individual contracts that vary employment at will. Collec-
tive contracts (collective bargaining agreements) negotiated by unions almost always vary employment at will and provide good-cause protection. However, the percentage of employees who are members of unions has been declining for decades, and now only about ten-and-a-half percent of the combined public and private sector workforce and just over six percent of private sector employees are even represented by unions. Plaintiffs who claim to be other than terminable at will by the terms of an individual or collective contract sue employers for breach of express or implied contract terms or file grievances under the procedures established by their collective bargaining agreements.

Beyond the common law of contracts, there are civil service statutes that provide good-cause and procedural protections to classified employees in both federal and state employment. Tenure rules at various levels of educational institutions provide protections of the good cause and procedural varieties.

Professor Richard Thompson Ford succinctly summarizes the sources that change at-will employment: “Employment at will . . . sometimes . . . is

68. Mark A. Rothstein et al., Employment Law 747 (3d ed. 2005) (“Relatively few workers have individual written contracts of employment”); Timothy J. Coley, Contracts, Custom, and the Common Law: Towards a Renewed Prominence for Contract Law in American Wrongful Discharge Jurisprudence, 24 BYU J. Pub. L. 193, 210 (2010) (stating that “[i]n the contemporary American employment market, employees working under individual work contracts are by far the exception to the norm, and contract-employees have traditionally been thought of as belonging to a relatively confined number of positions . . ..”).

69. See, e.g., Roger I. Abrams & Dennis R. Nolan, Toward a Theory of “Just Cause” in Employee Discipline Cases, 1985 DUKE L.J. 594, 594–95 (“Virtually every collective bargaining agreement contains some such limitations. . . . [The just cause] requirement is so well accepted that often it is found to be implicit in the collective agreement, even when there is no stated limitation on the employer’s power to discipline.”); Martha S. West, The Case Against Reinstatement in Wrongful Discharge, 1988 U. Ill. L. Rev. 1, 22 n.111 (1988) (“Most collective agreements require ‘cause’ or ‘just cause’ for discharge or discipline. Even in the absence of an express ‘just cause’ limitation, arbitrators will imply such a limitation on discharge.”) (citing F. Elkouri & E. Elkouri, How Arbitration Works 652 (4th ed. 1985)).

70. See Bureau of Labor Statistics, Union Members Summary (Jan. 18, 2019), https://www.bls.gov/news.release/union2.nr0.htm [https://perma.cc/HYS5–7UFC]. A somewhat higher percentage likely is covered by collective bargaining agreements, as unions that are certified as collective bargaining representatives bargain for the entire bargaining unit and not just members. Union density in the public sector has been much higher than in the private sector, and that remains so today. Id. It remains to be seen what effect the Supreme Court’s recent decision in Janus v. AFSCME 31, 138 S. Ct. 2448, 2478 (2018) (holding that state agency-fee laws regarding public sector jobs are unconstitutional), will have on public sector union density.

71. See, e.g., Seymour Moskowitz, Employment at Will and Codes of Ethics: The Professional’s Dilemma, 23 VAL. U. L. REV. 33, 46 (1988). Professor Leonard notes an irony regarding the job security of many civil service employees: “[P]ublic sector employees, whose salaries and benefits are paid from taxes extracted from unprotected private sector employees, may have enforceable employment rights due to federal or state civil service regulations and constitutional protections against arbitrary decision making by their governmental employers.” Leonard, supra note 47, at 647.

superseded by other arrangements, such as civil service rules, union contracts, academic tenure . . .” 73

2. At Will Employees Who Cannot Be Fired For Certain Reasons or Under Certain Circumstances: Statutory, Constitutional, and Tort Protections

Although they do not render employees other than at will, many federal and state statutes and local ordinances provide remedies for covered74 employees, including at-will employees, who are terminated75 for certain specified “bad” reasons or without certain procedures being followed before discharge. First, there is a large body of anti-discrimination statutes and ordinances at all levels of government prohibiting terminations based on specified characteristics, such as race, sex, disability, etc. The large body of anti-discrimination statutes is the most substantial restriction on termination of at-will employees.76 Another very large body of statutes and ordinances prohibits discharges77 for specified retaliatory reasons. Every federal employment statute has an anti-retaliation provision,78 and many state and local laws do as well, such as some state workers compensation statutes. A third type of statute that has proliferated in the last two or three decades is


74. Many of these laws have specifications regarding coverage. For example, Title VII of the Civil Rights Act of 1964 applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

75. In addition to terminations, most such statutes prohibit other employment actions classified as adverse employment actions. They do not necessarily reach all negative job actions, as some are considered too de minimis to merit protection. See, e.g., Rebecca Hanner White, De Minimis Discrimination, 47 EMORY L.J. 1121 (1998).

76. Some commentators have commented on the perception that the combination of at-will employment and the substantial exception of anti-discrimination statutes creates “differential standards for termination”—that white men are the least protected at-will employees. See, e.g., Stephen F. Befort, Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment, 43 B.C. L. REV. 351, 408–09 (2002); Jeffrey Hirsch, The Law of Termination: Doing More With Less, 68 Md. L. REV. 89, 140 (2008) (noting “an unfortunate irony that deeming certain characteristics as especially worthy of protection inevitably fosters resentment from those not sharing those traits”); Estlund, supra note 47, at 1679 (arguing that antidiscrimination law co-existing with employment at will “contribute[s] to perverse employer incentives and to divisive tensions between members of ‘protected groups,’ . . . and other employees”); Leonard, supra note 47, at 680 (arguing for expansion of protection to level the playing field and afford equality of treatment). While the anti-discrimination statutes prohibit discrimination based on any race or color and either sex, the evidentiary requirements may be higher for whites and males because of the reasonable presumptions flowing from our historical discrimination against African Americans and women. See, e.g., Charles A. Sullivan, The World Turned Upside Down?: Disparate Impact Claims by White Males, 98 NW. U. L. REV. 1505 (2004).

77. The statutes also prohibit other adverse employment actions. See supra note 75.

78. See, e.g., Alex B. Long, Employment Retaliation and the Accident of Text, 90 OR. L. REV. 525, 528 (2011) (“All of the other major federal employment statutes either contain explicit prohibitions on employer retaliation or have been held to prohibit employer retaliation.”).
whistleblower statutes.\textsuperscript{79} The whistleblower statutes bear the closest relationship to the tort theory of WDVPP; in fact, one category of WDVPP is whistleblower claims.\textsuperscript{80} Increasingly in recent decades, however, the need for whistleblower tort claims has dissipated as more and more whistleblower statutes have been enacted.\textsuperscript{81} A fourth consideration among federal legislation is the Employee Retirement Income Security Act ("ERISA") of 1974.\textsuperscript{82} Although ERISA is not primarily protection against employment termination, it creates nonforfeitable rights in benefits, and thus impacts incentives and expectations of employers and employees regarding job security/tenure.\textsuperscript{83} Finally, there are a variety of other statutes, primarily at the state level, that prohibit terminations for various reasons, such as an employee’s participation in lawful off-duty activity or pursuit of a certain lifestyle choice.\textsuperscript{84}

Federal and state constitutions also may provide recourse for terminated federal or state public employees. Under appropriate fact situations, public sector employees assert claims pursuant to section 1983\textsuperscript{85} that they have been terminated because of their exercise of constitutionally protected rights, such as rights under the First Amendment.\textsuperscript{86} State government employees also may assert claims that their terminations violate rights under their state constitutions.

It seems that the statutes have had an effect beyond the situations in which they actually provide for recovery for terminations. The proliferation of statutory exceptions to employment at will has given rise to expectations among both employers and employees that are not consistent with employment at will—a sense that all employees must be treated fairly in the matter of termination, described as "a new consciousness and assertiveness about job security."\textsuperscript{87}

\begin{itemize}
\item \textsuperscript{79} Consider, for example, the many federal whistleblower statutes within the jurisdiction of the Department of Labor. See U.S. Dep’t of Labor, Statutes, WHISTLEBLOWERS.GOV (Oct. 11, 2019), https://www.whistleblowers.gov/statutes [https://perma.cc/3G32-HWM5].
\item \textsuperscript{80} See infra Part V.A.
\item \textsuperscript{82} 29 U.S.C. §§ 1001–1461 (2012).
\item \textsuperscript{83} See, e.g., Leonard, supra note 47, at 633.
\item \textsuperscript{85} 42 U.S.C. § 1983 (2012).
\item \textsuperscript{87} Leonard, supra note 47, at 634–35.
\end{itemize}
Finally, at-will employees also have used several tort theories to seek recovery for their terminations: invasion of privacy, intentional infliction of emotional distress, breach of the implied covenant of good faith and fair dealing, and WDVPP. Professor Mark Gergen divides the torts into what he labels as the “collateral torts” applied to termination, on the one hand, and WDVPP and breach of the covenant of good faith, on the other. The collateral torts, such as intentional infliction of emotional distress and defamation, were not specifically created for employment and are not applied exclusively to employment. Neither the collateral torts nor WDVPP has functioned very well in providing a moderately successful theory of recovery for plaintiffs suing for employment terminations. Perhaps this is unsurprising in light of the importance attached to the employment-at-will doctrine.

This “dazzling and rapidly expanding array” of statutes and common law theories protecting workers’ rights and interests is different from, and perhaps inferior to, a collective bargaining model. This approach has been characterized as focusing on the individual but not promoting the long-term employment relationship and as being “adversarial and atomized.”

There is a need for additional protection against abusive and wrongful termination and redress for discharged employees. This need arises because the other types of restrictions on employment at will are inadequate. First, only a small percentage of employees in the United States are represented by unions and/or covered by collective bargaining agreements. Second,
statutory exceptions to employment at will are specific to particular types of terminations, such as race-based discharges or terminations based on retaliation for assertion of protected rights, and almost all efforts to statutorily abrogate employment at will have failed. Advocates of a strong employment-at-will doctrine undoubtedly will disagree. Others may argue that the current patchwork of contract law, statutes, and torts adequately restricts abuse by employers of the prerogative bestowed upon them by employment at will. I think, however, that many abusive discharges occur that our society should not tolerate. The many exceptions to employment at will that the law has recognized support this proposition. For reasons that I explain below, common law development offers a promising way forward through the development of a reimagined tort of abusive discharge, fashioned from the existing torts of wrongful discharge in violation of public policy and intentional infliction of emotional distress.

III. AMERICAN EXCEPTIONALISM AND STATUTORY EFFORTS TO ABROGATE OR LIMIT EMPLOYMENT AT WILL

A. The U.S. Stands Alone

It often is said that the United States is the only industrialized nation with a developed body of employment law that adheres to employment at will. With some qualification, that statement is accurate. The comparison of U.S. termination law with that of other nations that results in a characterization of U.S. law as clearly inferior in providing employment security and protection because of the predominance of the employment-at-will doctrine, however, may be too facile. As Professors Estreicher and

---

98. See infra Part III.B.

99. See, e.g., Estreicher & Hirsch, supra note 2, at 347 & 348 n.7 (stating that the at-will rule places the U.S. “in a singular position among most other developed countries” and citing numerous other sources); see also Befort, supra note 76, at 406 (“The United States stands virtually alone among industrialized nations in failing to provide general statutory protection against unjust dismissals.”); Peck, supra note 11, at 727 & n.48. While these statements are accurate, a more nuanced examination reveals that some nations have laws that, while not fully at-will, approach the U.S. law. Israeli termination law is characterized as at-will. See, e.g., Guy Davidov, The Principle of Proportionality in Labor Law and Its Impact on Precarious Workers, 34 COMP. LAB. L. & POL’Y J. 63, 73 (2012). In Israeli law, however, judicial recognition of good faith duties regarding procedures makes it distinct from employment at will in the United States. Sharon Rabin Margalioth, Regulating Individual Employment Contracts Through Good Faith Duties, 32 COMP. LAB. L. & POL’Y J 663 (2011); see also II.B WILLIAM L. KELLER & TIMOTHY J. DABRY, ABA SEC. OF LAB. & EMP. L., INT’L LAB. & EMP. LAWS, 65–32 (4th ed. 2013). Canadian law requires employers that terminate without good cause to provide a notice period or severance pay in lieu of notice. See, e.g., Rachel Arnow-Richman, Just Notice: Re-Reforming Employment at Will, 58 UCLA L. REV. 1, 49 (2010). Thus, employers in Canada may fire without good cause, but they may not do it without following any legal prerequisites. Of the twelve nations surveyed by Estreicher and Hirsch, the U.S. and Canada are the only nations lacking national unjust dismissal legislation. Estreicher & Hirsch, supra note 2, at 445.
Hirsch have demonstrated, a more detailed and nuanced approach to comparative law considers not just the “law on the books,” but also the degree of enforcement of those laws and the range of remedies available for violations. For example, Estreicher and Hirsch argue that although it is more difficult to win employment claims in the U.S., successful claimants often recover much larger awards than those in other nations. Although they argue that the big wins may mean the U.S. has a more robust array of employment protections and remedies, such a system also can be criticized as a “uniquely American employment law lottery,” in which there are rare big winners.

