September 1987

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https://doi.org/10.15779/Z38HP7P

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COMMENT

Common Law Remedies for Wrongfully Discharged Employees

David L. Kornblau†

Contrary to the traditional notion that employment could be terminated "at will," courts are increasingly offering employees protection against unfair discharge. This Comment critically examines the common law remedies available to wrongfully discharged employees under tort and contract theories, and upon application of the covenant of good faith and fair dealing. The author contrasts the purposes and effects of each doctrine and proposes new doctrines for courts' consideration in fashioning appropriate remedies.

INTRODUCTION

No longer does the private employer have the right to dismiss employees at will1 with unfettered discretion.2 Inspired by scholarly writing first appearing twenty years ago,3 practically every state has developed some form of common law protection for wrongfully discharged employees. At first, courts reacted to isolated and egregious employer abuses4

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1. At common law, employment was deemed at will when the contract of employment did not fix a definite term of employment. Moreover, courts presumed that employment for life or permanent employment was also at will. Numerous commentators have discussed the curious appearance of the employment-at-will rule in America and its subsequent history. See, e.g., Feinman, The Development of the Employment at Will Rule, 20 AM. J. LEGAL HIST. 118 (1976); Note, Implied Contract Rights to Job Security, 26 STAN. L. REV. 335 (1974).

2. By some inexorable law, any article concerning employment at will must include a cite to Payne v. Western & A.R.R., 81 Tenn. 507 (1884), overruled on other grounds, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915), in which the court said that unless an employee has bargained for an express contractual limitation, his employer can terminate the employment "for good cause, for no cause or even for cause morally wrong." Payne, 81 Tenn. at 519-20.


4. See, e.g., Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (allowing action by an employee who was allegedly dismissed for refusing to give false testi-
by fashioning what they thought were very narrow, fact-specific exceptions to the prevailing employment-at-will rule. But the theory animating those exceptions proved difficult to contain. Wrongful discharge doctrines grew to protect workers whose dismissals, though perhaps unfair, were far less disturbing than those prompting the earliest cases. Indeed, in most states, the laws of wrongful discharge are no longer "exceptions" at all. The at-will regime has fallen, usurped by an unruly group of doctrines struggling to give employees some degree of protection from arbitrary and unfair dismissals.

In general, wrongful discharge doctrines divide into two broad categories: contract and tort. Under the contract theories, courts find legal protection for employees by enforcing the private terms of their employment contract. Because few employment contracts contain express provisions for job security, courts have looked to employee handbooks, want ads, and oral assurances by recruitment officers to imply provisions for job security into the employment contract. Some courts have gone further and implied by law an obligation of good faith and fair dealing into every employment contract, which they construe to require some level of job security.

The tort theories of wrongful discharge are not concerned with the private agreement between the parties to the employment contract. Rather, they seek to vindicate some public policy independent of the terms of any particular employment contract. The most common of these tort theories is the public policy exception, under which the employee typically must prove that his discharge contravened some statutorily based public policy. Some of the earliest public policy cases involved employees terminated for filing nonfrivolous workers' compensation claims or for serving on a jury against the employer's wishes. Other courts have held that employers are liable for discharging employees for whistleblowing, refusing to commit a crime, or for refusing to submit testimony at a legislative hearing); Monge v. Beebe Rubber, 114 N.H. 130, 316 A.2d 549 (1974) (allowing action by an employee who was allegedly fired for resisting sexual advances of her foreman).

5. See, e.g., Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983) (affirming a jury award against an employer despite substantial evidence of employee incompetence, because the employer did not follow the specific discharge procedures set out in the employee handbook).

6. If contracts did contain express provisions, courts would enforce them even under the old employment-at-will rule.

7. See infra Part IV.


Courts have sometimes interpreted the public policy exception quite expansively. For example, in Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983), the Third Circuit interpreted Pennsylvania law to forbid an employer from discharging an employee because he refused to participate in the employer's lobbying efforts. The court found the requisite embodiments of public policy in the first amendments of the state and federal constitutions, even though those amendments apply only to state action.

to a polygraph test.\textsuperscript{12}

The decision to frame a wrongful discharge lawsuit in tort or contract can have important ramifications for the remedies awarded.\textsuperscript{13} Equitable remedies, such as reinstatement, are not likely to be practicable after an emotional lawsuit between the discharged worker and the boss;\textsuperscript{14} therefore, the most meaningful remedy to wrongfully discharged employees is a damage award. Contract damages, usually limited to the recovery of lost wages, are more restrictive than damages in tort, which frequently include punitive damages and compensation for nonpecuniary harms as well. Moreover, tort measures of damages generally tolerate more uncertainty in the quantity of losses once the fact of injury is established.\textsuperscript{15} As a result, a tort suit for wrongful discharge is often worth several hundred thousand dollars more to a successful plaintiff than an otherwise identical contract suit.\textsuperscript{16} The remedies available in wrongful discharge cases can be expected to have a significant impact on the employment relationship in general. Yet, most commentators in the area focus on liability issues alone, with perhaps a penultimate paragraph mentioning damages.\textsuperscript{17}

This Comment examines the common law remedies available to

\textsuperscript{12} Parks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979).
\textsuperscript{13} Besides remedies, the choice between tort and contract may have two other ramifications. First, different statutes of limitation may apply to tort and contract actions. See, e.g., Henon v. Lever Bros., 114 Ill. App. 3d 608, 449 N.E.2d 196 (1983); Stanley v. Sewell Coal Co., 169 W. Va. 72, 285 S.E.2d 679 (1981). Second, and more importantly, the employee's ability to waive a contractual right may be less restricted than his ability to waive his right to recover in tort.
\textsuperscript{14} Despite this potential problem, arbitrators enforcing collective bargaining agreements usually award reinstatement and backpay to unionized employees who are dismissed without just cause. The problems with reinstatement are exacerbated in wrongful discharge cases because no union officials are available to monitor the employer's treatment of the reinstated employee. See, e.g., Catler, The Case Against Proposals to Eliminate the Employment At Will Rule, 5 INDUS. REL. L.J. 471, 505 (1983) (concluding that "[t]he evidence currently available indicates that reinstatement would probably be an unsuccessful remedy in a statutory scheme designed to protect employees against unjust discharge"); cf. Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1319-20 (9th Cir.) (affirming damage award instead of reinstatement in ADEA case because of "discord and antagonism between the parties") (citing Combes v. Griffin Television, Inc., 421 F. Supp. 841, 846-47 (W.D. Okla. 1976)); cert. denied, 459 U.S. 859 (1982); Francouer v. Corroon & Black Co., 552 F. Supp. 403, 413 (S.D.N.Y. 1982) (awarding front pay award in title VII case because reinstatement was not "feasible"). But see Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983) (suggesting that reinstatement and backpay should be available under the public policy exception).
\textsuperscript{15} Indeed, reinstatement may be impracticable even in the union setting. See Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 HARV. L. REV. 1769, 1791-93 (1983) ("The reinstatement remedy, however, has proved to be far less effective in practice than in theory.").
\textsuperscript{17} Cf. Committee on Labor and Employment Law, At-Will Employment and the Problem of
wrongfully discharged employees. Part I presents empirical data from a few wrongful discharge cases. These data help describe the typical wrongful discharge plaintiff. With this picture in mind, we will be better able to evaluate the real world significance of the damage amounts actually awarded in such cases.

Part II discusses the principal tort theory of wrongful discharge: the public policy exception. The analysis examines the underlying rationales and purposes of the public policy exception, and argue that the current remedial regime of jury-determined compensatory and punitive damages does not adequately serve its substantive purposes. This Comment proposes and defends a somewhat different scheme of damages.

Part III discusses the express and implied-in-fact contract theories of wrongful discharge and evaluates the remedies currently used by courts under these theories. The Comment presents the conclusion that these wrongful discharge doctrines fall neatly into the traditional contract law model of private agreement, and that traditional contract remedies therefore serve them well.

Part IV examines the covenant of good faith and fair dealing that some courts have implied by law into employment contracts. It argues that courts have not clearly articulated the basis for implying this nonwaivable covenant into employment contracts, and thus have reached confusing results with respect to the proper remedy for breach of the implied-in-law covenant. Part IV also suggests two possible rationales for the nonwaivable covenant of good faith and fair dealing, and draws out the implications of each rationale for the proper remedy.

I

SOME EMPIRICAL DATA

The dimensions of the wrongful discharge problem in the United States are potentially quite large. Approximately sixty million American employees are not unionized, and therefore do not have the “just cause” protection against dismissals generally contained in collective bargaining agreements. Of these sixty million at-will employees, some two million are discharged each year. Professor Jack Stieber estimates that about 150,000, or 7.5%, of the two million discharged at-will employees would have won reinstatement under a collective bargaining agreement requiring that terminations be for just cause. Some commentators have
taken this disparity in job security for unionized and nonunionized workers, coupled with the general decline in union membership since the mid-1950's, as the basis for a general call for added job security protections.

Other commentators, as well as many judges, however, take a different view. They see these 150,000 fired workers as 150,000 potential plaintiffs, clogging the already overburdened courts with factually complex tales of employer abuse that are difficult for judges and juries to disentangle. Under current doctrine, however, only a small fraction of these discharged at-will employees are likely to become plaintiffs. Under contract theories, which yield damages based on lost wages alone, workers without substantial salaries will not have a large enough claim to attract lawyers on a contingent fee basis. Tort theories, on the other hand, allow the possibility of punitive damages and damages for nonpecuniary harms. But the most common tort cause of action, the public policy exception, may also be unavailable to lower-level employees, who often lack access to information that would allow them to "blow the whistle" on their bosses.

The typical wrongful discharge plaintiff comes from the ranks of "dismissed executives and managerial employees" rather than from the group of "hourly workers or lower level salaried employees who make up the overwhelming majority of discharged employees." In analyzing current wrongful discharge remedies, we should keep in mind that they will generally apply to employees earning $25,000 to $50,000 a year, if not more.

These typical salaries help give some concrete meaning to the jury awards that successful plaintiffs have won in wrongful discharge suits. The most comprehensive systematic study of jury verdicts surveyed Cali-
ifornia wrongful discharge cases reported from October 1979 to January 1984. Of the fifty-one reported cases in that period, plaintiffs won seventy-three percent. The mean award for lost wages was about $178,000. Nearly fifty percent of the victorious plaintiffs won punitive damages in addition to lost wages. The mean punitive damage award was over $533,000. Approximately ten percent of the winning plaintiffs won damages for emotional distress, with the mean at $92,500.

