THE HISTORY OF JOB (IN)SECURITY: WHY PRIVATE LAW THEORY MAY NOT SAVE WORK LAW

*Sophia Z. Lee**

This Article uses a history of the push for job security in the United States during the late 20th century to assess New Private Law (NPL) theory. The history recounts the rise and fall of common law and statutory approaches to replacing at-will employment with termination for just cause only. Applying NPL theory to that history, the Article argues that NPL theorists' current approach to defining their topic of study and distinguishing it from public law is inconsistent within and across theories. NPL theorists seek to carve out an area of law where interpersonal morality trumps legal economists' goal of collective welfare maximization. That conceptual project depends on a coherent and consistent approach to distinguishing private from public law. Ultimately, the Article argues, NPL theorists face a more fundamental problem, however. Regardless of how one categorizes the events in this history, it shows that the common law-derived interpersonal morality at the heart of NPL theory may not strengthen worker protections in the ways at least some of its theorists hope.

Introduction

Karl Klare argued in 1982 that U.S. labor and employment law distinguished public from private with such inconsistency as to "give rise to the suspicion that the distinction is not an analytical tool but an after-the fact rhetorical device used to justify political distinctions."[1] His first example of the categories' confounding quality was courts' recently recognized public policy torts.[2] As he noted, "[a]t common law, the private sector employment contract is deemed an essentially private arrangement."[3] Courts traditionally assumed, "absent explicit contrary contractual guarantees," that such a contract could "be terminated at will for a good reason, a bad reason, or no reason

* Professor of Law and History, University of Pennsylvania Law School. This Article benefitted from feedback by participants at the Private Law Theory Meets the Law of Work Conference, Penn Law's ad-hoc workshop, and the Writers Bloc(k). Doing historical research during the pandemic is incredibly challenging. Hearty thanks go to research assistants Jared Konnell and Janice Jiang, research librarians Susan Gualtier and Mary Shelly, and AFL-CIO archivist Alan Wierdak for their creativity, diligence, and generous assistance tracking down sources for this project. Incredible thanks are also due Theodore St. Antoine for sharing with me his personal records related to the Uniform Law Commission's Model Employment Termination Act. Janice Jiang and Evan Silverstein helped tremendously with the footnotes. The TIL editorial team's exceptional feedback is much appreciated as well.

1 Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. Pa. L. Rev. 1358, 1362 (1982).

2 *Id*.

3 *Id*.

at all."[4] But in "[o]ne of the most significant recent common law developments," he noted, courts in several jurisdictions had begun "forbid[ding] the discharge of an employee . . . for a reason that contravenes public policy."[5] These tort actions, Klare observed, blurred the boundary between public and private. Under them, "[p]ublic law norms are implied into the [traditionally private employment] relationship."[6]

Klare was hardly alone in documenting the instability of the private and public law categories: his article appeared in a symposium issue devoted to critiquing the "Public/Private Distinction." As Duncan Kennedy observed in its pages, "[w]hen people hold a symposium about a distinction, it seems almost certain that they feel it is no longer a success."[7] Morton Horwitz's contribution contended that public and private law were relatively recent organizing categories for U.S. law, adopted in the 19th century to insulate the common law from policy concerns.[8] These Critical Legal Theorists ("Crits") built on generations of Realist and Progressive legal thinkers who had challenged the divide, demonstrating how the ostensibly private common law was the product of and produced public policy.[9] The century of critique was so successful that by its close, scholars tended to deploy the categories of private and public law almost sheepishly and with many caveats.[10]

In the last quarter-century, however, a new generation of legal theorists has revived the distinction. The theorists of the "New Private Law" (NPL) push back against these critical traditions as well as law and economics scholars who contend that collective welfare maximization via efficient market mechanisms is the best guide for the law's development.[11] Both traditions, NPL theorists argue, have overlooked the intrinsic interpersonal moral core of what they term "private law," a core they seek to recenter and analyze.[12] Distinguishing between public and private law is not NPL theorists' organizing purpose.[13] They nonetheless depend on the distinction to carve out an area of law where morality can override consequentialist policy

4 *Id*.
5 *Id*.
6 *Id*. at 1363.
7 Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1349, 1349 (1982).
8 *See infra* Part I.
9 *Id.*
10 *See*, *e.g.*, Michel Rosenfeld, *Rethinking the Boundaries between Public Law and Private Law for the Twenty First Century: An Introduction*, 11 Int'l J. Const. L. 125, 125-26 (2013); Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 Mich. L. Rev. 875, 887 (1991).
11 *See*, *e.g.*, Hanoch Dagan & Benjamin C. Zipursky, *Introduction: The Distinction Between Private Law and Public Law*, *in* Research Handbook on Private Law Theory 9-10 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020); Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 Colum. L. Rev. 1395, 1408-09 (2016).
12 *See infra* Part I.
13 *See*, *e.g.*, Dagan & Dorfman, *supra* note 11, at 1399 ("We do not claim that there is an intrinsic value in the separation of private law from public law; rather, we claim that there is an intrinsic value in private law itself, one worth retaining.").

justifications. NPL theorists diverge, however, over where and how to draw the line between public and private law.[14]

This Article uses an historian's toolkit to offer an outsider's take on the project, using as a case study the late-20th century push by legal scholars, jurists, and worker advocates to replace at-will employment with termination only for good reasons. By the 1970s, most unionized and many government workers were protected from at-will employment by, respectively, collective bargaining agreements and civil service rules. Both limited an employer to firing a worker for what was often termed "just cause." They also generally required notice of the reasons for termination and set out a procedure through which an employee could challenge her termination. But around two-thirds of workers remained terminable at will.[15] As the Article recounts, during the last decades of the 20th century, advocates opened two paths for ensuring job security to unorganized, private-sector workers.[16] One was cut through the common law and consisted of novel contract and tort causes of action, such as those Klare described. The other was forged out of statutes to be enforced by courts, administrative agencies, and arbitrators.[17] This Article offers a methodological mash up, looking at the history of the fight for job security through the lens of NPL theory while also using the history to probe NPL theorists' revived public-private law distinction.

Employment law is an apt subject for the analysis. As the articles in this conference issue attest, there is a rich body of NPL scholarship that uses moral theory to strengthen workers' legal protections against legal economists' welfare-maximizing critiques, making the subject relevant. Employment law also brings together common law, legislative, and regulatory law related to the legal relationships in the workplace and exists precisely because those areas of law are interconnected as regards workplace relationships.[18] That makes it a fruitful place to examine the boundaries between and relationships among some of employment law's legal components.

What follows develops two observations. First, I use the history to highlight challenges to slotting law neatly into the NPL theorists' categories. I remain skeptical about the ability to wrestle the law's messiness into the public and private law categories in any coherent and stable way. Even among NPL theorists, the boundary between them is disputed.[19] In what follows, I locate in history the factors that NPL theorists use to sort law between public and private law. As a historian, my vision will be blurry and I may mistake some squirrels for rabbits. The history nonetheless

14 *See infra* Part I.

15 *See infra* Part III.

16 For related challenges to the boundary between the public and private sector, see generally Sophia Z. Lee, The Workplace Constitution from the New Deal to the New Right (2014).

17 *See infra* Parts II-III.

18 In this regard, employment law is like other newer fields within the law, such as family law and corporations, that eschew sorting by type of law (e.g., tort, property, criminal, etc.) and instead emphasize how different types of law interrelate within a particular domain of legal regulation.

19 *See infra* Part I.

identifies slipperiness, overlap, and disagreement among and within NPL theorists' categories, as well as features of the law that are challenging to slot into them.[20]

The Article's examples could offer fodder to critics of the distinction, but they may also identify opportunities to NPL theorists for its refinement. The boundary between public and private law marks the legal terrain to which their theories apply. At the least, NPL theorists should ensure that their particular approach to drawing that boundary sorts law consistently to one side or the other. Doing so would seem a basic requirement for a workable theory of something called "private law."[21] NPL theorists are also claiming a space where law should pursue interpersonal morality rather than competing consequentialist claims. They define that space with the public/private distinction: in private law, moral theory governs; in public law, the consequentialists rule.[22] To reclaim a space for interpersonal morality's primacy, they need the distinction to be coherent. As NPL theorists gather into an intellectual movement and tangle with the social welfarists over turf, they would be aided by a more coherent and consensual definition of the boundary mapping the domain in which their moral theories govern.

Second, this Article highlights the dynamic interaction between the common law and statutory approaches to job security. As this history shows, common law and statutory approaches to job security were not discrete alternatives but deeply interrelated. They fomented and forestalled, inflected and infected each other within and across time.[23] This dynamism offers a note of caution to those who argue that the common law's moral core can strengthen worker protections. As noted above, this could occur because the common law pursues interpersonal moral ends that can trump consequentialist critiques. For some NPL theorists, common law precepts also shore up the legitimacy of employment law statutes by colonizing them from within. These theorists point to statutes that incorporate aspects of common law doctrine and its interpersonal morality.[24] This Article includes instances when the common law protected workers. But those protections inspired preempting legislation, a reminder that the common law can be vulnerable from without, perhaps never more so than when it challenges economic logics. This Article also demonstrates how the common law can dramatically weaken protective statutes, most intensely when it is incorporated into them. This history thus serves as a reminder that NPL theorists are working with a dangerous tool, one that has tremendous resources for undermining the very workplace protections they seek to support.

Part I lays out briefly the revived but variable approaches to distinguishing public and private law. The remainder develops in three Parts the history of the

---

20 *See infra* Part III.

21 This seems particularly true for those theorists who define the boundary by the moral theory itself—that is, as separating out areas of the law where their moral theory applies. *See infra* note 48.

22 For a complication to this point, see *infra* notes 103-106.

23 *See infra* note Part II-III.