Employment at will, as the hallmark of U.S. employment law, is both one of the most reviled and one of the most sacrosanct principles of U.S. law. While many scholars have railed against the doctrine and called for its abrogation, some scholars, courts, and others defend employment at will as an important and perhaps indispensable part of U.S. law and the nation’s economy. The chronicle of states’ adoption of employment at will and its proliferation is discussed above, but many have challenged the maintenance of a rule permitting employers such a broad prerogative in terminating, with nothing owed to the employee, of one of the most important relationships in American society. Professor Epstein is one of the strongest and most often-cited academic advocates for employment at will. His defense of the doctrine is based principally on a libertarian freedom of contract rationale with some law and economics rationale blended in. Epstein argues, essentially, that the freedom of contract afforded by the at-will rule is mutually beneficial to employers and employees; “[T]he employer is the full owner of his capital and the employee is the full owner of his labor, the two are free to exchange on whatever terms and conditions they see fit.” As part of Epstein’s broader libertarian and law-and-economics agenda, government regulation should be limited and the market forces should be left in play. A cavalcade of critics have challenged many of the assumptions in Professor Epstein’s defense of employment at will, such as the autonomy and

100. Estreicher & Hirsch, supra note 2, at 351 & 355–56.
101. Id. at 356.
102. Befort, supra note 76, at 402; see also Gergen, supra note 21, at 1693 (“Wrongful termination litigation is seen as a big-stakes lottery with outcomes that correlate poorly with the degree of the harm suffered by the plaintiff or the nature of the defendant’s conduct.”).
104. See, e.g., Linzer, supra note 28, at 409 (calling Epstein “the most prominent academic defender of economic libertarianism”).
105. See Epstein, supra note 103.
106. Id. at 955.
107. Epstein views employers and employees as freely choosing at-will terms and concludes that “freedom of contract tends both to advance individual autonomy and to promote the efficient operation of labor markets.” Id. at 951.
bargaining power of an individual employee.108 Putting the dubious claims of autonomy and benefit to the employee aside, the libertarian and law-and-economics argument contends that permitting employer prerogative aids market-based outcomes that are economically efficient.109 In the words of the Wisconsin Supreme Court, employment at will “is central to the free market economy and serves the interests of employees as well as employers’ by maximizing the freedom of both.”110 One may question whether employment at will is so crucial to a robustly performing market-based economy. The United States is the only nation that adheres to at-will employment.111 There are numerous nations that have generally good economic performance without employment at will, such as Germany.112

Perhaps the United States should end its exceptionalism regarding employment termination and come into conformity with other nations by enacting a statute or statutes that require good or just cause for termination. The next Section considers such efforts.

B. Abolishing or Restricting Employment at Will by Statutes

1. Abrogating Employment at Will by Statutes: Proposals and Results

Legion are the proposals to bring the United States into conformity with the rest of the world by enacting statutes that require good or just cause for termination.113 As one commentator expressed it, wrongful discharge statutes have been viewed at various times by commentators as the “deus ex machina of employment law.”114 I will not join the multitude115 who have argued that

108. See, e.g., Linzer, supra note 28, at 415 (“Epstein’s several defenses of at-will contracts are based on incorrect assumptions of both law and fact.”); Gary Minda & Katie R. Raab, Time for an Unjust Dismissal Statute in New York, 54 B ROOK. L. REV. 1137, 1172 (1989) (“By presenting employment relations as though they were purely the product of private choice rather than economic power, Professor Epstein’s understanding of at-will employment ignores the consequences of disparities in economic power and the realities of economic disadvantage.”).

109. Epstein, supra note 103, at 951 (“The principle behind this conclusion is that freedom of contract tends both to advance individual autonomy and to promote the efficient operation of labor markets.”); see also Mayer G. Freed & Daniel L. Polsby, Just Cause for Termination Rules and Economic Efficiency, 38 EMORY L.J. 1097 (1989).


111. See supra note 99 and accompanying text.

112. See, e.g., Michael Kittner & Thomas C. Kohler, Conditioning Expectations: The Protection of the Employment Bond in German and American Law, 21 COMP. LAB. L. & POL’Y J. 263 (2000). However, as comparative law scholars such as Otto Kahn-Freund have cautioned, one must be cautious in asserting that law that functions well in one society can be transplanted to another society where it will function well. See, e.g., Freed & Polsby, supra note 54, at 1138–42.

113. See Bird, supra note 18, at 517–18 (describing the prodigious scholarship on employment at will).

114. Parker, supra note 20, at 370.

115. In an article published in 2004, Professor Bird observed that since 1985, at least 200 articles had been published that critique some aspect of employment at will. Bird, supra note 18, at 518. He observed
the United States should relent from its rogue status and replace employment at will with a good- or just-cause-for-termination statutory regime like that of most other nations. Regardless of the merits of that position, such a change simply is not going to occur in the United States in the foreseeable future.\textsuperscript{116} I will support that not-so-bold prediction with evidence from the historical record and brief consideration of why that record is as it is. Moreover, the limited experience in the United States with states that have enacted statutory schemes demonstrates that the statutes do not clearly give employees more protection or redress than the common law schemes that they replace. Still, consideration of both the unsuccessful proposals and the statutes that have been enacted is relevant and important both because it substantiates my prediction that no more statutes that provide significant protection are likely to be enacted and because it accentuates the need for more robust common law theories of recovery and remedies. It also demonstrates that the route to enactment of legislation has gone first through common law development.\textsuperscript{117}

Most proposals to statutorily displace employment at will have been proposals for states to enact laws, such as the Uniform Law Commission’s Model Employment Termination Act.\textsuperscript{118} Some, however, have been proposals for Congress to abrogate employment at will by federal legislation.\textsuperscript{119}

To begin with, I think it is almost a certainty that any legislative change in employment at will would have to occur at the state level. Employment at will, as followed by 49 states, is not federal law; it is state law. Despite ambitious proposals for Congress to pass federal legislation abrogating employment at will, that is not going to happen. This forbearance is not a matter of Congressional authority, but Congressional will and restraint. As a matter of federalism, Congress is not going to invade that area of state regulation.\textsuperscript{120} This is unfortunate because states almost certainly will not legislatively modify employment at will because legislators are likely to fear

\textsuperscript{116.} See id. at 523 (positing that no change will occur because it “would require an immense transformation of well-settled statutory and common law”).

\textsuperscript{117.} See, e.g., Arnow-Richman, supra note 48, at 1582 (stating that recognition of a common law cause of action “may be a necessary first-step toward securing support for [the proposed] legislative reform”).


\textsuperscript{119.} See, e.g., Hirsch, supra note 76; Befort, supra note 76, at 424; Ann McGinley, Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy, 57 OHIO ST. L.J. 1443 (1996).

\textsuperscript{120.} See Bird, supra note 18, at 524 (“Perhaps only sweeping congressional action, an extremely unlikely possibility given the long entrenchment of employment at will, could enact just cause reform.”).
that such a change would make them less attractive to businesses compared to states that adhere to the doctrine.\footnote{See, e.g., Jeffrey M. Hirsch, Taking States Out of the Workplace, 117 YALE L.J. POCKET PART 225, 228 (2008); cf. Bales, supra note 54, at 463–67 (explaining the widespread adoption of employment at will as states’ responses to other states’ adoption—that is, a race to the bottom of employment standards).}

Turning then to the states, only Montana, has enacted a statutory scheme abrogating employment at will, and that occurred in 1987.\footnote{MONT. CODE ANN. §§ 39–2-901 to 39–2-914 (1987).} It is worth noting about the Montana experience both the conditions that prompted the adoption of the statute and the effect that it has had on the law of termination. Employers and their insurers were the principal proponents who lobbied the state legislature to enact the legislation, and they did so because employers were losing cases under common law theories, principally a “double-barreled tort” theory of WDVPP and breach of an implied covenant of good faith, and facing large and unpredictable awards.\footnote{See, e.g., Leonard, supra note 47 at 664–68; Marc Jarsulic, Protecting Workers From Wrongful Discharge: Montana’s Experience With Tort and Statutory Regimes, 3 EMPLOYEE RTS. & EMPL. POL’Y J. 105 (1999).} These common law innovations by the courts in Montana were part of a movement in state courts throughout the nation during the 1970s and 1980s. Generally, numerous state courts recognized one or more of the following common law theories that narrowed the scope and impact of employment at will: implied contract, breach of the covenant of good faith and fair dealing, and wrongful discharge in violation of public policy.\footnote{See, e.g., Coley, supra note 68, at 195–96; David J. Walsh & Joshua L. Schwarz, State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales, 33 AM. BUS. L.J. 645, 646 (1996).} However, that period of common law innovation ended around the 1990s,\footnote{See infra Part IV.} and courts began restricting or recanting on the common law innovations.\footnote{See Bird, supra note 18, at 578 (stating that “[a]lthough scholarship helped make significant inroads in curbing the worst excesses of employment at will, few fundamental changes have been made to the doctrine since the heyday of innovation in the 1980s”).} Thus, since about 1990 employment at will has been resurgent. Absent development of another significant common law theory restricting employment at will, it is hard to imagine that powerful political actors would advocate for enactment of such a statute in any state today.\footnote{See infra Part IV.} Moreover, advocates of such statutes should consider that the Montana experience has not, by some accounts, produced better recoveries for plaintiff employees.\footnote{See see, e.g., Parker, supra note 20, at 371–72 (“The Montana statute has essentially gutted fundamental common law protections and theories of recovery”). Yet, the law may have produced a better regime. See Donald C. Robinson, The First Decade of Judicial Interpretation of the Montana Wrongful

\footnote{121. See, e.g., Jeffrey M. Hirsch, Taking States Out of the Workplace, 117 YALE L.J. POCKET PART 225, 228 (2008); cf. Bales, supra note 54, at 463–67 (explaining the widespread adoption of employment at will as states’ responses to other states’ adoption—that is, a race to the bottom of employment standards).}

\footnote{122. MONT. CODE ANN. §§ 39–2-901 to 39–2-914 (1987).}

\footnote{123. See, e.g., Leonard, supra note 47 at 664–68; Marc Jarsulic, Protecting Workers From Wrongful Discharge: Montana’s Experience With Tort and Statutory Regimes, 3 EMPLOYEE RTS. & EMPL. POL’Y J. 105 (1999).}

\footnote{124. See, e.g., Coley, supra note 68, at 195–96; David J. Walsh & Joshua L. Schwarz, State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales, 33 AM. BUS. L.J. 645, 646 (1996).}

\footnote{125. See Bird, supra note 18, at 578 (stating that “[a]lthough scholarship helped make significant inroads in curbing the worst excesses of employment at will, few fundamental changes have been made to the doctrine since the heyday of innovation in the 1980s”).}

\footnote{126. See infra Part IV.}

\footnote{127. Alan B. Krueger, The Evolution of Unjust-Dismissal Legislation in the United States, 44 INDUS. & LAB. REL. REV. 644, 659 (1991) (stating that “the prospects for passage of unjust-dismissal legislation are linked to the erosion of the common law employment-at-will doctrine”); Parker, supra note 20, at 373.}

\footnote{128. See, e.g., Parker, supra note 20, at 371–72 (“The Montana statute has essentially gutted fundamental common law protections and theories of recovery”). Yet, the law may have produced a better regime. See Donald C. Robinson, The First Decade of Judicial Interpretation of the Montana Wrongful
The Uniform Law Commission’s Model Employment Termination Act ("META"), which was promulgated in 1991, has not been adopted by a single state.129 As Professor Befort observed, the fundamental impediment to adoption of the META is that it does not offer employers "an adequate tradeoff for their loss of the at-will prerogative."130 First, META did not have a sufficiently broad preemptive scope because it displaced most common law claims, but not statutory claims.131 Second, the remedial scheme under META was more expansive than that of most nations with such statutes.132

In short, no other state in the nation is going to abrogate employment at will unless conditions arise similar to those in Montana in 1987, to cause businesses to lobby a state legislature for such a change. Businesses seem to have adjusted to the existing exceptions to employment at will.133

2. Limiting Employment at Will by Statutes: Using Existing Statutes and Enacting More

As discussed above, the United States has many statutes at all levels of government that do not displace employment at will but that do restrict it to some extent.134 The employment anti-discrimination statutes are the most significant body of such statutes. An approach to providing job security for more workers is to interpret the existing statutes expansively and/or to enact more statutes that declare certain reasons and circumstances to be unlawful, thus carving out more exceptions to employment at will.

Regarding the statutes already in place, courts should not stretch and distort existing statutory law and doctrine thereunder to address bad or abusive discharges.135 The employment anti-discrimination laws have

_DischARGE FROM EMPLOYMENT ACT (WDEA)_ 57 MONT. L. REV. 375, 422 (1996) (observing that “the Montana WDEA has in fact resulted in a workable scheme that is understandable and predictable”).

129. See Befort, supra note 76, at 426.


132. Id. at 431–32 (positing that states were unlikely to move from employment at will to statutes providing greater remedies than the wrongful discharge laws of other nations).

133. The adjustments, which have been many, include employing human resource employees and employment attorneys, who develop defensive strategies to ward off or prevail in litigation. See generally, Susan Bisom-Rapp, _Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice_, 26 FLA. ST. U. L. REV. 959 (1999). The rise and prevalence of mandatory arbitration agreements is another. See generally, Alexander J.S. Colvin, _The Metastasization of Mandatory Arbitration_, 94 CHI.-KENT L. REV. 3 (2019).