According to these data, an employer found liable for wrongfully discharging an employee in California faces a jury verdict of roughly $450,000 or more for a tort claim, and about $178,000 for a contract claim. These figures prompt two observations. First, successful wrongful discharge suits are worth a lot of money. To a “typical” wrongfully dismissed employee making around $50,000 a year, the expected jury award represents more than three years of salary for lost wages alone. And punitive damages, often in the hundreds of thousands of dollars, supplement these unearned wages about fifty percent of the time. The second observation is the enormous difference that the doctrinal classification of the lawsuit makes. According to the California data, the average tort claim is worth nearly $300,000 more than the average contract claim.

These observations—the size of the jury awards and the disparity between tort and contract damage awards—raise important questions concerning the fundamental purposes of wrongful discharge doctrine, and suggest the need for a reexamination of the remedies best suited to achieve them.


28. See Tanenbaum, supra note 27, at 185-92. The median award was $100,000. The table uses the term “general damages,” but since it also contains amounts for “emotional distress” and “punitive damages,” it is assumed that “general damages” means lost wages and does not include damages for nonpecuniary harms.

29. The median punitive damage award was $120,000. See id.

30. See id. A study of 1986 California cases found similar results. The survey found that plaintiffs won 78% of the cases. The average verdict was $424,527, and the average punitive damage award was $494,006. See Rice, Trial Awards Keep Growing in Wrongful Firing Cases, The Recorder, Feb. 23, 1987, at 1, col. 2.

31. This is assuming that the contract cases will be limited to lost wages, while the tort actions could also include damages for emotional distress and punitive damages.
II
WRONGFUL DISCHARGE AND TORT:
THE PUBLIC POLICY EXCEPTION

A. The Goals of the Public Policy Exception

Created in 1959, the public policy exception gives a tort cause of action to employees whose dismissals contravene a clear mandate of public policy. The discharged employee usually must locate this public policy in a legislatively enacted source, but courts have occasionally found actionable discharges that contravene norms found in judicial opinions, codes of professional ethics, or even accepted standards of morality. The public policy exception is controversial because these enactments, while proscribing certain kinds of conduct, do not expressly give discharged employees a private right of action. Nonetheless, the right of action implied from these sources can serve as a useful and justifiable private mechanism for promoting certain public policies.

The discharges that give rise to a cause of action under the public policy exception are commonly divided into three categories. First, a plaintiff can allege that he was terminated because he refused to commit an unlawful act. For example, in Tameny v. Atlantic Richfield Co., the California Supreme Court held that an employee, allegedly fired for refusing to participate in an illegal price-fixing conspiracy, had a cause of action. The second category covers discharges based on the performance of an important public duty, such as serving on a jury or blowing the whistle on illegal conduct involving the workplace. Finally, the public
Wrongful Discharge Remedies

Policy exception allows employees to sue if they are fired for exercising an important statutory right or privilege. The most common of these cases involves an employee dismissed for filing a workers' compensation claim.\textsuperscript{38}

The public policy exception is not designed to provide all employees with job security, but rather to vindicate various public policies often substantially unrelated to the workplace.\textsuperscript{39} Thus it gives no solace to employees whose dismissals are unfair but invoke no particular public policy concern. For example, an employer who dismisses a worker for being unproductive is not subject to liability under the public policy exception, even if it turns out that the employer was plainly wrong in its judgment of the worker's productivity. But the public policy exception does subject an employer to liability if it discharges an employee, no matter how unproductive the employee might have otherwise been, because the employee served a term of jury duty.\textsuperscript{40}

The public policy exception has nothing to do with job security at all; rather, it is designed to protect the jury system, to ensure that workers are compensated for on-the-job injuries, or to protect the public from employers who break the law. The job security dimension only comes into play because the ability to fire an employee, like the ability to coerce someone by means of physical violence, is one of the most prevalent and effective forms of power private citizens can exercise over one another. Just as unchecked physical violence could destroy the very foundations of society, the unregulated ability to fire could wreak serious harm upon our public institutions. Unlike physical violence, however, an employer's power to discharge employees is indispensable to our capitalist economy.

The public policy exception represents a judicial decision to supplement whatever public means of enforcement the legislature has provided to protect its public policies with a system of private enforcement. The

\textsuperscript{38} See, e.g., Kelsay v. Motorola Co., 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

\textsuperscript{39} Because the purpose of the public policy exception really has nothing to do with ensuring job security for all workers, even Professor Epstein—probably the staunchest proponent of the employment-at-will rule—approves of it. See Epstein, In Defense of the Contract at Will, 51 U. Chi. L. Rev. 947, 952-53 (1984).

\textsuperscript{40} Despite the possible laziness of the employee, the discharge in this example is intended to be solely because of the jury service. If the employer fires someone both for serving on a jury and for being lazy, then a “mixed motive” problem arises. See, e.g., Smith v. Atlas Off-Shore Boat Serv., 653 F.2d 1057, 1063-64 (5th Cir. 1981) (requiring unlawful objective to be “a substantial motivating factor for the discharge”); W. Holloway & M. Leech, supra note 15, at 303-04 (advocating “but for” standard in mixed motive termination cases). The mixed motive issue, however, is more a problem of proof and factfinding than one of substantive policy.
private enforcement scheme chosen, however, differs from those traditionally fashioned by the judiciary. These more traditional schemes include implying private rights of action from statutes creating common law-like duties, such as federal pollution standards, or recognizing common law tort suits for compensation based on violations of criminal statutes. Unlike these traditional suits, however, the plaintiff in a public policy exception case is not really suing the defendant because the defendant injured him, but because the defendant's conduct has injured public policy.

Courts would do well to keep in mind this contrast to other private rights of action when they are asked to expand the public policy exception to include a public policy not previously covered. Instead of asking merely whether the public policy is important and the "violation" serious, courts should consider whether a scheme of private enforcement by discharged employees is necessary or appropriate to supplement whatever system the legislature has established to protect the public policy.

For example, the situation in *Petermann v. International Brotherhood of Teamsters*, in which an employee was dismissed allegedly for his refusal to commit perjury at a legislative hearing, is one of the most appropriate for a private action under the public policy exception. Perjury is a serious crime that imposes costs on society including erroneous adjudications and legislative decisions arising from perjured testimony, as well as the decrease in public confidence in the judicial system that a widespread belief in the existence of unprosecuted perjury would engender. Moreover, criminal prosecutions of perjurors are notoriously rare because perjury is difficult to detect and prove, and because prosecutions are expensive. Finally, employees dismissed for refusing to commit perjury are good candidates to serve as private "prosecutors," as they will have good access to information concerning both the perjury they refused

41. Commentators have discussed this general problem extensively. For example, Professors Stewart and Sunstein have argued that in theory courts should imply private rights of action from regulatory statutes when two conditions are met:

   First, the regulatory agency must have devoted inadequate resources to enforcement or must lack the sanctions needed to obtain an economically appropriate level of compliance from regulated firms. Second, private enforcement must promote a higher level of compliance without costing more than its incremental benefits.

Stewart & Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1195, 1296 (1982). Because courts cannot evaluate these conditions directly in any given case, they should apply six rules of thumb: (1) "whether the statutory norm promotes efficiency"; (2) "whether additional compliance with the relevant norm is presumptively efficient"; (3) "whether the benefits of additional compliance outweigh enforcement costs"; (4) "whether private enforcement would generate serious problems of overinclusiveness"; (5) "whether there is a need for consistency and coordination in norm enforcement"; and (6) "the relative costs of private and public enforcement." *Id.* at 1296-98. Unfortunately, a detailed application of these rules to the public policy exception must await another commentator.

to commit and perhaps other employer misconduct. In short, private enforcement through the public policy exception could ameliorate some of the serious deficiencies of public perjury prosecutions.

Once a court has decided to recognize a private cause of action by a worker dismissed in contravention of a given public policy, it must determine the amount of damages to award. The damage award should promote two goals. First, it should be high enough to deter employers from wrongfully discharging employees. Second, the damage award should give employees the proper incentive to sue when they have been wrongfully discharged.

With respect to the goal of deterring employers, the damage award must be high enough to offset the employer’s gains from wrongfully discharging the employee. If every employer knew that a discharge contravening public policy would subject it to liability to the extent of its gain from the discharge, then the law would likely deter discharges that contravene public policy. According to this reasoning, damages set at any amount above the employer’s potential gain from a wrongful discharge would deter it. Yet the law should not overdeter employers. At the time an employer decides to dismiss an employee, it does not know with complete certainty whether that discharge will subject it to liability. The law in the jurisdiction may be unclear, or the adjudicating court might reach an erroneous result even under perfectly clear law. The greater the potential damages the employer faces, the greater the risk that the law will deter it from discharging employees even for legitimate reasons. Such overdeterrence could impose very large social costs, if it

43. This assertion assumes that employers are risk neutral. Such an assumption, however, is probably incorrect as studies indicate that twentieth century businesses are quite risk averse. See, e.g., Breit & Elzinga, Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis, 86 Harv. L. Rev. 693 (1973). Thus a damage award set at less than the employer’s net gain may deter a wrongful discharge. This observation strengthens the conclusion later in this Comment that punitive damages are awarded in too many wrongful discharge cases.

44. An assumption here is that every wrongful discharge would trigger a successful wrongful discharge suit, and that the legal system could accurately evaluate the employer’s gain from the wrongful discharge in every case. Furthermore, the effect of the defendant’s attorneys’ fees, which would reduce the amount of damages necessary to deter a wrongful discharge, is ignored. These simplifications are not unreasonable. First, as developed in Part I, potential public policy exception plaintiffs are largely at the managerial level. They are likely to be aware of their legal rights and have access to lawyers. Second, there is no reason to believe that, on average, the legal system could not estimate the employer’s gain accurately. Finally, the effect of the defendant’s attorneys’ fees argues for lower damage awards, which is generally consistent with the conclusion that punitive damages are awarded too frequently. Moreover, the question of attorneys’ fees in wrongful discharge cases is really no different from the widely analyzed problem of fee shifting in general.

45. The size of the damage award also will affect the conduct of discharged employees. The greater the potential award, the greater the incentive a discharged worker has to bring a lawsuit when he is uncertain about the result. When this uncertainty arises from the possibility of erroneous adjudication, it yields noxious “strike suits” by validly dismissed employees seeking a quick settlement. When it arises because the law is unclear, it yields “test cases,” in which courts can expand the doctrine when they deem expansion appropriate.
led employers to retain unsuitable or unneeded workers to a significant degree. The challenge in developing a measure of damages in public policy exception cases is to find a formula that will deter wrongful discharges without significantly intruding on the employer's ability to dismiss unsatisfactory workers.