24 *See*, *e.g.*, Hanoch Dagan & Roy Kreitner, *The Other Half of Regulatory Theory*, 52 Conn. L. Rev. 605, 609-11 (2020); Hanoch Dagan & Avihay Dorfman, *The Domain of Private Law*, 71 U. Toronto L.J. 207, 220-22 (2021).

fight for just cause protections, with an emphasis on the challenges it presents for NPL theories. Part II describes how seemingly viable statutory and common law paths to job security emerged in the 1970s. This Part further demonstrates the public/private law categorization problems each path raises, especially given the unsettled status of arbitration in NPL theory, as well as the two paths' dynamic interrelation. Part III recounts how those paths drove each other on and shut each other off during the 1980s and early '90s. Throughout, it highlights how those legal developments blurred NPL theorists' private/public law distinction. In particular, Part III.A.1 challenges some NPL theorists' approach of designating as private law specific doctrines that are subsumed within statutory regimes they deem public law. Part III.A.3 and III.B also demonstrate how worker-protective common law causes of action can incite preempting legislation and undermine legislative protections. That dynamic interconnection, in turn, threatens NPL theorists' efforts to carve out an area of law in which interpersonal morality will govern relationships between employers and workers. A brief conclusion follows.

I. Distinguishing Private and Public Law

This Part provides a brief overview of the construction, deconstruction, and recent reconstruction of the public law-private law distinction. The emphasis is on the last of these to inform the conversation between theory and history in the Parts that follow.

The idea that public and private law are conceptually distinct, comprehensive, and important categories emerged gradually in the United States during the 19th century. The distinction dates to ancient times.[25] Legal thinkers in the U.S., however, did not adopt it as a comprehensive taxonomy until the 19th century.[26] When they did, they gathered constitutional, criminal, and administrative law under the public law label and separated those from the private law of torts, contracts, property, and commercial law.[27] The distinction's adoption was part of a larger project "to create a legal science that would sharply separate [private] law from politics."[28] Law falling on the private side of the line was reconceived "as a neutral system for facilitating voluntary market transactions."[29] The rise of the distinction was accompanied by changes in doctrine that newly separated governance from the common law. For instance, new constitutional and administrative law causes of action displaced

25 Robert Ludlow Fowler, *American Public Law*, 2 Fordham L. Rev. 111, 111 (1916).

26 Morton J. Horwitz, *History of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1423, 1424 (1982). *Compare, e.g.*, 1 William Blackstone, Commentaries on the Laws of England in Four Books: With An Analysis of the Work 87-88 (1900) (dividing the law into "private wrongs" and "public wrongs" but also into "rights of persons" and "rights of things"), *with* Thomas Erskine Holland, The Elements of Jurisprudence 105-06 (1896) (describing law that regulates rights between private persons as private law and that which regulates relationships between the state and private persons as public law); *cf.* Dan Priel, *The Political Origins of English Private Law*, 40 J.L. & Soc'y 481, 482-83, 490-91 (2013) (dating the conceptual distinction in English law to the 20th century).

27 Horwitz, *supra* note 26, at 1424.

28 *Id.* at 1425.

29 *Id.* at 1426.

traditional common law claims against government officials.[30] Meanwhile, the common law was shorn of doctrines that limited private ordering or imposed regulatory objectives.[31]

The distinction did not fare well during the 20th century. No sooner was the distinction embraced than jurists and scholars subjected it to sustained and withering criticism. During the Progressive and Legal Realist Eras, critics argued that the common law was just as much a system of governance as the areas of law deemed public. They challenged the idea that the subjects of private law governed voluntary market transactions, were devoid of politics, or judged by neutral arbiters.[32] Crits of the later 20th century built on these earlier arguments but arrived at the conclusion that private law was shot through with politics via a different route. The legal categories and concepts that judges ostensibly relied on to steer private law clear of politics, the Crits contended, were incoherent, internally contradictory, and indeterminate; applying them required judges to import their own subjective preferences, whether consciously or not.[33]

The 21st century has witnessed a revival of the public-private law distinction among private law theorists, however.[34] These theorists are united in rejecting the claim that there is no meaningful distinction between public and private law.[35] They disagree mightily, however, over the right way to draw the distinction.[36] Some define the categories in terms similar to those late 19th century legal thinkers who described private law as that which governs horizontal relationships among the governed and public law as that which governs the vertical relationship between the government and its subjects.[37] Others limit private law to just some horizontal relationships—those that are "interpersonal" as opposed to those in which we engage as "co-citizens."[38] Some draw the distinction on institutional grounds, defining private law as "concerned

30 *Id*. at 1424. *See also* Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. Pa. L. Rev. 1669, 1711-12, 1721-23, 1732 (2019).

31 Horwitz, *supra* note 26, at 1425.

32 *See* Morton J. Horwitz, The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy 5-6, 170, ch. 8 (1992). Canonical examples include Morris R. Cohen, Law and the Social Order (1933); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 Pol. Sci. Q. 470, 471-74 (1923). Note that this is a reductive account of Legal Realism; as Horwitz observes, it was full of contradictions and disagreements. Horwitz, *supra*.

33 *See generally* Robert W. Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 57, 114-16 (1984). *See*, *e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1732 (1976). *Cf*. Dagan & Zipursky, *supra* note 11, at 7.

34 *See, e.g.*, John C. P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 Harv. L. Rev. 1640, 1651 (2012) (identifying what he terms "The New Private Law" and specifying "some of the core elements of the new thinking in private law").

35 *See, e.g.*, Dagan & Dorfman *supra* note 11, at 1406; Goldberg, *supra* note 34, at 1651.

36 Public law scholars have similar trouble defining their sphere of study. Farber & Frickey, *supra* note 10, at 885 n.43 (reporting that they asked "a variety of law professors about the meaning of 'public law'" and "received almost an equally great variety of answers").

37 *Compare* Goldberg, *supra* note 34, at 1640 *with* Holland, *supra* note 26, at 105-06.

38 Dagan & Zipursky, *supra* note 11, at 14; Dagan & Dorfman, *supra* note 24, at 210; Dagan & Dorfman, *supra* note 11, at 1396-97. Distinguishing private and public law by interpersonal as opposed to co-citizenly relationships, however, arguably restates rather than clarifies the public-private divide.

with the rights which, one against another, people are able to realize in courts."[39] Others reject this approach, arguing that private law can encompass the work of administrative agencies.[40] Some theorists emphasize the source of law rather than the institution that produces it, limiting private law not just to courts but further to common law causes of action.[41] Others include statutes within private law's purview.[42] Those theorists who include statutes in private law nonetheless disagree about which ones belong.[43] Some insist that private law is apolitical;[44] others acknowledge that it is informed by politics.[45] NPL theorists largely agree that private and public law are defined by their respective normative goals.[46] They also largely agree that only public law pursues redistributive and social welfarist ends.[47] But while they agree that private law's goals are reflected in its internal structure and doctrine, they disagree about the substance of its normative goals.[48]

---

39 Peter Birks, English Private Law xxxvi (2000). *See also* Ernest Joseph Weinrib, The Idea of Private Law 9-10 (1995); Benjamin C. Zipursky, *Philosophy of Private Law*, *in* The Oxford Handbook of Jurisprudence and Philosophy of Law 648-49 (Jules L. Coleman et al. eds., 2004); Dagan & Kreitner, *supra* note 24, at 609.

40 Dagan & Dorfman, *supra* note 24, at 215, 217-20; Dagan & Kreitner, *supra* note 24, at 608-10; Dagan & Dorfman, *supra* note 11, at 1399. For a complication to this approach, see *infra* notes 103-106 and accompanying text.

41 Hanoch Dagan and Avihay Dorfman identify a "common law conception" of private law. Dagan & Dorfman, *supra* note 24, at 214 (identifying Peter Birks, John Goldberg, and Benjamin Zipursky with this "court-centric" approach). That said, it is not clear that any private law theorist adheres to it. At the least, those Dagan and Dorfman identify with the conception count at least some statutes within private law's domain. *See, e.g.*, Birks, *supra* note 39, at 12; John C. P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs 40-42 (2020); Zipursky, *supra* note 39, at 648.

42 *See infra* note 43.

43 For instance, some private law theorists treat workers' compensation laws as a public law regime while others consider it at least in part a species of private law. *Compare, e.g.*, Arthur Ripstein, Private Wrongs 293-94 (2016) (describing workers' compensation laws as a public law limit on private law) *with* Dagan & Dorfman, *supra* note 24, at 218-20 (arguing that workers' compensation law is a species of private law).

44 Dagan & Zipursky, *supra* note 11, at 20-21; Goldberg, *supra* note 34, at 1658, 1663. Goldberg and Zipursky treat tort law as having public and private aspects. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 Tex. L. Rev. 917, 918 (2010). They also see the private aspect of tort law as political in that the rights of action it provides as recourse for wrongs are among the things the government provides its citizens. *Id.* at 974, 981. But they do not view tort law's implementation as driven by politics or judicial policy preferences. *Id.* at 918, 924; Dagan & Zipursky, *supra* note 11, at 20. In this sense, Goldberg and Zipursky argue that the private aspects of tort law are apolitical. Goldberg recognizes elsewhere that public policy may sometimes shape private law. Goldberg, *supra* note 34, at 1659-60. But in his account that should happen only as a special exception to an otherwise internally driven rule. Their argument that tort law is apolitical appears to sidestep, however, the Crits' argument that the legal concepts and categories involved are so indeterminate that policy choice is inevitable. *See* Dagan & Dorfman, *supra* note 11.

45 Dagan & Dorfman, *supra* note 11, at 1398.

46 *See*, *e.g.*, Goldberg, *supra* note 34, at 1661; Dagan & Dorfman, *supra* note 24, at 207, 215.

47 *See infra* notes 49-55 and accompanying text. As noted below, they are nonetheless divided over whether substantive equality can be a goal of private as well as public law. *Id*.

