EMPLOYMENT AT WILL: THE RELATIONSHIP BETWEEN SOCIETAL EXPECTATIONS AND THE LAW

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INTRODUCTION

Fifty-eight percent of the respondents to a recent poll believe that the ethical standards of American business executives are only fair or poor.[1] The public outcry about business ethics is paralleled in legal journals.[2] At the same time, an employee who is discharged for reporting or refusing to engage in illegal or unethical activity within the organization receives little or no legal protection in many U.S. jurisdictions.[3]

This contradictory state of affairs arises from a traditional legal principle establishing that noncontractual private sector workers—so-called "at will" employees—are subject to dismissal without recourse against their employers. Some jurisdictions make an exception to this rule by prohibiting employers from retaliating against at-will employees who report or decline to participate in illegal or unethical

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[1] Wildstrom, *A Risky Tack for Democrats: Bashing Business Won't Get Votes*, BUS. WEEK, July 20, 1987, at 71 (Business Week/Harris poll).

[2] *See, e.g.*, Conry & Nelson, *Business Law and Moral Growth*, 27 AM. BUS. L.J. 1 (1989); Moskowitz, *Employment-At-Will & Codes of Ethics: The Professional's Dilemma*, 23 VAL. U.L. REV. 33 (1988); Pellegrino, *Character, Virtue and Self-Interest in the Ethics of the Professions*, 5 J. CONTEMP. HEALTH L. & POL'Y 53 (1989); Wiesner & Cava, *Stealing Trade Secrets Ethically*, 47 MD. L. REV. 1076 (1988).

[3] *See infra* notes 18-28 and accompanying text.

activity. Other states, however, continue to adhere strictly to the at-will doctrine in such cases.[4]

The lack of uniformity among state responses in this area may be explained, at least in part, by the competing considerations involved: the employer's interest in maximizing control, efficiency, and productivity; the worker's interest in being able to report or refuse to engage in illegal or unethical conduct without penalty; and society's interest in promoting lawful and ethical behavior. Where traditional at-will principles are followed, the employer's interest is given the highest priority.

Freedom of contract and enterprise are the policy bases for the traditional rule.[5] A predictable result of this approach, however, is that legal and ethical behavior is discouraged. An employee who is threatened with job-related consequences for reporting or refusing to engage in wrongful activity will be disinclined to do so; an employer who is insulated from legal responsibility for such threats may impose them more readily. Does adherence to the traditional at-will rule in these circumstances reflect societal expectations?[6] This inquiry raises two further questions: whether the law governing employment at will should correspond to societal expectations; and, assuming that such beliefs are pertinent, whether they can be systematically determined.

This article begins by briefly reviewing the current law regarding the discharge of at-will employees for reporting or declining to participate in illegal or unethical activity.[7] It then argues that societal expectations are relevant to the law's content concerning this issue.[8] In this connection, the article presents the results of a survey designed to discover societal expectations concerning at-will employment, a survey that demonstrates an exceptional level of support for workers discharged under the circumstances described.[9] An analysis of the relationship between the survey results and existing law follows.[10] The article concludes with recommendations for legal reform in this area.[11]

[4] *See infra* notes 15-28 and accompanying text.

[5] Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 342-43 (1974); Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WIS. L. REV. 777, 781-82.

[6] Throughout this article, the terms "societal expectations," "societal values," and "societal beliefs" are used interchangeably. The analysis focuses on identifying the types of employee conduct that society believes the law *should* protect, rather than the conduct the law in fact does protect.

[7] *See infra* notes 12-28 and accompanying text.

[8] *See infra* notes 29-38 and accompanying text.

[9] *See infra* notes 39-65 and accompanying text.

[10] *See infra* notes 66-89 and accompanying text.

[11] *See infra* notes 90-94 and accompanying text.

The employment-at-will rule establishes that a hiring for an indefinite period is terminable by either party, for any reason, at any time. In the United States, the genesis of this principle was a treatise on master-servant relationships.[12] In the words of the seminal decision, employers are permitted to "dismiss their employees at will ... for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."[13] The theoretical basis for the rule is a principle of mutuality to the effect that an employee who cannot be compelled to work may not compel the employer to employ him or her.[14]

The common law at-will rule retains vitality in most U.S. jurisdictions. It has been eroded, however, by legislative enactments at both the state and federal levels.[15] These statutes range from the broad

[11] *See infra* notes 90-94 and accompanying text.

[12] *See* H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). Wood's account of the origins of the rule is often criticized. *See, e.g.*, Moskowitz, *supra* note 2, at 35-37; Note, *supra* note 5, at 341-42. The rule had received widespread acceptance in U.S. jurisdictions by the turn of the century. For a discussion of this development and the historical, social, and economic reasons for it, see Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416-21 (1967); Moskowitz, *supra* note 2, at 38-41; Note, *supra* note 5, at 340-47; Comment, *supra* note 5, at 782.

[13] Payne v. Western & A. R.R., 81 Tenn. 507, 519-20 (1884). *Payne* was overruled on other grounds in Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915).

[14] *See* Blades, *supra* note 12, at 1419-21; Summers, *Individual Protection Against Unjust Dismissal: Time For a Statute*, 62 VA. L. REV. 481, 484-85 (1976); Comment, *supra* note 5, at 780-81. As was noted by one judge, however, "[w]hile the doctrine is cast in mutuality ... it cannot seriously be contended that, in reality, it impacts with equal force. [I]t assures equality to the employee as does the law which forbids the rich as well as the poor to sleep under bridges." Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213, 214 (1985).

[15] *See* PLI UNJUST DISMISSAL UPDATE 20-29 (1985); Dworkin & Near, *Whistleblowing Statutes: Are They Working?*, 25 AM. BUS. L.J. 241, 244-53 (1987); Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. J.L. REFORM 277, 292-301 (1983); Moskowitz, *supra* note 2, at 44-46; Summers, *supra* note 14, at 491-99; Cooper & Covey, *Whistle-Blower Protection Acts Broaden Rights to Employees*, NAT'L L.J., July 3, 1989, at 32, col. 1.

The National Conference of Commissioners on Uniform State Laws is in the process of drafting a model statute governing employee discharge. *See* EMPLOYMENT TERMINATION ACT (Discussion Draft February 1990). The most recent draft prohibits discharge if:

> (1) the termination is in retaliation for the individual's compliance with, or refusal to violate, public policy derived from constitutional or statutory law existing at the time of the compliance or refusal or the termination and conferring rights or imposing duties on persons in this State; or
>
> (2) the termination is based upon the individual's good faith reporting of facts to the appropriate representatives of the employer or to appropriate civil

protection against employment discrimination offered by Title VII[16] to narrow state laws proscribing discharge in specific situations.[17] Notwithstanding such legislative action, many at-will employees who report or refuse to engage in illegal or unethical conduct must rely on common law for protection; typical statutory coverage is limited in terms of categories of employees[18] and/or protected actions.[19]

The level of judicial relief available to otherwise unprotected employees varies significantly. It does so on the basis of two factors: the nature of the employee activity that caused the discharge and the jurisdiction in which recourse is sought. In the courts of many states, employees who are fired for declining to participate in illegal activity are most likely to receive protection.[20] Dismissals resulting

authorities, if the individual is under a legal duty to report those facts and the facts, if proven, would constitute one or more elements of a felony under applicable state or federal law, or if failure to report the facts would adversely affect the safety or health of any fellow worker or of the general public.

Id. at 3. Under the draft statute, an employee who has been employed for at least one year may not be discharged without "good cause." *Id.*

[16] Title VII of the 1964 Civil Rights Act prohibits employers from discharging employees on the basis of "race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a) (1982).

[17] *See, e.g.*, N.Y. JUD. LAW § 519 (McKinney Supp. 1989) (prohibiting discharge of employee for absence due to jury service); N.Y. WORK COMP. LAW § 120 (McKinney Supp. 1989) (declaring unlawful the discharge of an employee for testifying in a worker's compensation proceeding).

[18] *See, e.g.*, 10 U.S.C.A. § 1587(b) (West 1983 & Supp. 1989) (prohibiting "personnel actions" against civilian employees of the military who report certain types of information); 48 U.S.C.A. § 441(a)(1) (West 1986 & Supp. 1989) (prohibiting discharge or other discriminatory action against railroad employees for filing complaints relating to federal railroad safety laws).