134. See supra Part II.B.2.

135. Contract law is seldom distorted by courts to provide a remedy for discharged employees. On the contrary, as I discuss below, contract doctrine as applied to employment has been warped and deformed to deny recovery. There was a period of time, during the 1970s and 1980s, during which some state courts stretched contract law to permit recovery, as discussed more fully below. See, e.g., _Toussaint v. Blue Cross & Blue Shield of Mich._, 292 N.W.2d 880 (Mich. 1980) (finding good-cause contract);
become, in large part, wrongful discharge laws, with over fifty percent of the charges filed with the Equal Employment Opportunity Commission involving terminations.\footnote{See EEOC LITIGATION STATISTICS, BASES BY ISSUE (CHARGES FILED WITH EEOC) FY 2010 - FY 2018 (2019), https://www.eeoc.gov/eeoc/statistics/enforcement/bases_by_issue.cfm [https://perma.cc/JHN7-NL8D].} When Title VII of the Civil Rights Act of 1964 became effective in 1965, more charges were based on refusals to hire,\footnote{See John J. Donohue III & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 STAN. L. REV. 983, 1015 (1991) (noting that "hiring charges outnumbered termination charges by 50 percent in 1966, but by 1985, the ratio had reversed by more than 6 to 1"); Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, Individual Justice or Collective Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States, 7 J. EMP. LEGAL STUD. 175, 177–80 (2010).} and the shift to a preponderance of termination claims occurred as the law achieved a purpose of opening employment opportunities to those to whom they had been discriminatorily denied.\footnote{See Donohue & Siegelman, supra note 137, at 1015 ("Assuming that concrete improvements have occurred, one might expect to see a significant shift in the nature of employment discrimination cases as minorities and women no longer need to complain about blanket exclusions from good jobs—that battle has, by now, largely been won—but now complain more commonly of being fired from these better jobs.").} I think that the employment discrimination doctrine developed by courts in case law has been shaped narrowly in part by the perception that the discrimination laws have become wrongful discharge laws that restrict employer prerogative under employment at will.\footnote{Consider, for example, the bizarre hypothetical invoked by the Supreme Court in \textit{Univ. of Texas Sw. Med. Ctr. v. Nassar}, 570 U.S. 338 (2013). The Court’s hypothetical presented an employee who was about to be fired or suffer other adverse employment action who might file a frivolous discrimination charge and then, when the adverse action occurred, file a retaliation charge. \textit{Id.} at 358–59. The Court concluded that employers would be put to greater costs because they would be unlikely to win on summary judgment if the standard of causation were but-for. \textit{Id.} The discussion of the hypothetical was part of the rationale for adopting the more stringent but-for causation standard for retaliation claims under Title VII. For a fuller discussion of the shaping of employment discrimination law by courts’ adherence to employment at will, see William R. Corbett, The “Fall” of Summers, the Rise of “Pretext Plus” and the Escalating Subordination of Employment Discrimination Law to Employment at Will, 30 GA. L. REV. 305, 372 (1996).} I also do not think the enactment of numerous additional statutes limiting employment at will is the best way or a practically feasible way to provide additional protection against abusive termination to employees, although I concede that the statutory approach does have some advantages over development of common law doctrine.\footnote{See, e.g., Peck, supra note 11, at 371 ("Legislation would provide more certain and effective protection against unjust discharge than slow development of job protection in judicial decisions. Statutory law is not limited or confined by development within a particular factual context. A well drafted statute offers more immediate, comprehensive, and definitive protection. Statutes are more easily understood by employees than the law extracted from judicial opinions.").} Here I am referring to individual employment rights statutes, such as whistleblower or lawful activity statutes.
rather than a general wrongful discharge statute. I argue against this approach, although statutes have become, in recent decades, the vehicle of choice for regulating the American workplace, as evidenced by the cavalcade of statutes enacted.141 I agree with Professor Parker who, in advocating for common law development, said that “[l]egislation cannot solve the deeply rooted and multi-faceted problems surrounding employment-at-will.”142

First, enactment of statutes that restrict employment at will is beset with the same problem as the ill-fated META and other proposed laws that would displace employment at will. As a general matter, it is hard to muster the political support to enact statutes that actually are protective of employees, although the resistance varies from state to state and over time.143 Statutes are passed not necessarily because they embody good ideas, but because enough political support is brought to bear.144 Generally, employees have less political clout than employers.145 In light of this imbalance, when employment statutes are enacted at the state level, they sometimes are not favorable to employees. Beyond the experience with the Montana Wrongful Discharge from Employment Act,146 consider the euphemistically named Arizona Employment Protection Act. The Arizona Act was enacted by the state legislature, in part, to contain the state supreme court’s expansion of the WDVPP tort after the court decided Wagenseller v. Scottsdale Memorial Hospital.147 The Arizona Act, despite its name, appears to have done more to benefit employers than employees, although it is unclear whether it was very detrimental to employees.148

141. See, e.g., Frank J. Cavico, Employment at Will and Public Policy, 25 AKRON L. REV. 497, 531 (1992) (“Most of the recent, significant developments in employment law have been accomplished through federal and state legislation.”).

142. Parker, supra note 20, at 371.

143. California, for example, has many state and local laws providing protections and benefits for workers. However, even in such a state, business resistance to some worker protections can be significant. Privacy Bill for Employee E-Mail Vetoes for Third Time by California Gov. Davis, Daily Lab. Rep. (BNA) No. 195 (Oct. 11, 2001).

144. Peck, supra note 11, at 751–52; Blades, supra note 12, at 1434 (“Suffice it to say that general statutory limitations on the employer’s right of discharge are unlikely to be enacted so long as there is no strong lobby to support them.”).

145. Peck, supra note 11, at 751–52; Blades, supra note 12, at 1434.

146. See supra notes 122–128 and accompanying text.


Beyond the obstacle of mustering sufficient political support to enact statutes that actually benefit employees, statutes often have precise language and lack the flexibility of common law theories of recovery to address the many circumstances that may arise in workplace terminations. The statute protects specified types of whistleblowing. It also prohibits employers from taking reprisal against employees who “[o]bject[,] to or refuse[,] to participate in an employment act or practice that is in violation of law.” One of the difficulties with the statute is fitting employee conduct within the “object[,] to or refuse[,] to participate in” language. The tort of WDVPP has more flexibility because the covered acts are not identified by precise statutory language. On the other hand, statutes admittedly do have a number of advantages over common law theories, such as “immediate, comprehensive, and definitive protection,” and they are more accessible and perhaps comprehensible to employers and employees.

In the end, even if statutes provide a superior vehicle for abrogating or limiting employment at will, the statutory and common law approaches are not mutually exclusive. More robust common law protections are needed. First, the track record reveals the difficulty in enacting employee-protective laws, so if courts do not act, as they did most conspicuously in the 1980s, there is a lack of protection. Second, one of the chief services that common law theories provide is that they can, over time, give employers incentive to seek a better solution through legislative action, in which both sides may receive something, as evidenced by the enactment of the Montana and Arizona Acts discussed above. Finally, legislatures seldom write and enact legislation on a blank slate; instead, they review and react to judicially created theories. Thus, the development of the common law not only may prompt the enactment of legislation, but it also may provide the background and education for the drafting of the statutes. Thus, the next Part posits that the common law is the most promising source of restricting employment at will, but that contract law is not the branch holding such potential.

IV. COMMON LAW LIMITATIONS OF EMPLOYMENT AT WILL AND THE

149. Consider, for example, the courts trying to decide the issue of whether dating is a “legal recreational activity” under New York Labor Law § 201-d(2)(c). See State v. Wal-Mart Stores, 207 A.D.2d 150 (N.Y. 1995); McCavitt v. Swiss Reinsurance Am. Corp., 237 F.3d 166 (2d Cir. 2001), rev’g, 89 F. Supp.2d 495 (S.D.N.Y. 2000).
151. Id. 23:967(1)(a) & (2).
152. Id. 23:967(1)(a)(3).
153. See Peck, supra note 11, at 749.
154. Id. at 752–53; Arnow-Richman, supra note 48, at 1581–82.
155. Peck, supra note 11, at 753.
INADEQUACY OF CONTRACT LAW

We are decades past the vibrant period of the 1970s and 1980s when courts throughout the nation aggressively engaged in the development of common law contract and tort theories that restricted employment at will.156 So vigorous were the courts in some states in creatively developing the common law at that time that it has been described as an attack or assault on employment at will.157 Indeed, Walter Olson characterized Professor Lawrence Blades’s important article proposing the tort of abusive discharge as having launched an academic assault on employment at will.158 Interestingly, Professor Henry Perritt sees an article by Professor Clyde Summers proposing a wrongful dismissal statute as “part of the genesis of the common law revolution in wrongful dismissal law.”159 So significant were the common law developments that, when combined with statutory efforts such as the Montana Wrongful Discharge Act and the ultimately

156. See, e.g., Bird, supra note 18, at 521–22; Peck, supra note 11, at 725–34; Cavico, supra note 141, at 497 (describing the “erosion of the conventional employment at will doctrine and the concomitant creation of statutory and common law exceptions to its dictate”); Leonard, supra note 47, at 647 (“Over the past two decades judicial development of common-law exceptions to the presumption of at will employment has been extraordinary . . . .”); Theodore St. Antoine, ADR in Labor and Employment Law During the Past Quarter Century, 25 ABA J. LAB. & EMP. L. 411, 412 (2010) [hereinafter St. Antoine, ADR] (stating that “beginning in 1980, came a flood of court decisions that ultimately reached every state except Florida, Louisiana, and Rhode Island and imposed at least some limitations on the absolutist reign of at-will employment”).

157. It is difficult in looking back on that period to discern what confluence of events, conditions, and forces caused such a creative thrust by the courts. Some have posited that the courts acted because collective bargaining had collapsed as a regime for regulating the American workplace. See, e.g., Summers, Effective Remedies, supra note 42, at 459–60. However, the decline in union representation and collective bargaining had been occurring for years before. See, e.g., Robert J. Flanagan, NLRA Litigation and Union Representations, 38 STAN. L. REV. 957, 981–82 (1986). However, it is plausible that the Wagner Act regime had reached a level of demise by 1980 that prompted the courts to act. In 1980, union density was down to about 18% in the overall workforce (public and private). Id. at 981. It also is possible that the flurry of legislative enactments, beginning with the Equal Pay Act in 1963 and Title VII in 1964 and continuing for over a couple of decades, emboldened the courts. See generally Summers, Effective Remedies, supra note 42, at 458 (“The trend did not begin with the employment at will cases but can be traced back at least to the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964 (Title VII), the Pregnancy Discrimination Act of 1978 (PDA) and the Age Discrimination in Employment Act of 1967 (ADEA) . . . . Other acts building upon this statutory trend included the Occupational Safety and Health Act of 1970 (OSH), and the Employment Retirement Income Security Act of 1974 (ERISA).”); see also Rothstein, supra note 68, at 728 (stating that enactment of civil rights laws in the 1960s “gave further support to the concept that unchallenged employer prerogative in hiring and firing decisions had to give way to other social interests”).

158. Walter Olson, The Trouble with Employment Law, 8 KAN. J.L. & PUB. POL’Y 32 (1999): “Lawrence Blades . . . kicked off the modern revolution in state employment law with his article in the Columbia Law Review in 1967 launching the attack on employment at will. The resulting intellectual insurgency, which soon spread to pretty much every law faculty, was to transform American employment law quite dramatically.” Id. at 32.

moribund Model Employment Termination Act, several commentators predicted the imminent demise of employment at will. From today’s perspective, those predictions appear recklessly bold, as it has been clear for a couple of decades now that the common law “assault” on employment at will subsided. Employment at will is stronger now than it was thirty years ago, as many of the common law developments have been diluted or overturned. For all the common law developments of the 1970s and 1980s, the decades after that were marked by substantial retrenchment. Admittedly, one can argue that the ebbing of common law protections is an argument for legislative engagement and statutory protections. However, calls for legislative solutions and common law solutions are not mutually exclusive. Recent history has witnessed more legislative successes, but there is opportunity and need for the courts’ re-engagement in this area.

In the last great common law incursion on employment at will, courts in various states developed contract, tort, and hybrid doctrines that limited employment at will. Because statutes do not offer a satisfactory or sufficient way of imposing additional restrictions on employment at will, what is needed is a second common law thrust. Contract law, infused with, and misshaped by, the employment at will doctrine, does not offer adequate doctrine for such an incursion. Tort law, although not adequate in its current state, has untapped potential to restrict employment at will.

160. See supra Part III.B.1.

161. Consider, for example, the following prediction from 2000: “The future of employment-at-will, then, is that it has no future.” Deborah A. Ballam, Employment-at-Will: The Impending Death of a Doctrine, 37 AM. BUS. L.J. 653, 685–86 (2000); see also Peck, supra note 11, at 4 (predicting the demise of employment at will); Cavico, supra note 141, at 497 (explaining that the growing momentum of court development of the public policy tort exception “point[s] to the eventual demise of the employment at will doctrine”).