48 *Compare*, *e.g.*, Ripstein, *supra* note 43, at 6 (theorizing tort law as stemming from the "moral idea that no person is in charge of another"), *with* Goldberg & Zipursky, *supra* note 44, at 937 (explaining tort law as addressing "interference with . . . individual interests that are significant enough aspects of a person's well-being to warrant the imposition of a duty on others not to interfere with the interest in certain ways"), *or* Goldberg, *supra* note 34, at 1662 (arguing that "private law is normatively distinct precisely

Also relevant for the history that follows is how NPL theorists conceptualize the relationship between public and private law. For some, they are hermetically sealed off from each other, pursuing distinct goals, with private law focused on formal equality while public law seeks redistribution and substantive equality.[49] John Goldberg and Benjamin Zipursky, for instance, accept that tort law has public and private law aspects,[50] but view its private law aims as distinct from those of public law.[51] Hanoch Dagan and Avihay Dorfman, in contrast, contend that their theory of private law "does not imply a strict separation between private and public law."[52] They argue, for example, that both public and private law promote the norms of individual self-determination and substantive equality.[53] But even for them, the two categories of law are ultimately distinguishable. In their view, private law eschews what they term public law's collectivist, redistributivist, and social welfarist ends.[54] As a result, private law's focus on substantive equality and individual self-determination is distinct from public law's: where public law pursues those ends for collectivist reasons, private law does so to ensure individuals' just interpersonal relationships.[55]

The following Parts apply the NPL theorists' revived public and private law divide to a history of job security "law in action." Each part or subpart first presents the history, then analyzes how NPL theorists would categorize the law in that history. Those analyses provide fodder for those who want to externally critique the coherence of NPL theorists' revived public/private law distinction. My hope, however, is that they also help those internal to NPL theory refine their accounts of the distinction. Most consistently, however, these analyses demonstrate that the common law and statutory approaches to job security are dynamically interrelated. They provide a cautionary tale about the capacity of the common law they celebrate to undermine the type of legislative projects that at least some NPL theorists hope to shore up, and most aim to at least leave unscathed.

---

in its commitment to arming individuals with a legal power to demand and hold others accountable to them"), *with* Dagan & Dorfman, *supra* note 11, at 1399 (2016) (identifying self-determination and substantive equality as "the normative commitments that animate private law").

49 Dagan & Dorfman, *supra* note 24, at 222-23 (describing corrective justice theorists).

50 Goldberg & Zipursky, *supra* note 44, at 918. *But see id.* at 937-38 ("tort law does not vindicate public or communal interests, though of course those might be served indirectly by its operation").

51 *See supra* note 40. *Cf.* Goldberg & Zipursky, *supra* note 44, at 927 (distinguishing their view of torts as being about private wrongs and recourse from tort theorists who view "tort law as carrying out one or more of several public goals"). *But see* Goldberg, *supra* note 34, at 1659-60 (urging New Private Law scholars to address when and how public interests should shape private law).

52 Dagan & Dorfman, *supra* note 24, at 210.

53 *Id.* at 222. *See also* Dagan & Zipursky, *supra* note 11, at 15.

54 Dagan & Dorfman, *supra* note 24, at 210-11; Dagan & Dorfman, *supra* note 11, at 1398.

55 Dagan & Dorfman, *supra* note 24, at 212. In contrast, Birks, who draws his line institutionally, contemplates that private law can pursue public aims. Birks, *supra* note 39, at 4.

II. Opening Two Paths to Job Security

Legal scholars and labor advocates began calling for job security for all workers in the late 1960s. At the time, there were reasons to think that they would achieve their goal via legislation. But a promising new common law front also opened in the fight for workers' rights, providing a second possible path to job security. As explained further below, both paths could be construed as public or private law according to NPL theorists' drawing of the distinction. Further, even if they could be stably placed on different sides of the public/private law distinction, from their inception, proponents saw both paths' fate as interrelated.

When the push for just cause protections got started, termination at will had been the rule for anyone hired without an express agreement as to duration since the late 19th century.[56] As the 20th century progressed, legislatures overlaid the employment relationship with numerous legal protections, but they left the at-will default rule largely intact. During the Progressive, New Deal, and Civil Rights Eras, states and the federal government passed numerous laws that prohibited termination based on specific reasons. Most regulated termination indirectly only, by prohibiting termination in retaliation for the exercise of rights recognized in these statutes.[57] Civil rights laws directly regulated termination as well, outlawing discharges on the basis of race, sex, religion, and national origin.[58] Doing so further surgically limited the at-will default. But all these statutes still left employers free to fire workers for *almost* any reason or no reason at all.[59]

Instead, most employees could only be free of the at-will default through a contract. Top-level executives and some highly sought-after employees might secure an individual contract for just cause termination. But for most workers, their only hope for such a contract came from having a union. The National Labor Relations Act (NLRA), enacted in 1935, facilitated contractual just-cause protections negotiated one union and employer at a time.[60] After its enactment, unionization rates rose steadily. Unable to build the power to transform U.S. law for all workers, unions settled for creating contractual "walled off zones of security for their members and

56 Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 Am. J. Legal Hist. 118, 118-19, 126 (1976). This replaced a more worker-friendly default rule many jurisdictions had adopted from England according to which employment was presumed to be for one year, terminable only with cause or at least adequate notice. *Id.* at 119-22, 125.

57 *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 215(a)(3).

58 42 U.S.C. § 2000e et seq. Some scholars view antidiscrimination laws as providing broader protection to workers because employers seeking to prevent litigation under these laws need to ensure that they can document nondiscriminatory reasons for terminations. *See, e.g.*, Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 Colum. L. Rev. 319, 331-33 (2005). However true this is as a description of employer practices in the 21st century, it was not true in the 1970s when employers and courts were still just working out the scope of antidiscrimination laws and employers were figuring out how to adapt to them. *Cf.* Frank Dobbin, Inventing Equal Opportunity 87-89 (2009) (describing the gradual process through which employers added grievance procedures designed to prevent discriminatory discharges during the 1970s, '80s, and '90s).

59 One exception, discussed further below, can be found in the civil service laws. *See infra* note 62.

60 For emphasis on the private nature of these agreements by the statute's backers, see Klare, *supra* note 1, at 1390-92.

dependents."[61] A common aspect of that security was a guarantee that members would be fired only with just cause.[62]

Circa 1970, advocates began critiquing this regime of at-will for most and just-cause via contract for some. At the time, a legislative approach to job security for all seemed most likely. There was already a well-established tradition of statutory responses to employment issues, while Congress had just enacted a slew of Great Society legislation.[63] This calculation was reinforced when Congress passed additional employment laws in the 1970s that directly and indirectly chipped away at the at-will default.[64] Events abroad created further momentum for a statutory approach to job security. France and Germany had long codified protections against unjust terminations.[65] Those had not influenced the United States much, however, given their civil rather than common law tradition.[66] In 1963, the International Labor Organisation (ILO), a United Nations agency that recommended workplace standards for its members, called for the adoption of just-cause laws.[67] Eight years later, Great Britain, which had a common law system and at-will default like the U.S., enacted just such a statute.[68]

Perhaps unsurprisingly, then, the decade witnessed the opening of a legislative path to job security in the United States. In 1970, labor lawyer Ruth Weyand used the 76 countries with just-cause statutes and the ILO's report to call for a similar law in the U.S.[69] As best I can tell, Connecticut was the first state to consider a just-cause bill, which was introduced in 1974 and '75 but went nowhere.[70] In 1976,

---

61 Gabriel Winant, The Next Shift: The Fall of Industry and the Rise of Health Care in Rust Belt America 11 (2021).

62 Public-sector employees provided a limited exception to the security-by-contract rule. Some among them had just-cause termination rights under civil service laws adopted by governments starting in the late 19th century. But one scholar estimated that only half of public-sector workers, who were themselves a small minority of all employees, were protected by civil service laws. Cornelius J. Peck, *Some Kind of Hearing for Persons Discharged from Private Employment*, 16 San Diego L. Rev. 313, 315 (1979). Further, by 1970, they were facing legislative rollback of their job security and were increasingly also turning to union contracts to protect against at-will termination. June Weisenberger, Job Security and Public Employees 2-3 (1973).

63 *See supra* notes 55-57 and accompanying text.

64 *See* Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678; Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1191(c); Age Discrimination in Employment Act of 1976, 29 U.S.C. §§ 621-34. Their anti-retaliation provisions can be found at §§ 660(c), 1140, and 623(d), respectively. The last two laws barred termination of a longtime employee on the eve of eligibility for retirement benefits.

65 Clyde W. Summers, *Individual Protection against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481, 509 (1976).

66 For an argument that public law and private law are also interconnected and perhaps indistinguishable in the civil law context, see William Ewald, *Comparative Jurisprudence (I): What Was it Like to Try a Rat*, 143 U. Pa. L. Rev. 1889, 1988-89 (1995).

67 Int'l Lab. Organisation, Termination of Employment Recommendation, § II(2)(1) (1963).

68 Industrial Relations Act 1971, § 22. English common law departed from the United States, however, by requiring notice prior to termination. *See* Feinman, *supra* note 56.

69 Ruth Weyand, *Present Status of Individual Employee Rights*, 1970 Proc. N.Y.U. 22d Ann. Conf. Lab. 171, 209-11, 213-14.

70 *Mahoney Plans to Revamp Bill*, Bridgeport Post, Apr. 12, 1974; *Milford Chamber Opposes Abusive Dismissal Bill*, Bridgeport Post, Mar. 23, 1975.

Puerto Rico successfully enacted such a law.[71] That same year, Clyde Summers, an eminent labor law scholar, urged "that the anachronistic rule that employees can be discharged for any reason or no reason should be abandoned."[72] It was "Time for a Statute," he declared.[73] He and Weyand envisioned that arbitrators would decide the issue of sufficient cause.[74]

Others were not so sure that the time for a statute was nigh; for them, the common law, with its capacity for judicial innovation, provided the more promising path. Lawrence Blades was the first to chart a common law path to job security in 1967. Blades liked the idea of a statute but thought the prospects dim as he anticipated that neither employers nor unions would support it.[75] He thought employers' reasons for opposing just-cause legislation self-evident; labor, he thought, would want just-cause protections to remain an advantage of unionizing.[76]

With the statutory path blocked, Blades opined "that protection of all employees from the abusive exercise of employer power will have to originate . . . in the courts."[77] Judges' insistence on mutuality of consideration in the employment context made contract law an unlikely source of protection.[78] As he observed, courts had repeatedly rejected attempts to enforce employer promises of continued employment on the grounds that the employee had given up nothing in return.[79] Blades viewed tort law, which had recently recognized "liability based largely on the defendant's bad motives," as a more promising path.[80] A dozen years later, Cornelius Peck revisited the subject and came to much the same conclusion as Blades.[81] Peck, however, could cite a handful of cases in which state courts had realized the tort potential Blades had predicted.[82]

By the close of the 1970s, a statutory and a common law path to job security had opened. No one focused on how to categorize these legal innovations as between public and private law.[83] But filtering them through the criteria that today's NPL

71 Puerto Rico Unjust Dismissal Act of 1976, 29 L.P.R.A. §§ 185(a)-(m).

72 Summers, *supra* note 65, at 484.

73 *Id*. at 481. Summers is credited with drafting the pioneering Connecticut bill. Jack Stieber & Richard N. Block, *Comments on Alan B. Krueger, The Evolution of Unjust-Dismissal Legislation in the United States*, 45 Indus. & Lab. Rel. Rev. 792, 794 (1992).