[19] *See, e.g.*, N.Y. JUD. LAW § 519 (McKinney Supp. 1989) (prohibiting discharge of employee for absence due to jury service); N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1989) (declaring unlawful the discharge of an employee for testifying in a worker's compensation proceeding).

[20] *See, e.g.*, Hansrote v. Amer Indus. Technologies Inc., 586 F. Supp. 113 (W.D. Pa. 1984), *aff'd*, 770 F.2d 1070 (3d Cir. 1985) (applying Pennsylvania law; refusal to make commercial bribe); Perry v. Hartz Mountain Corp., 537 F. Supp. 1387 (S.D. Ind. 1982) (applying Indiana law; employee would not engage in conspiracy in constraint of trade); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (refusal to participate in scheme to fix gasoline prices); Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (employee declined to commit perjury); McClanahan v. Remington Freight Lines, Inc., 498 N.E.2d 1336 (Ind. App. 1986), *rev'd on other grounds*, 517 N.E.2d 390 (Ind. 1988) (employee unwilling to drive truck carrying load exceeding state weight limit); Trombetta v. D.T.& I. R.R. Co., 81 Mich. App. 489, 265 N.W.2d 385 (1978) (refusal to falsify state pollution control reports); Phipps v. Clark Oil & Ref. Corp., 396 N.W.2d 588 (Minn. Ct. App. 1986), *aff'd*, 408 N.W.2d 569 (Minn. 1987) (employee declined to violate Clean Air Act by pumping leaded gas into automobile equipped for unleaded fuel only); Kalman v. Grand Union Co., 183 N.J. Super.

from refusals to take part in practices that are not illegal but which are believed by the employee to be unethical are less apt to be actionable.[21] Both of these situations are addressed in terms of the so-called public policy exception to the employment at will rule.[22] The

153, 443 A.2d 728 (N.J. Super. Ct. App. Div. 1982) (employee unwilling to violate state regulations regarding operation of pharmacy within grocery store); O'Sullivan v. Mallon, 160 N.J. Super. 416, 390 A.2d 149 (N.J. Super. Ct. Law Div. 1978) (x-ray technician refused to perform catheterization for which she was untrained and legally unqualified); Delaney v. Taco Time Int'l, Inc., 297 Or. 10, 681 P.2d 114 (1984) (employee declined to sign potentially defamatory statement about discharge of former employee); Sabine Pilot Serv. v. Hauck, 687 S.W.2d 733 (Texas 1985) (employee refused to pump bilges into open water).

But see Guy v. Travenol Laboratories, Inc., 812 F.2d 911 (4th Cir. 1987) (applying North Carolina law; affirming motion to dismiss where plaintiff alleged termination due to refusal to falsify federally-required drug production and control records); Reich v. Holiday Inn, 454 So. 2d 982 (Ala. 1984) (no cause of action stated by motel auditing clerk discharged for failure to pay invoices she claimed were from dummy corporation established to defraud Internal Revenue Service and employer's stockholders); Troy v. Interfinancial, Inc., 171 Ga. App. 763, 320 S.E.2d 872 (1984) (affirming judgment n.o.v. in favor of employer where plaintiff alleged dismissal due to refusal to perjure self in deposition); Gil v. Metal Serv. Corp., 412 So. 2d 706 (La. Ct. App. 1982) (no cause of action stated by plaintiff who was fired for declining to participate in practice of selling foreign steel as domestic by removing identification marks).

[21] *See, e.g.*, Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980) (physician refused to test drug on basis that study participants would be subjected to risk because of the controversial nature of saccharin, one of the drug's ingredients). *But see generally* Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (applying Pennsylvania law; motion to dismiss improperly granted where employee alleged discharge due to refusal to participate in employer's lobbying effort and private expressions of opposition to employer's political views).

[22] The public policy exception often encompasses cases in addition to those involving an employee who reports or refuses to participate in illegal or unethical activity. One typical category protects employees who are discharged for fulfilling a public obligation. *See, e.g.*, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (cause of action stated where plaintiff fired for refusing to ask to be excused from jury duty); Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985) (employee who was dismissed for complying with subpoena to testify before state Employment Security Commission has cause of action). *But see* Bender Ship Repair, Inc. v. Stevens, 379 So. 2d 594 (Ala. 1980) (employee at will may be terminated for serving on grand jury).

Another representative group of cases gives recourse to workers who are fired for exercising a statutory right. *See, e.g.*, Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (retaliatory discharge for filing worker's compensation claim actionable); Hansen v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984) (same). *But see* Segal v. Arrow Indus. Corp., 364 So. 2d 89 (Fla. Dist. Ct. App. 1978); Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978) (all holding that no cause of action is available for dismissal based on filing worker's compensation claim).

For more comprehensive discussions of the public policy exception, see Bastress, *A Synthesis and a Proposal for Reform of the Employment At-Will Doctrine*, 90 W. VA. L. REV. 319, 326-34 (1988); Hubbell, *Retaliatory Discharge and the Economics of Deter-*

cause of action, often labeled "wrongful discharge" or "retaliatory discharge," is typically tort-based, although a few states employ contract theory in this context.[23]

Whistleblowers generally receive a lower level of protection than do employees who refuse to participate in illegal or unethical activity. The courts are more likely to assist employees who blow the whistle to state or federal authorities[24] than those who make similar disclosures to the news media.[25] On the other hand, individuals who report illegal or unethical practices within the organization—for example, to a superior—and are fired for their efforts are left without legal recourse with perhaps surprising frequency.[26] Such dismissals are

rence, 60 U. COLO. L. REV. 91, 95-96 (1989); Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80's*, 40 BUS. LAW. 1, 6-17 (1984); Moskowitz, *supra* note 2, at 49-53; Comment, *supra* note 5, at 787-88.

[23] *See* Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (recognizing contract-based cause of action where discharge violated public policy). *See also* Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980); Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983) (both recognizing similar cause of action but declining to apply it on facts of case).

[24] *See, e.g.*, Wagner v. City of Globe, 150 Ariz. 82, 722 P.2d 250 (1986) (police officer arranged to bring illegally arrested prisoner before magistrate); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (employee reported possible criminal activity of fellow employee to local law enforcement officials); Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859 (Mo. Ct. App. 1985) (employee disclosed employer's violation of federal regulations to Food and Drug Administration); McQuary v. Bel Air Convalescent Home, Inc., 69 Or. App. 107, 684 P.2d 21 (1984) (employee threatened to report alleged patient mistreatment to state agency). *But see, e.g.*, Welch v. Brown's Nursing Home, 20 Ohio App. 3d 15, 484 N.E.2d 178 (1984) (no recovery for nursing home employee discharged for reporting allegations of patient mistreatment to state Commission on Aging).

[25] *See, e.g.*, Rozier v. St. Mary's Hosp., 88 Ill. App. 3d 994, 411 N.E.2d 50 (1980) (upholding summary judgment in favor of employer where employee fired for disclosing to newspaper inappropriate conduct toward patients by hospital personnel).

[26] *See, e.g.*, Newman v. Legal Servs. Corp., 628 F. Supp. 535 (D.D.C. 1986) (applying District of Columbia law; regional directors of LSC informed superiors of claimed violations of LSC Act); Foley v. Interactive Data Corp., 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988) (employee privately reported to vice president, former supervisor, that new supervisor was being investigated by the FBI for embezzlement from his former employer); Gould v. Campbell's Ambulance Serv., Inc., 111 Ill. 2d 54, 488 N.E.2d 993 (1986) (emergency medical technicians complained about co-employee's lack of certification as required by city ordinance); Zaniecki v. P.A. Bergner & Co., 143 Ill. App. 3d 668, 493 N.E.2d 419 (1986) (dock supervisor reported to chief security officer that store manager was taking for own use scrap wood from shipping containers); Martin v. Platt, 179 Ind. App. 688, 386 N.E.2d 1026 (1979) (employee disclosed to superior's boss that superior was soliciting and receiving kickbacks from suppliers); Campbell v. Eli Lilly & Co., 421 N.E.2d 1099 (Ind. 1981) (employee informed superiors of dangerous effects of drugs being researched and manufactured); Adler v. American Standard Corp., 290 Md. 615, 432 A.2d 464 (1981) (employee reported various record-

often characterized by the courts as resulting from mere management disputes.[27]