With respect to the goal of providing the correct incentives to employees, the damage award should at least compensate the employee fully for the losses she sustains because of the discharge. Under these conditions, the employee will never be forced to choose between fulfilling her public duty or exercising a legal right—by serving on a jury, blowing the whistle, or filing a workers' compensation claim, for example—and getting fired. Under a scheme of full compensatory damages, an employer will not be able to intimidate all of its employees by committing a few egregious wrongful discharges, for employees will know that they can perform their duties and exercise their rights with financial impunity.

B. The Inadequacy of the Prevailing Remedial Scheme

Under current law, successful plaintiffs in public policy exception cases automatically receive an award of compensatory damages. Furthermore, the jury has discretion to award punitive damages if the discharge was "willful, malicious, wanton, fraudulent, or oppressive." The only legal limitation on the amount of the punitive damage award is that it may not be "excessive." Although the compensatory damage award does provide employees with the proper incentives to promote public policy goals, current damage awards in public policy exception cases do not provide the proper level of deterrence for employers.

46. This risk of overdeterrence may be less serious in some other areas of the law. For example, if the law of battery overdeterred potential batterers, the social costs involved would not likely be that great. On the other hand, the great social importance of free speech suggests that the law should be extremely careful about overdetering potential speakers. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (limiting availability of punitive damages in libel suits). Perhaps the closest analogy to the public policy exception in this regard is antitrust law, which allows a private party injured by anticompetitive conduct to recover treble damages. See 15 U.S.C. § 4 (1982). Overdeterrence in antitrust law could chill aggressive entrepreneurial activity at great expense to the national economy. See generally Breit & Elzinga, Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages, 17 J.L. & ECON. 329 (1974).

47. Mallor, Punitive Damages for Wrongful Discharge of At Will Employees, 26 WM. & MARY L. REV. 449, 481 (1985); see Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 186, 384 N.E.2d 353, 359 (1978) (holding that punitive damages are available if the discharge was "committed with fraud, actual malice, deliberate violence or oppression or when the defendant act[ed] willfully or with gross negligence as to indicate wanton disregard of the rights of others"); Harless v. First Nat'l Bank, 289 S.E.2d 703, 703 (W. Va. 1982) ("Harless II") (noting that punitive damages may be appropriate "where the employer's conduct is wanton, willful or malicious"). See generally J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 5.31 (1984) (reviewing law of punitive damages in common law actions for wrongful discharge).

In order to see why current damage law provides insufficient deterrence, we first must ask what level of deterrence is necessary to deter wrongful discharges. An employer's net gains from a wrongful discharge depend on his motivation. For example, in the Petermann case the Teamsters union fired Petermann allegedly because he refused to commit perjury at a legislative inquiry into union corruption. The Teamsters had obviously hoped to coerce Petermann into lying, which would have helped the union and its leaders avoid criminal charges and additional legislative and judicial inquiries into union activities. But once Petermann had told the truth, dismissing him served at least two other functions. First, the union "got even" with Petermann for his "disloyalty." Second, it sent a clear message to other employees who would be called to testify: perjury or discharge. The value of these two effects to the upper-level Teamsters officials is difficult to quantify, but they obviously had a great deal at stake, including possible prison terms, fines, and tremendous legal expenses. In extreme cases like Petermann, a damage award of several hundred thousand dollars may well be necessary to provide proper deterrence. The current remedial scheme, in which punitive damages alone frequently run this high, seems reasonably well adapted for such cases.

But employers' net gains are not always this large in public policy cases. For example, in Nees v. Hocks, the employee was fired for serving on a jury. By terminating employees who serve on juries, employers may hope to coerce their other employees into violating their legal duty to serve. Even if this coercive program were wholly successful, however, the employer's only gain would be a slight increase in the amount of working time he would get from his employees. Furthermore, employers need not pay employees for their jury time, so that the real gain to the employer whose employees never serve on juries is only the savings incurred in not having to hire and train replacements or pay overtime for this short period of time. However the details of this calculation are worked out, it is fairly clear that the amount of damages necessary to deter the employers in jury service cases is far less than the amount re-

49. See supra Part I.
50. 272 Or. 210, 536 P.2d 512 (1975).
51. In Reuther v. Fowler & Williams, Inc., 255 Pa. Super. 28, 386 A.2d 119 (1978), the employer directed the employee to evade jury duty by fabricating a reason why she should be disqualified. Despite the easy analogy to perjury cases like Petermann, Reuther should be analyzed in the same manner as Nees, because the reason for the discharge was to get employees to evade jury duty, not to coerce employees into helping their employer evade criminal charges.
52. Since citizens are generally called for jury duty every two or three years, many of those called are never empanelled, and most jury trials last less than a week, it is estimated here that an employer with many employees would lose less than a day per year of work per worker because of jury service.
quired in cases like Petermann, where the employer has much more at stake.

Falling somewhere in between Nees and Petermann are cases like Tameny v. Atlantic Richfield Co.\textsuperscript{53} and Kelsay v. Motorola Co.\textsuperscript{54} In Tameny, the employee refused to participate in his employer's illegal price fixing conspiracy. Atlantic Richfield's potential gain from price fixing—monopoly profits—was probably very large. And firing Tameny, a retail sales representative pressured to "threaten [and] cajole" service stations in his territory to fix prices,\textsuperscript{55} surely increased the chances that other sales reps would apply the pressure in their territories necessary for Atlantic Richfield to reap those monopoly profits. But these potentially large gains must be balanced against the potentially devastating cost of a wrongful discharge lawsuit. Mr. Tameny is a virtual "smoking gun" to public antitrust authorities who could initiate criminal and civil actions against Atlantic Richfield. A wave of private treble damage suits by injured competitors could then follow. Because of these great risks, the publicity alone of a lawsuit for even minor damages might well deter future Atlantic Richfields from similar discharges.

The plaintiff in Kelsay was fired allegedly for filing a nonfrivolous workers' compensation claim. Because a workers' compensation claim is still valid after the employee is discharged, the only effect of such a discharge is to deter other employees from filing their claims in the future.\textsuperscript{56} Since all but the most seriously injured employees would probably waive their claims to avoid termination, the employer—especially a large, industrial one whose workers get injured relatively frequently—could stand to gain a great deal from a policy of routinely discharging employees who file claims.\textsuperscript{57} Thus the appropriate damage award in a worker's compensation dismissal case would seem to be higher than that necessary in the jury service or Tameny-type cases. Because the employer who evades worker's compensation payments is not subject to criminal prosecutions, however, the damage award necessary to deter it is probably not quite as large as that appropriate in a case like Petermann.

Regardless of the relative deterrence necessary in cases like

\begin{footnotes}
\footnote{53. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).}
\footnote{54. 74 Ill. 2d 172, 384 N.E.2d 353 (1978).}
\footnote{55. Tameny, 27 Cal. 3d at 171, 610 P.2d at 1332, 164 Cal. Rptr. at 841.}
\footnote{56. The employer might fire a workers' compensation claimant because the claim was frivolous and designed only to harass the employer. Such a case is clearly different from the usual Kelsay situation. The discharge might also be motivated by the claimant's history of accidents caused by his own clumsiness. This case presents a "mixed motive" problem, which really presents an issue of factfinding, not of substantive law. \textit{See supra} note 40.}
\end{footnotes}
Petermann, Nees, Tameny, and Kelsay, the thrust of this analysis is that the appropriate level of deterrence depends on the particular public policies involved in each public policy exception case. In setting this level of damages, the law should ask how much the discharge was worth to the employer. Yet, compensatory and punitive damages, currently awarded without regard to this question, frequently fail to provide the proper level of deterrence.

Compensatory damage awards may fail to provide sufficient deterrence in two ways. First, employers who rationally calculate the gains they could reap from a wrongful discharge may find in some cases that they exceed whatever losses the employee is likely to experience. For example, the proper level of deterrence in Petermann had nothing to do with the discharged employee’s losses. If Petermann had found a new job with better pay and benefits the day after he was fired and had suffered no emotional distress, his compensatory damages would have been zero. Yet the harm to public policy would have been the same in that imagined case as it was in the actual case, in which Petermann won $50,000 in lost earnings. Compensatory damages alone, then, could grossly underdeter employers from injuring public policy through wrongful discharges.

Second, some employers who wrongfully discharge employees experience an “illicit benefit.” Illicit benefit is the pleasure some tortfeasors gain from the very fact of imposing harm on others. For example, part of the Teamsters’ motivation in Petermann might have been a desire to get even with Petermann. Another employer might get a vindictive satisfaction from dismissing an employee who refused sexual advances. Were the law not to impose damages in excess of the harm caused in these types of cases, the most spiteful employers would not be properly deterred.

The traditional standard governing the availability of punitive dam-


59. Compensatory damages could also overdeter employers in some public policy cases. For example, in a case granting a common law action to an employee allegedly dismissed for filing a workers’ compensation claim, a dissenting judge wrote: “Once an employee claims compensation or testifies in a compensation proceeding he thereby acquires privileged status so that the employer may discharge...him...only at peril of facing all the sanctions and remedies of the statute.” Lally v. Copygraphics, 173 N.J. Super. 162, 413 A.2d 960, 970 (1980) (Antell, J., dissenting), aff’d, 85 N.J. 668, 428 A.2d 1317 (1981). The possibility of overdeterrence in a case like this arises from the risk that a jury will reach an erroneous factual result by awarding damages against an employer who discharged a worker for legitimate reasons unrelated to the worker’s recent filing of a workers’ compensation claim. Because of the sympathy jurors tend to feel for dismissed employees, it is less likely that a jury would erroneously rule against a plaintiff in such a case. Depending on the amount of damages awarded, this imbalance could lead to overdeterrence.

ages, however, cannot be relied upon to appropriately supplement the
deterrence from compensatory damage awards.

The "malice, fraud, or oppression" standard used to impose punitive
damages does seem to identify cases in which employers enjoy an illicit
benefit, as when an employer fires an employee out of spite or revenge. A
punitive damage award in such a case would help ensure that the wrong-
ful discharge would not be worth committing.