74 Summers, *supra* note 65, at 521-22, 524; Weyand, *supra* note 69, at 209-11, 213.

75 Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum. L. Rev. 1404, 1433-34 (1967).

76 *Id*. at 1434.

77 *Id*.

78 *Id*. at 1420-21.

79 *Id*. at 1419. Some courts have since recognized that this type of mutuality is no longer typically required for contracts, and even if required, can be found in the continuing work performed under the contract. *See* Summers, *infra* note 117 and accompanying text.

80 Blades, *supra* note 75, at 1422.

81 Peck, *supra* note 62, at 317.

82 *Id*. at 320-22. Peck argued that common law job security was mandated by the U.S. Constitution. *See* Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 Oh. St. L.J. 1, 4 (1979).

83 In an exception that proves the rule, Peck referred to wrongful discharge torts as occurring in a "private law area" but nonetheless referred to them as vindicating constitutional principles. Peck, *supra* note 82, at 42, 46.

theorists employ, they slip between the categories. Commentators and courts described the common law, not only statutory, path as seeking goals that most NPL theorists associate with public law. Blades emphasized that wrongful discharge torts would preserve the conditions of freedom necessary for democracy. "Large corporations now pose a threat to individual freedom comparable to that which would be posed if governmental power were unchecked," he warned.[84] But "the law has done little . . . to protect the economically dependent employee from employer power."[85] For Peck, common law actions would vindicate constitutional guarantees of equality and due process.[86] Courts also justified these torts on the grounds of the social policies they advanced.[87] Scholars defended the legislative alternative in social welfarist terms as well, contending that "employees are entitled to at least this minimum measure of security in their jobs."[88]

NPL theorists would categorize one or both paths as private law based on other of their sorting mechanisms, however. The path made up of common law claims vindicated in courts via suits between a worker and their employer could fall on the private law side of the line for most NPL theorists. This could be because they distinguish the types of law based on the institution, cause of action, and/or horizontal nature of the parties' relationship (at all or because it is interpersonal). How to conceive of legislatively mandated arbitration is trickier, whether Summers's publicly funded and state-mediated approach or Weyand's privately secured and funded system.[89] NPL theorists, as far as I am aware, have not tackled where contract-based arbitration fits in their categories, let alone government-mandated arbitration.[90] But for any who limit private law to courts or common law causes of action, legislatively required arbitration of a statutory just-cause protection would seem to fall on the public law side of the divide. If the core of private law is instead one party's entitlement to call another party to account for a violation of a legal duty owed them, perhaps even Summers's version would be deemed private law.[91]

However NPL theorists today would categorize the legislative and common law paths to job security, those at the time saw them as interrelated; indeed, they thought they faced a chicken-and-egg problem. Summers argued that it was time for a statute in part because most courts were dismissing the type of common

84 Blades, *supra* note 75, at 1404.

85 Blades, *supra* note 75, at 1405. *See also* Weyand, *supra* note 69, at 215.

86 Peck, *supra* note 82, at 46. *See also* Blades, *supra* note 75.

87 *See*, *e.g.*, Monge v. Beebee Rubber Co., 114 N.H. 130, 133 (1974); Klare, *supra* note 1, at 1363.

88 Summers, *supra* note 65, at 532. *But see id*. at 532 (describing such laws as also protecting individual property rights in a job).

89 Arbitration in the union context further blurs the categories because it is contractually based but judicially encouraged based on the labor law. *See* Klare, *supra* note 1, at 1365-66 (noting that courts and scholars disagreed whether labor arbitrators were public or private actors and could adjudicate only private or also public law claims).

90 *But see* Dagan & Kreitner, *supra* note 24, at 639 n.169 (implying that arbitration does not vindicate private law's relational justice aims).

91 *See, e.g.*, Goldberg & Zipursky, *supra* note 41, at 70; Goldberg & Zipursky, *supra* note 44, at 918, 924 (2010); Zipursky, *supra* note 39, at 648-49.

law claims that Blades and Peck endorsed.[92] Meanwhile Peck acknowledged that judicial innovation would provide only a partial solution. But he contended that it would "direct a legislature's attention to the need for comprehensive reform."[93] Their predictions about the two paths' interdependence proved prescient.

III. The Rise and Fall of Job Security's Legislative and Common Law Paths

The 1980s opened with innovative forms of job security on the legislative and common law fronts. The common law approach, which could gain substance with the pen stroke of a single judge, took off first. As Peck predicted, its growth initially spurred on a legislative alternative. But the statutory push also chastened the judges; further, as the decade persisted, the common law of job security undermined, and ultimately helped foreclose, the legislative approach. The dance between the two paths demonstrates their dynamic interrelationship, simultaneously and across time. This history is also rife with evidence of the slipperiness between NPL theorists' public and private law categories.

A. The Legislative and Common Law Paths Urge Each Other On

During the first half of the 1980s, the legislative and common law paths to job security developed rapidly, with advances in one sphere used to justify action in the other. The two paths not only drove each other on, however. Even when just-cause legislation seemed to fit most squarely in NPL theorists' public law category or common law causes of action in their private law domain, the law of job security demonstrated the difficulty of using NPL theory to disentangle public and private law.

1. Cutting a Federal Legislative Path

The 1980s began with a push for a federal just-cause law that was but one prong in an ambitious effort to redistribute power from corporations to workers, shareholders, and the public. The proposed bill would have fallen squarely on the public law side of NPL theorists' lines, but it also highlights difficulties in some NPL theorists' view that the public law and private law categories can overlap.

Designed to kick-off a decade-long effort to make corporations more accountable to the public, activists promoted a federal just-cause law as part of a larger effort to preserve democracy by redistributing power from corporations to their shareholders and the public. During the 1960s and 1970s, business had organized itself in new, and newly effective, ways to counter unions and fight back against the regulatory

92 Summers, *supra* note 65, at 490.
93 Peck, *supra* note 62, at 317.

state.[94] They met with immediate success.[95] Businesses' onslaught created friends out of erstwhile foes on the left. In 1980, environmental, labor, civil rights, corporate responsibility, and consumer activists joined forces to promote a federal bill and nationwide rally for what they called Big Business Day.[96] Their proposed Corporate Democracy Act sought to remake governance, increase disclosure, and protect employment at the nation's largest corporations.[97]

The activists saw their bill's just-cause provisions as serving these power-redistributing and democracy-enhancing goals. They proposed empowering a federal agency to enforce just-cause protections for all employees. One of the bill's drafters argued that its just-cause provisions would protect workers from being discharged for such democracy and rule-of-law preserving acts as political speech and whistleblowing.[98] The Act would have expressly declared it "the policy of the United States" to protect employees' participation in the legal system, including impliedly by calling their corporate employers to account for violation of federal laws.[99] The Act asserted a much broader public interest in job security, however, giving all employees covered by the NLRA a "right to be secure in their employment from discharge . . . except for just cause."[100] Violations of these protections would constitute unfair labor practices, to be adjudicated by the NLRB and enforced by its General Counsel.

Whether measured by normative goals, institution, cause of action, or the parties' relationship, NPL theorists would deem the Corporate Democracy Act a public law; even here, though, there is some confusion. Created by statute as well as administered and enforced by an agency, the Act was a far cry from the court-adjudicated, common law, horizontal, and/or interpersonal actions that NPL theorists associate with private law. Yet, those who argue that private law can encompass agency-adjudicated and

94 Kim Phillips-Fein, Invisible Hands: The Making of the Conservative Movement from the New Deal to Reagan (2009); Lee, *supra* note 16, at ch. 11; Lane Windham, Knocking on Labor's Door: Union Organizing in the 1970s and the Roots of a New Economic Divide ch. 3 (2019).

95 Windham, *supra* note 94, at 65 (documenting how employer violations of labor laws and union election losses reached unprecedented levels by 1980); Larry Kramer, *The Tide of Consumer Influence is in the Grip of Strong Undertow*, Wash. Post, Jan. 13, 1980, at G12 (describing the stymieing of the consumer movement's legislative agenda); Victor Riesel, *Labor Joins Consumerist Assault on Big Business*, Tampa Trib., Mar. 10, 1980, at 14 (same for the labor movement).

96 Larry Kramer, *Coalition Plans to Fight "Crime in the Suites"*, Wash. Post, Dec. 13, 1979, at D1; *see also* William T. Poole, *The New Left and Big Business Day: A Preliminary Survey*, Heritage Found. Backgrounder, Mar. 11, 1980, at 7; City of Portland Archives and Records Center, Archives and Records Management, City Archives, Efiles, Archival box "Intelligence: Aba – Art," Archival folder "Americans Concerned About Corporate Power," https://efiles.portlandoregon.gov/Record/2845188/ [hereinafter *CPARC Efiles*] (all archival sources are on file with the author); A National Association of Manufacturers Assessment (Spring 1980) (CPARC Efiles).

97 Corporate Democracy Act, H.R. 7010, 96th Cong. (1980). On the rise of corporate governance in the 1970s and its taming by the early 1980s to focus narrowly on shareholder interests as a proxy for social welfare, see Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 Colum. L. Rev. 2563, 2571-75 (2021); William W. Bratton, *Separation of Corporate Law and Social Welfare*, 74 Wash. & Lee L. Rev. 767, 773-80 (2017).

98 Mark Green, *The Case for Corporate Democracy,* Regul., May-June 1980, at 24.

99 Corporate Democracy Act, H.R. 7010, 96th Cong. § 401(a)-(b) (1980).

100 *Id*. at § 401(b)-(c).

statute-based causes of action could still deem the Act to generate private law.[101] But what then of the fact that the law—designed to redistribute power, reduce workers' economic vulnerability, and advance the collective welfare—pursued what even these theorists would term the social welfarist ends of public law?[102] The inconsistency is produced by these NPL theorists' willingness to categorize law as private in a retail, doctrine-by-doctrine manner that departs from what they view as a statutory regime's wholesale public law purposes. So, for instance, occupational safety and health law may be social welfarist, but they deem particular of its doctrines private law because those doctrines advance interpersonal justice.[103] Similarly, a job security law might pursue redistribution, but if aspects of its application involve adjudicating a just outcome between an employer and employee, these NPL theorists would deem that application within private law's domain.