162. See, e.g., Estlund, supra note 47, at 1688 (“The argument that wrongful discharge law has eviscerated employment at will is simply overstated.”); Donald C. Dowling, Jr., The Practice of International Labor & Employment Law: Escort Your Labor/Employment Clients into the Global Millennium, 17 LAB. L. & EMP. L. 1, 13–14 (2001) (“U.S. employment lawyers say that America’s employment at will has eroded away, but theirs is a historical, not an international perspective. By comparison to other countries, employment at will is alive and well in the U.S.”).

163. Cf. Libenson, supra note 130, at 127 (stating that, despite the exceptions, “a powerful ghost still looms”).

164. See, e.g., Rowe v. Montgomery Ward & Co., 473 N.W.2d 268 (Mich. 1991) (distinguishing Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880 (Mich. 1980)); Guz v. Bechtel Nat’l Inc. 8 P.3d 1089 (Cal. 2000) (limiting the effect of Pugh v. See’s Candies, Inc., 171 Cal. Rptr. 917 (1981)); Pauline T. Kim, Privacy Rights, Public Policy, and the Employment Relationship, 57 OHIO ST. L.J. 671, 680 (1996) (“Despite the many calls for reform, the at-will rule has retained its vitality and, if anything, has been regaining strength in recent years.”); Clyde W. Summers, Employment at Will in the United States: The Divine Right of Employers, 3 U. PA. J. LAB. & EMP. L. 65, 85 (2000) (“[T]he trend in the last ten years has been toward more employer dominance.”); see also Parker, supra note 20, at 350–51 (discussing the scrutiny of employment at will during the 1970s and 1980s, but concluding that courts have not developed coherent tort and contract law regarding the doctrine).


166. See supra Part III.B.
A. There is a Need for More Effective Common Law Limitations of Employment at Will

Before turning to the inherent weaknesses of contract law as applied to employment and the untapped potential of tort law, I first address why I think we need a more robust common law limiting employment at will. Do we really need a second common law “assault” on employment at will? I do not think that we need another period of freewheeling experimentation in which courts try out various contract, tort, and hybrid theories and remedies as they did in the 1970s/1980s. The historical record reveals that most of those experiments were rather short-lived, as courts relented and legislatures stepped in to circumscribe the innovations, as in Montana and Arizona. However, I do think a more effective common law theory of recovery is needed for abusive terminations. WDVPP was the most durable and prominent survivor from the 1970s/1980s, and that fact suggests that tort law could be further developed to provide a worthwhile and effective common law limitation on employment at will.

Some would argue that employment at will does not need to be limited, as Professor Epstein and Mr. Olson argued during the first assault. Others would argue that, regardless whether employment at will needs to be further limited, common law or tort law is not the appropriate or best way to do it. Regarding the second argument, I have already explained what I see as the limitations of statutes. Accordingly, I turn to the first issue—why we need additional restrictions of employment at will.

Termination from employment is a major event in the life of a person that, in most cases, has enormously significant financial, psychological, and social consequences. It also harms society because it takes from citizens central attributes of citizenship. Many, and perhaps most, at-will employees likely do not understand that they can be fired for bad reasons; that state of the law does not match their expectations. It seems likely that this disconnect between understanding/expectations and actual law has increased since the passage of so many statutes, such as anti-discrimination, anti-retaliation, and whistleblower statutes. Employees are aware there is a large and complex body of statutes that provide protection against

167. See supra note 164.
168. See supra notes 122–128 and 147–148 and accompanying text.
169. See supra notes 103, 158.
171. See supra Part III.B.
172. See supra notes 5–15 and accompanying text. See also Libenson, supra note 130, at 123 (stating that among the academic criticisms of employment at will, “an important common denominator is that the at-will rule essentially gives employers an unchecked right to impose devastating economic and personal harms on undeserving individuals”).
173. See supra note 12 and accompanying text.
termination under some circumstances, even if they do not know the specific protections. There also likely is a competing notion, however, that employees in “protected groups” enjoy job security that other employees do not. From the employer’s perspective, the proliferation of statutes has placed employers in the position that few human resources departments would recommend firing an employee for a bad reason or without documentation of a good reason. Thus, while we may have employment at will as our default principle of law regarding termination, our expectations and values are not fully consistent with it, and most employers do not operate as though they will not be required to give a reason for a discharge. Indeed, society has embraced the norm that certain bad-motive terminations are wrong and should be subject to legal redress. While it is a positive development that employers are adjusting their practices, it is a role of tort law to enforce societal standards and impose liability when they are violated. Indeed, a common law approach may be preferable to a statutory approach when society already has begun to adjust norms and expectations. The only question then is what bad reasons and abusive terminations should be subject to redress and how do we provide that redress.

Common law theories supplement the statutory bases for recovery, and, as I have argued, they are needed because statutes have substantive and practical limits. As the 1970s/1980s period demonstrates, we want common law theories of recovery to supplement the statutes. It is a function of tort law to protect societal values. Moreover, the availability of common law theories of recovery and remedies may obviate resort to anti-discrimination and other statutes for bad-reason terminations that do not really fit under the

174. See supra notes 94–96; Leonard, supra note 47, at 633.
175. See supra note 76. Professor Bisom-Rapp has explained that the procedures developed by employers in response to employment discrimination laws may enable them to successfully defend claims but may not ensure nondiscriminatory employment actions. Bisom-Rapp, supra note 133.
176. See, e.g., Libenson, supra note 130, at 113.
177. See Leonard, supra note 47, at 637 (arguing that in workplaces regulated by so many rules and regulations, the employment-at-will gap filler “is now in considerable doubt”).
178. See, e.g., Estlund, supra note 47, at 1664 (explaining that the “bad motive” exceptions at their core rest on strong and widely shared moral commitments that reach well beyond the workplace”).
179. See, e.g., Clayton P. Gillette, Lock-In Effects in Law and Norms, 78 B.U. L. REV. 813, 834 (1998) (“The possibility that government will advocate particular patterns of behavior might go some distance toward providing a centralizing authority for the enunciation of norms, but unless government goes further to provide sanctions, those who are subject to the norm may lack sufficient confidence about the compliance of others to make norms as susceptible to rapid change as common law or statutory law.”).
Perhaps, in the end, the need for common law theories is obvious as Professor Mark Gergen suggested in defending the “collateral torts” applied to wrongful termination. If one accepts the proposition that additional common law restrictions are needed, to which branch of the common law should courts turn? The next section addresses why contract law does not have the potential to further restrict employment at will.

**B. Contract Law is Inferior to Tort Law as a Source of Doctrine for Limiting Employment at Will**

Relying on tort law to restrict employment at will avoids the pitfalls of contract law in the employment context. First, employment at will, however it is regarded—rebuttable evidentiary presumption, substantive rule—is within the ambit of contract law. Employment at will describes the termination rules regarding a type of employment contract. In order to permit recovery for breach of an employment contract, courts must find evidence of an agreement between employer and employee that overcomes the employment-at-will default. Courts seldom find sufficient evidence of such an agreement. Doctrinally, courts do not have to accept weakening of employment at will in the realm of contract law to permit recovery under tort law. Tort law, in contrast to contract law, does not depend upon the understandings and intentions of the parties. Courts can more readily accept a tort remedy, and thus they do not weaken the at-will presumption, because they do not have to undermine the presumption of employment at will, and they do not have to find that parties agreed to a variation in at-will
employment; rather, the tort is based on duties implied in law based on societal judgments. A related point is that a tort-based duty cannot be divested by an employer’s supposed bargaining—and more likely, coercion. This is an important advantage because a protection that can be taken away by one party’s superior bargaining power is not much protection at all.

Contract law doctrine and tenets have been savagely distorted in the context of employment law because of the overwhelming obeisance of courts to employment at will. There are numerous examples. Most courts require a precise form of evidence to overcome the at-will presumption and routinely dismiss evidence that would be deemed probative of most other types of contracts. The employment contract concepts of additional consideration and mutuality of obligation, which are often invoked to defeat contracts alleged to be other than at-will, are corruptions of traditional contract doctrine foisted on employment law by courts’ passion to preserve employment at will. When Professor Blades proposed the tort of abusive discharge, he found it reasonable to bypass contract law because of its rigid doctrinal requirements. Perhaps this should not be surprising because employment contract formation and termination never has fit well into the exchange transaction model of commercial contracts, in which there is a discrete transaction and the contractual relationship does not span a long period of time with changing circumstances. The relational contract model, developed by Ian Macneil better accounts for the dynamics of the employment contract and relationship.


188. See, e.g., Coley, supra note 68, at 214 (“While a majority of American jurisdictions—roughly seventy-five percent—recognize the implied contract doctrine, approximately half of these jurisdictions limit the doctrine’s applicability exclusively to those cases involving written, rather than oral employer representations.”).

189. See, e.g., Summers, The Contract of Employment, supra note 56; Blades, supra note 12, at 1419–21; Parker, supra note 20, at 385–89.

190. Professor Lawrence Blades considered and rejected an implied contract term as inefficacious in protecting employees. Blades, supra note 12, at 1421–22 (finding it “reasonable to bypass the law of contracts and its unyielding requirement of consideration by turning to the more elastic principles of tort law”).

191. See Leonard, supra note 47, at 663.


193. See, e.g., Linzer, supra note 28, at 391–94.
The historical record also suggests that contract law is inferior to tort law in restricting employment at will. The contract law innovations of the last great incursion on employment at will have not proven durable. The implied covenant of good faith and fair dealing has virtually disappeared from employment law after a somewhat successful period in the 1970s and 80s. Many of the contract innovations, such as in Pugh v. See’s Candies in California and Toussaint v. Blue Cross & Blue Shield of Mich. in Michigan, have been rolled back. In every state, it is now extremely difficult for a terminated employee who is not covered by a collective bargaining agreement to prove that she has an employment contract that is other than at will.

Simply put, contract law in the context of employment has been shaped, distorted, and dominated by employment at will. Although many commentators have decried this corruption of contract law, it is what the courts have done. Given both disfigured doctrine and a historical record of no enduring effective theory, there is no basis for thinking that courts will implement substantial and lasting contract restrictions on employment at will. Although tort law has the potential to impose such restrictions, the next Part considers weaknesses in the current tort law in the realm of employment that renders it unable to effectively harness employment at will.

V. INADEQUACY OF EXISTING TORT LAW TO APPROPRIATELY LIMIT ABUSIVE DISCHARSES

Among the many bad terminations that occur in the United States, Green v. Bryant involved what strikes me as among the worst in the reported decisions. The case also serves as an exemplar of the weaknesses of the existing tort theories that are available to discharged employees. Ms. Green worked at a doctor’s office. While not at work, she was attacked by her estranged husband, who beat her with a pipe and raped her at gunpoint. When she reported for work, she was fired, presumably because the employer...

---

198. See supra note 164.
199. See, e.g., Summers, The Contract of Employment, supra note 56, at 1097–1109. The increased difficulty is due in part to courts providing guidance to employers to include at-will language in writings that they provide to employees, such as employee handbooks. See, e.g., Fischl, supra note 182, at 195.
201. See Schwab, supra note 17, at 1948 (discussing Green as a “striking example” of the doctrinaire approach of courts in dismissing wrongful discharge cases because they involve private rather than public issues).
feared that her violent spouse might come to her workplace and injure people. Ms. Green sued for her termination based on legal theories of wrongful discharge in violation of public policy, intentional infliction of emotional distress, negligent infliction of emotional distress, and breach of the covenant of good faith and fair dealing. The court denied recovery on all theories, granting a motion to dismiss for failure to state a claim. On her WDVPP claim, Ms. Green argued that the public policies implicated were protecting an employee’s right to privacy and protecting victims of crime or spousal abuse. The court found that plaintiff’s termination did not violate the public policy favoring privacy because there was no evidence that the employer sought to obtain private information about plaintiff. The plaintiff’s argument regarding protecting victims of crime or spousal abuse cited numerous state statutes manifesting the public policy. The court dismissed the claim because the statutes relied upon by the plaintiff did not create employment rights and privileges and victims were entitled to only the benefits or privileges expressly provided for in the statutes. The court dismissed the intentional infliction claim because it found that the circumstances alleged by the plaintiff did not rise to the level of “outrageous.” Regarding negligent infliction of emotional distress, the court held that employers do not, when they terminate, breach a duty of reasonable care owed by an employer to an employee. The good faith and fair dealing claim failed because, the court held, there is no bad faith when an employer terminates an at-will employee.

I think that Ms. Green should have recovered for her termination under a tort theory. Although the employer had an articulable interest in terminating her (fear of violence in the workplace), that interest should not have been found to outweigh the competing interests of Ms. Green and the public. There are several tort theories, in addition to those pled in Green, that can, in appropriate circumstances, be applicable to terminations, such as defamation and invasion of privacy. There are only two tort theories that I
wish to consider—wrongful discharge in violation of public policy ("WDVPP") and intentional infliction of emotional distress ("IIED"). Intentional infliction is one of the "collateral torts" that is not specifically applicable to employment termination. Stated differently, IIED can apply to any type of conduct that may be characterized as "outrageous"; IIED is not applicable to only employment terminations or other employment acts. WDVPP, on the other hand, addresses specifically and only discharge from employment. These two tort theories have been largely unsuccessful for plaintiffs, and this is particularly true of IIED. WDVPP exists in several different forms in the many states that recognize the theory. It is a tort theory that held great promise, but its various iterations, uncertain elements, and uncertain connection to identification and preservation of public policy have rendered it a poor match for the powerful employment at will doctrine that it weakly limits. Despite their weaknesses, these two tort theories have the potential to be reshaped and used in ways that impose meaningful limits on employment at will.