Although the precise number of states recognizing a public policy-based exception to the at-will rule is difficult to pinpoint, most estimates indicate that more than half have done so.[28] Judicial ap-

keeping improprieties, payment of commercial bribes, and misuse of funds); Mello v. Stop & Shop Co., 402 Mass. 555, 524 N.E.2d 105 (1988) (employee disclosed that store managers were making false claims to manufacturers, suppliers, and company warehouse that merchandise had been delivered in defective condition or not at all); Suchodolski v. Michigan Consol. Gas Co., 412 Mich. 692, 316 N.W.2d 710 (1982) (objection to internal accounting practices inconsistent with guidelines of Institute of Internal Auditors); Wiltsie v. Baby Grand Corp., 774 P.2d 432 (Nev. 1989) (poker room manager disclosed supervisor's illegal conduct); House v. Carter-Wallace, Inc., 232 N.J. Super. 42, 556 A.2d 353 (N.J. Super. Ct. App. Div.), *cert. denied*, 564 A.2d 874 (N.J. 1989) (employee opposed distribution of allegedly contaminated batches of tooth polish); Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 506 N.E.2d 919, 514 N.Y.S.2d 209 (1987) (reporting illegal tax avoidance schemes and slush funds to superior); Murphy v. American Home Prod. Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983) (employee disclosed discovery of $50 million in illegal account manipulations improperly inflating income growth and generating unwarranted bonuses to upper level managers); Phung v. Waste Management, Inc., 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986) (chief chemist at toxic waste disposal site reported that business being conducted in violation of law); Walsh v. Consolidated Freightways, Inc., 278 Or. 347, 563 P.2d 1205 (1977) (reporting safety problems); Geary v. U.S. Steel Corp., 456 Pa. 471, 319 A.2d 174 (1974) (informing superiors that new product had been inadequately tested and was dangerous); Rinehimer v. Luzerne County Community College, 372 Pa. Super. 480, 539 A.2d 1298 (1988) (college president exposed misappropriation of funds by board member and college dean).

But see, e.g., Sheets v. Teddy's Frosted Foods, 179 Conn. 471, 427 A.2d 385 (1980) (cause of action stated by employee who was discharged for attempting to convince employer to comply with state food labeling law); Schmidt v. Yardney Elec. Corp., 4 Conn. App. 69, 492 A.2d 512 (1985) (individual fired for disclosing knowledge regarding employer's falsified insurance claim to auditors of employer's parent corporation had cause of action); Shores v. Senior Manor Nursing Center, Inc., 164 Ill. App. 3d 503, 518 N.E.2d 471 (1988) (cause of action stated by nurse's aide who was discharged for reporting charge nurse's improper performance); Petrik v. Monarch Printing Corp., 111 Ill. App. 3d 502, 444 N.E.2d 588 (1982) (complaint improperly dismissed where vice president-finance was dismissed for reporting to president suspicions regarding embezzlement and discovery of discrepancy in corporate financial records which he believed may have resulted from criminal conduct); Brown v. Physician's Mutual Ins. Co., 679 S.W.2d 836 (Ky. Ct. App. 1984) (reversing summary judgment for defendant where plaintiff was discharged for reporting violations of state Insurance Code to supervisor); Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978) (dismissal of complaint reversed where employee fired for bringing to attention of superiors federal and state consumer protection laws).

[27] *See, e.g.*, *Newman*, 628 F. Supp. at 539-40; *Zaniecki*, 143 Ill. App. 3d 668, 493 N.E.2d at 422; *Suchodolski*, 412 Mich. 692, 316 N.W.2d at 712.

[28] *See, e.g.*, Hames, *The Current Status of the Doctrine of Employment at Will*, 39 LAB. L.J. 19, 20 (1988).

proaches to the exception vary widely, however, and in few states can employees at will report or refuse to participate in illegal or unethical activity with assurance that the law will shield them from being fired.

Survey Rationale, Design, and Method

Tort Law and Employment at Will

As discussed above, the level of protection given by the courts to an at-will employee who reports or refuses to engage in illegal or unethical conduct varies significantly among U.S. jurisdictions. In a few states, contract law-based limitations are imposed on employer behavior.[29] In the absence of legislative action, however, tort law is best suited to the task of dealing with employers who retaliate against their employees under these circumstances.[30] The competing interests

[29] *See supra* note 23.

[30] *See generally supra* notes 20-21, 24-26 (discussing cases utilizing such an approach). Two issues, both beyond the scope of this article, are raised by this point. The first is whether an exception to the at-will rule protecting employees who are discharged for reporting or refusing to engage in illegal or unethical behavior should be made judicially, rather than legislatively. *See, e.g.*, Martin v. Platt, 179 Ind. App. 688, 386 N.E.2d 1026 (1979); Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 506 N.E.2d 919, 514 N.Y.S.2d 209 (1987) (both arguing that alteration of the at-will rule should be undertaken by the legislature as opposed to the courts). *But see* Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983) (stating that the courts should adapt the common law to social change); Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 Ohio St. L.J. 1, 3 (1979) (the courts may properly "perfor[m] a catalytic function to provoke legislative consideration" of issues such as this one). Prosser and Keeton have noted that "[i]n some instances this issue over the respective roles of courts and legislatures in making tort law occupie[s] more of the court's attention than the clash of views over the substantive law issue." W. Prosser & W. Keeton, Prosser and Keeton on the Law of Torts 18 (5th ed. 1984).

The at-will rule is well suited to judicial modification, particularly in light of the inherent impediments to legislative relief in this area of the law. *See* Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment At Will*, 17 Am. Bus. L.J. 467, 492 (1980); Blades, *supra* note 12, at 1434; Peck, *supra*, at 3 (all noting that business organizations as well as labor unions are likely to oppose legislative protection for employees at will, the former on the basis that it would interfere with employers' freedom of action, the latter because legislation providing job security would usurp their role); Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 Ga. L. Rev. 323, 419 (1986) (arguing that "the courts act legitimately when they retain their historic, active role in changing private law to reflect changes in the way society sees itself"). *But see* St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 Neb. L. Rev. 56, 69-70 (1988) (contrary to popular assumptions, labor unions should, and may be likely to, support legislative relief in this area).

A second issue relates to the breakdown of the traditional barriers between tort and contract law. A number of commentators have observed that public policy

involved—employer vis-a-vis employee vis-a-vis society—are precisely those with which tort law typically, and appropriately, deals.[31] Additionally, the minimum standard of conduct to be enforced by the legal system in this context should be derived from societal expectations, rather than an agreement between the employer and employee.[32]

Societal expectations are not systematically determined with reference to most legal issues.[33] Indeed, in some situations there may be legal or policy considerations that should override those expectations.[34] Nonetheless, societal beliefs, the very source of the obligation enforced by tort law, are certainly relevant to the law's content; it is axiomatic that the gauge of "reasonable" conduct, which is the touchstone of tort liability, is societal values.[35]

It has been said in this context that "[i]t is a simple matter to say that the interests of individuals are to be weighed against one another in the light of those of the general public, but far more difficult to say where the public interest may lie."[36] For many legal issues, there

considerations have led or should lead to the dissolution of such boundaries. *See* H. COLLINS, THE LAW OF CONTRACT 21 (1986); G. GILMORE, THE DEATH OF CONTRACT 87-90 (1974); Linzer, *supra*, at 326-27; Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 NW. U.L. REV. 1198 (1988). For an argument that contract theory may be more useful than tort theory in wrongful discharge cases, see, e.g., Blackburn, *supra*, at 482-87.

[31] *See* W. PROSSER & W. KEETON, *supra* note 30, at 6 ("to strike some reasonable balance between the plaintiff's claim to protection against damage and the defendant's claim to freedom of action for defendant's own ends, and those of society, occupies a very large part of the tort opinions"); *id.* at 15 ("the twentieth century has brought an increasing realization of the fact that the interests of society in general may be involved in disputes in which the parties are private litigants"). *See generally* Malin, *supra* note 15, at 277 (appropriate balance to be struck in whistleblowing cases is "between the employee's interest in acting in accordance with his individual conscience and his duty of loyalty to his employer"); Note, *supra* note 5, at 336 (interests of both employer and employee must be accounted for in evaluating discharge situation).