These NPL theorists' nestling of ostensibly private law doctrines within a social welfarist public law regime may not be tenable, however. Their goal in so arguing is to shore up those regimes against legal economists' consequentialist critiques.[104] But the doctrine they deem interpersonal private law also serves the social welfarist ends of the public law regime of which it is a part. In what sense, then, is the doctrine distinctly private law? If anything, is it not public law that is actualized through interpersonal adjudication? And even if the doctrine can be both private and public law, how can it serve the shoring up purposes these NPL theorists propose? On what grounds would their interpersonal justice account triumph over, say, an economist's argument that the doctrine actually defeats the statute's social welfarist ends? This is, after all, a common structure of economists' critiques of employment laws. Minimum wage laws, for instance, are said to hurt not help workers' economic security by decreasing the supply of jobs.[105] The only way to resolve the tension in favor of the doctrine's interpersonal justice ends is to insist that private law trumps public law categorically. But one needs some reason for this to be the case and, perhaps, a stronger commitment to the public/private law sorting project than these NPL theorists claim to have.[106]

Categorizing the Corporate Democracy Act remains a theoretical exercise, however, as it failed to take off. Big Business Day attracted minimal media attention and the Act died in the House soon thereafter, never to be reintroduced.[107] The larger agenda of which it was a part got a drubbing later that year when Ronald Reagan coasted to the White House. His resounding victory only added pressure to job security's common law alternative.

---

101 *See supra* notes 40-43.

102 *See supra* notes 53-55.

103 Dagan & Dorfman, *supra* note 24, at 217-20.

104 *See supra* note 24 and accompanying text.

105 Richard A. Epstein, *Minimum Wage Hype*, Defining Ideas (Feb. 24, 2014), https://www.hoover.org/research/minimum-wage-hype.

106 *See supra* note 13.

107 Herbert Stein, *Big Business Day Rated a Badly Timed Failure*, Pitt. Press, Apr. 27, 1980, at 96.

2. Widening the Common Law Path

The common law path to job security broadened dramatically in the early 1980s, including by adding claims that would seem to fall at the core of theorists' accounts of private law. Yet slotting these claims into only NPL theorists' private law category holds surprising challenges. In part, this is because some claims were inflected with what NPL theorists deem public law goals. Also, even those claims that meet their criteria for private law were at least influenced by statutes that served the distributive purposes that NPL theorists ascribe to public law.

The push for common law protections came primarily from office workers. The ranks of these managers and professionals had grown considerably in the mid-twentieth century.[108] By the 1980s, however, corporate downsizing and new office technologies threatened their jobs.[109] Known colloquially as "white-collar" workers (distinguishing them from the manufacturing workers who sported blue collars), they turned to the common law rather than statutes for job protection. This may have been partly because they did not identify as proper subjects of employment laws, some of which excluded supervisory, professional, and administrative personnel from their coverage.[110] In contrast, the common law invited white-collar workers in while holding the working-class at bay. The torts that had gotten traction before 1980 targeted discharges that violated a sufficiently important public policy. Some actionable policies, such as retaliation for filing a workers' compensation claim, opened these claims to blue-collar workers.[111] But others favored higher-ups and those with access to office records. The seminal case involved a union's business agent fired for refusing to lie when giving sworn testimony to the state legislature.[112] In another, a bank employee was fired for reporting illegal customer charges.[113] The tort was also a far cry from a general just-cause protection since courts narrowly construed when a termination would hurt the public.[114] As a result, it was of limited applicability for all workers, and particularly for lower-level ones.

During the early 1980s, these white-collar workers widened the common law path considerably. State courts cracked open a true just-cause protection that, at least in theory, could cover workers regardless of the color of their collars. Some cases found that employers, through a mix of oral assurances and written policies promising

108 Louis Hyman, Temp: The Real Story of What Happened to Your Salary, Benefits, and Job Security 5-6, 143-45, 160 (2018).

109 Hyman, *supra* note 108, at 8, 184, 225-27, ch. 6; Erin Hatton, The Temp Economy: From Kelly Girls to Permatemps in Postwar America 92-94 (2011). On promotion of "lean" corporations, see Hyman, *supra* note 108, at 161-62, 185-86, 211-14, 239-44.

110 On this class dimension as an underexplored feature of labor and employment law history, see Sophia Z. Lee, *"The Employee": From Labor History to the History of Work?*, 59 Lab. Hist. 239, 240-41 (2018) (reviewing Jean-Christian Vinel, The Employee: A Political History (2013)).

111 *See, e.g.*, Frampton v. Central Indiana Gas Co., 260 Ind. 249, 249-50, 252, 297 (1973).

112 Petermann v. Int'l Brotherhood of Teamsters, 174 Cal. App. 2d 184, 187-89 (1959).

113 Harless v. First National Bank, 162 W.Va. 116, 118-19, 124-25 (1978).

114 *See* Theodore J. St. Antoine, *You're Fired—For the Nonunion Worker, Protection against Arbitrary Dismissal Is an Idea Whose Time Has Come,* 10 Hum. Rts., Winter 1982, at 32, 35.

job security, could create an implied contract for cause-only termination.[115] Oral assurances seemed most likely to be given to higher-level employees and, indeed, the plaintiffs in these cases were in the managerial ranks. But several jurisdictions also found such implied contracts based on far more ubiquitous written policies alone.[116] More states recognized these common law exceptions to at-will employment as well. By 1980, only "occasionally a court ha[d] broken through the crust of precedent and sided with the employee."[117] Just two years later, the American Bar Association (ABA) reported that 10 states had recognized at least one tort or contract cause of action and another 12 had indicated that they were, or might be, open to doing so.[118] By 1987, by one count the number of states recognizing these actions had exploded to about 40 states,[119] with over 30 recognizing the public policy tort and more than half recognizing implied contract exceptions to at will.[120]

This widened path was well-traveled. The number of reported cases jumped from 40 in 1982 to over 300 in 1985.[121] The payouts could be quite large; one 1986 survey claimed damage awards in California averaged over $400,000 and in two cases topped one million dollars (worth over 1.3 million and over 3.3 million dollars respectively today).[122] The volume and value of this litigation was significant enough to spur the creation of specialized law reports,[123] the formation of a lawyers' association for those representing discharged employees,[124] and a special ABA committee,[125] not to mention a flood of law review articles.[126]

---

115 Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 558-59 (1980); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 456 (1980); *cf.* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 329 (1981). A few jurisdictions also found implied covenants of good faith and fair dealing; however, this cause of action remained rare and of limited applicability. *See Report of the Committee on Development of the Law of Individual Rights and Responsibilities in the Workplace*, 1981 A.B.A. Sec. Lab. & Emp. L. Comm. Rep. 1, 18-19.

116 Forrester v. Parker, 93 N.M. 781, 782 (1980); Hedrick v. Center for Comprehensive Alcoholism Treatment, 7 Ohio App. 3d 211, 213 (1982); Yartzoff v. Democrat-Herald Pub. Co., 281 Or. 651, 656-57 (1978).

117 Clyde W. Summers, *Protecting All Employees Against Unjust Dismissal*, Harv. Bus. Rev., Jan.-Feb. 1980, at 132, 134.

118 *Report of the Committee on Development of the Law of Individual Rights and Responsibilities in the Workplace*, 1982 A.B.A. Sec. Lab. & Emp. L. Comm. Rep. 1, 16.

119 Henry H. Perritt, Jr., *Wrongful Dismissal Legislation*, 35 UCLA L. Rev. 65, 67 (1987).

120 Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. Rev. 631, 635-36 (1988).

121 Comm. on Individual Rts. & Resp. in the Workplace, *Individual Rights and Responsibilities in the Workplace*, 2 Lab. Law. 351, 351 (1986).

122 "Discharge Verdicts Average $424,527 in California," 1 Individual Emp. Rts. 1, 3 (1987) [hereinafter *Discharge Verdicts*]. *But see* David J. Jung & Richard Harkness, *The Facts of Wrongful Discharge*, 4 Lab. Law. 257, 260 (1988) (contending that news reports of average payouts were misleading).

123 Comm. on Individual Rts. & Resp. in the Workplace, *Individual Rights and Responsibilities in the Workplace*, 1 Lab. Law. 89, 94 (1985) [hereinafter *Individual Rights and Responsibilities in the Workplace* 1985].

124 Notes of PELA Goals Discussed at Inaugural Meeting (Mar. 13, 1985) (on file with author).

125 Subcomm. on State Common L. Rts. of Emps. to Their Jobs, of the Comm. on State. Lab. L., *State by State Summary of Common Law Rights of Employees to Their Jobs*, 1 Lab. Law. 109 (1985) [hereinafter *State by State* (1985)].

126 Paul Fenn & Christopher J. Whelan, *Job Security and the Role of Law: An Economic Analysis of Employment-at-Will*, 20 Stan. J. Int'l L. 353, 353 (1984).