A. The Enigmatic Tort of WDVPP: Origins, Foundations, Development, and Problems

WDVPP is a curious case among torts. It is a distinctly American tort of relatively recent vintage in the annals of tort law. Most chronicles trace the tort’s origin to the 1959 California court of appeals decision in Petermann v. Int’l Bhd. Teamsters. The tort did not gain the momentum of adoption by many states, however, until after the publication of Professor Lawrence Blades’s article proposing the tort of abusive discharge in 1967. During the 1970s, a few states recognized the tort, and the number increased significantly in the 1980s. Today, all but about nine states recognize some version of WDVPP, yet it is nebulous and generally inefficacious.

212. See Gergen, supra note 21 (also discussing defamation and other tort theories sometimes used).
213. Id. at 1699.
214. See Cavico, supra note 141.
215. Libenson, supra note 130, at 128 ("The breadth of this wrongful discharge tort varies tremendously.").
218. Bird, supra note 18, at 521.
219. ROTHSTEIN, supra note 68, at 750 (5th ed. 2015). The Rothstein treatise lists Alabama, Florida, Georgia, Louisiana, Maine, New York, and Rhode Island as states that do not recognize the tort, and notes that Arizona and Montana have statutes that regulate employment termination. Id.; see also Charles J. Muhl, The employment-at-will doctrine: three major exceptions (2001), at https://www.bls.gov/opub/mlr/2001/01/art1full.pdf [https://perma.cc/5PST-LCTE]. Louisiana, however, also has a statute that regulates some aspects of wrongful discharge. See LA. R.S. 23:967.
In *Petermann*, a union business agent sued when his employer fired him for refusing to commit perjury in testimony before a state legislative committee. The court crafted a common law exception to employment at will to permit recovery, stating as follows:

In order to more fully effectuate the state’s declared policy against perjury, the civil law, too must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee’s refusal to commit perjury. To hold otherwise would be without reason and contrary to the spirit of the law.  

The court seemingly then treated this theory as a breach of contract claim, explaining that firing for the alleged reason would be improper because it would constitute a failure to act in good faith. Later California decisions would characterize the theory of recovery as a tort. At the time it was decided, *Petermann* did not clearly look to be the development of a new common law limitation on employment at will. After some other adoptions of the tort, the theory was examined, the case law surveyed, and the tort theory adopted by the Oregon Supreme Court in 1975 in *Nees v. Hocks*.  

The tort gained academic grounding and more momentum in the courts after Professor Lawrence Blades advocated for recognition of a new tort of abusive discharge. Blades argued that the power of corporations had come to rival that of governments and that it was anomalous that the law placed restrictions on government action against citizens but not actions of corporations and other employers that result in discharge of employees. Using the torts of abuse of process and intentional interference with contractual relations by a third party as models and the underlying rationale of prima facie tort, Blades proposed a tort of abusive discharge. He posited

---

221. *Petermann*, 344 P.2d at 27.
222. *Id.* at 28; see also *Schwab*, supra note 17, at 1951 (noting that the *Petermann* court purported to find violation of an implied term of the employment contract).
224. *Peck*, supra note 11, at 723–24 (stating that *Petermann* was viewed as a “‘sport’ rather than as a general modification of employment law”).
225. See, e.g., *Peck*, supra note 11, at 723–725.
227. *Blades*, supra note 12. Professor Blades’s article has been cited by 88 court decisions and 538 secondary sources. Walter Olson declared that the article “kicked off the modern revolution in state employment law.” *Olson*, supra note 158, at 32; see also *Ballam*, supra note 57, at 659 (noting that, after *Petermann*, courts in other states did not begin adopting WDVPP until after the publication of Blades’s article).
that the proposed tort would provide a remedy when an employer discharges an employee in order to effectuate an ulterior purpose, other than that for which the right to discharge was designed. Although Blades acknowledged the argument for the more radical approach of extending all constitutional restrictions on government to employers, he saw such an approach as too expansive and unnecessary if legislatures enacted statutes or courts developed theories to stem the tide of abusive discharges. Blades’s approach to proposing a new tort was cautious and conservative, analogizing the proposed new tort to existing torts. Although Blades’s article was frequently cited by courts adopting or adhering to the tort of WDVPP, the abusive discharge tort envisioned by Professor Blades was different than, and probably broader than, the various versions of WDVPP.

WDVPP is rooted primarily in the prima facie tort theory of Oliver Wendell Holmes and Francis Pollock. Holmes’s and Pollock’s general theory provided that intentional infliction of harm is tortious unless the tortfeasor can justify her action on policy or ethical grounds. Some courts, most notably the New York courts, took the general theory of Holmes and Pollock and distilled out of it a specific tort called prima facie tort. In Nees v. Hocks, the Oregon Supreme Court decision adopting the tort of WDVPP, the plaintiff, who was fired for not fully complying with her employer’s instruction that she request to be excused from jury service, pled the tort theory of prima facie tort. The Oregon court took note of “the New York experience indicating the difficulties of transposing a very broad principle of liability into a specific tort.” The court eschewed adoption of the prima facie tort in favor of recognizing the emerging tort of WDVPP. It is notable that torts based on the general prima facie tort rationale tend to be rather “formless.” It was this formless or amorphous nature that, in part, caused

230. Id.
231. Id. at 1432 (“If contrary to this assumption, the legislatures or the courts proceed quickly with the task of developing other approaches, it will not be necessary to resort to the drastic yet inadequate step of limiting the exercise of private power through recourse to constitutional law.”).
232. See Bernstein, supra note 37, at 1547 n.41.
233. See Ballam, supra note 57, at 660.
236. See, e.g., Vandevelde, supra note 234, at 487–91.
237. Nees, 536 P.2d at 514.
238. Id. at 514–516.
239. Gergen, supra note 21, at 1696–97 (labeling the following torts as formless: invasion of privacy, intentional interference with business relations, and prima facie tort).
the Oregon court to refuse to adopt the prima facie tort. However, WDVPP, rooted in the general prima facie tort theory, has not fared much better in terms of concreteness or certainty of elements.240

The rise of the tort of WDVPP in the 1970s and 1980s did not occur in isolation. This was, as already discussed, the period of the great assault on employment at will that led to predictions of the demise of the doctrine. Courts across the nation recognized contract, tort, and hybrid theories that permitted recovery notwithstanding employment at will.241 The incursion was not limited to the courts, as state legislatures, to a lesser extent, passed employment statutes that limited the rights of employers to terminate employees. From that period, WDVPP emerged as the most recognized common law restriction on employment at will.242 Just as the tide of change ebbed in the 1990s and employment at will began to reclaim its prominence,243 the lack of clarity and limited usefulness of WDVPP became increasingly apparent. In 1997, Professor Bernstein, in evaluating four “new” torts, declared WDVPP to be “the most precarious, the least firmly fixed” of the four torts she considered.244 The recognition of WDVPP by over four-fifths of the states and its inclusion in the Restatement of Employment Law indicate it is solidly established. However, it is among the most nebulous torts, existing in different iterations, and with divergent analyses, scopes, and rationales. Several commentators have tried to make sense of the case law, while others have proposed modifications. Yet for all its problems, WDVPP remains the most commonly recognized discrete common law exception to employment at will. What accounts for the tort’s weakness?

WDVPP has been challenging and vexing in at least two key respects: (1) the rationale for permitting recovery; and (2) what a plaintiff must prove in order to recover.245 There are two basic approaches to the tort.246 The approach followed by a majority of states recognizing the tort begins with

240. See Callahan, supra note 220, at 488.

241. See supra Part IV.

242. Mark A. Fahleson, The Public Policy Exception to Employment at Will—When Should Courts Defer to the Legislature?, 72 NEB. L. REV. 956, 958 (1993) (describing the tort as “[b]y far the most widely recognized judicial limitation on the rule”); Parker, supra note 20, at 392 (calling the tort “[t]he most widely accepted common law limitation to an employer’s broad right to discharge at will employee”); Note, Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception, 96 HARV. L. REV. 1931, 1931 (1983) (calling the tort “[t]he most widely accepted limitation on the rule”).

243. See, e.g., Bird, supra note 18, at 522–23 (detailing the denouement of the “veritable open declaration of war by courts and commentators on employment at will in the 1970s”).

244. Bernstein, supra note 37, at 1547. The three other torts she considered were IIED, strict products liability, and invasion of privacy. Id. at 1541.

245. See, e.g., Callahan, supra note 220, at 488 (stating that “few decisions involving the public policy exception give explicit consideration to the elements of the claim; fewer still address the allocation of burden of proof”).

246. See FINKIN, supra note 12, at 44.
three or four categories of fact situations: employee is terminated for (1) refusing to perform illegal acts; (2) exercising legal rights; (3) performing public duties; or (4) whistleblowing. Thus, under this approach, recovery for WDVPP is permitted only if the fact situation fits into one of these categories or “pigeonholes.” Some states recognize the tort under only one or two of the four fact scenarios. Texas, for example, recognizes only wrongful discharge for refusing to perform an illegal act. Moreover, Texas has further limited its recognition to refusal to perform illegal acts for which the law imposes criminal penalties. States recognizing the categories also require a plaintiff to identify a public policy that is implicated in the fact situation and require the plaintiff to establish causation between the employee’s act in support of public policy and the termination. A second approach to WDVPP, followed by a small minority of states, recognizes the tort when a plaintiff can establish certain elements: (1) clear public policy; (2) discouraging plaintiff’s conduct by termination would jeopardize the public policy; (3) the public-policy linked conduct caused the termination; and (4) the employer cannot offer an overriding justification for the termination. The Washington Supreme Court noted the two different approaches in Gardner v. Loomis Armored, Inc., and embraced the elements-based approach, under which recovery was granted for a fact situation that did not fit well into any of the four categories.

The American Law Institute’s Restatement of Employment Law articulated a version of WDVPP that follows the categories or pigeon-hole approach. The Restatement does add some categories to the four mentioned above and adds a catchall category: “engages in other activity directly furthering a well-established public policy.” Professor Matthew Finkin has

247. ROTHSTEIN, supra note 68, at 750. The categories or pigeonholes of WDVPP make it look somewhat like the tort of invasion of privacy, of which it has been said it is unclear whether it is one tort or four different torts. See Gergen, Tortious Interference, supra note 235, at 1697 n.9.

248. See Schwab, supra note 17, at 1954–1955 (terming this process of categorization “pigeonhole analysis”).

249. See, e.g., Brunner v. Al Attar, 786 S.W.2d 784 (Tex. 1990); Sabine Pilot, Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985).

250. ROTHSTEIN, supra note 68, at 753.


252. The number and statement of elements varies depending on the source relied upon. Callahan, supra note 220, at 492–94 & 493 nn. 55–57.


254. RESTATEMENT OF EMPLOYMENT LAW § 5.02 (2015).
criticized the ALI’s endorsement of this approach as not permitting for adequate development and evolution of the law. 255

Generally, courts have interpreted WDVPP grudgingly and narrowly. 256 This seems attributable to at least two issues. First, in a majority of jurisdictions that follow the pigeonhole approach, there is no authority for a specified set of elements in a procedural framework. 257 Second, the central rationale articulated for the tort (and from which it takes its name) is that the discharge is subject to legal redress not because the plaintiff employee was injured by the action, but because permitting the termination poses a threat to the public. 258

The search for public policy in WDVPP claims has been described by courts and commentators as the “Achilles heel” of the tort. 259 “Public policy” is an inherently and notoriously vague term. 260 A plaintiff must identify a clear public policy that is implicated in her termination. Most courts take a narrow view of the sources that they deem appropriate to consult for such a public policy. Most are reluctant to accept a proposed public policy unless it is anchored in a constitution or statute, although in a minority of jurisdictions courts take a more expansive view of what may be sources of public policy. 261

Most courts’ reluctance to adopt expansive views of the tort stems from two principal concerns. First, WDVPP unequivocally impinges on employer prerogative under the employment-at-will doctrine. Although it is true that employer discretion is otherwise significantly restricted by many employment statutes and ordinances, and most saliently, the employment discrimination laws, those restrictions are imposed by legislatures. Judges realize that under the WDVPP tort they are second guessing management decisions from the bench. 262 That concern leads to the second consideration that results in the narrow scope. Courts find justification for the second