[32] *See* Moskowitz, *supra* note 2, at 50; Note, *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith & Fair Dealing Into the Commercial Realm*, 86 COLUM. L. REV. 377, 392 (1986).

[33] *See* W. PROSSER & W. KEETON, *supra* note 30, at 17. *See also* Linzer, *supra* note 30, at 423.

[34] Many factors may appropriately contribute to the law's content: "[t]ort ultimately involves society-wide judgments of right and wrong. The judgments need not be based on moral values alone. Questions of cost and benefit and of how they should be shared are legitimate factors in determining the right and wrong of who should pay." Linzer, *supra* note 30, at 371. *See generally, e.g., infra* text accompanying notes 61-84 (considering policy issues as well as survey results in evaluation of law governing at-will employees who report or refuse to engage in illegal or unethical activity).

[35] *See* W. PROSSER & W. KEETON, *supra* note 30, at 6, 7; Linzer, *supra* note 30, at 371.

[36] W. PROSSER & W. KEETON, *supra* note 30, at 17.

may be no definable "public interest," in the sense of well-formulated general attitudes, because such questions are given little consideration by most individuals.[37] On the other hand, as societal beliefs develop or become focused—in response, for example, to public outrage about business ethics—it may be appropriate to measure and take cognizance of them.[38] Such data may be of practical as well as theoretical value, in the sense that the law presumably provides an incentive to legal and ethical behavior when it is consistent with societal values.

Survey Design and Method

Generally, survey results are useful to the extent that they can be said to be representative of a larger group of people. This principle has been explained as follows:

> Surveys rest on a paradox. Although the individual respondents are asked questions about their own behavior or beliefs, survey researchers are not interested in the respondents as individuals. They are interested in them only insofar as their answers, when combined with others, allow the surveyors to make statements about the population as a whole or significant subgroups of the population.[39]

Accordingly, researchers place great emphasis on survey design and methods of administration.

Sample

The sample for this article's survey comprised approximately five hundred persons[40] employed in the Syracuse, New York metropolitan area. It was developed through direct contacts with employers. Thir-

[37] *See* Linzer, *supra* note 30, at 423.

[38] *See* W. PROSSER & W. KEETON, *supra* note 30, at 18; Linzer, *supra* note 30, at 426.

The high response rate to the survey reported in this article (55.2%) indicates that societal beliefs regarding the legal protection of at-will employees who report or refuse to engage in illegal or unethical activity have become crystallized. The return rates achieved by questionnaires mailed—in contrast, for example, to personal interviews conducted—to the general public are highly dependent upon topic saliency. S. SUDMAN & N. BRADBURN, ASKING QUESTIONS 226-27 (1988). Presumably, therefore, the issues presented in the survey were of interest and importance to the respondents. *See generally infra* note 46 (discussing the relationship between saliency and return rate).

[39] N. BRADBURN & S. SUDMAN, POLLS AND SURVEYS 4-5 (1988). This book is a useful primer of survey technique.

[40] The original mailing list included 507 names. We were unable to find correct addresses for eight returned packets, so the return rate has been calculated on the basis of a final sample of 499 persons.

teen employers and a professional association agreed to participate in the study.[41] The largest of the participating organizations employs more than four thousand persons; the smallest, fewer than ten. Most, if not all, of the forty members of the professional association surveyed work for different employers. Accordingly, the survey respondents represent a wide range of organizational perspectives.

It was hypothesized that employment characteristics would be the most important variables in determining societal expectations about the legal protection of at-will employees. Accordingly, the respondent pool was planned to attain a distribution of employees in major occupational groups and nonagricultural sectors of the area economy. Additionally, the research design called for, and achieved, a sufficient number of employees represented by a union to permit comparative analysis with other workers.[42]

Table I compares respondent employment characteristics with Syracuse area characteristics.[43] The sample is quite representative in terms of both major occupational groups and economic sectors. Although there are some discrepancies, all categories are represented. Many of the differences are small, and the overall correspondence between the respondents and the actual data is sufficiently close to allow generalization to the area population. The data also provide useful insights regarding more widespread perceptions toward employees who report or decline to participate in illegal or unethical activity.

Administration

For mailed questionnaires, survey researchers place a great deal of emphasis on rates of return because "[t]he greater the response, the more accurately it will estimate parameters in the population sampled."[44] Follow-up letters to individuals who do not return the initial mailing are a highly successful method of increasing rates of

[41] Eleven of the participating employers and the professional association supplied their employees' names and addresses for the study. The two remaining employers were supplied with stamped, sealed packets which they addressed and mailed. The respondent pool included all employees of seven of the employers and a sample of six of the employers and the professional organization.

[42] 26.1% of the respondents indicated that they were represented by a union. This compares with a national figure of 19.4% of full-time workers. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 416 (1989) (1987 figure). A comparison of survey results from union respondents versus all other respondents is presented *infra* at text accompanying notes 61-65.

[43] Complete demographic statistics are presented in Appendix A.

[44] Kanuk & Berenson, *Mail Surveys and Response Rates: A Literature Review*, 12 J. MARKETING RES. 440, 440 (1975).

TABLE I

Economic Sector	Syracuse MSA[1]	Survey Respondents
Manufacturing	17.6%	15.6
Construction	5.1	8.7
Transportation, utilities, communications	6.0	6.2
Wholesale or retail sales	23.6	17.8
Finance, real estate, insurance	6.4	8.7
Services	24.3	33.0
Government	16.9	6.9
No response		3.3

Occupational Group	CNY Region[2]	Survey Respondents
Clerical, admin. support	19.2%	15.6
Produc., maint., mechanics, constr.	24.6	23.9
Professional, paraprof., technical	20.9	34.1
Service	15.7	6.2
Sales	10.8	4.3
Managerial, supervisory	6.8	12.7
No response		3.3

[1] Division of Research & Statistics, N.Y. Dep't of Labor, Annual Labor Area Report: Syracuse Area, Fiscal Year 1989 23 (1988).

[2] Source: Division of Research & Statistics, N.Y. Dep't of Labor, Occupational Needs 1989-1991: Central New York Region 4-16 (1988).

response.[45] Thus, two follow-up mailings in addition to the first were planned.

In the cover letter accompanying the first mailing, the study was presented as a survey of societal attitudes regarding employment law. Because the questionnaire was completely anonymous, the entire

[45] *See* Heberlein & Baumgartner, *Factors Affecting Response Rates to Mailed Questionnaires: A Quantitative Analysis of the Published Literature*, 43 AM. SOC. REV. 447, 450-51 (1978); Kanuk & Berenson, *supra* note 44, at 441; Linsky, *Stimulating Responses to Mailed Questionnaires: A Review*, 39 PUB. OPINION Q. 82, 85 (1975).

sample was sent the first follow-up. Respondents were asked to check an appropriate box and return the second cover letter if they had previously completed the survey; those who did so were omitted from the third, final mailing. The follow-up mailings were sent in approximately two-week intervals. Each included both a copy of the survey instrument and a postpaid return envelope. An excellent return rate of 55.2 percent was achieved.[46]

Content

The questionnaire was divided into four parts. One section asked respondents to rank the relative influence of six factors on an employee's decision whether to blow the whistle in the context of a hypothetical fact pattern. Two additional parts measured attitudes about the specific circumstances in which an employee discharged for reporting or refusing to participate in wrongful activity should prevail in a lawsuit against his or her former employer. The last section requested demographic information.

FINDINGS

Factors Influencing Behavior

Four earlier investigations have analyzed the values held by business managers in the United States, asking respondents to rank the relative influence of five or six factors on managers' unethical conduct generally.[47] Respondents in this study were requested to rank the same factors with reference to the following hypothetical scenario:

> An employee of a manufacturing company has discovered that a product manufactured by his firm is defective and unsafe. The employee must decide whether to inform outside authorities of the problem even though this might be costly to the firm. In what order would you expect the factors listed ... to influence this employee's decision whether to divulge this information to the authorities?[48]

[46] Return rates for mailed questionnaires vary widely, depending on a number of factors. *See* Heberlein & Baumgartner, *supra* note 45; Kanuk & Berenson, *supra* note 44; Linsky, *supra* note 45. One analysis revealed that two factors are responsible for 50.5 percent of the variance in final response rates to mailed questionnaires: number of follow-up contacts and salience. Heberlein & Baumgartner, *supra* note 45, at 451.