Practicalities nonetheless ensured that common law actions would remain accessible largely to white-collar workers. Most urgently, lawyers needed to be compensated, and quite a lot. Plaintiffs' attorneys in these cases either had to be paid out of pocket or by a contingency fee. For obvious reasons, paying out of pocket would price-out most blue-collar workers as well as the growing ranks of women in low-status administrative office jobs, known as "pink-collar" workers. For a lawyer to accept a contingency fee, the possible payout had to be large enough to be worth the gamble. A less well-off worker might get a lawyer to take a tort case because those could result in large awards due to the availability of valuable punitive damages. But that kind of claim was most likely to arise among white-collar workers. The most common remedy for the implied contract claims available to blue- and pink-collar workers was backpay. Their pay, however, was unlikely to be high enough to entice a lawyer to take their case.[127] As a result, even as the common law path opened dramatically in the early 1980s, it was accurately perceived as a remedy for white-collar workers.[128]

The widening of the common law path highlights both the challenges of slotting the messy past into NPL theorists' neat categories and the dynamic interrelationship between the developing legislative and common law paths. The new contract causes of action might seem like private law under any of the theorists' approach. Yet even in what would seem to be private law's core—court-adjudicated, common law actions regarding interpersonal contractual relationships—normative goals that NPL theorists attribute to public law intruded. For non-managerial workers, the implied contract cause of action turned largely on what employers said in their policy handbooks. Courts found that those handbooks created an implied contract because many employers had taken to issuing policies that mimicked collective bargaining agreements as a union avoidance strategy. If the employer provided graduated discipline, grievance procedures, and just-cause protections, the idea was, workers would not want a union.[129] The implied contract theory had the potential to make those union avoidance policies legally binding; that is, to saddle employers with precisely the legal obligations they sought to avoid.[130] A court in a seminal case explained its recognition of the implied contract theory as in part about holding employers to promises they made in their handbooks to avoid workers' exercise

127 *See also* William B. Gould IV, *To Strike a New Balance: A Report of the Adhoc Committee on Termination at Will and Wrongful Discharge Appointed By the Labor and Employment Law Section of the State Bar of California*, 1984 State Bar of Cal. Lab. and Emp. L. Sec. 6-7 (noting that even contingency-fee arrangements required a large up-front fee that "tends to exclude the average worker").

128 *See, e.g.*, James N. Dertouzos et al., The Rand Inst. for Civ. Just., The Legal and Economic Consequences of Wrongful Termination 21 (1988) (finding that about 53 percent of plaintiffs in California's wrongful termination jury trials between 1980-86 had executive and middle management positions, which were only a portion of white-collar positions such that the total rate of professional and managerial positions was likely even higher).

129 *See, e.g.*, Teresa Carson, *Employee Rights Issues Are on the Rise*, Am. Banker, July 30, 1979, at 1, 3; Leonard, *supra* note 120, at, 634-35.

130 *See, e.g.*, Kenneth T. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 Bus. Law. 1, 27 (1984).

of their right to organize.[131] Labor law, by casting a shadow over contract doctrine, shows how what NPL theorists deem public law could affect law they see as private. Indeed, it shows that what seems like the core of private law might even seek the distributive and social welfarist ends they ascribe to public law.[132]

Compounding the slipperiness and dynamic interplay between theorists' categories, the common law path's exclusiveness, costs, and uncertainty created new momentum for a legislative solution. As the next section shows, the proposed statutes would serve ends that NPL theorists associate with public law: redistributing the common law's protections while lowering their costs and smoothing the inefficiencies of their uncertainty. But even the legislative alternatives come with categorization challenges.

3. Broadening the Statutory Path

Labor law scholars did not think that the common law route was adequate because the courts' "formalized processes are not readily accessible to rank-and-file workers."[133] Instead, they argued, "[i]f employees are to be fully and effectively protected against unjust discipline, new specialized legislation will be necessary."[134] During the early 1980s, labor law scholars used the proliferating common law cases to push for more egalitarian job security legislation. They proposed dramatically broadening access to job security and capping payouts for violations. In other words, their proposed statutes would redistribute the costs and rewards of the common law causes of action, meeting the criteria for public law of even those NPL theorists with the most capacious account of private law's scope. Yet these statutes also directed resolution of claims into the private/public netherworld of arbitration or even allowed court adjudication, raising challenges for at least some NPL theorists' efforts to coherently divvy up public from private law.[135]

As attention to job security grew, labor law scholars beat the drum for legislation that redistributed the risks and benefits of the common law causes of action in part by moving them out of the courts. Labor law scholars promoted such laws as bringing the benefits of job protections to the "rank-and-file" unlikely to benefit from the common law path.[136] By capping payouts and preempting common law claims, their proposals redistributed the fruits of contract and tort causes of action to the mass of

131 Woolley v. Hoffman-LaRoche, Inc., 99 N.J. 284, 296-97 (1985) (observing that the "trial court viewed the manual as an attempt by Hoffmann-La Roche to avoid a collective bargaining agreement," just before finding that "[i]f such a commitment is indeed made, obviously an employer should be required to honor it").

132 *See also* Dare v. Montana Petroleum Mktg. Co., 212 Mont. 274, 282 (1984) (explaining that the covenant of good faith and fair dealing addressed "the inherent inequality of bargaining power present in many employment relationships").

133 St. Antoine, *supra* note 114, at 36.

134 *Id*.

135 Note that proponents chose arbitration not only for scale and public costs but to redistribute the risk and security of common law causes of action. *Cf*. Dagan & Kreitner, *supra* note 24, at 622 (arguing that issues of delay and cost can justify creating fora other than courts to vindicate private law).

136 William B. Gould IV, *Protection from Wrongful Discharge*, N.Y. Times, Oct. 22, 1984, at A21; Gould, *supra* note 127, at 6-7. *See also* Joseph Gordin, *Toward a Wrongful Termination Statute for California*, 42 Hastings L.J. 135, 140 (1990).

workers. Proponents also promised their legislation would redistribute risks among employers by redressing the common law actions' grinding costs and unpredictably large payouts.[137] They called for resolving claims to this newly populist job security via arbitration.[138] Tying this institutional preference to their redistributive ends, they claimed that arbitrators could provide a quick, cheap alternative to litigation in the courts.[139]

The common law causes of action helped labor law scholars' proposals gain traction in the states. Legislatures steadily introduced just-cause bills, mostly in labor strongholds and often with labor law scholars' support, gaining momentum as the decade progressed.[140] Fittingly, however, it was California, which had some of the strongest common law job security protections and led the country in large jury awards, that seemed poised to lead the percolating bills into law. In early 1983, the state's Bar Association created a committee to review the dramatic increase in wrongful discharge litigation.[141] The committee issued a split report. The majority, led by labor-law scholar and committee co-chair William Gould, contended that "legislation is necessary" to ensure job security.[142] The majority proposed establishing a state-run mediation and arbitration process that redistributed the risks and rewards of the common law by providing broad coverage of workers in exchange for speedier resolution and precluding potentially big-ticket damages remedies.[143]

Initially, the California bill gathered momentum, but businesses and their lawyers had a different idea of what would serve the public weal. The committee's minority, led by its management-side co-chair, conceded that a statute was desirable, but not the one that the majority proposed. Rather than expand coverage, Gould's co-chair would use a statute to restrict the common law route by allowing claims to the already recognized causes of action only and dramatically limiting damages.[144] A Republican state legislator introduced a competing bill that would have overridden the state's common law incursions on at-will employment altogether.[145] Business representatives

137 Jacquelynn Boyle, *Bill Gives Fired Workers a Hearing*, Lansing St. J., Nov. 30, 1983, at 4B; Gould, *supra* note 127, at 4-5, 17; Gould, *supra* note 136.

138 See *supra* note 90 and accompanying text for uncertainty about how arbitration fits in NPL theorists' private/public law categories.

139 Gould, *supra* note 127, at 4, 8-9.

140 *See Report of the Committee on Development of the Law of Individual Rights and Responsibilities in the Workplace*, 1983 A.B.A. Sec. Lab. & Emp. L. Comm. Rep. 25, 31 [hereinafter *Report of the Committee 1983*]; Stuart Henry, *Legislating Just Cause, 1980-92*, 536 Annals Am. Ad. Pol. & Soc. Sci. 149, 161-62 (1994); Jack Stieber & Michael Murray, *Protection against Unjust Discharge: The Need for a Federal Statute*, 16 U. Mich. J. L. Reform 319, 334 n.94 (1983); Roger Gillot, *Proposed Law Would Restrict Dismissal of Workers*, Santa Cruz Sentinel, Apr. 4, 1984, at B-7.

141 Gould, *supra* note 127, at i.

142 *Id*. at 7.

143 *Id*. at 13-14, 20, 24-25.

144 Howard Hay & Maureen McLain, *Minority Report: Of Two of the Six Members of the Adhoc Committee on Termination at Will and Wrongful Discharge*, *in* To Strike A New Balance: A Report of the Adhoc Committee On Termination At Will And Wrongful Discharge Appointed By The Labor And Employment Law Section Of The State Bar of California, Lab. & Emp. L. News (State Bar of Cal. Lab. & Emp. L. Section), Feb. 8, 1984, at 38.

145 Roger Gillot, *supra* note 140.

in California and elsewhere lined up against just-cause laws, contending that they would put their state at a competitive disadvantage, bury employers in bureaucracy, open the litigation floodgates, and intrude on businesses' right to manage.[146] Meanwhile the bill modeled on Gould's recommendations suffered so many amendments that Gould rejected it as "completely antithetical to our recommendations."[147]

Gould's leveraging of the common law cases spurred mobilization for legislation beyond California's borders, however, where employers' plea for the state to manage their risks alone caught on. In 1985, the National Conference of Commissioners on Uniform State Laws (also known as the Uniform Law Commission or ULC) formed a committee to study whether to draft a Uniform Employment Termination Act.[148] The ULC, which was composed of judges, lawyers, academics, and policymakers selected by their state's government, drafted laws on subjects for which its Commissioners thought more national uniformity would be beneficial.[149] Gould's report motivated the ULC to tackle the job security issue, but out of fear not sympathy.[150] Rather than enhance workers' security by seeking to expand just cause, the ULC "directed [its bill] at impeding the present judicial course away from at-will employment."[151]

The ULC's work on the subject helped produce the first state just-cause law, one spurred by common law innovations and, at least initially, focused on protecting employers. Despite the ULC's calls for speed,[152] it did not approve a drafting committee until 1987.[153] A member of its study committee who was a Montana legislative staffer got further redistributing risk from employers to workers by supporting a just-cause law in her state. Such a law, she promised Montanans, would "harmonize the inconsistent and unpredictable results . . . coming out of the courts."[154] Indeed, Montana's courts had arguably scared employers even more than California's. Montana (like California) was among the few states whose courts had recognized a cause of action with even broader sweep than the handbook cases: one based on a covenant of good faith and fair dealing.[155] The Montana Supreme Court held in 1984 that the covenant could guarantee job security based on as little as a raise, praise, and a

146 *See, e.g.*, *id.*; Hay & McLain, *supra* note 144, at 39; Thomas R. Horton, *If Right to Fire is Abused, Uncle Sam May Step In*, Wall St. J., June 11, 1984, at 1; Stephen Hudak, *You're Fired*, News J., June 21, 1984, at 5E. *See generally* Stieber & Block, *supra* note 73, at 792-93.