255. FINKIN, supra note 12, at 44–45.
256. See, e.g., Callahan, supra note 220, at 515.
257. Id. at 516–17.
258. See, e.g., Schwab, supra note 17, at 1944 (stating that courts “attempt to cabin [the tort’s] domain by insisting that the discharge violate public policy rather than involve a mere spat between employer and employee”).
261. See, e.g., ROTHESTEIN, supra note 68, at 752 (stating that although early cases often looked broadly for public policy, “the more recent trend has been to restrict public policy to legislative sources”); Libenson, supra note 130, at 128 (stating that “[m]ost states require that the violated public policy is ‘clearly established’ in a statute, constitution, or other specific source of law”); Schwab, supra note 17, at 1957–58 (noting the “recent trend” toward requiring identification of public policy in a statute or regulation rather than an “open-ended” or “freewheeling” search).
262. See Peck, supra note 11, at 749.
guessing of employers by reasoning that the employer’s decision is not just bad or offensive to the court, but it violates a well-defined public policy of the state, which the court must protect. In articulating such clearly defined public policies, courts risk the accusation that they are activists who are legislating from the bench. Sometimes, state legislatures even perceive it that way and react to such judicial proclamations of public policy.263 Schwab points out that the middle-ground approach264 of limiting employment at will by insisting on jeopardy to public policy results in line-drawing efforts that lead to “muddled opinions and contradictory holdings.”265

There is a second part of the search-for-public-policy requirement that is seldom discussed by the courts and thus is largely underdeveloped.266 The issue has been characterized as the “impact” that the discharge has on the identified public policy, or the “jeopardy” in which it places the policy.267 It is interesting that this issue is rarely discussed by the courts when it is integral to the rationale given for recognizing the tort. In most cases it seems likely that one discharge, the one at issue in the case, seldom will pose a great threat to the implicated public policy. Instead, the impact or jeopardy could be forecast through extrapolation, considering what might happen to the public policy if many employers terminated employees for the reason at issue. Although the issue is seldom discussed by courts, Professor Perritt frames the inquiry in the jeopardy issue differently: “[D]ecide if the threat of dismissal is likely in the future to discourage the employees from engaging in similar conduct.”268 However, that seems too broad an inquiry because, as Perritt acknowledges, the answer to that question will almost always be “yes.”269

Perhaps no decision is a better exemplar of the difficulties courts face in identifying a public policy that is jeopardized by a termination than the Arizona Supreme Court’s decision in Wagenseller v. Scottsdale Memorial Hospital.270 In that case, an employee who refused to participate in a skit that involved “mooning” the audience while singing the song Moon River was fired.271 The court, while disclaiming any expertise in the techniques of

263. A conspicuous example of this is the Arizona legislature’s enacting the Arizona Employment Protection Act in response to the Arizona Supreme Court’s decision in Wagenseller, discussed below. See infra notes 270–277.

264. The all-or-nothing approaches are adopting a good-cause rule, which abolishes employment at will, and strictly adhering to employment at will. Schwab, supra note 17, at 1944.

265. Schwab, supra note 17, at 1944.

266. See Callahan, supra note 220, at 494 (stating that this element “is seldom assessed by the courts”).

267. Id. at 493 n.57.

268. Perritt, supra note 159, at 408.

269. Id.


271. Id. at 1029.
mooning,272 observed that the legislature passed a statute declaring indecent exposure to be a crime.273 Accordingly, the court concluded that it was “compelled to conclude that termination of employment for refusal to participate in public exposure of one’s buttocks is a termination contrary to the policy of this state.”274

While the discharge in Wagenseller may have been a bad or an abusive discharge for which relief should have been granted, the idea that it violated and jeopardized a well-defined public policy seems quite far-fetched. First, should the court have found implicated by the facts a public policy in a criminal statute on indecent exposure? Although the connection certainly could be made, it seems tenuous. Second, the question of impact or jeopardy is even more troublesome, and the court did not discuss it. Would anyone predict that the state of Arizona would be beset with incidents of indecent exposure if the court denied recovery in the case? One could respond that the question calls for an extrapolation, and if many employers fired employees for refusing to moon others, then there could be a rash of indecent exposures. However, this whole scenario sounds preposterous. Professor Schwab offers Wagenseller as evidence that courts’ demands that employees show a violation of a public policy manifested in a specific statute can become comical, calling Wagenseller “an example of such silliness.”275

Wagenseller also demonstrates the “Catch 22” in which the searches for public policy ensnare courts. It seems likely that most courts follow a narrow approach and look to constitutions and statutes as sources of public policy so that they will not be seen as usurping the role of the legislature in declaring public policy.276 Nonetheless, even if a court tethers its declaration of public policy to statutes, as the court did in Wagenseller, if a legislature deems a court’s proclamation of public policy to be overreaching, the anchor of a statute may not provide sufficient cover. The Arizona legislature was so concerned with the court’s decision in Wagenseller that it enacted the Arizona Employment Protection Act to rein in the court and preserve a strong at-will doctrine.277 Indeed, the concern with invading the province of the legislature is the very reason articulated by New York courts for not recognizing the tort of WDVPP at all.278

The other dilemma presented by courts’ insistence on relying on statutes for public policy is the issue of whether a statute creates a private right of

272. Id. at 1035 n.5.
273. Id. at 1035.
274. Id.
275. Schwab, supra note 17, at 1959.
276. See, e.g., Schwab, supra note 17, at 1958; Peck, supra note 11, at 744.
277. See Jones, supra note 147, at 1140; Cleveinger, supra note 148, at 608.
action. Most of the statutes relied upon do not expressly create a right of action. If they did, plaintiffs would be bringing statutory claims under the statutes. Thus, courts are being asked to permit a tort claim based on a public policy ostensibly manifested in a statute that does not clearly provide a right to sue. A court doing this can be criticized for legislating from the bench—essentially the same criticism drawn by courts going beyond constitutions and statutes to identify public policy. Thus, if the courts go beyond statutes to identify public policy, they may be seen as invading the province of the legislature, and if they insist on statutes as sources, they may be seen in the same way.

The courts also express reluctance to adopt expansive approaches to identifying public policy because the more expansive approach carves out a larger exception to employment at will and, at the extreme, approaches a good-cause standard in place of at will.

B. The Enigmatic Tort of WDVPP: Rationalizing the Judicial Decisions and/or Reforming the Tort

There have been many attempts to provide a rationale for the analysis and results in the decisions. Why did Ms. Green lose? Why did Ms. Wagenseller win? What is really going on when a court finds that a public policy is or is not violated by an individual termination?

Considering the array of court decisions, several commentators find the public policy rationale of the tort dubious or, at least, not an adequate explanation of the decisions. Professor Peck concedes that the question of violation or conflict with public policy is considered by the courts, but he suggests that the public policy rationale is in part a façade or “camouflage” for courts that believe employees and society are deserving of job protection. As he evaluates the decisions, he posits that the otherwise unexplainable variations in the results reflect different judicial beliefs about the extent to which courts should provide such protection and/or different levels of comfort with the cover provided by the public policy rationale against the charge that judges are legislating from the bench a just-cause principle for termination. Professor Cavico agrees that the public policy rationale is subordinate to the goal of reining in the “lawless” doctrine of employment at will “which sanctions conduct inimical to societal welfare.” Professor Schwab does not attempt to undermine the public policy rationale,
but he explains that the public/private distinction is a largely chimerical line, and even private disputes between employers and employees have an element of public interest. 284 Schwab posits that a rationale that better explains the results in WDVPP decisions is that courts are trying to determine whether the discharges have effects on third parties beyond the employer-employee relationship. 285 The Restatement of Employment Law also embraces the third-party effects rationale. 286

Considering the cogent analyses of Peck, Cavico, Schwab, and others, I conclude that the jeopardy posed to public policy by a termination is indeed relevant to courts’ WDVPP applications, analyses, and decisions. Nonetheless, that consideration alone does not fully or adequately explain what courts are doing with the tort. If public policy is understood in a much broader sense, the explanation may be apt. For example, courts could conclude that abusive terminations that are motivated by attempts to invade and restrict personal freedoms of employees violate public policy, as Professor Blades proposed. 287 Professor Parker also proposed a broad and innovative concept of public policy based on the enforceability of contract terms. 288 Instead, I will diverge from the WDVPP rationale further by proposing that violation of general or specific public policy be a major consideration, but not the sole litmus test, for a tort theory of recovery.

Several commentators have suggested that, given the problems with the tort and the dubious rationale for its existence, reforms are needed. Some commentators think that the answer is to move to a statute that restricts employment at will. 289 Others have called upon courts to abrogate employment at will by announcing some version of a good-cause requirement for discharge. 290 Still others have called for reform of the tort remedy. An innovative proposal by Professor Parker called for keeping the tort of WDVPP but changing the definition and scope of public policy: public policy would be violated and tort liability would be imposed if a court would not enforce a reason for termination if it had been stated in a contract. 291

285. Id. at 1978.
286. RESTATEMENT OF EMPLOYMENT LAW § 5.01 cmt. a (2015) (“A principal justification for this public-policy cause of action is that, regardless of the terms of the employment, certain discharges that contravene well-established norms of public policy harm not only the specific employee but also third parties and society as a whole”).
288. Parker, supra note 20, at 402–05.
289. See, e.g., Perritt, supra note 159, at 427–30.
290. See, e.g., Peck, supra note 11, at 773; Cavico, supra note 141, 531–32; Leonard, supra note 47, at 673, 680–83.
291. Parker, supra note 20, at 402–05. Parker’s proposal is somewhat similar to Professor Schwab’s third-party effects theory. Schwab posited that courts would refuse to enforce a contract term by which the parties agree to further their own interests and ignore deleterious effects on third parties. Schwab, supra note 17, at 1952–53.
My proposal calls for a reformed tort theory of recovery with principles drawn from existing tort theories. Before turning to that proposal, however, I consider the application of IIED to terminations because that theory of recovery is the other tort theory relevant to my proposal.

C. IIED: Terminations That Civilized Society Will Not Tolerate

IIED is not a tort that was designed for employment law or terminations, as was wrongful discharge in violation of public policy. The tort emerged from efforts to unleash parasitic damages for emotional distress from other torts. Before the recognition of the freestanding tort of IIED, emotional distress damages could be recovered only if some other damage could be established under some existing tort theory. The work of academics, including Professors William Prosser and Calvin Magruder, and the enshrinement of IIED in the Restatement (Second) of Torts prompted courts’ recognition of IIED or the tort of outrage. IIED is now officially recognized in all but two states, and the highest courts of those states seem receptive to recognizing the tort under appropriate facts.

IIED is perhaps the most nebulous of all intentional torts, requiring “extreme and outrageous conduct” that “goes beyond the bounds of human decency such that it would be regarded as intolerable in a civilized society.”

---


293. See, e.g., Gergen, supra note 21, at 1705 (discussing the work of Prosser and Magruder); Martha Chamallas, Discrimination and Outrage: The Migration from Civil Rights to Tort Law, 48 WM. & MARY L. REV. 2115, 2151 (2007) (describing IIED as “a tort created by academics” and citing the work of Prosser and Magruder); see also Duffy, supra note 170, at 393 n.17 (recognizing role of academic advocacy in recognition of the tort and citing several influential law journal articles).

294. Chamallas, supra note 292, at 2151 (citing the recognition of IIED as a separate tort in the Restatement (Second) as the “official birth” of the tort).


296. See, e.g., Frank J. Cavico, The Tort of Intentional Infliction of Emotional Distress in the Private Employment Sector, 21 HOFSTRA LAB. & EMP. L.J. 109, 116–17 (2003) [hereinafter Cavico, The Tort of Intentional Infliction] (discussing that “outrageousness” lacks a specific definition); Gergen, supra note 21, at 1695 (stating that what employers fear about IIED is the unknown and describing IIED as one of the formless torts); Alex B. Long, Lawyers Intentionally Inflicting Emotional Distress, 42 SETON HALL L. REV. 55, 60 (2012) (“If it is difficult, if not impossible, to state with precision what actions qualify as extreme and outrageous”).
community.” Nonetheless, it has been a largely unavailing theory for plaintiffs generally. Indeed, the Restatement (Second), while giving its imprimatur to the tort, bestowed the initial weakness that it still bears: “Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.” Thus, IIED is paradoxically one of the potentially most broadly applicable torts and a tort theory that courts have been most reluctant to apply broadly.