[47] Baumhart, *How Ethical are Businessmen?*, HARV. BUS. REV., July-Aug., 1961, at 6, 156; Brenner & Molander, *Is the Ethics of Business Changing?*, HARV. BUS. REV., Jan.-Feb, 1977, at 57, 66; Dolecheck, Caldwell & Dolecheck, *Ethical Perceptions and Attitudes of Business Personnel*, AM. BUS. REV., Jan., 1988, at 47, 51; Posner & Schmidt, *Values and the American Manager: An Update*, 26 CAL. MGMT. REV. 202, 212 (1984).

[48] *See generally* Geary v. United States Steel Corp., 456 Pa. 471, 319 A.2d 174 (1974); Dolecheck, Caldwell, & Dolecheck, *supra* note 47, at 50 (both providing inspiration for the wording of this question). In the other four studies, respondents were asked simply

The respondents were asked to include in their rankings a factor not considered in the earlier studies: "whether the employee might be fired for reporting this information."[49] The results are set forth in Table II.

The table demonstrates that the results of this study are generally compatible with the four previous surveys in terms of the factors offered as alternatives. The additional factor regarding impact on employment security, however, was ranked third in a tie with "formal company policy." Only the ethical practices of the industry and the behavior of the employee's superiors received higher rankings. Further, the job security alternative received the most first-place rankings of the six factors.[50]

It was suggested above[51] that the law has an effect on employee decision making. The relatively high ranking of the job security factor in this question supports that hypothesis. The responses to this question demonstrate that the threat of dismissal has a direct bearing on the behavior of employees.[52] More specifically, this result

to rank five or six factors in order of their influence on unethical behavior, actions, or decisions; no hypothetical fact pattern was given. *See* Baumhart, *supra* note 47, at 156; Brenner & Molander, *supra* note 47, at 66; Dolecheck, Caldwell, & Dolecheck, *supra* note 47, at 51; Posner & Schmidt, *supra* note 47, at 212.

[49] To limit the number of alternatives to be ranked and thus to avoid respondent confusion, this study omitted one factor, "personal financial need," included in the other investigations. *See generally* S. SUDMAN & N. BRADBURN, *supra* note 38, at 149, 161 (recommending the limitation of alternatives to be ranked). This factor was selected for deletion because it ranked last in three of the four studies. *See* Baumhart, *supra* note 47, at 156; Brenner & Molander, *supra* note 47, at 66; Dolecheck, Caldwell, & Dolecheck, *supra* note 47, at 51; Posner & Schmidt, *supra* note 47, at 212.

[50] Seventy-three of the 265 respondents to this question ranked the job security factor first. This factor tied with society's moral climate for the highest standard deviation, 1.94.

An analysis of the demographics indicates that the sex of the respondent is the only important variable in determining a first place ranking of the job security factor. The sample as a whole is 55.1 percent male and 43.5 percent female (the remaining respondents did not answer this question). Of the 73 respondents in question, 64.4 percent are male and 35.6 percent are female.

[51] *See supra* note 38 and accompanying text.

[52] Unsurprisingly, this also seems to be true generally. *See, e.g.*, Blackburn, *supra* note 30, at 481 n.6; Blades, *supra* note 12, at 1416; Moskowitz, *supra* note 2, at 34; St. Antoine, *supra* note 30, at 67; Summers, *supra* note 14, at 532; Note, *Employers and Employees: A Call for Oklahoma's Adoption of the Whistle-Blower Exception to the Employment-at-Will Doctrine*, 40 OKLA. L. REV. 285, 296 (1987) [hereinafter cited as Note, *Employers and Employees*]; Note, *Reforming At-Will Employment Law: A Model Statute*, 16 U. MICH. J.L. REFORM 389, 393-94 (1983) (all discussing the importance of job security to employees).

TABLE II

FACTORS INFLUENCING BEHAVIOR

	1989 Study Mean	Rank	1986 Study[1] Mean	Rank	1984 Study[2] Mean	Rank	1976 Study[3] Mean	Rank	1961 Study[4] Mean	Rank
Whether employee might be fired for blowing the whistle	3.4	3	*		*		*		*	
Ethical practices of the industry	3.1	1	3.75	4	3.57	3	3.34	3	2.6	2
Behavior of superiors	3.3	2	2.31	1	2.17	1	2.15	1	1.9	1
Formal company policy	3.4	3	4.32	5	3.84	5	3.27	2	3.3	4
Society's moral climate	3.5	5	4.38	6	3.79	4	4.22	5	*	
Behavior of other employees in the company	4.2	6	3.08	2	3.3	2	3.37	4	3.1	3
Personal financial need	*		3.18	3	4.09	6	4.46	6	4.1	5

* Factor not included in study.

Note: Means are calculated on a scale of 1 (most influence) to 6 (least influence).

[1] Dolecheck, Caldwell & Dolecheck, *Ethical Perceptions and Attitudes of Business Personnel*, Am. Bus. Rev., Jan. 1988, at 47, 51.

[2] Posner & Schmidt, *Values and the American Manager: An Update*, 26 Calif. Mgmt. Rev. 202, 212 (1984).

[3] Brenner & Molander, *Is the Ethics of Business Changing?*, Harv. Bus. Rev., Jan.-Feb. 1977, at 57, 66.

[4] Baumhart, *How Ethical Are Businessmen?*, Harv. Bus. Rev., July-Aug. 1961, at 6, 156.

clearly indicates that potential whistleblowers are deterred from reporting to outside authorities information whose disclosure may be in the public interest. As noted by a respondent in a handwritten comment, "[t]he employee of any company or government agency should be applauded for having enough moral convictions [sic] to report any unethical or illegal activity. This trend will only be set in the court system when the employee knows his job is safe."

When Should the Employee Prevail?

General Premises

The questionnaire contained two measures of respondents' attitudes about the circumstances in which a discharged employee should prevail in a lawsuit against his or her former employer.[53] Table III sets forth eight general kinds of employee activity that were assumed to lead to discharge, and tabulates the respondents' degree of concurrence—whether they strongly agreed, agreed, disagreed, strongly disagreed, or had no opinion—with the conclusion that the legal system should protect each activity.

It is clear that the respondents discriminated between the alternatives in these scenarios. In each comparison, the respondents were less inclined to call for the law to protect employees who reported or refused to engage in unethical behavior than was the case in situations involving illegal activity. For instance, ninety-seven percent believed that an employee who is fired for refusing to participate in illegal activity should prevail in a lawsuit against the former employer, while only sixty-eight percent would similarly support an individual who refused to perform a task perceived to be unethical. Perhaps the respondents drew this distinction on the basis that determining whether particular conduct is "ethical" is likely to require interpretation, and that the employer's interests in control and efficiency therefore should receive greater relative weight. This possibility is supported by handwritten comments on several of the questionnaires. For example, one respondent noted: "'Ethics' is a vague term that is subjective to a single person."

[53] A 1977 study investigated business managers' attitudes toward employee rights, including perceptions regarding employees who refuse to participate in illegal or unethical behavior or who blow the whistle to their superiors. Ewing, *What Business Thinks About Employee Rights*, HARV. BUS. REV., Sept.-Oct. 1977, at 81. Questions focused on appropriate management responses to such situations. For example, where an accountant was fired by her superior for failing to falsify a profit-and-loss statement prepared to support a loan application, respondents were asked whether a senior executive should reinstate her. Ninety-six percent believed that she should be rehired. *Id.* at 84.

TABLE III

CIRCUMSTANCES IN WHICH A DISCHARGED EMPLOYEE SHOULD PREVAIL IN A LAWSUIT AGAINST THE EMPLOYER

Activity Leading to Discharge	Strongly Agree	Agree	Disagree	Strongly Disagree	No Opinion	N	Mean*	Standard Deviation
1. Refuses direction to participate in illegal activity.	66%	31%	2%	1%	1%	274	1.4	0.56
2. Refuses direction to perform task believed unethical.	28	40	20	4	8	254	2.0	0.84
3. Informs superior of another employee's job-related illegal activity.	58	37	4	1	0	272	1.5	0.62
4. Informs superior of another employee's job-related unethical practices.	43	46	7	1	3	269	1.7	0.68
5. Informs law enforcement authorities of employer's illegal activity.	50	38	9	1	2	267	1.6	0.70
6. Informs law enforcement authorities of employer's unethical practices.	24	41	27	3	5	260	2.1	0.82
7. Informs news media of employer's illegal activity.	42	34	15	6	4	262	1.8	0.89
8. Informs news media of employer's unethical practices.	22	41	25	7	6	256	2.2	0.87

* Strongly agree = 1; agree = 2; disagree = 3; strongly disagree = 4. Excludes "no opinion."