However, traditional punitive damage doctrine as applied to pub-
lic policy exception cases may fail to satisfactorily isolate those cases
where extra deterrence is necessary. Theoretically, an employer acting
with "malice, fraud, or oppression" may not be motivated by a desire for
revenge against the discharged employee. While not likely, in such cases
a jury focusing on the absence of vindictiveness might fail to award puni-
tive damages. But, as we have seen, punitive damages are needed to de-
ter wrongful discharges adequately in cases like Petermann, even if spite
is absent.

In practice, however, the traditional punitive damage standard is
more likely to be overinclusive. Juries are tempted to find it applicable to
employers who enjoyed no real illicit benefit and to situations where pu-
nitive damages are not needed to deter wrongful discharges. Once a jury
has decided that the employee was discharged in a manner that contra-
vened an important public policy, its sympathies are solidly with the
plaintiff. Given an often impersonal and wealthy employer and a dev-
astated employee, there is very little reason grounded in a jury's common
sense values not to give the employee the moon. This may explain why
punitive damages accompany compensatory damages in public policy ex-
ception cases over fifty percent of the time.

Thus, the traditional standard governing the availability of punitive
damages does not properly isolate the few public policy cases in which a

61. This analysis of punitive damages borrows liberally from several writers. See Ellis, supra
note 48, at 32, 52; Landes & Posner, An Economic Theory of Intentional Torts, 1 INT'L REV. L. &
ECON. 127, 130-31 (1981); Note, Punitive Damages and Libel Law, 98 HARV. L. REV. 847, 849-51
(1985); S. Shavell, A Theoretical Analysis of Tort Liability, ch. 6 at 1, 3, 26 (July 9, 1984) (unpub-
lished manuscript on file in Harvard Law School Library).

62. See supra note 27. The California study found that about fifty percent of all wrongful
discharge plaintiffs who won compensatory damages also won punitive damages. But this figure also
includes wrongful discharge cases sounding in contract, in which punitive damages are generally not
awarded. Hence, the percentage of successful tort plaintiffs who win punitive damages in addition to
compensatory damages is over fifty percent. See supra Part I.

63. See Mallor, supra note 47, at 491 ("If the use of punitive damages is not closely supervised,
jurors acting out of passion and prejudice may return extraordinary verdicts against defendant-
employers.").

64. Indeed, plaintiffs' lawyers will try to convey this image at trial. See Palefsky, Wrongful
Termination Litigation: "Dagwood" and Goliath, 62 MICH. B.J. 776, 779 (Sept. 1983) ("You must
make the jury aware of the utter disrespect a large corporation can have for the individual—for the
human spirit.").
punitive award may be appropriate. This mismatch between ends and means is magnified by the unbridled discretion juries have in determining the *quantity* of punitive damages to award. No study has attempted to correlate the size of punitive damage awards with the presence or absence of certain elements in wrongful discharge cases, but one could reasonably suppose that awards would be influenced by the defendant's wealth, its conduct during trial, and the meanness of the discharge itself. Although the last factor may be relevant in those cases involving an illicit benefit, these factors are not generally appropriate to quantify the level of damages necessary to deter future wrongful discharges. Moreover, the wild unpredictability and virtual unreviewability of the quantity of punitive damages present serious problems of fairness to defendants in wrongful discharge cases.

**C. Toward a Revised Doctrine of Damages in Public Policy Exception Cases**

To summarize, I have criticized the prevailing damage doctrines in public policy cases on three grounds. First, the "wanton, willful, or oppressive" standard, though it does identify those cases where employers receive an illicit benefit, may not provide extra deterrence when the employer, through a rational calculation of economic costs and benefits, without a hint of malice towards the employee, determines that discharging the employee is in its best economic interests. Second, once a jury decides that a plaintiff was dismissed wrongfully, its common sense equities and pro-employee prejudices too often lead it to award punitive damages in cases where they are not appropriate. If these problems are not corrected by meaningful judicial review of the jury's discretionary determination of the quantity of punitive damages, then the awards may bear no relation to the extra deterrence necessary in a given case.

To solve these problems, I suggest that the judge, not the jury, should have the discretion to award punitive damages, or, where that is not possible, the judge should carefully scrutinize any large punitive damage award for prejudice. In exercising this discretion, the judge should emphasize two factors in deciding both the appropriateness and quantity of a punitive damages award: (1) the personal vindictiveness or spitefulness of the discharge, and (2) the deterrent effect of the compensatory award in light of what the employer had to gain from the wrongful discharge. In addition, judges should explain how those factors applied

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65. A litigant in a public policy exception case could not argue that having the judge decide this issue violates his federal constitutional right to a jury trial because the seventh amendment does not apply in state courts. See Minneapolis & St. L.R.R. v. Bombolis, 241 U.S. 211, 217 (1916). However, jury trial rights provided under state constitutions may vary.
in a thorough order or opinion.\textsuperscript{66}

These two factors are more likely than the prevailing "malicious, fraudulent, or oppressive" standard to identify those employers whom the basic award will not sufficiently deter. The first factor—the personal vindictiveness or spitefulness of the discharge—identifies those cases where the employer receives an illicit benefit in wrongfully discharging the employee. The improvement over the prevailing standard is simply that the judge, not the jury, applies it. The judge, who may see a great variety of wrongful discharge cases, can more soberly decide whether there was a significant degree of personal animus, distinct from a rational calculus of costs and benefits, that would justify additional deterrence.

The second factor—the size of the basic award in relation to the employer's potential gain—will identify those discharges that need extra deterrence even though the employer gained no illicit benefit. In the relatively rare cases like \textit{Petermann}, courts will be able to enforce large damage awards, to match the potentially large benefits the employer hoped to gain from the wrongful discharge. Even in more run-of-the-mill public policy exception cases like \textit{Kelsay},\textsuperscript{67} courts might be able to increase the basic award when, for example, the discharged employee's yearly earnings were too low to provide adequate deterrence. Judges who are able to apply this two-factor analysis in a written opinion will give guidance to other judges, litigants and potential litigants. Appellate courts, in particular, should take a special interest in this issue. By giving guidance as to the appropriate level of damages in a range of public policy exception cases, they can make punitive damages in public policy exception cases more predictable and fair.

III

\textbf{Wrongful Discharge and Contract: Job Security Through Private Agreement}

As we have seen, the public policy exception has little to do with job security. The law gives certain discharged employees a tort cause of action in order to protect public policies often having little to do with employment. Some courts have imposed a form of job security in limited circumstances by implying in law a requirement that employers terminate employees only in good faith, but these decisions are few and of uncertain scope.\textsuperscript{68} Under current law, an employee who wants job security generally has to bargain for it, along with the other terms of his em-

\textsuperscript{66} Cf. \textit{Fed. R. Civ. P.} 52(a) (requiring federal trial judges in nonjury cases to make written findings of fact and conclusions of law).

\textsuperscript{67} See W. Holloway & M. Leech, \textit{supra} note 15, at 285 ("Discharge for the filing of a workers' compensation claim appears to be the single most frequent basis for a retaliatory discharge suit in the reported cases.").

\textsuperscript{68} These decisions are discussed \textit{infra} in Part IV.
employment contract. Traditional contract law, albeit with some special employment twists, governs the forms that these promises of job security may take and specifies what remedies courts will apply for their breach. My conclusion in this Part is that, at least with regard to remedies, there is nothing particularly distinctive about agreements to protect job security. Thus, the usual expectation measure of damages for breach of contract is the suitable remedy for breaches of promises to provide job security.

A. Easy Cases: Express and Implied-in-Fact Agreements Concerning Job Security

Even under the rigors of the employment-at-will rule, employees who wanted job security were permitted to negotiate with their employers for explicit contractual protection. For example, the courts regularly enforced provisions in written employment contracts that specified a fixed term for the duration of the employment relationship. Until recently, however, the presumption in favor of at-will employment contracts was so strong that only the clearest and most definite expressions of intent to rebut it were recognized. Thus contracts for "permanent" or "lifetime" employment were held to be unenforceable without some consideration in addition to the employee's promised labor.69 Moreover, courts were extremely reluctant to look beyond an express, written employment contract for other indicia of intent. These extremely formalistic requirements indicated that the law was pursuing goals other than the enforcement of private consensual agreements. Some have argued that the strict employment-at-will presumption served evidentiary purposes, or promoted industrial growth.70

In recent years courts have begun to return to the private contractual ideal in enforcing employers' promises of job security. Many courts have loosened the additional consideration requirement when they are confronted with express promises of job security.71 More significantly, judges have shown a greater willingness to look beyond formal written contracts, which, after all, are relatively rare, for other evidence of intent.

69. See, e.g., Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439, 441 (7th Cir.), cert. denied, 379 U.S. 914 (1964); Stauter v. Walnut Grove Prods., 188 N.W.2d 305, 311-12 (Iowa 1971); Note, supra note 19, at 1819.

Other courts have refused to enforce permanent employment contracts because they lacked "mutuality": the employee could quit at any time without becoming liable in damages to the employer, but the employer could not dismiss the employee without good cause. For a criticism of this formalistic approach, see id.

70. See, e.g., Note, supra note 19, at 1826.

71. For example, in Drzewiecki v. H & R Block, Inc., 24 Cal. App. 3d 695, 704, 101 Cal. Rptr. 169, 175 (1972), the court enforced the employer's promise to terminate the employee only if he "improperly conducted the business." The court limited the additional consideration requirement to contracts using "oblique" words such as "permanent."
Promises of job security have been derived from oral assurances,\textsuperscript{72} employee handbooks,\textsuperscript{73} and nonverbal conduct.\textsuperscript{74} These so-called implied-in-fact contracts are really no more controversial than express contracts, since the purpose of each is to determine the intent of the parties.\textsuperscript{75}

**B. The Sound of Contractual Silence: The Employment-at-Will Rule**

A more difficult doctrinal problem arises when the employment contract—whether gleaned from a formal document, an employee handbook, or the parties' course of conduct—is wholly silent with respect to job security. In these cases the contract specifies neither a just-cause requirement for dismissal nor an at-will relationship. When presented with such contractual silence, traditional contract law has two choices. First, it could void the whole contract for indefiniteness.\textsuperscript{76} This solution, though, would amount to overkill. The parties have agreed on the employee's duties and his wages and other benefits. To void their whole legal relationship because they failed to specify the circumstances under which the employee may be fired would be inconsistent with the ordinary understanding of their agreement.