As difficult as it has been for plaintiffs generally to recover for IIED, plaintiffs in employment cases, particularly those involving terminations, have found courts particularly reluctant to permit recovery. As with WDVPP, courts fear permitting a substantial tort incursion on employment at will. Some courts adopting such a restrictive approach to IIED have cited a comment in the Restatement (Second) of Torts: “The actor is never liable . . . where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.” Believing that employment at will is a sacrosanct principle of law, some courts fear that permitting recovery for one

298. See Fraker, supra note 292, at 984 & 996 (describing it as a disfavored cause of action and “the tort of last resort”); Long, supra note 296, at 56 (quipping that IIED is “predictable in the sense that most plaintiffs lose”).
299. Restatement (Second) of Torts § 46 cmt. j. (1965).
300. See Chamallas, supra note 292, at 2117 (noting that IIED represents both “expansive protection” of tort law and courts’ “considerable reluctance . . . to intrude upon other areas of law”).
301. See, e.g., Gergen, supra note 21, at 1695–96.
302. In 1994, Professor Duffy declared that “the overwhelming majority of jurisdictions either do not recognize the tort in the employment at will context, or place severe restrictions on liability in that context.” Duffy, supra note 170, at 391; see also Gergen, supra note 21, at 1702 (“Despite the apparent openness of the tort, infliction claims by employees rarely succeed.”); Cavico, The Tort of Intentional Infliction, supra note 296, at 157–58 (describing reluctance of courts to permit IIED to be used as a backdoor wrongful discharge claim). Although there has been some expansion of application of IIED to terminations in some states since Duffy’s statement, there is still considerable reluctance on the part of courts.
303. Restatement (Second) of Torts § 46 cmt. g (Am. Law Inst. 1965); see also Restatement (Third) of Torts § 46 cmt. e (2012) (“An actor can intentionally or recklessly cause severe emotional harm while exercising a legal right. For example, a spouse who seeks a divorce or an employer who terminates an at-will employee might be substantially certain that the conduct will cause severe emotional harm, but neither is liable for that conduct. Otherwise, the tort of intentional infliction of emotional harm would undermine well-established principles of marital law and employment law.”); Chamallas, supra note 292, at 2117 (describing “a considerable reluctance on the part of courts to intrude upon other areas of law or to interfere with what is perceived to be an exercise of the defendant’s legal rights”); Gergen, supra note 21, at 1706 (explaining that IIED was not vexing until cases presented the question “whether liability might exist for conduct that is privileged or immunized under another body of law”).
termination case under IIED will open the floodgates and jeopardize employment at will.304

The Texas courts are representative of the restrictive approach to IIED applied to workplace claims and terminations, and plaintiffs asserting IIED claims for workplace incidents have lost most such cases.305 The Texas Supreme Court explained this approach in GTE Southwest, Inc. v. Bruce:306 “[T]o properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer, and discipline employees. Although many of these acts are necessarily unpleasant for the employee, an employer must have latitude to exercise these rights in a permissible way, even though emotional distress results.”307 The court in GTE Southwest cited numerous Texas cases following the restrictive approach.308 Yet, the Texas Supreme Court affirmed a judgment for the plaintiffs on an IIED claim, given the supervisor’s “repeated” and “ongoing harassment” of his subordinate employees.309 GTE Southwest was not a termination case, but it did slightly liberalize the standard for outrageous conduct in Texas in the workplace setting. Yet, the principle that courts should rarely permit a successful IIED claim for employment termination remains vibrant in Texas case law after GTE Southwest.310 The idea that a termination, even if not executed as well as might be hoped, is not outrageous because of employment at will persists in all states.311 Discharged employees are almost never going to recover for IIED.312

On the other hand, the Restatement (Third) takes the position that just because one is exercising a legal right, “the actor is not immunized from liability if the conduct goes so far beyond what is necessary to exercise the

304. See, e.g., Diamond Shamrock Ref. & Mktg. Co. v. Mendez, 844 S.W.2d 198, 202 (Tex. 1992) (finding “there would be little left of the employment-at-will doctrine” if the court permitted recovery under IIED).
305. See Duffy, supra note 170, at 404–11; Gergen, supra note 21, at 1728–30; Cavico, The Tort of Intentional Infliction, supra note 296, at 120–22.
306. 998 S.W.2d 605 (Tex. 1999).
307. Id. at 612.
308. Id. at 611–13.
309. Id. at 616.
310. See, e.g., City of Midland v. O’Bryant, 18 S.W.3d 209, 217 (Tex. 2000); Bell Mobile Sys., Inc. v. Franco, 971 S.W.2d 52, 54 (Tex. 1998); Gergen, supra note 21, at 1703 (stating, before GTE Southwest was decided, that “conduct which normally or naturally occurs in a termination cannot be considered morally outrageous as a matter of law”).
311. See, e.g., Winters v. Concentra Health Servs., Inc., No. CV07S012082S, 2008 WL 803134 (Conn. 2008) (finding that “while [employer’s] method of terminating the plaintiff may have been a callous, insensitive and unjustifiable course of conduct, a jury could not find that it was ‘so extreme and outrageous as to exceed all possible bounds of decency in a civilized community’”); Harris v. Ark. Book, Co., 700 S.W.2d 41, 43 (Ark. 1985); Bollinger v. Fall River Rural Elec. Co-op, Inc., 272 P.3d 1263, 1274 (Idaho 2012); Pratt v. Caterpillar Tractor Co., 500 N.E.2d 1001, 1003 (Ill. 1986).
312. See, e.g., Schwab, supra note 17, at 1976 (stating that scholarly commentary “has recognized that employees rarely can win emotional distress claims”).
right that it is extreme and outrageous." Thus, a discharge carried out in a humiliating way may satisfy the standard of outrageous conduct.

VI. A REFORMATION TORT: ABUSIVE DISCHARGE

A. The Tort

As certainly as American law has embraced employment at will as the foundational and default rule for employment terminations, it is clear that there are terminations that are so unfair that our society will not countenance them without providing legal recourse. The fundamental notion that there are some “bad motive” terminations that will not be tolerated by the law is based on widely shared moral commitments, and is well established alongside employment at will. The statutory bad-motive exceptions to employment at will have expanded since the 1960s; thus, it is clear that the bad-motive terminations that society is unwilling to accept without redress have been expanding.

As the statutory exceptions to employment at will expanded, we experienced an expansion of common law exceptions for a period of years followed by contraction. Yet, the common law exceptions persist, and WDPP continues to be recognized in over eighty percent of the states. I think that common law exceptions play a vital and indispensable role in employment law in the United States. The common law exceptions are needed because the statutes clearly do not cover all terminations that our society finds intolerable. The common law exceptions also are needed so that discharged employees are not given the perverse incentive of trying to force their claims under statutes that do not really fit their circumstances. Furthermore, the common law exceptions sometimes are the precursors to statutory exceptions, as legislators seldom write employment laws on a blank slate.

Now, some thirty years after the great assault on employment at will subsided around 1990, it is time to expand the common law exceptions again.

313. RESTATEMENT (THIRD) OF TORTS § 46 cmt. e. (AM. LAW INST. 2012).
316. Estlund, supra note 47, at 1664.
317. Title VII was enacted in 1964, but its effective date was July 2, 1965. Civil Rights Act of 1964, Pub. L. No. 88–352, § 716, 78 Stat. 241, 266 (stating that the effective date shall be one year after the date of enactment).
318. See supra note 219.
319. See supra Part IV.A.
320. See Leonard, supra note 47, at 648 (“Tort exceptions reflect a concern that unbridled operation of an at will presumption may undermine important public policies . . . or that it may encourage behavior inconsistent with current community standards of civility and respect for human dignity.”).
This is so because the common law exceptions have fallen into such disrepair since the innovations of the 1970s/1980s. This time, however, rather than courts developing a variety of contract and tort theories, they can engage in a more focused effort based on the results of the earlier period. As discussed above, contract law is not a body of common law conducive to developing effective exceptions to employment at will. Instead, tort law has the potential to provide an effective common law theory of recovery for abusive terminations. In 1996 Professor Gergen defended the role of the “collateral torts” (IIED and others) applied to terminations as essentially patrolling the outer perimeter of employment law and providing recovery in only the most egregious cases. There is still a need for this last guardian against abusive discharges—one that is not constrained by the specifics of statutory language and one that can express the disapproval of society based on shared values on a case-by-case basis.

I once argued for a more vigorous and expansive application of IIED to discharges, with courts finding the standard of “outrage” satisfied if the discharge was on the periphery of a violation of employment discrimination law, such as terminations involving issues of sex and/or appearance. I now acknowledge that IIED cannot be reconceptualized and repurposed to address abusive terminations. The large body of case law finding that discharges are not outrageous because employers are exercising their lawful right is too powerful to overcome and is supported by the comments to the torts Restatements.

I now think that courts should abandon the tort theories that have been ineffective, amorphous, and vexing. They should declare that recovery will not be permitted under IIED and WDVPP for employment terminations. What is needed and supported by the development and evolution of the law is essentially a fusing of the two torts of WDVPP and IIED into the refashioned tort of abusive discharge. I respectfully take the name for the

321. See supra Part IV.B.
322. Gergen, supra note 21, at 1699 n.17. Professor Givelber views the tort of IIED as providing a vehicle for dealing with the occasional hard case where enforcement of the normal legal rules or principles produces a result that seems terribly wrong. Daniel Givelber, The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct, 82 COLUM. L. REV. 42, 75 (1982).
324. See RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1965); see also RESTATEMENT (THIRD) OF TORTS § 46 cmt. e (2012).
325. Mindful of the admonition of Professor Bernstein about the three paradoxes that stand in opposition to the success of new torts (novelty, torts, and agency), I submit that I am not proposing a new tort, but instead fusing two existing torts and making sense of the case law and doctrine for those torts. See Bernstein, supra note 37, at 1544.
326. As discussed above, “wrongful discharge” would not serve well because the tort would be burdened with the legacy and baggage of the tort of WDVPP. See supra Part V.A.
tort proposed by Professor Blades. I think the tort I propose is close to what he envisioned, although perhaps broader.

Professor Peck has explained the WDVPP decisions in part as the courts providing the job security to which they believe employees are entitled and which society deserves. Because courts are called upon to second guess business judgments of employers, they feel most secure doing this under the guise or camouflage of public policy, and they feel least comfortable doing so when they find discharges for socially reprehensible reasons. The result is the enigmatic tort of WDVPP. Courts should stop this charade. They are not just protecting the public from an employer threatening public policy; they are second guessing employers on termination decisions. Notwithstanding the employment-at-will doctrine, that is a proper role for courts applying tort law. Employment at will is, in most states, common law doctrine. Moreover, it is best described as a rebuttable presumption about the employment contract. Employment at will should not control tort doctrine, and courts are fully competent to interpret and modify common law doctrine. Indeed, it is remarkable that a “mere” rebuttable presumption and default rule of contract law has impacted the development of tort law so substantially. Courts should recognize that this is neither necessary nor appropriate.

Tort law is about imposition and enforcement of duties that reflect societal values. Courts should unabashedly address the question of whether a particular termination is one that should not be tolerated by society. A fusing of the torts of IIED and WDVPP would equip them to do this candidly without the disguise afforded by the public policy rationale of WDVPP. Professor Gergen argued that the outrage standard “allows new moral values to be woven into the fabric of the common law.” However, as discussed above, courts have rendered the “outrage” standard of IIED beyond the reach of almost any employment termination. Nonetheless, the tort of IIED still may have something to offer. A variation on the standard is included in the Restatements’ comments: conduct that is “intolerable in a civilized

---

327. Peck, supra note 11, at 749.
328. See, e.g., Scott A. Moss, Where There’s At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will, 67 U. PITL. REV. 295, 300 (2005) (“[C]ourts do not show the uniform fealty to employment at will that they profess”).
329. Id.
330. The courts would have a harder task in states in which there is some statutory basis for employment at will, such as Louisiana, Georgia, and Arizona.
331. See, e.g., Leonard, supra note 47, at 638–39 (“We expect the state courts to play this role in dealing with private disputes: to identify principles which are congruent with the reasonable expectations of the parties and the society in which they interact, building on existing bodies of precedent and theory.”); Parker, supra note 20, at 401–02 (arguing that judges should begin to ascertain public policy “to further the goals of integrating tort and employment principles”).
332. Gergen, supra note 21, at 1709.
community." That iteration comes closer to the mark of the standard that courts should apply for abusive discharge.

For the tort of abusive discharge, there should be only two elements: proof of a discharge\(^\text{334}\) and evaluation of abusiveness, meaning analysis of whether the discharge should be tolerated by society ("tolerance standard"). It is appropriate that a court should apply a tort standard that is calibrated to societal values.\(^\text{335}\) I do not think that there should be a separate element of justification, as in the elements-based approach to WDVPP, in which an employer can provide an overriding justification to defeat liability.\(^\text{336}\) Instead, an employer’s argument of justification is appropriately considered under the tolerance standard. The answer to the question whether society should tolerate a termination should be resolved, as under many other tort standards, by balancing of the relevant interests—interests of employer, employee, and society. Professor Blades argued that society has an interest in protecting employees from termination regarding matters that are not their employers’ business.\(^\text{337}\) As applied by most courts, the tort of WDVPP, with its rigid insistence on jeopardy to public policy manifested in statutes, has devalued the interest of the employee and taken an unnecessarily cramped view of the relationship between the employee’s interest and the interest of society.\(^\text{338}\)

Under the proposed tolerance standard, in performing the balancing test, courts could and should, in appropriate cases, take into account several different considerations that various courts have considered in their decisions evaluating terminations under WDVPP and IIED. For example, courts could consider whether a public policy is implicated by the termination. Critiques of the case law under WDVPP, discussed above, do not reject or disparage the idea that the courts were concerned with a public policy.\(^\text{339}\) Instead, those critiques posit that insistence on identification of a clear public policy and jeopardy to that policy as the sine qua non of the tort theory fail to explain the decisions. Courts should consider whether a public policy is implicated, but this is only one consideration, and not dispositive, under the overarching