Regarding the statements relating to whistleblowing, the respondents were more likely to approve of legal protection for employees who reported their concerns to their superiors than for those who did so to law enforcement authorities; fewer still favored recourse for employees who released information to the news media. For example, ninety-five percent believed that an employee who is discharged for informing a superior of another employee's job-related illegal practices should prevail in a lawsuit against the former employer; eighty-eight percent called for the same result after a report to government authorities, while seventy-six percent would protect a similar disclosure to the news media. The high level of support for internal whistleblowing may demonstrate that the respondents value employee loyalty to the organization. As stated by one respondent in this context, "I believe the employee owes [his or her] primary obligation to [the] employer."

By a sizable margin, the hierarchy of appropriate whistleblowing outlets indicated by these responses generated the largest number of handwritten comments. These remarks are also notable for the diversity of occupations represented, including those of architect, computer programmer, electrician, state legislative staffer, secretary, truck driver, accountant, and dental hygienist, among others. One respondent explained, "I feel that the chain of command within an organization must be allowed to correct problems first. [I]f solutions can't be found through the chain of command, an employee is obligated to contact law enforcement officials. The media should be the last resort in all cases."

These distinctions are clearly drawn and important to an understanding of societal expectations about employment relationships and the law. More significant, perhaps, is the overall measure of support for discharged employees in these situations. To illustrate, sixty-three percent of the respondents would have the employee prevail in the scenario involving the weakest combination of variables—a report to the news media about an employer's unethical activities.

Specific Fact Patterns

Another section of the instrument set forth thirteen fact patterns, ten of which were based on reported cases.[54] In each instance, the

[54] The fact patterns used were based on the cases cited below. In each instance, the parenthetical following the citation briefly describes the fact pattern as it was adapted for the questionnaire. Petermann v. International Bhd. of Teamsters, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (discharge for failure to perjure self before state legislative committee); Sheets v. Teddy's Frosted Foods, 179 Conn. 471, 427 A.2d 385 (1980) (quality control director discharged for insistence on compliance with state food

respondents were told that the employee had filed a lawsuit against the employer as a result of the events described in the question, and were asked to indicate whether they believed that the law should favor the employee or the employer.

In most respects, the results in this section of the instrument reinforce those in the section discussed above, particularly with reference to the distinctions drawn by the respondents between whistleblowing outlets. For example, ninety-eight percent of the respondents believed that the law should favor the assistant treasurer of a corporation who was fired for blowing the whistle to the company president where high officials were illegally manipulating firm accounts. The same report made to law enforcement authorities was supported by seventy-six percent of the respondents, while only fifty-three percent believed the law should favor an employee who made such a report to the news media.

The results in this section of the questionnaire present a contrast to the previously discussed portion of the instrument in several instances. As discussed above, in the section of the questionnaire containing general premises, the employer was favored in none of the scenarios. In the present section, however, there were several instances where a majority of the respondents indicated that the employer should prevail in a lawsuit by the employee. For example, ninety-nine percent of the respondents believed that the law should protect a bookkeeper who was fired for reporting to her manager that two of her company's salespeople had been padding their expense accounts by approximately twenty-five dollars per month. Seventy-one percent felt that her employer should prevail, however, if she informed the news media of this discovery. In addition to whistleblowing scenarios, this section of the questionnaire included four fact patterns in which an employee was fired for refusing to follow his or her boss's directions. Sixty-seven percent of the respondents

labeling standards; three fact pattern variations used in questionnaire); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980) (researcher fired for refusing to participate in employer's drug-testing project on basis of personal belief that one ingredient was dangerous); O'Sullivan v. Mallon, 160 N.J. Super. 416, 390 A.2d 149 (1978) (technician untrained to perform catheterization discharged for refusal to do so); Murphy v. American Home Prod. Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983) (corporate assistant treasurer fired for reporting illegal account manipulations; three fact pattern variations used); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (discharge for failure to request excuse from jury service).

Three variations of a hypothetical fact pattern were also used; these questions involved the bookkeeper of a small company who discovered that two of her employer's salespeople were padding their expense accounts.

believed that the employer should prevail in a lawsuit by an employee whose disobedience was based on personal ethical beliefs.[55]

The questionnaires provided no clues to explain why the respondents were moderately less inclined to have the law protect employees in the section providing fact patterns than in the earlier portion, where simple abstract premises were set forth.[56] It can be hypothesized, however, that ambiguities in the general terms used in the earlier sections were resolved in the context of the fact patterns. For example, greater appreciation for the employer's interest in efficiency and control may be possible in the context of the whistleblowing bookkeeper referred to above than with reference to the premise that "an employee who is fired because she informs her superior in the company of job-related unethical practices by another employee should prevail in a lawsuit against the employer."

Disclosure versus Refusal to Act

As discussed above,[57] whistleblowers generally enjoy a lower level of protection from the courts than do employees who refuse to engage in illegal activity. The survey responses indicate that employees do not make the same distinction. In the section of the questionnaire setting forth general premises, ninety-seven percent of the respondents agreed with the statement that "[a]n employee who is fired because he refuses his employer's direction to participate in an illegal activity should prevail in a lawsuit against the employer." This statement received the highest level of concurrence of the eight premises, and many of the premises regarding whistleblowing received substantially less support.[58] Yet ninety-five percent agreed that the law should protect an employee who is discharged for informing her superior of another employee's job-related illegal activity.[59]

In the part of the questionnaire describing specific fact patterns, ninety-eight percent of the respondents indicated that the law should favor an employee who was fired for refusing to commit an illegal

[55] This question, based on the facts of *Pierce*, asked whether the employer or employee should prevail in a legal action under the following circumstances:

> A research chemist was fired for refusing to participate in her employer's drug-testing project, which had the approval of the U.S. Food and Drug Administration. Her refusal was based on her own belief that one ingredient of the drug being tested was dangerous, although she could not prove that this was true.

[56] *See supra* note 53 and accompanying text.

[57] *See supra* notes 20-27 and accompanying text.

[58] *See supra* Table III.

[59] *Id.* at item 3.

act in both of the two questions in this category. Ninety-nine percent, however, supported a discharged internal whistleblower in two scenarios, and ninety-eight percent did so in a third question.

As previously discussed, the respondents clearly discriminated between illegal and unethical activity, and among whistleblowing outlets.[60] Taking these distinctions into account, the results indicate that, so far as recovery for discharge is concerned, an employee's refusal to participate in an activity and his or her blowing the whistle on similar conduct by another employee are viewed in essentially the same fashion.

Union versus Nonunion Respondents

The respondent pool was planned on the basis of the general assumption that employment characteristics would be the most important variables in determining societal beliefs about the legal protection of at-will employees.[61] More specifically, it was hypothesized that respondents who were represented by a union would be more likely than the sample as a whole to favor legal protection for at-will employees who are fired for reporting or refusing to engage in illegal or unethical activity.[62] This result was expected because most collective bargaining agreements prohibit the discharge of covered employees without just cause.[63] Thus, it was hypothesized, individuals represented by a union would identify a higher standard of employee protection as the norm than would other employees.

Accordingly, Chi-square tests were conducted to determine whether union affiliation is related to level of support for discharged at-will employees. A statistically significant relationship (at p less than .05) emerged with respect to only two of the twenty-one substantive questions in the survey.[64] These questions involved the same fact

[60] *See supra* notes 53-55 & Table III and accompanying text.

[61] *See supra* notes 40-42 & Table I and accompanying text.

[62] The eight civil servants in the sample (2.9% of the respondents) were included in the "union" category because they typically enjoy statutory protection against discharge analogous to that provided in most collective bargaining agreements under the circumstances at issue in the article. *See, e.g.*, N.Y. CIV. SERV. LAW § 75 (McKinney 1983) (no dismissal absent incompetency or misconduct).