The other choice that contract law provides to courts faced with contractual silence is to imply a term that serves as a default rule. This, of course, is the choice that the law has made. When the parties do not make an agreement with respect to job security, courts presumed—and generally still presume—that the employment was at will. As we have seen, this presumption served as far more than a mere default rule; it became a substantive rule so firmly embedded in the judicial conscience that only the baldest contractual language could overcome it.

But the employment-at-will rule need not have been the default rule chosen by the law. As a general matter of contract law, default rules

\textsuperscript{72} See, e.g., Fries v. United Mine Workers, 30 Ill. App. 3d 575, 333 N.E.2d 600 (1975).


\textsuperscript{74} See, e.g., Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917, 927 (1981) (holding that jury could imply a promise of job security from "the duration of appellant's employment, the commendations and promotions he received, the apparent lack of any direct criticism of his work, the assurances he was given, and the employer's acknowledged policies"); Allegri v. Providence-St. Margaret Health Center, 9 Kan. App. 2d 659, 664, 684 P.2d 1031, 1036 (1984) (noting that "parties may become contractually obligated by their nonverbal conduct as well as by their use of oral or written words").

\textsuperscript{75} At a deeper level, there may be no coherent distinction between express and implied-in-fact contracts, for the meaning even of express language cannot be unraveled without reference to attendant conduct and prevailing social norms. See F. KESLER & G. GILMORE, CONTRACTS: CASES AND MATERIALS 117 (2d ed. 1970) ("The language used by the contracting parties . . . cannot be divorced from the 'environment' in which they have conducted their negotiations.").

\textsuperscript{76} See, e.g., E. FARNSWORTH, CONTRACTS 192 (1982).
should be chosen to conform to the rule that the parties in a given kind of transaction would have most often negotiated on their own if they had considered the matter. This technique for deriving default rules minimizes transaction costs. If most contracting parties in a standard transaction will, in fact, agree to term \( X \) and the law so presumes, then these parties can include term \( X \) in their contract at little or no cost. Their mere inaction activates the default rule. A default rule different from term \( X \) would force more people to opt out of the legally presumed result. However, the expense of opting out might lead some bargaining parties to accede to the default provisions—finding themselves entering into Procrustean standardized contracts that do not further their own interests.

Why did the law choose the employment-at-will rule to govern in the face of contractual silence? History gives us little guidance. The rule was created in the United States in 1877 when a treatise writer asserted it with no precedential or policy-based support. In a recent article defending the employment-at-will rule, Professor Richard Epstein argues that the widespread existence of at-will employment relationships is the best evidence of the job security arrangement that most employers and employees want. But this argument ignores the effects of the default

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77. See id. at 112. Indeed, some view all of contract law as fulfilling this goal:

Contract law can be viewed as . . . attempting to reproduce what the parties would have agreed to if they could have costlessly planned for the event initially. Since the parties would have included contract terms that maximize their joint benefits net of their joint costs . . . this approach is equivalent to designing contract law according to the efficiency criterion.


Surprisingly, in defending the at-will default rule, Professor Epstein allows overt policy concerns to enter into his methodology: the contractual default rule "is normally chosen because it reflects the dominant practice in a given class of cases and because that practice is itself regarded as making good sense for the standard transactions it governs." Epstein, supra note 39, at 951 (emphasis added). Although public policy concerns external to the parties' desires will inevitably seep into the choice between various default rules, they disrupt Professor Epstein's libertarian assumption that "freedom of contract tends both to advance individual autonomy and to promote the efficient operation of labor markets." Id.

78. See H.G. Wood, A Treatise on the Law of Master and Servant § 134, at 272 (1877) ("[T]he rule [in America] 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."); see also W. Holloway & M. Leech, supra note 15, at 27; Note, Implied Contract Rights to Job Security, 26 Stan. L. Rev. 335, 340-47 (1974).

79. See Epstein, supra note 39, at 940 ("The survival of the contract at will, and the frequency of its use in private markets, might well be taken as a sign of its suitability for employment relations.").

Professor Epstein supplements this argument with an explanation of "why the at-will contracting arrangement . . . typically works to the mutual advantage of the parties." Id. at 957. This explanation generally amounts to an argument that the employment-at-will rule is cheaper and more economically efficient than a rule binding both the employer and the employee to the contract for a given period of time. For example, he argues that the at-will relationship is good for the employee because if the employer makes an unreasonable demand, the employee "is free to withdraw for good reason, bad reason, or no reason at all." Id. at 966. Professor Epstein, however, does not address
rule currently in place. Any default rule in place for a hundred years will have a direct influence on the actual agreements that take place under it. The substantial transaction costs of contracting out of the default result will deter all but those most adversely affected by it.

A more persuasive argument for determining the appropriate default rule looks to the union context.\textsuperscript{80} In negotiating collective bargaining agreements for a large number of employees, a union bargains with the employer over nearly every aspect of the employment relationship. Because such high stakes are involved, transaction costs do not force the union into settling for default rules. The union can afford to gather accurate information concerning the risk of wrongful discharges, and must be responsive to the employees' preferences between marginal increases in job security and marginal decreases in the wage level and other benefits. Yet, the vast majority of collective bargaining agreements contain a just cause provision circumscribing the employer's right to terminate at will. This result suggests that a just cause rule—or at least some limitation on the employer's ability to fire at will—would serve as a more efficient default rule in employment contracts in a wide variety of circumstances.

C. Damages for Breach of a Contractual Promise to Provide Job Security

Once a court has found that a dismissal breached a contractual promise—whether express, implied-in-fact, or adopted by default—to provide job security, it must determine the quantity of damages to award the employee. Applying traditional contract damage doctrines, courts have awarded discharged employees damages covering a variety of losses.\textsuperscript{81} The basic element of contract damages is lost wages. In addition, courts have awarded damages for the value of unused sick leave, vacation pay, vested pension rights and commissions, insurance benefits, and accrued stock option rights. The employee's costs of finding a replacement job may also be included as an expense incurred in mitigation of damages. Consistent with traditional contract law, however, courts have generally not awarded discharged employees suing under a contract theory damages for either intangible losses or punitive damages. In this Section, I will argue that these results, derived from general contract law principles, square quite well with the purposes of the contract theories of wrongful discharge.

This scheme of damages is derived from the principle that contract
Wrongful Discharge Remedies

Law generally protects the promisee's expectation interest. The promisor who breaches his promise usually pays the promisee expectation damages: an amount calculated to put the promisee in the same positions he would have been in had the promisor not breached his promise. The promisee is thus given the benefit of her bargain. This principle is modified, however, by another traditional contract law doctrine: mitigation of damages. Under this principle, the promisor pays the promisee only for unavoidable losses in expectations. The law expects the promisee to take affirmative steps to mitigate the losses she sustains from the promisor's breach of contract.

These two fundamental principles of contract damages—the expectation measure and the mitigation of damages—work quite well in remedying breaches of promises to provide job security. Under this measure of damages, an employer will not discharge an employee without, for example, complying with contractually specified procedures for "progressive discipline," unless it stands to gain more from the discharge than the employee stood to gain from his continued employment. If the employer does violate the terms of their contract by firing an employee in some prohibited way, the employee will lose nothing, because the expectation measure of damages ensures that he will be as well off after the breach as he would have been without a breach. The discharged employee's duty to mitigate damages encourages him to seek reemployment after the breach. The law would not give even an unfairly discharged employee a lifetime's worth of wages without requiring him to seek reemployment forthwith.

Awarding expectation damages with a duty to mitigate also creates socially desirable incentives for employers contemplating a breach of their promise to provide a given worker with job security. For example, consider an employment contract that specifies that Employer may not fire Employee X without just cause. Employee X is doing her job satisfactorily. Job-seeker Y approaches the employer for X's slot. Employer is convinced that Y could perform X's job far more productively than X does—so much better that the employer would be willing to pay X expectation damages under the contract and hire Y in her place. Under expectation damages, Employer will replace X with Y, and society will be better off. Employer's business is more productive, Y has the job that he wants, and X reaps the gains from her employment contract. X may

82. Occasionally one sees reliance damages awarded in the cases. This is most common when the court has determined that an employee was terminable at will but incurred various costs in reasonable reliance on the employer's offer of employment. The employee's expectation damages are zero in such a case, because she had no legally protected expectation in continuing employment. To avoid the harshness of the employment-at-will rule, courts have awarded reliance damages to employees who, for example, moved a great distance in anticipation of their new job. See, e.g., Hackett v. Food Maker, Inc., 69 Mich. App., 591, 245 N.W.2d 140 (1976).
resent having to look for a new job, but she will be compensated for her interim losses. Were damages higher than expectations, Employer might not find it worthwhile to fire X and hire Y, and society would lose the extra productivity that hiring Y would yield. Were damages consistently lower than expectations, employee X would lose some of the substantive protection for which she had bargained. A future employee seeking a remedy consistent with the substantive protection of his contract would have to incur the significant transaction costs involved in negotiating a provision specifying the damages to be awarded in the event of a breach.

Given the rule of expectation damages and mitigation, one might question wrongful discharge law's reluctance to award damages for intangible harms in breach of contract actions. Such intangible harms arise from the anguish and stigma that some employees experience as a result of being fired. In refusing to recognize such losses in contract actions, courts invoke the rule that contract damages must be "definite" and not "speculative." They cite Hadley v. Baxendale for its rule limiting damages in contract to those losses within the contemplation of the parties at the time of assent. These rationales, however, are unpersuasive, for these damages are no less indefinite or speculative in traditional intentional tort cases, where they are allowed. Moreover, the Hadley foreseeability rule seems to argue for damages for intangible losses in contract actions. Both employers and employees know that a job means much more to an employee than wages and benefits, and that any dismissal could have a serious effect on the employee's psyche.

Yet, contract law is generally correct in disallowing damages for intangible losses in wrongful discharge contract actions. The goal of damages in contract cases is to put the employee in the same position she would have been in had the employer not breached the employment contract—to give the employee the benefit of her bargain. Thus, the law gives her her lost wages and benefits. But money damages cannot cure anxiety or remedy a bruised psyche. The psychic benefits of the em-

84. As one judge noted:
   Every man's employment is of utmost importance to him. It occupies his time, his talents, and his thoughts. It controls his economic destiny. It is the means by which he feeds his family and provides for their security. It bears upon his personal well-being, his mental and physical health.