\(^\text{333.}^\text{ RESTATEMENT (SECOND) OF TORTS § 46 cmt. d. (1965).}
\(^\text{334.}^\text{ As explained above, I do not propose extending the tort to adverse employment actions other than terminations. See supra note 36. However, I do propose that constructive discharge satisfies this element. Most states that recognize WDVPP do permit claims for constructive discharge. See RESTATEMENT OF EMPLOYMENT LAW § 5.01 cmt. c (2015).}
\(^\text{335.}^\text{ See, e.g., Leonard, supra note 47, at 648 ("Tort exceptions reflect a concern that unbridled operation of an at will presumption may undermine important public policies . . . or that it may encourage behavior inconsistent with current community standards of civility and respect for human dignity").}
\(^\text{336.}^\text{ See supra note 252.}
\(^\text{337.}^\text{ See Blades, supra note 12, at 1432–34.}
\(^\text{338.}^\text{ Id. at 1410 (advocating for tort recovery "for the sake of providing specific justice for the afflicted individual, deterring a practice which poses an increasingly serious threat to personal freedom generally, or instilling into employers a general consciousness of and respect for the individuality of the employee").}
\(^\text{339.}^\text{ See supra Part V.A.}
standard. Courts also should consider factors such as third-party effects, which, as Professor Schwab points out, is an appropriate consideration for tort law.\footnote{Schwab, supra note 17, at 1972–75.} Whether the reason for the termination would be enforceable if it had been included as a term of an employment contract\footnote{Parker, supra note 20; see also Wieder v. Skala, discussed supra note 278.} also could be considered under the tolerance standard, as suggested directly by Parker and indirectly by Schwab, both because it is relevant to employer and employee interests and it helps in the evaluation of third-party effects.\footnote{I must admit some trepidation with incorporating references to contract law, given the many ways that contract principles have been distorted by employment at will. See supra Part IV.B. Nonetheless, the query seems relevant and it is supported by case law, such as the Wieder case. See Wieder, supra note 278, at 107.} I think courts also should evaluate whether a termination would be highly offensive to a reasonable employer and employee. This standard is similar to that used for the invasion of privacy tort of intrusion on seclusion.\footnote{RESTATEMENT (SECOND) OF TORTS § 652B (1977).} It also is similar to a standard used under employment discrimination law to evaluate whether conduct rises to the level of sexual harassment.\footnote{See, e.g., Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).} The employer and employee perspectives are appropriate considerations because both parties have interests worthy of protection, which should be balanced along with the interest of society. In a case such as \textit{Green v. Bryant},\footnote{887 F. Supp. 798 (E.D. Pa. 1995), discussed supra Part V.} for example, a court would conclude that a termination of a woman because she had been beaten by a spouse or partner should not be tolerated by society by weighing the interests of the employer, employee, and society, rather than requiring that a specific public policy be jeopardized by the termination.

The tort of IIED offers a factor that should be considered under the tolerance standard. One of the markers of outrageous conduct under IIED is abuse by the tortfeasor of a position of authority over the tort victim.\footnote{RESTATEMENT (SECOND) OF TORTS § 46 cmt. e. (1965).} While employers necessarily have a position of authority over employees whom they discharge, whether the exercise of authority is intolerable by societal standards may be considered in light of the characteristics of the employment relationship and the degree of imbalance of power. For example, an employer that terminates a managerial employee who has worked for the employer for decades may leave the employee with few options for a comparable job. For example, a California court considered the number of years of service and level of accomplishment of the employee in \textit{Pugh v. See’s Candies, Inc}.\footnote{171 Cal. Rptr. 917, 927 (Cal. Ct. App. 1981). I am aware that the employee lost the case on remand in \textit{Pugh}. 250 Cal. Rptr. 195 (Cal. Ct. App. 1988).} The employee’s service was considered in \textit{Pugh} under an implied contract theory. However, even California has backed away from the importance of
the employee’s service as a factor in the contract analysis.348 Because the relational contract theory349 has not flourished in employment law, I propose that courts consider the characteristics of the relationship, such as longevity and quality of service under tort law in determining whether a termination should be tolerated by society. I think this factor is consistent with the imbalance-of-power factor under IIED and Professor Green’s relational tort theory.350

In the courts, a weakness of IIED has been that courts often grant summary judgments, preventing the question of whether conduct meets the standard of outrage from reaching the jury.351 It also seems that a disproportionate percentage of WDVPP claims are dismissed on summary judgment, perhaps because courts consider it their province to determine whether a public policy is implicated. Under the proposed tort of abusive discharge, the tolerance standard calls for application of a standard of what conduct is tolerated by society, and it is appropriate that it be resolved by the fact finder, except in cases in which reasonable people could not disagree.

One situation in which public policy is implicated is when a termination is on the periphery of being actionable under other employment laws. For example, the Iowa Supreme Court did not permit a dental hygienist to recover for sex discrimination when her employer fired her so that he would not try to have an affair with her (and because his wife gave him an ultimatum) in Nelson v. James H. Knight DDS, P.C.352 Although the Iowa court may have been correct to deny recovery for sex discrimination, the case teetered on the brink of being actionable as sex discrimination. The tort of abusive discharge could provide recovery for cases in which a statute is arguably violated, but the statute and case law thereunder do not have to be stretched to permit recovery. Under the tort analysis of abusive discharge that I propose, I think that a court should find that the termination in the Nelson case is one that should not be tolerated by society. A public policy is implicated even if the sex discrimination is not established based on the doctrine developed in case law under the statute. It seems likely that the termination would be highly offensive to a reasonable employer and employee. Moreover, the potential for third-party effects should be clear in a case bordering on sex discrimination and sexual harassment. The recognition of hostile environment claims and sexual harassment claims by persons who were not targets of the alleged harasser’s conduct353 indicate the law’s concern with third-party effects. In the balancing of interests that occurs under the

---

349. See supra notes 192–193 and accompanying text.
350. See supra note 28.
351. See, e.g., Gergen, supra note 21, at 1694–95.
352. 834 N.W.2d 64 (Iowa 2013).
tolerance standard, the employee’s and society’s interests should outweigh
the employer’s justification.

It is worth noting that, because employers increasingly have resorted to
requiring employees to sign mandatory arbitration agreements, with
the imprimatur of the Supreme Court on the enforceability of such agreements, many claims asserting this tort likely would be decided by arbitrators. There
is great concern among employee rights advocates about employees being
forced to arbitrate their employment claims. Research indicates that
employees do not fare as well in arbitration as employers do. This is not a
concern unique to this tort, as mandatory arbitration agreements typically
cover all claims arising out of employment disputes, including statutory
claims. However, the common law claim lacks the additional check on
employers that comes with a federal agency that can assert the statutory
claims in court that the employees themselves are precluded from asserting, as the EEOC can do with federal employment discrimination claims. With
fewer employment claims being litigated in the courts because of mandatory
arbitration, courts would have fewer opportunities to recognize abusive
discharge and to develop the doctrine than courts had in the 1970s and 1980s
when WDVPP was being adopted and developed. There are legislative
proposals at federal and state levels, such as the Arbitration Fairness Act,
introduced in Congress multiple times, including 2017 and 2018, which
would render predispute mandatory agreements unenforceable. The tort that
I propose has a better chance of initial adoption and subsequent development
if employees are able to assert their claims in courts.

354. See, e.g., Colvin, supra note 133, at 23 (noting that employees in over 50% of American
workplaces are subject to mandatory arbitration); St. Antoine, ADR, supra note 156, at 414.


356. See generally St. Antoine, ADR, supra note 156, at 415–17; see, e.g., Equal Emp. Opportunity
Comm’n Notice No., 915.002, Policy Statement on Mandatory Binding Arbitration of Employment
Discrimination Disputes as a Condition of Employment, Section V.B. (July 10, 1997), https://www.eeoc.gov/policy/docs/mandarb.html [https://perma.cc/9CHD-NB4A]. The EEOC, in a
divided vote, rescinded this position in December 2019. Erin Mulvaney, EEOC Rescinds Policy Against

357. See, e.g., Colvin, supra note 133, at 22 (citing Alexander J.S. Colvin, Empirical Research on
Employment Arbitration: Clarity Amidst the Sound and Fury?, 11 EMP. RTS. & EMP. POL’Y J. 405, 410
(2008)).

358. See, e.g., EEOC v. Waffle House, Inc., 534 U.S. 279, 297–98 (2002); EEOC v. Circuit City,
285 F.3d 404, 407 (6th Cir. 2002).

359. Professor Colvin notes that employer use of mandatory arbitration agreements did not begin to
expand until the 1990s and 2000s after the Supreme Court’s decision in Gilmer v. Interstate/Johnson Lane


B. Objections to the Refashioned Tort

As with all proposals, there are many possible objections. I will address what seem to me the most significant ones.

First, proponents of a strong employment at will doctrine will argue that the standard under the proposed tort of abusive discharge is nebulous and will substantially erode employment at will. On the other side, I think proponents of statutory abrogation of employment at will are likely to argue that the refashioned tort is an incremental change that would not result in a significant increase in employee recoveries.

Addressing the anticipated objection of at-will advocates, first, the tolerance standard that I propose is less amorphous than the standards and analyses applied under IIED and WDVPP. It is a classic tort standard, which applies a societal value and arrives at an answer by balancing the interests at stake. It is more concrete than the outrage standard of IIED, it applies specifically to terminations (unlike IIED), and it strips away the camouflage used by courts in WDVPP by articulating the considerations under the standard. I admit that the tolerance standard is not objective and concrete, and it is subject to varying interpretations and applications by judges and juries. However, I think that I have fashioned a standard, from existing tort and contract doctrine, that is better calibrated to the issue of employment termination and is not dependent on what are often fictional connections to public policy. Essentially, the standard declares that there are terminations that are too bad for society to tolerate without the law providing a remedy. This is an important declaration of protection for one of the most important relationships that exits in American society, and I think it is consistent with societal values. The merging of injury to relationships and a standard that reflects societal values is an appropriate tort standard. If the uncertainty of how the standard will be applied by any particular judge or jury in a case gives employers pause in carrying out a termination, that is not a bad thing. Given the significance of employment termination, employers should consider the decision very carefully. If a termination is reasonably defensible, this tort standard should not deter employer decisions. The extent to which the refashioned tort would erode employment at will depends on the strength of a state’s adherence to employment at will.

Turning to likely objections by advocates of more drastic reform, I already have discussed the history and limitations of statutes that abrogate employment at will. Moreover, my proposal for common law tort development does not preclude efforts to enact statutes. I admit that adoption of the proposed tort would be incremental progress, but it is progress that is worthwhile. The tort of abusive discharge would give courts an effective tool

362. See supra Part III.B.
with which to provide redress in the most egregious cases. In addition to imposing a more substantial limitation on employment at will, I am proposing a tort that I think aligns better with societal values and with the decisions courts are reaching, or should be reaching, under ill-fitting tort theories. It is important that the rationale articulated for recognition of tort theories of liability and the case law actually decided be consistent. This has not been the case for the tort of WDVPP. The tort of abusive discharge, as I have described it, would call for courts to articulate the reasons that actually are driving their decisions. Furthermore, if tort theories are worth maintaining, then plaintiffs should have some prospect of recovery under them. Terminated employees have almost never recovered for IIED. They have recovered for WDVPP rarely and spasmodically, with many of the decisions defying credible explanation under existing doctrine. This fused tort theory seeks to address those infirmities in the law by peeling away the disguise of public policy. Consideration of the factors described above makes clear that courts actually are evaluating the termination decisions of employers. Although this may be characterized as second guessing employer’s business judgment, the analysis that I have proposed makes clear that the decision is being evaluated by taking into account the interests of all stakeholders that are implicated in terminations—employers, employees, and society (the public).

Finally, some will ask why I think courts, which have not been creative and proactive in employment law since about 1990, would recognize this reconceptualized tort. I have several responses. First, I propose what I think the law should be, recognizing that I cannot make it so. Second, it seems more likely to me that some state courts will consider and adopt the proposed tort than it is that state legislatures will pass legislation abrogating employment at will. Third, as a general matter, I think that some courts do endeavor to understand and improve the law with which they work. Specifically, courts in some states have demonstrated a willingness to adopt a more coherent and workable version of the WDVPP tort. Several jurisdictions moved from the more common “pigeonhole” approach to the elements-based approach. Finally, there were circumstances and forces that converged in a two-decade or so period that caused courts to become active and creative with the common law of employment. Perhaps that will happen again on a smaller scale.

VII. CONCLUSION

The common law has an important role to play in employment law. Professor Lawrence Blades saw the need for a tort of abusive discharge in

363. See, e.g., Gergen, supra note 21, at 1695.
364. See supra Part V.A.
the 1960s. During the 1970s and 1980s, courts engaged in a period of vigorous development of the common law contract and tort theories used to address termination from employment. That period ended around 1990, and the courts since have retreated from many of the innovations in the common law, thus restoring much of the strength of the employment at will doctrine. From that period, however, emerged the most widely recognized common law exception to employment at will: the tort of WDVPP. The tort, however, is fraught with problems that render it nebulous and generally ineffective, and the incoherent doctrine leads to decisions that are difficult to explain. The prolific use of statutes to regulate employment has caused courts to relax in the development and evolution of common law theories. Statutes, however, have significant limitations. Moreover, common law developments also play a role in prompting legislative action and providing the background and education for enacting legislation. The time has come for courts once again to become active, but this time in a more targeted way. Using existing tort doctrine under IIED and WDVPP, the courts should recognize a refashioned tort of abusive discharge under which the dispositive issue is whether society should tolerate a discharge. Recognition of such a tort, with the benefit of over half a century of development since Professor Blades’s proposal, would help achieve his vision of an effective tort check on employment at will and give the common law a larger role in protecting society’s interest in a vital attribute of citizenship.