147 *Quoted in* Stieber & Block, *supra* note 73, at 792-93. California remained locked in a duel between more employee-friendly and employer-friendly bills throughout the decade. *See Employees*, Sunday Dispatch, July 21, 1985, at E3.

148 *Minutes of the Executive Committee*, 94 ULC Handbook 109, 112 (1985).

149 Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 Wash. L. Rev. 361, 365-66, 369-70 (1994).

150 *Report of the Scope and Program Committee Meeting*, 94 ULC Handbook 120, 124 (1985).

151 *Id.*

152 Jeanyse R. Snow, *Report of the Vice President*, 95 ULC Handbook 78, 84 (1986).

153 *Minutes of the Executive Committee*, 96 ULC Handbook 114, 115 (1987).

154 Jim Tracy, *Wrongful Discharge: Fired Workers See Employers in Court*, Mont. Standard, Sept. 14, 1986, at 19.

155 Gates v. Life of Montana Insurance Co., 196 Mont. 178 (1982). This discussion of Montana case law relies heavily on Leroy H. Schramm, *Montana Employment Law and the 1987 Wrongful Discharge from Employment Act: A New Order Begins*, 51 Mont. L. Rev. 94, 94-101 (1990). The covenant confounds private law theorists' categorization. *See, e.g.*, Sabine Tsuruda, *Good Faith in Employment*, 24 Theoretical

handbook stating standards for promotion.[156] Further, Montana's courts deemed this a tort, rather than contract, action, giving rank-and-file employees access to costly punitive damages.[157] Montana juries were also generous with their compensatory damages, awarding one terminated plaintiff $2.5 million (worth over $6 million today) for a lifetime of future lost wages.[158]

The Montana courts' innovative jurisprudence in employment and other areas spurred a just-cause statute that ultimately mitigated risk for employers and workers alike.[159] The Montana bill started out purely as an effort to protect employers by reining in the courts.[160] The draft law allowed wrongful discharge claims for whistleblowers and employer violations of written policies while preempting all other claims and limiting liability to at most three years of lost wages. The bill sailed through the House.[161] But the plaintiffs' bar won important concessions in the Senate, including the addition of a sweeping requirement that all terminations be for just cause.[162] The final law kept unjust discharge claims in the courts while incentivizing arbitration in a way that mixed choice and compulsion.[163]

The various state laws further demonstrate the slipperiness between NPL theorists' categories as well as the dynamic interaction between the legislative and common law paths to job security. All the state bills pursued goals that NPL theorists associate with public law by redistributing risk and security among workers and employers. They also contained additional features that many NPL theorists would sort into the public law category, including displacing the common law in whole or part with statutes and, for the labor scholar-backed bills, replacing courts with state-mandated and -run arbitration. Yet, the Montana statute kept claims in the courts, falling on the private law side of the line for those NPL theorists who base the distinction on institution.[164] Further, some NPL theorists consider antidiscrimination claims part

---

Inquiries L. 211 (2023) ("the duty of good faith supplies a public standard for interpretation and hence for determining what counts as compliance or breach").

156 Dare v. Montana Petroleum Mktg. Co., 212 Mont. 274, 283 (1984). *See also* Crenshaw v. Bozeman Deaconess Hospital, 213 Mont. 488, 500-01 (1984) (extending the covenant to probationary employees).

157 Gates., 205 Mont. at 304.

158 Steve Shirley, *Wrongful-Discharge Measure Pits Lawyers Against Lawyers*, Mont. Standard, Mar. 11, 1987, at 7.

159 Mea Andrews, *Liability Reform Campaign Has Several Targets*, Missoulian, Sept. 15, 1986, at 12; *Liability Reform Is No Cure-All but It's a Start*, Indep. Rec., May 7, 1987, at 4.

160 Jim Tracy, *State Lawyers Keep an Eye on Lawmakers*, Mont. Standard, Mar. 8, 1987, at 7; Shirley, *supra* note 158.

161 *A Run at Tort Reform*, Indep. Rec., Feb. 17, 1987, at 4.

162 For plaintiffs' bar opposition, see Tracy, *supra* note 160; Shirley, *supra* note 158. For Senate amendments, see Sue O'Connell, *Liability Bills Stack Up*, Great Falls Trib., Mar. 27, 1987, at 15. The final law also allowed older, long-term employees to still access private law causes of action, *see Liability Reform Is No Cure-All but it's a Start*, Indep. Rec., May 7, 1987, at 4.

163 The law allowed either party to request arbitration in lieu of court; if the opposing party refused and lost, they would be responsible for their opponent's attorney fees. *See* Mont. Code. Ann. §§ 39-2-914-15 (2021). In addition to being the result of state-encouraged agreements, the arbitrations had to conform with certain statutory requirements. *Id*. If arbitration generally poses tough categorization problems for NPL theorists, *see supra* note 90, this is all the truer of the Montana provision.

164 *See supra* note 39.

of private law because of their horizontal and relational structure.[165] They might assess claims under Montana's statute similarly, creating a conflict between how they would sort those claims according to private law criteria and the statutory scheme's overarching redistributive public law ends.[166] Regardless of their categorization, though, the state bills and Montana statute exemplified how worker-protective common law innovation could lead to preempting legislative reform.

B. The Closing of the Statutory and Common Law Paths

Just as the common law helped spur legislative efforts, however, a reverse dynamic took hold. Not only did legislation temper the courts' common law innovations, but the common law also eroded the legislative path from without and from within. At the same time, both the common law and statutory paths developed in ways that highlight how easily the law can slip between NPL theorists' public and private categories.

1. The Common Law Path Narrows

While most courts widened the common law path to job security in the first half of the 1980s, a few found ways to trim it back. As their limits caught on in the second half of the decade, they added new twists to the dynamic dance between the legislative and common law routes to job security. One front in employers' war against courts' innovative causes of action used resources internal to common law that NPL theorists associate with private law. Others, however, came from directions that some or all of these theorists identify with public law, demonstrating the difficulty of assigning the resulting doctrines to one category or the other.

Even as common law exceptions to at-will were spreading across the country, limits on those causes of action were not far behind. The journey of at-will disclaimers is illustrative. In 1980, Michigan became one of the first states to recognize contracts for job security based on employee handbooks in *Toussaint v. Blue Cross & Blue Shield of Michigan*.[167] When terminated employees of Sears, Roebuck & Co. sought to make use of the precedent, however, attorneys for Sears argued that the court had left a loophole. In dicta, the 1980 opinion noted that employers could protect themselves by expressly disclaiming "that the employee serves . . . at the will of the employer."[168] Sears pointed to applications its Michigan employees signed at hire with just such a provision.[169] Over the next few years, the federal district courts to which Sears had the claims removed split on whether this disclaimer precluded establishing an

165 *See* Goldberg & Zipursky, *supra* note 41, at 41 (describing sexual harassment under Title VII of the Civil Rights Act of 1964 as "in effect, a statutory tort" that redresses something that is "in some sense a private wrong"); Dagan & Dorfman, *supra* note 24, at 218-19 (arguing that workers' compensation laws fall within private law because they retain "the interpersonal tort duty of care that employers owe to employees and have even strengthened that duty").

166 For more on the tenability of this approach, see *supra* notes 103-106.

167 Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579 (1980).

168 *Id*. at 612 n.24.

169 *See, e.g.*, Reid v. Sears, Roebuck & Co., 790 F.2d 453, 456 (6th Cir. 1986).

implied contract for job security under *Toussaint*.[170] The issue eventually made it to the Sixth Circuit Court of Appeals, and in 1986, that court found that the disclaimers defeated the handbook claims.[171] Employers in other states then added arguments based on the Sixth Circuit's opinion to appeals of successful suits against them.[172]

During the latter part of the 1980s, employers fashioned similar loopholes in other states.[173] In 1984, an appellate court in California, another pioneer in common law incursions on at-will, affirmed the dismissal of an implied contract claim based on the employer's production of an at-will disclaimer.[174] The employer had argued before the court that if disclaimers could not be grounds for dismissing a suit at the outset, employers would be mired in "frivolous litigation" "no matter how well the at-will relationship is documented."[175] Express statements that handbooks were not part of the employment contract received similar treatment in the Nebraska courts.[176] By the mid-1980s, disclaimers were raised in enough cases (albeit with mixed results) to make them an extended subject of the ABA committee's annual reports.[177] In 1986, the ABA committee reported a slight downtick in the rate of plaintiffs' success making such claims.[178] Demonstrating the growing effect of the courts' trimming turn, in 1988, companies were reportedly adding at-will disclaimers at a quick pace, even as lawyers continued to debate whether they merely hurt or entirely foreclosed an implied-contract claim.[179] The Missouri Supreme Court, for its part, declared that, contrary to a run of lower-court decisions, handbooks were not binding, obviating the disclaimer issue altogether.[180] Courts trimmed back

---

170 *Compare, e.g.*, *Report of the Committee 1983*, *supra* note 140, at 36 (describing Forrester v. Sears, Roebuck & Co., No. 81-73308, 1982 WL 25915 (E.D. Mich. Aug. 20, 1982) as holding that the at-will disclaimer was a barrier to a handbook-based claim to a contract for just-cause termination only), *with* Reid v. Sears, Roebuck & Co., 588 F. Supp. 558, 561 (E.D. Mich. 1984) (finding that, where the job application's at-will disclaimer had been signed 17 years prior to termination, it could not be a bar to an implied contract claim based on subsequent events and that making it so would be "a particularly unjust and unjustified interpretation of Toussaint").

171 Reid v. Sears, Roebuck & Co., 790 F.2d 453, 462 (6th Cir. 1986) (finding that, under *Toussaint*, the application disclaimers were "all that was required to create contracts for employment at will").

172 *See, e.g.*, Brief of Appellant at 8-11, Stark v. Circle K. Corp., No. 86-543 (Mont. May. 21, 1987) (arguing based on *Reid* that an at-will disclaimer in the job application signed by the plaintiff precluded his claim that his termination violated the employer's duty of good faith and fair dealing).