The majority in Valentine held that damages for mental distress are unavailable in Michigan breach of employment contract cases because "the employment contract's essence is commercial." 123 Mich App. at 526, 332 N.W.2d at 594. The dissent argued that damages for mental distress should be available under Michigan precedent because employment contracts "involve[] 'rights we cherish, dignities we respect, emotions recognized by all as both sacred and personal.' " Id. (Gillis, J., dissenting) (quoting Stewart v. Rudner, 349 Mich. 459, 469, 84 N.W.2d 816, 823 (1957)).
employee’s bargain are irretrievably lost when she is dismissed. Thus, damages for intangible losses cannot place the employee in the same position as before the employer’s breach.

Moreover, a rational employee would not bargain for this element of damage recovery if she negotiated a fully-specified employment contract. In order to receive a larger payment from the employer upon the employer’s breach, the employee would have to give up some marginal employment benefit, such as a reduction in salary. Under these conditions, the wage reduction can be seen as an insurance premium paid out continually to cover for a contingent loss.

The employee would not “buy” such insurance to cover intangible losses because the insurance money paid to her for those losses after a discharge is not likely to be worth more to the employee than the premiums she gave up to receive it. This difference in the marginal utility of money before and after a wrongful discharge arises from the fact that a psychologically healthy, employed person can often get more marginal utility from his last dollar—more bang for her buck—than a depressed, unemployed person.\(^8\) Even if the marginal utility of the employee’s money were the same before and after a wrongful discharge, an employee would not want to incur the transaction costs of insurance coverage for intangible losses. Thus, the employee would not bargain for the protection that allowing damages for nonpecuniary losses in contract actions would provide.\(^6\)

For similar reasons, the unavailability of punitive damages in wrongful discharge actions based on breach of contract makes legal and economic sense. Punitive damages are certainly not part of the bargain that contract damages seek to protect. Furthermore, were an employee and employer to bargain over the remedies that would govern a breach of the employment contract, an employee would, again, have to pay an “insurance premium” in the form of lower wages or diminished benefits in order to win a contractual promise to pay punitive damages. As in the case of damages for intangible losses, the marginal utility of such a punitive damage award after a breach is likely to be less than the marginal

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85. See S. Shavell, supra note 61, ch. 6, at 1-13 (discussing the optimal level of insurance for nonmonetary losses).

86. If the employee thinks that he may incur additional pecuniary expenses (such as obtaining psychological therapy) when he suffers intangible losses from a wrongful dismissal, then he might want these expenses covered by his “insurance policy.” This observation would argue for an exception to the general rule against damages for nonpecuniary harms in the case where the discharged employee has reasonably incurred therapy expenses because of the wrongful dismissal. Cf. Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772 (1985) (advocating limiting damages for intangible losses in unintentional tort cases to an amount for out-of-pocket costs). Nonetheless, one might eschew such an exception because of the factually difficult causation issues it would raise. For example: which therapy sessions were a result of the discharge, and how long should the therapy have taken to cure the discharged employee of his emotional woes?
utility of the insurance premiums the employee paid before his dismissal. Contract law, then, should not impose punitive damages for breach of a promise to provide job security when the employee would not bargain for them herself.

IV

Part III discussed theories of wrongful discharge predicated solely on the private agreement of the contracting parties. The underlying assumption in these pure contract cases is that employers and employees are generally free to negotiate any degree of job security, including no job security, that they desire. The purpose of the law in this context is merely to effectuate the terms of the contract that the parties themselves have agreed upon. When the contract is silent as to job security, the role of the law is to supply a default rule that will conform to what most contracting parties would have agreed to had they considered it. Any parties who do not like the job security default rule for any reason remain free to override it by explicit provision.

In many areas of the law, however, this pure freedom-of-contract paradigm has given way to more sophisticated approaches. Based on a growing recognition of the failure of traditional contract law to portray accurately the ways that real people enter contractual relationships, both legislators and courts have chipped away at its central assumption that contracting parties are always competent to set the terms of their agreement to further their own interests. Among the more notable examples of this trend are developments in the law of tenancy, products liability, bankruptcy, and consumer protection, where the law has implied terms into contracts that the parties are powerless to change or waive.

Recently, a few courts have indicated that the law of wrongful discharge may also be joining this trend away from strict freedom of contract. As noted earlier, policy concerns beyond the mere vindication of private agreement lurked behind even the most traditional contract law of wrongful discharge, which erected nearly insuperable barriers before

87. In the few contract cases where punitive damages are permitted, the post-breach marginal utility of the punitive damages often exceeds the marginal value of the premiums paid for it. For example, courts have imposed punitive damages on insurance companies for vexatious refusals to settle insurance claims. See E. FARNSWORTH, supra note 76, at 844. An insured often needs to be reimbursed very quickly after the loss—especially a large one. Excessive delay by the insurance company may impose added costs on the insured, who may have to scrape for temporary assistance elsewhere before he gets the insurer's payment. These added costs could be seen as making a punitive damage award a rational outcome of a hypothetical fully-specified bargain between the insurer and insured.
those employees who wanted to contract out of the prevailing employment-at-will default rule. These recent cases, however, indicate a deeper erosion of the freedom of contract, for they suggest that under certain circumstances the law will imply a provision for job security into employment contracts regardless of the intent of the bargaining parties. They also force us to reconsider the fundamental differences between tort and contract.

This Part discusses these inroads into the employer’s and employee’s freedom of contract. Section A summarizes the available case law implying by law a covenant to provide job security, and discusses the scope of the covenants that these courts have created. Section B discusses the theories available to justify such intervention into the employment relationship. Section C draws out the implications of these theories for damage awards to employees discharged in violation of a nonwaivable, implied-in-law duty to provide job security.

A. Employment Contracts and the Implied-in-Law Covenant of Good Faith and Fair Dealing

The idea of implying an obligation of good faith and fair dealing into certain classes of contracts has firm roots in the law of contracts. For example, the Uniform Commercial Code implies such an obligation into security agreements and contracts for the sale of goods. In addition, courts and legislatures have implied an obligation of good faith and fair dealing into franchising and insurance contracts.

Seizing upon these contract law precedents, two state courts boldly extended their ideas to employment contracts. In the 1974 case of Monge v. Beebe Rubber Co., the Supreme Court of New Hampshire upheld an award of lost wages to an employee who alleged that she was fired for refusing the sexual advances of her boss. The court held that “a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good and constitutes a breach of the employment contract.” Three years later, in Fortune v. National Cash Register Co., the Supreme Judicial Court of Massachusetts approved a jury verdict for an employee who claimed that he was fired to prevent the vesting of certain commission rights. Even though the court conceded that “under the express terms of the contract Fortune
[had] received all the bonus commissions to which he [had been] entitled,” it held that the discharge violated the covenant of good faith and fair dealing implied by law into the employment contract.\textsuperscript{93}

Despite the potentially expansive holdings in Monge and Fortune, the New Hampshire and Massachusetts courts have shrunken from a broad reading of the implied covenant of good faith and fair dealing in employment contracts. The New Hampshire court limited Monge to discharges that violate the usual public policy exception standard.\textsuperscript{94} In Massachusetts, the implied covenant was applied only in cases in which employees lost “identifiable, reasonably anticipated future compensation, based on . . . past services” because of a discharge without cause.\textsuperscript{95}

The most influential decision involving the implied covenant of good faith and fair dealing is Cleary v American Airlines.\textsuperscript{96} Acknowledging “the continuing trend toward recognition by the courts and the Legislature of certain implied contract rights to job security, necessary to ensure social stability,” a California court of appeal held that Cleary had pleaded a valid suit under “the implied covenant of good faith and fair dealing contained in all contracts, including employment contracts.”\textsuperscript{97} The court seemed most moved by Cleary’s eighteen years of “apparently satisfactory performance,” but also considered American Airlines’ general policy of providing an impartial hearing for employees who protest their discharge or suspension.\textsuperscript{98} The longevity-of-service factor could potentially form the basis for an implied-in-law requirement that all employers dismiss long-term employees only in good faith. But the second factor, a vague reliance on company procedure (the details of which were not before the court), reinjected an implied-in-fact element into the covenant that makes the scope of the holding difficult to ascertain. Regarding the proper remedy, the Cleary court stated that an employer’s breach of the covenant “sounds in both contract and in tort[,] . . . entitling [the discharged employee] to an award of compensatory damages, and, in addition, punitive damages if his proof complies with the requirements for [punitive] damages.”\textsuperscript{99}

The only other major decision to recognize an implied-in-law cove-

\textsuperscript{93} Id. at 101-02, 364 N.E.2d at 1255-56.
\textsuperscript{94} See Howard v. Dorr Woolen Co., 120 N.H. 295, 297, 414 A.2d 1273, 1274 (1980) (“We construe Monge to apply only to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn.”).
\textsuperscript{96} 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).
\textsuperscript{97} Id. at 455, 168 Cal. Rptr. at 729.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 456, 168 Cal. Rptr. at 729.
nant of good faith and fair dealing in employment contracts is *Gates v. Life of Montana Insurance Co.* (*Gates I*), decided in 1982. The employee alleged that she was coerced into resigning without prior warning, in breach of the provisions of her employee handbook and of the implied covenant of good faith and fair dealing. The Supreme Court of Montana explicitly rejected her express contract claim based on the handbook, because the employer issued it two years after she was hired. Curiously, the court held that despite the insufficiency of her express contract claim, she had alleged a triable issue under the implied covenant. The court reasoned that the employer unilaterally promulgated the handbook, which led the plaintiff to "develop[] the peace of mind associated with job security." The jury could find that by effectively discharging the plaintiff without prior warning and thus failing "to follow its own policies," the employer breached the covenant of good faith and fair dealing implied in its employment contract. As in *Cleary*, the implied-in-law covenant established in *Gates I* may be confined to employers who create expectations of job security through the issuance of employee handbooks.

In *Gates II*, the case returned to the Montana Supreme Court after a jury awarded Gates $1,891 in compensatory damages and $50,000 in punitive damages. The supreme court reversed the trial court's decision to strike the punitive damage award. The majority held that the employer's duty of good faith and fair dealing was implied by law, "apart from, and in addition to, any terms agreed to by the parties." Therefore, they said, the breach of the duty sounds in tort and supports an award of punitive damages if the defendant acted with oppression, fraud, or malice. Two dissenters countered that tort recovery should be limited to cases falling within the public policy exception.

The disagreement between the majority and dissenters in *Gates II* raises a profound question: what is the justification for the implied covenant of good faith and fair dealing in employment contracts, whatever its scope? The logic used by the *Gates II* judges is formalistic and unpersuasive. The existence of an employment contract led the dissenters to conclude that the employer's breach sounded in contract, whereas the fact that the covenant is implied by law, rather than derived from the parties' intent, led the majority to conclude that tort damages were appropriate. None of the judges gave adequate justification for choosing between tort and contract.