[63] *But see* Malin, *supra* note 15, at 288 & n.46 (whistleblowers not always protected by just cause standard).

[64] Standard statistical tests such as the Chi-square test are used to measure "hypotheses that two (or more) estimates are really different from one another ... that is, that the differences obtained in the survey are not the result of chance variation." N. BRADBURN & S. SUDMAN, *supra* note 39, at 234-35.

The question in which respondents were asked to rank six factors in terms of their relative importance in a decision whether to blow the whistle (*see supra* notes 47-52

pattern: a report to the news media of unethical activity by an employer or co-worker.[65] In both cases, union respondents were more likely to favor legal protection for the employee than were other respondents.

This result is consistent with the hypothesis that respondents who are represented by a union are more likely to favor legal protection for employees discharged under the circumstances at issue in this article. More interesting, however, is the lack of a statistically significant relationship between union affiliation and response as to approximately ninety percent of the questions. This result would be more noteworthy if the level of support for at-will employees in the survey as a whole were lower. In terms of the overall study, the outcome of this analysis is yet another indication of the prevalence of the societal belief that at-will employees who are discharged for reporting or refusing to engage in illegal or unethical activity should receive legal protection.

The Relationship Between Law and Societal Values

As discussed above,[66] societal expectations are relevant to the law's content. The study reported herein demonstrates that societal values have crystallized regarding the circumstances in which the law should protect an employee who reports or refuses to participate in illegal or unethical activity. In instances where existing law and the respondents' beliefs converge, it is contended that the law supplies an incentive to legal and ethical behavior. Where they diverge, it may be argued that a disincentive to such conduct is provided.

Jurisdictions Adhering to the At-Will Rule

Although estimates of the precise figure vary, it is apparent that more than half of the American workforce is employed at will.[67] Many

& Table II and accompanying text) was excluded from this analysis.

A significant relationship (at p less than .01) was indicated with reference to a third question, but was disregarded because 50% of the cells had expected counts of fewer than five.

[65] The first of these questions asked respondents to indicate their degree of concurrence with the general premise that "[a]n employee who is fired because he informs the news media of unethical practices by his employer should prevail in a lawsuit against the employer." The second set forth a hypothetical fact pattern involving a bookkeeper's report to the media of other employees' expense account padding.

[66] *See supra* notes 29-38 and accompanying text.

[67] *See Phipps v. Clark Oil & Ref. Corp.*, 396 N.W.2d 588 (Minn. Ct. App. 1986), *aff'd*, 408 N.W.2d 569 (Minn. 1987) (two-thirds); Moskowitz, *supra* note 2, at 34 (more than one-half); Peck, *supra* note 30, at 9 (60-65 percent); St. Antoine, *You're Fired!*, Hum Rts., Jan., 1982, at 33, 36 (more than three-quarters); Tobias, *Current Trends in Employment Dismissal Law: The Plaintiff's Perspective*, 67 Neb. L. Rev. 178, 179-80 (1988) (more than 60 percent).

states continue to adhere to traditional legal principles, refusing to intervene in the employment relationship even in cases where at-will workers are discharged for reporting or declining to participate in unlawful or unethical activity. The results of the study reported herein demonstrate that the legal system's failure to protect employees under these circumstances is inconsistent with societal values.[68] More concretely, in terms of the business environment, the survey indicates that job security is a critical factor in ethical decision making in the workplace.[69] The potential impact of the legal system's failure to give recourse to at-will employees who decide to disclose or refuse to participate in wrongful practices is apparent when the sheer number of such workers is considered. How many backs are turned or questionable assignments accepted daily in the interests of job security? In summary, adherence to the traditional at-will rule under the circumstances at issue in this article is both inconsistent with societal expectations and a disincentive to ethical behavior.

Jurisdictions Recognizing Exceptions to the Traditional Rule

In the more progressive jurisdictions, the relationship between law and societal beliefs is less clear-cut. The majority approach of jurisdictions affording protection to at-will employees who report or refuse to participate in illegal or unethical activity may be compared, however, with societal expectations as they are reflected in the results of the study reported here. Policy considerations distinct from societal values are appropriately considered in this context as well.

Illegal vs. Unethical Activity

Among jurisdictions recognizing a public policy exception to the at-will rule, legal protection is more likely to be extended to employees fired for declining to break the law at the request of their employers than to those who are dismissed for refusing to engage in conduct believed by the employee to be unethical.[70] This distinction was drawn by the survey respondents as well, presumably on the basis that individual perceptions of what is "ethical" may reasonably differ.[71] Illegal conduct, on the other hand, is capable of definition, at least by those familiar with its parameters.

From a policy standpoint, this approach makes good sense. The courts must have a principled basis upon which to decide whether a discharge is actionable. Identifying the boundaries of "public policy"

[68] *See supra* notes 49-55 & Table III and accompanying text.
[69] *See supra* notes 43-48 & Table II and accompanying text.
[70] *See supra* notes 20-21 and accompanying text.
[71] *See supra* Table III and accompanying text.

in the context of employment cases has troubled courts and commentators ever since this exception to the traditional rule was recognized.[72] If the goal of the law is to encourage legal and ethical behavior, a broad definition should be adopted; refusals to violate public policy as defined by constitution, statute, regulation, or the common law should be protected. It also has been persuasively argued that generally accepted professional codes of conduct and practice may support this cause of action.[73]

Refusal to Participate vs. Whistleblowing

The courts are much more likely to protect an employee who refuses his or her employer's direction to commit an illegal act than one who discloses, to any source, the same act committed by another employee.[74] But the survey respondents do not so discriminate.[75]

In terms of the competing interests involved, the employee's interest in being prohibited from reporting information about the activities of an employer or co-worker is arguably not as compelling as his or her interest in protection from obligatory participation in illegal or unethical activity. The argument has been made that public policy concerns are not sufficiently implicated to provide a cause of action where the employee is not being forced to undertake wrongful activity.[76] The employer's interests—maintaining control and efficiency—are more clearly threatened in the choice of an outlet to which information is disclosed than in the context of the refusal-to-act-versus-whistleblowing dichotomy.[77] On the other hand, the disclosure of illegal conduct, at least, furthers society's interest in the enforcement of its laws in the same manner as does refusal to break

[72] *See, e.g.*, Wagenseller v. Scottsdale Memorial Hosp., 167 Ariz. 370, 710 P.2d 1025 (1985); Bastress, *supra* note 22, at 331; Rongine, *Toward A Coherent Legal Response to the Public Policy Dilemma Posed by Whistleblowing*, 23 AM. BUS. L.J. 281, 294-95 (1985); Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1947 (1983).

[73] *See* Moskowitz, *supra* note 2.

[74] *See supra* notes 20-21 and accompanying text.

[75] *See supra* Table III and accompanying text.

[76] One court explained the distinction in this way:

> The employee who chooses to report illegal or unsafe conduct by his employer differs significantly from the employee forced to choose between his job and actual participation in illegal behavior. The latter is the paradigmatic case of a public policy violation; in contrast the whistleblower faces the arguably less onerous choice of either ignoring the known or suspected illegality or becoming an instrument of law enforcement.

Wagner v. City of Globe, 150 Ariz. 82, 722 P.2d 250, 256 (1986).

[77] *See infra* notes 79-89 and accompanying text.

them.[78] Overall, this distinction does not support the goal of improving the legal and ethical climate of business.

External Whistleblowing: Government Authorities versus the News Media

The survey respondents were much more likely to support employees who reported wrongful activity to law enforcement authorities than to the news media.[79] A parallel result is reached in the more progressive states, although generalizations are tenuous because very few reported cases involve whistleblowers who made disclosures to the media.[80] Nonetheless, the legal systems in these jurisdictions reflect societal values in these cases.

In light of the competing considerations at issue in this context, this result makes sense if society's interest in promoting lawful and ethical behavior is better served by direct reports to government authorities. Perhaps this is so. If, on the other hand, the distinction is made on the assumption that a spiteful employee intent on revenge against the employer would resort to the media, while a worker concerned solely with public safety would go to law enforcement officials, it may be less defensible. The whistleblowing employee's motives are sometimes considered in determining whether he or she should prevail in a lawsuit against the former employer.[81] They are irrelevant, however, if the interest given paramount weight is the exposure of potentially harmful conduct by employers. Further, disclosures to anyone outside the organization would seem equally invasive of an employer's discipline and organization. The more critical focus should be on external whistleblowing vis-a-vis reports within the organization.