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100. 196 Mont. 178, 638 P.2d 1063 (1982) [hereinafter *Gates I*].
101. *Id.*, 638 P.2d at 1067.
103. *Id.* at 214.
104. *Id.* at 215, 220-21 (Gulbrandson, J., dissenting) (opinion joined by Harrison, J.); see also *id.* at 222 (Weber, J., dissenting) (arguing that punitive damages were not justified because the alleged breach of the implied covenant arose from a contract).

The decisions in Cleary and Gates I held that the common law requires employers to provide a certain degree of job security to their employees. However, many questions regarding the scope of the implied-in-law duty remain unanswered. Does the duty apply only to long-term employees? When the duty applies, does it require discharges to be made merely in subjective good faith? Or must an employer have some objective good cause to fire an employee to whom he owes the implied-in-law duty? Finally, what relationship, if any, does the standard for discharges bear to the just cause standard common in collective bargaining agreements?

Despite these important unanswered questions, which are beyond the scope of this Comment, the Cleary and Gates courts did clarify one essential aspect of the implied-in-law covenant. As stated in Gates I: “The duty arises out of the employment relationship yet the duty exists apart from, and in addition to, any terms agreed to by the parties.”

Despite the existence in both cases of employee handbooks that specified procedural protections against unfair discharges, the duty of good faith and fair dealing was not designed merely to protect the employee’s bargained-for expectations. This observation suggests that the duty is nondisclaimable and nonwaivable, for if an employer could avoid the implied-in-law duty by disclaiming it itself or by having the employee waive his rights under it, then the duty would be governed by the intent of the parties. If the duty could be overridden by the parties’ intent, then it would be no more than a default rule governing in the event of contractual silence. But the Cleary and Gates courts’ insistence that they were not enforcing the terms—either explicit or presumed—of the employment contracts before them argues against a theory that reduces the implied-in-law covenant to a mere default rule.

The nondisclaimable nature of the implied-in-law covenant calls

105. Id. at 214; see Cleary, 111 Cal. App. 3d at 453, 168 Cal. Rptr. at 728 (“The duty which arises from the covenant of good faith and fair dealing is unconditional and independent in nature; it is not controlled by events in the same manner as conditions precedent or subsequent.”) (emphasis in original).

106. It would be possible for the law to impose a very high standard of “knowing” waiver or disclaimer in order for the parties to override the implied-in-law duty of good faith and fair dealing. With such a high standard of waiver, the implied covenant would have more substance than a default rule, but would still be governed, at least to some degree, by the intent of the contracting parties.

Nonetheless, changing the standard of waiver does not solve the problem grappled with here. The traditional rationale of contract law—the vindication of private agreement—does not justify imposing an especially high standard of waiver. Whether the duty of good faith and fair dealing is waivable only under very narrow circumstances or completely nonwaivable, the rationales of traditional contract law cannot justify it.

107. No distinction is made between waivability and disclaimability.
for special justification. Why should the law impose a term governing the employment relationship that neither of the contracting parties may want? And why should the common law single out job security for this paternalistic treatment, and not any of the other terms of employment, such as wages, benefits, and working conditions?

A superficially appealing explanation suggests that the common law should mandate some degree of job security because it is the only major employment condition not already regulated by the state. Since the New Deal, state and federal minimum wage laws have imposed paternalistic limitations on the employer's and employee's freedom to bargain for wages. Similarly, state workers' compensation schemes and the federal Occupational Safety and Health Administration have regulated allowable conditions in the workplace. Most recently, the Employee Retirement Income Security Act has invaded the employer's traditional freedom over the terms of employee pension plans. Through these programs, society has declared that employment contracts implicate concerns beyond the individual preferences of negotiating employers and employees. According to this argument, state courts of general jurisdiction should not hesitate to infuse analogous public values and policy concerns into cases involving employee job security.

But this argument provides only a partial justification, for it does not explain why the state should interfere with private choice as to all the other terms of employment. It merely bootstraps a new paternalistic law onto an existing body of paternalistic laws. The implied-in-law covenant of good faith and fair dealing in employment contracts demands a deeper rationale, one that explains why public choices concerning job security should predominate over private ones.

Such a rationale can be derived from two assumptions underlying traditional contract law's fundamental presumption that private choice best furthers the collective good. One assumption is that contracting parties act out of their own free will and are capable of ascertaining their own best interests. The other is that the contract's terms impose no costs ("externalities") on people who are not parties to the contract. When either of these assumptions is incorrect, the law may justifiably intervene into the parties' presumed freedom of contract. Of course, the law need not intervene in every instance where these assumptions falter; the faltering only legitimizes a possible intrusion into individuals' freedom of contract.

A persuasive argument can be made that the first assumption—that

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109. The following analysis borrows Professor Jackson's conceptual framework for analyzing legal intrusions into the contracting process. See generally Jackson, The Fresh-Start Policy in Bankruptcy Law, 98 Harv. L. Rev. 1393 (1985).
parties contract freely in their own best interests—is empirically unsound as applied to employees negotiating with their employers over job security. As mentioned earlier, an employee in such a negotiation must make a choice between marginally increasing her job security through various degrees of contractual protection and marginally increasing other employment benefits, particularly wages. When an employee makes this choice between current consumption (through a higher wage) and future protection against job loss, her ability to act according to her own best interests may be compromised by both cognitive and volitional phenomena.

Cognitive weaknesses at the time of contracting could lead employees to favor a paternalistic legal rule limiting their ability to negotiate higher wages in lieu of job security. For example, employees may not have sufficient information at the time of contracting to evaluate the risks of unfair discharge. As previously discussed, the experience of unions in collective bargaining suggests that a bargainer with complete information would decide that employees want legal protection against unfair dismissal even at the expense of a marginally higher wage. Even if employees had all the empirical data available to unions, there may be weaknesses in their ability to use this information to make decisions in the face of uncertainty. Recent psychological research suggests that such weaknesses systematically lead people to underestimate the probability of future unfavorable contingencies. Such systematic undervaluation would cause employees to make decisions at odds with their own subjective preferences concerning job security versus wages.

In addition to these cognitive weaknesses, employees may experience a volitional effect that would justify a rule mandating some degree of protection against unfair dismissals. When confronted with a choice between current consumption and deferred consumption, people tend to opt for the former, even if the latter would yield greater personal utility. Aware of this behavioral phenomenon, these same people could rationally desire a rule that prohibited their "present self" from overconsuming at the expense of their "future self." Thus employees themselves might favor a covenant of good faith and fair dealing that places some nonwaivable restriction upon their own ability to bargain away job security. Such a restriction would prevent an employee negotiating the terms of his employment from overconsuming wages at the expense of the more distant and seemingly intangible benefits of added job security.

The preceding discussion of why employees may not be able to bargain for job security according to their own best interests suggests that employees themselves might prefer a legal rule limiting their own free-

110. See id. at 1410-14 (discussing psychological theories and data).
111. See id. at 1408-10 (discussing "impulse control" as a justification for legal paternalism).
dom to bargain. Arguments for legal intervention based upon externalities, however, do not purport to describe what employees themselves would want. Rather, externalities arguments assert that society must intervene in the contracting process to protect those who are not bargaining parties but who could be affected by the results of the bargain.¹¹²

Whether the external effects of unfair dismissals upon society at large justify legal intervention is a difficult and value-laden problem. An unfair discharge might impose costs upon society at large in a number of ways. The dismissed employee and his financial dependents may have to be supported by public benefits until she finds a new job. The unfair discharge might cause depression or other emotional harms to the employee, increasing the time it takes her to find reemployment. During this increased time of unemployment, society loses the productive efforts of the employee. Finally, some might argue that widespread abuse of the employer's power to discharge employees undermines public values of personal integrity and autonomy.

C. The Proper Remedy for Breach of the Implied-in-Law Covenant to Provide Job Security

The preceding discussion argued that there are persuasive rationales for implying by law a nonwaivable duty on employers to provide some degree of job security for their employees. We can now turn to the question of what remedy best fits within these rationales.¹¹³ This Section argues that the appropriate remedy for breach of the implied covenant depends upon which rationale—contract paternalism or externalities—one chooses as the underlying basis for the implied covenant.

One justification for the implied duty to provide job security is contract paternalism. Under this rationale, the law limits the employee's freedom of contract because cognitive and volitional weaknesses prevent him from bargaining rationally. The law steps in to give the employee what he would have gotten had he contractedrationally. This rationale has direct consequences for the appropriate remedy for breach of the paternalistically implied covenant: the law should give the employee the remedy that he would have rationally bargained for.

As previously seen, implying a nonwaivable covenant to provide job security can be viewed as forcing employees to purchase insurance against unfair discharge.¹¹⁴ The employee pays out premiums in the

¹¹² See id. at 1418-24 (discussing externalities as a basis for legal intervention).
¹¹³ The discussion of remedies is confined to damages because reinstatement is likely to be impracticable. See supra note 14 and accompanying text.
¹¹⁴ Cf. W. Viscusi, Risk by Choice: Regulating Health and Safety in the Workplace 89 (1983) (arguing that the proper level of income support in workers' compensation systems should be determined by asking how much insurance coverage a rational employee would buy for work-related injuries).
form of a marginal decrease in wages, and the employer-insurer pays out
damages in the event of a "wrongful discharge," however these terms are
defined by the insurance policy. According to this view, we can
recharacterize the question of the proper remedy as the question of how
much insurance coverage a rational employee would buy. The answer to
this question is that the employee would purchase insurance up to the
level at which the last dollar of benefits yields the same benefit to him as
would the wage he gave up in "premium" to obtain it.

As argued above with respect to contract
damages, a rational em-
ployee would not want any insurance coverage for intangible losses (em-
totional harms) or for punitive damages. Since money damages by
definition cannot remedy intangible losses, a dollar of benefits would
yield no more utility to a discharged employee than an extra dollar of
wages would yield to the employee while she is still employed. In fact,
the marginal utility of a dollar in addition to lost wages may well be less
for the discharged employee, whose depressed state would keep her from
getting as much enjoyment out of that extra dollar. Similarly, a dollar in
punitive damages is not likely to be worth more to a discharged worker
than an extra dollar in wages would be worth to the worker while she is
still employed.