Internal Whistleblowing

The most striking discrepancy between the survey results and the general approach of courts in states making an exception to the employment-at-will rule on the basis of public policy relates to whistleblowing within the organization. In the section of the questionnaire containing general premises, ninety-five percent of the respondents agreed with the proposition that an individual who is fired for informing his or her supervisor of another employee's job-related illegal activity should prevail in a lawsuit against the employer;

[78] *See* Rongine, *supra* note 72, at 293-94; Note, *Employers and Employees*, *supra* note 52, at 296-97.

[79] *See supra* Table III.

[80] *See supra* note 25 and accompanying text.

[81] *See, e.g.*, Malin, *supra* note 15, at 311.

eighty-nine percent agreed with a similar statement regarding unethical activity.[82] When given three factual scenarios describing internal whistleblowing and asked to identify the party who should prevail in a lawsuit between employee and employer, the employee was supported by ninety-eight percent of the respondents in one case and ninety-nine percent in the other two.[83] Throughout the study, the respondents gave internal whistleblowing a greater measure of protection than any other reporting activity.

In contrast, most lawsuits involving in-house reports of questionable behavior or practices are resolved in favor of the employer.[84] In some of these cases, the conduct at issue arguably is not sufficiently egregious to amount to a violation of public policy.[85] Some courts have concluded that public policy is not implicated in these cases precisely because the report at issue was made in-house, rather than to an outside authority.[86] More generally, a reading of the cases conveys the sense that these disputes are often mechanically characterized as conflicts in management style, as to which the employer's interest in maximizing organizational control and efficiency is appropriately given the highest priority.[87]

Legal protection for internal whistleblowers strikes a reasonable balance among the competing interests at stake. Lawful and ethical behavior is encouraged, furthering societal aims.[88] The employee is able to report wrongful activity without penalty. Admittedly, the extension of such protection would interfere with the employer's interest in maintaining a loyal workforce subject to its authority. But incentives for in-house communication may be welcomed by many employers.

Internal disclosures of questionable conduct permit similarly internal responses, possibly avoiding adverse, potentially unjustified publicity

[82] *See supra* Table III.

[83] *See generally supra* note 54 and accompanying text.

[84] *See supra* note 26 and accompanying text.

[85] No cause of action was found, for example, where a store department manager was discharged for complaining to her superior about treatment given one of the plaintiff's employees during an interview by store security personnel. Sieverson v. Allied Stores Corp., 97 Or. App. 315, 776 P.2d 38 (1989).

[86] *See* Zaniecki v. P.A. Bergner & Co., 143 Ill. App. 3d 668, 493 N.E.2d 419 (1986); Wiltsie v. Baby Grand Corp., 774 P.2d 432 (Nev. 1989); House v. Carter-Wallace, Inc., 232 N.J. Super. 42, 556 A.2d 353 (N.J. Super. Ct. App. Div. 1989).

[87] *See, e.g.*, Newman v. Legal Servs. Corp., 628 F. Supp. 535, 539-40 (D.D.C. 1986); Zaniecki, 143 Ill. App. 3d 668, 493 N.E.2d at 422; Suchodolski v. Michigan Consol. Gas Co., 412 Mich. 692, 316 N.W.2d 710, 712 (1982).

[88] *See* Note, *Employers and Employees*, *supra* note 52, at 293 (noting that "[e]nforcement of the law is enhanced when employees use internal channels to stop or preempt legal activity by their employer").

and the costs of defending against legal action in some cases. Utilizing channels within the organization may give the concerned employee access to more complete information, resolving the situation in its entirety. Finally, if the employee's motives are relevant, they are less at issue in this context simply because notoriety is not sought.[89] Thus, in-house reporting is a relatively less disruptive alternative for a loyal employee troubled by activities within the organization. In this light, the apparent judicial inclination toward greater protection for external as opposed to internal whistleblowing seems anomalous in policy terms, as well as inconsistent with societal expectations.

Conclusions

Societal expectations, as the source of the obligation enforced by tort law, are relevant to the law's content.[90] The results of the study reported in this article indicate that the traditional at-will rule is inconsistent with societal expectations when it has the effect of insulating from legal challenge an employer who fires a worker for reporting or refusing to participate in unethical or illegal activity. Further, the legal system's failure systematically to give recourse to such employees seems inconsistent with the widespread current concern about business ethics.[91] These conclusions suggest that action be taken to ameliorate the effect of the traditional rule, at least in the circumstances discussed in this article.

To be effective, a legislative or judicial response[92] should take into account both societal values, as demonstrated by the survey results, and policy considerations. On the basis of the analysis in the foregoing section, such an approach should include the following general features:

1. Recognition of a cause of action in favor of employees who are discharged because they decline to participate in illegal activity, as defined by constitution, statute, regulation, or common law.
2. Similar protection for refusals to take part in unethical conduct, as defined in generally accepted professional codes of conduct and practice and/or the policies of the employer.

[89] *See generally* Malin, *supra* note 15, at 305-14.

[90] *See supra* notes 29-38 and accompanying text.

[91] This approach is inconsistent with international norms as well; employees in most other industrialized nations enjoy a substantially greater measure of job security than exists in the United States. *See, e.g.*, Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 Am. J. Comp. L. 310 (1985); Comment, *Employment At-Will: The French Experience As A Basis for Reform*, 9 Comp. Lab. L.J. 294 (1988).

[92] *See supra* note 30 (discussing whether exception to the at-will rule should be made judicially, rather than legislatively).

3. Recourse for employees who blow the whistle on wrongful activity as defined in recommendation 1 and/or 2, if the report was initially made internally and the employer was given a reasonable opportunity to address the problem under the circumstances.

The broad definition of illegality adopted in the first recommendation reflects the remarkably high level of support given by the survey respondents to employees who are fired for refusing to participate in illegal activity. Employees who are dismissed for declining to perform a task believed to be unethical were less favored by the respondents.[93] The approach suggested in recommendation two addresses the concern underlying this lower level of support by giving specific content to the definition of unethical behavior. Finally, the extension of legal protection to whistleblowers who seek internal resolution of their concerns, if possible, accommodates the interests of society and the employee while minimizing disruption to the employer.[94]

These recommendations reflect the contention that legal and ethical behavior is discouraged where employees are subject to discharge without recourse for disclosing or declining to participate in unlawful or unethical activity. The message currently sent by the legal system to employers who consider or take such action is mixed, at best. Movement toward greater consistency between the law and societal expectations in this context helps to address the ubiquitous public concern about "business ethics."

[93] *See* Table III.

[94] *See supra* notes 88-89 and accompanying text.

APPENDIX A

DEMOGRAPHICS

	N	%
Age		
under 20	4	1.4
20-29	68	24.6
30-39	96	34.8
40-49	59	21.4
50-59	34	12.3
60 or over	14	5.1
No response	1	0.4
Sex		
Female	120	43.5
Male	152	55.1
No response	4	1.4
Education		
Some high school or less	9	3.3
High School diploma (or equivalent)	48	17.4
Some college	65	23.6
Associate's degree	40	14.5
Bachelor's degree	64	23.2
Some graduate school	18	6.5
Graduate degree	30	10.9
No response	2	0.7
Employment Status		
Employed	267	96.7
Not employed	7	2.5
No response	2	0.7
Occupational Group		
Clerical, admin. support	43	15.6
Production, maintenance, mechanics, construction	66	23.9
Professional, paraprof., technical	94	34.1
Service	17	6.2
Sales	12	4.3
Managerial, supervisory	35	12.7
No response	9	3.3

Sector of Economy		
Manufacturing	43	15.6
Construction	24	8.7
Transportation, utilities, communications	17	6.2
Wholesale or retail sales	49	17.8
Finance, real estate, insurance	24	8.7
Services	91	33.0
Government	19	6.9
No response	9	3.3
Union Representation		
Yes	72	26.1
No	198	71.7
No response	6	2.2
Civil Servant		
Yes	8	2.9
No	261	94.6
No response	7	2.5