Deciding the rational level of benefits for lost income is more diffi-
cult. In theory, some employees might not want full recovery even for
their lost wages due to the wrongful discharge. For example, if an
employee generally saves ten percent of his wages, then he would get no
more utility out of an insurance payout covering that ten percent of lost
wages than he would have gotten out of the wages he paid out as
premiums.

The problem for the law is how to generalize this phenomenon. How much coverage for lost income would an "average" employee want?
For guidance, courts might look to three other areas where the law pro-
vides income support for employees who no longer work. The first exam-
ple is accident law. When an employee suffers a tortious injury unrelated
to her job, she may be unable to work. Tort law generally forces the
tortfeasor to pay damages for the entire amount of lost income caused by
the injury. Second, state workers' compensation schemes typically pro-
vide up to two-thirds of the disabled worker's lost wages during the pe-
riod of disability. Third, unemployment insurance generally gives
unemployed workers about fifty percent of their previous wage level for

115. See supra Part III.C.
116. See, e.g., NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 120 (1973) [hereinafter WORKMEN'S COMPENSATION] (Table 8.8); W. Viscusi, supra note 114, at 89. State workers' compensation plans also have a statutory maxi-
mum award, which sometimes significantly undercuts the two-thirds income replacement goal for
many workers.
up to twenty-six weeks of unemployment. 117

Accident law, which provides full coverage for lost income, is the weakest of the three analogies. Tort laws deals with interactions between strangers, who cannot bargain over the terms of a possible recovery before the accident occurs. Unlike an employee who gives up higher wages for insurance protection from her employer, an accident victim has not generally paid any insurance premiums to the tortfeasor who injures him. In setting the level of damages, tort law forces unreasonably risky actors to internalize the full social cost of their activities, which includes the lost wages of the victim. Thus the whole theory of a remedy based upon the putative choice of a rational insurer does not apply in tort law.

Workers' compensation law has more in common with wrongful discharge law. It governs one aspect—safety—of the relationship between employers and employees, who can and do contract with each other over a wide range of rights and duties. In providing an employee injured on the job a nondisclaimable right to recover two-thirds of his income during the time of disability, workers' compensation law imposes a term in the employment contract that neither party may in fact want. The major goal of this two-thirds figure is income replacement, 118 which corresponds well with the goal of the rational employee insurer guarding against wrongful dismissal. Other goals of workers' compensation, however, do not fit in well with the implied covenant of job security. By allowing only a two-thirds recovery of lost income, workers' compensation law gives employees incentives to recover from their disabilities quickly, and to take care on the job to avoid disabling accidents. By contrast, the wrongfully discharged employee does not want to deprive himself of income in order to encourage himself to find reemployment. He would, however, want coverage for as long as it would take him to find a new job. Finally, an employee cannot take care to avoid a wrongful discharge, which generally is under the employer's exclusive control.

The final area of law from which judges could seek guidance in determining the rational level of insurance coverage for lost income is unemployment insurance, which gives an unemployed person approximately fifty percent of her lost wages (up to a statutory maximum) for up to a half year after she loses her job. The primary goal of unemployment insurance—to ensure that "individuals looking for a job

117. See Nat'l Comm'n on Unemployment Compensation, Unemployment Compensation: Final Report §§ 4.2-3, at 38-45 (1980) [hereinafter Unemployment Compensation]. Like workers' compensation plans, unemployment insurance schemes also have a statutory maximum that often undercuts the goal of fifty percent income replacement. Unemployment insurance schemes do not provide any income support for workers who quit without good cause or who were fired for "misconduct." See id. § 4.4., at 45-50.

118. See Workmen's Compensation, supra note 116, at 24.
should not face substantial alteration in their lifestyle"—coincides neatly with the interests of the employee insuring against wrongful discharge. The wrongfully discharged employee will want coverage that will enable her to feed her family and to avoid defaulting on her mortgage or rent payments. If coverage went significantly beyond these kinds of basic expenses, the employee could probably have made better use of the additional premium money while she was still employed.

But the unemployment insurance system faces constraints not applicable to the employee buying private insurance against wrongful discharge. Public funds available for unemployment insurance payments are limited. Such fiscal constraints could require unemployment insurance law to provide incentives to the unemployed to find reemployment that would force an unemployed person to accept a new job that he would not have otherwise taken. An employee attempting to insure against wrongful discharge would probably give himself more latitude—both in time and available funds—to find a new job than a public program could afford to allow him. The employee (in theory) could buy as much coverage as he wants by reducing his wage more and more. Thus as a guidepost, the fifty-percent figure from unemployment insurance probably best serves as an indication of the minimum amount of coverage that the employee would buy to insure against wrongful discharge.

Taken together, workers' compensation and unemployment insurance might suggest that our employee would buy somewhere around seventy-five- or eighty-percent coverage for wages lost because of wrongful dismissal. This range exceeds the levels for these other programs thereby making up for the constraints that apply to them but not to the implied covenant to provide job security. In addition, courts could borrow from unemployment insurance law the twenty-six-week figure as a reasonable estimate of the time a wrongfully discharged employee needs to find a new job. Under this approach, the jury would not have to determine, from a possibly misleading hindsight perspective, how long the plaintiff should have taken to find suitable reemployment.

Another possible rationale for a legally mandated level of job security is that bargaining employers and employees will not take into account the external effects of their bargain on society in general. Three possible effects were discussed above. First, society would bear the cost of providing benefits to those victims of wrongful discharge who would be unable to support themselves while they were unemployed. Second, if the wrongful nature of a discharge caused an employee to suffer emotional harms that prolonged the duration of his unemployment, then society would lose the benefit of his productive work during that period. And

119. Unemployment Compensation, supra note 117, at 38.
finally, the ability of employers to dismiss workers unfairly might be said to contravene public values of personal integrity and autonomy.

The insurance-based scheme of damages presented above would only partially serve the goals of an externalities theory. The nearly full compensation for lost wages would eliminate the need for the discharged employee to obtain public benefits. Under the insurance scheme, however, many employers would find it worthwhile to dismiss workers wrongfully and pay the employee the benefits of this "insurance policy." Thus, society would lose more from emotionally harm wrongfully discharged employees than it would under a damage scheme that achieved a higher level of deterrence. Moreover, setting a social level of wrongful discharges below full deterrence would arguably offend public values of personal integrity and autonomy.

The externalities theory really brings us back to the public policy exception and the scheme of damages it suggests. Under the public policy exception, the goal of the law is to deter all discharges that contravene certain public policies. By equating the freedom from being wrongfully discharged with notions of integrity and autonomy, one would essentially be arguing that job security itself should be a public policy protected by the public policy exception, and that employment is a quasi-public institution that should be protected from private employer abuse. In that case, damages would be set to deter all discharges that violated the implied covenant of good faith and fair dealing. We would then return to the analysis of the public policy exception presented in Part II of this Comment.

With these theories of the implied covenant of good faith and fair dealing in employment contracts revealed, we can now profitably return to the debate between the majority and dissenters in Gates II. Recall that the employer told employee Gates, without prior warning, to resign or be fired. A jury decided that this conduct violated the employer's implied-in-law duty of good faith and fair dealing and awarded Gates compensatory and punitive damages. The majority upheld the jury's award of punitive damages, claiming that the employer's breach sounded in tort, while the dissenters argued that punitive damages were inappropriate because the breach sounded in contract.

Using the rhetoric of tort and contract damages, the majority and dissenting judges in Gates II were really arguing about the fundamental rationale of the implied-in-law covenant of good faith and fair dealing, and the level of deterrence that this rationale envisions. The dissenters took the view I have labeled contract paternalism: that the law has no business awarding punitive damages when the employee himself would not have rationally bargained for them himself. Under this view, employers should be free to breach the implied covenant (whatever its
scope), as long as they are willing to pay at least a percentage of the employee's lost wages. The majority, by contrast, took a far more radical view in holding that the implied-in-law covenant represented a public policy beyond the control of the parties. Under their view, the law should deter employers from breaching the implied-in-law covenant under any circumstances. This view raises one employer's failure to give an employee prior notice before being fired to the level of a public institution, like the jury system or workers' compensation plans.

The boldness of the Gates II majority is out of synch with the strict limitations most courts have placed on the public policy exception. For the purposes of the public policy exception, courts have generally confined the available policy sources to specific legislative enactments. The broadest readings of the public policy exception have located public policy in professional codes of ethics, but none have gone nearly so far as declaring job security itself—however narrowly defined—to be a public policy. One wonders whether the Gates II majority would have reached the opposite result had the case been argued under the rhetoric of the public policy exception.

CONCLUSION

In less than thirty years, judges have made revolutionary changes in the way the law treats employees who complain that they were discharged unjustly. The nearly irrebuttable employment-at-will rule has been replaced by a variety of doctrines limiting the employer's traditional right to discharge employees for any reason it deemed appropriate. This Comment has focused on the remedies that each of these doctrines does, and should, give to wrongfully discharged employees. This focus on remedies has forced us to reconsider the fundamental purposes of these wrongful discharge doctrines.

Despite their apparent similarity, these new doctrines actually are designed to serve quite different ends. The public policy exception has very little to do with job security for employees; rather, through the deterrent effect of private damage suits, it protects a limited number of important public policies and institutions from the abuses of private employers' power to discharge employees. The express and implied-in-fact contract theories, by contrast, have very little to do with public policy. Unlike the public policy exception, they are designed to allow employers and employees to bargain over the degree of job security that they want. They will provide an employee with legally enforceable job security, but only if he bargains for it with his employer. Thus, these contract doctrines relegate job security to the private sphere of the employer-employee relationship.

The final theory of wrongful discharge that I have considered is the
implied-in-law covenant of good faith and fair dealing. This doctrine of wrongful discharge is still in its formative stages. Only a few jurisdictions have indicated that they will imply a nonwaivable duty to provide some level of job security into employment contracts, and these jurisdictions have only begun to elaborate the scope of this duty. And, as we have seen, there is still confusion over the proper remedy for breach of this implied covenant.

In deciding upon the appropriate remedy for an employer's breach of the implied duty to provide job security, courts will have to reconsider the theories justifying judicial intrusion into the employer's and employee's freedom of contract. They must decide whether the law is implying the duty of good faith in order to remedy defects in the private bargaining process or whether the law is taking a far more radical step—removing the whole issue of job security from the hands of the employer and employee and raising it to the level of a public policy. In making this decision, judges must rethink their conceptions of the state, the individual, and her work.