173 These efforts were not always successful. For instance, in the case discussed *supra* note 172, the Montana Supreme Court rejected Circle K's disclaimer argument. Stark v. Circle K., 751 P.2d 162 (Mont. 1988) (explaining that the employer "misunderstands the nature of good faith and fair dealing" in arguing that the at-will disclaimer precludes finding a breach of that duty).

174 Shapiro v. Wells Fargo Realty Advisors, 153 Cal. App. 3d 467, 482 (1984).

175 Appellant's Opening Brief at 21, Shapiro v. Wells Fargo Realty Advisors, No. 70061 (Cal. App. 3d Sept. 19, 1983).

176 *State by State* (1985), *supra* note 125 at 113.

177 Comm. on Individual Rts. & Resp. in the Workplace, *Individual Rights and Responsibilities in the Workplace*, 1 Lab. Law. 777, 787 (1985) [hereinafter *Individual Rights* (1985)].

178 Comm. on Individual Rts. & Resp. in the Workplace, *Rights and Responsibilities in the Workplace*, 2 Lab. Law. 351, 353 (1986) [hereinafter *Individual Rights* (1986)] (reporting a 12% decline in plaintiffs' success rate since 1984).

179 Keith Bradhser, *Firms Ask That Workers Waive Job Security*, L.A. Times, July 31, 1988, at 18-19.

180 Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661 (Mo. 1988). For contrary appellate court decisions, see, for example, Enyeart v. Shelter Mut. Ins. Co., 693 S.W.2d 120 (Mo. Ct. App. 1985); Matthews v.

other claims as well. In 1983, the Wisconsin Supreme Court narrowed the grounds on which a discharge would be held to violate a public policy and deemed them contract rather than tort claims, precluding more lucrative damages.[181] By 1986, the ABA reported that less than 30 percent of public policy claims were successful, a decline of 15 percent from the previous year.[182]

Pinpointing the precise causes of courts' retrenchment may be impossible, but several factors seem likely to have played a role.[183] Perhaps the most direct was the attorneys who disseminated limiting arguments based in common law principles to each other, employers, and the courts. During the 1980s, corporate law firms opened employment law departments left and right.[184] This new army of management-side attorneys promised employers that better legal advice could protect them. They shared their strategies through publications with titles like "Avoiding and Defending Wrongful Discharge Claims" and "Employment Termination Law: A Practical Guide for Employers."[185] Lawyers should offer employers "both pre-litigation counseling" as well as "effective litigation techniques," they urged.[186] This included advising employers to secure at-will disclaimers and to regularly update their policies "to ensure they conform with the changing law."[187] Contract law, management-side attorneys promised, could liberate employers from, not only expose them to, legal liability. Such advice secured the facts for, and was supported by, the claims these attorneys successfully made in court.[188]

State politics may have also caused courts to trim back their common law incursions on at-will. State legislative efforts, regardless of their success, correlated with doctrinal retrenchment. For instance, no sooner did Montana enact its just-cause statute than its courts began retracting the good faith and fair dealing doctrine that had given rise to the pathbreaking law.[189] Similarly, in California, with just-cause bills stalled in the state legislature, the once innovative California Supreme Court recategorized covenant of good faith and fair dealing actions as a less lucrative contract rather

---

Federal Land Bank of St. Louis, 718 S.W.2d 220, 225 (Mo. Ct. App. 1986).

181 *Individual Rights and Responsibilities in the Workplace* 1985, 89, 95. For evidence that this was consequential for the risk employers faced, see Jung & Harkness, *supra* note 122 at 263-65 (1988) (describing contract-based wrongful discharge actions as "low-stakes" financially and public policy torts and covenant of good faith and fair dealing actions as "high-stakes").

182 *Individual Rights* (1986), *supra* note 178, at 354. Of course, the decline in success rate could also be due to an increase in unmeritorious claims as awareness of the legal theory grew.

183 The broader retrenchment of contract law during this period is likely also a cause, though one beyond the scope of this Article. I thank David Hoffman for this observation and welcome his future work on the subject.

184 Stephanie Saul, *Employers Finding It Harder to Fire "At Will"*, Corvallis Gazette-Times, Oct. 14, 1984, at 27.

185 Jeffrey S. Goldman & Martin K. Denis, *Avoiding and Defending Wrongful Discharge Claims*, Brief, Spring 1986, at 48, 50; Maureen E. McLain, Employment Termination Law: A Practical Guide for Employers (1987).

186 Goldman & Denis, *supra* note 185.

187 *Id*.

188 An example of this dynamic is documented in Keith Bradsher, *Firms Ask that Workers Waive Security*, L.A. Times, July 31, 1988, at A1.

189 Schramm, *supra* note 155, at 107-08, 123-24.

than tort action.[190] Both types of feedback make intuitive sense since both reflect judicial deference to the legislature. But whether the state legislative actions were a direct influence on those courts is hard to know. In both instances, politics may also have played a role: both states' elected supreme court justices were the subject of bruising battles over the legal regulation of business and the politics of those on the court shifted to the right during the 1980s.[191]

Even more atmospherically, by the second half of the 1980s, influential legal scholars had jumped to at-will employment's defense. In 1984, University of Chicago law professor Richard Epstein penned a "Defense of the Contract At Will." Epstein was a highly prolific star of the law and economics field. These scholars, who argued that collective welfare maximization via efficient market mechanisms was the best guide for the common law's development, had gained sway in legal academia during the 1960s and '70s.[192] Epstein contended that "[t]he doctrine of wrongful discharge is the problem and not the solution."[193] The at-will rule, he argued, "respond[s] to the manifold perils of employment contracts better than any rivals that courts or legislatures can devise."[194] Because at will better reflected both parties' expectations, Epstein urged, departing from it also infringed on workers' "freedom to enter into such contracts."[195] More colloquially, Epstein argued that the courts' innovative causes of action were a "wasteful tax that harms workers and employers."[196] In Epstein's view, when it came to at-will employment, "courts and legislatures should leave well enough alone."[197] For any judges listening to the professoriate, Epstein gave them reason for pause.

The trimming back of the common law path in the 1980s raises questions about the viability of cleanly sorting law into NPL theorists' private and public categories even at private law's core. As before, courts' changes to their contract and tort incursions on at-will are private law by most of NPL theorists' metrics, from their institutional home to their common law source and relational structure. But these trends were also likely influenced by forces they associate with public law: legislative decisions about whether and how to redistribute risk and security, political battles over the proper relationship between law and business, and legal theories about the common law's role in advancing collective welfare. NPL theorists treat these kinds of external influences as irrelevant to divining private law's internal normative structure.[198] The interaction between what they deem public law forces and private

190 Foley v. Interactive Data Corp., 47 Cal. 3d 662, 663 (1988). The at-will disclaimer case also was decided during the legislative deadlock over Gould's proposed bill described in *supra* note 147.

191 On Montana, see Anthony Johnstone, *A Past and Future of Judicial Elections: The Case of Montana*, 16 J. App. Prac. & Proc. 47, 74 (2015); Schramm, *supra* note 155, at 107-08 n.78. For California, see Tom Wicker, *A Naked Power Grab*, N.Y. Times, Sept. 14, 1986, at A4.

192 *See generally* Steven M. Teles, The Rise of the Conservative Legal Movement: The Battle for Control of the Law ch. 4 (2010).

193 Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. Chic. L. Rev. 947, 982 (1984).

194 *Id*. at 952.

195 *Id*. at 954.

196 Michael K. Burns, *Fighting "Wrongful Discharge"*, The Sun, Mar. 19, 1989, at 3H.

197 Epstein, *supra* note 193, at 982.

198 *See supra* note 48 and accompanying text.

law's substance, however, begs the question whether the two can be held conceptually apart. Further, at times, these influences migrated into courts' reasoning, such as when the California Court of Appeals argued that allowing implied contracts for job security "destroys the centuries-old solid and settled principle of vast and demonstrated value to employer and employee, to the world of commerce and to the public, of" the at-will rule.[199] And what of lawyers' role in shaping the course of these common law doctrines? They do not fit neatly into NPL theorists' accounts of public or private law. But perhaps they should, given the burgeoning employer-side bar's role in shaping the course of the common law, from the facts they generated on the ground to the arguments they convinced courts to adopt.

The multivalent interactions across NPL theorists' public/private law divide underscore the difficulty of hiving the two sides off from each other, historically and, perhaps, conceptually. This history also demonstrates the interconnection between common law and statutory worker protections. Here, legislative activity (or the lack thereof) weakened worker protections based in common law. These features are even clearer in the demise of the legislative path.

2. The Legislative Path Peters Out

Even as the common law path to job security narrowed dramatically, it both weakened and eroded support for the ULC's efforts to secure a uniform just-cause statute. A complex interplay of common law doctrine and legislation, and of what NPL theorists would deem private and public law, resulted. The dynamic interrelationship between common law and legislation, including the common law's potential to inflect—or some might say infect—legislation's course, challenges NPL theorists' static conceptualization of private and public law. It also serves as a warning that the common law can erode—not only bolster—employment law statutes designed to redistribute power and enhance social security.[200] At the same time, the ULC's decision to allow parties to contract around key provisions highlights some challenges of applying NPL theorists' categories.

The ULC committee in charge of drafting the Uniform Employment Termination Act proposed a law that would manage and redistribute the risk for employers and workers. The committee proposed providing affordable just-cause protections for most workers by employing arbitration in lieu of courts. In exchange, it would preempt common law causes of action and limit employer liability to backpay and either reinstatement or a capped severance amount.[201]

The opposition the ULC bill faced was driven by and illustrated the complex interactions between the common law and statutory paths to job security. The committee's risk-sharing proposal was so controversial that the Commissioners

199 Foley v. Interactive Data Corp., 47 Cal. 3d 662, 663 (1988).

200 *Cf.* Dagan & Kreitner, *supra* note 24, at 609-10 (arguing that viewing occupational safety law as private law can rescue it from cost-benefit critiques).

201 Model Emp. Termination Act, §§ 1(4), 2(c), & 3(a) (Unif. L. Comm'n 1991) (*in Proceeding in Committee of the Whole Uniform Employment Termination Act,* 1991 Nat'l Conf. of Comm'rs on Unif. State L. 11 [hereinafter ULC Proc. 1991]).

nearly disbanded the drafting committee when it presented its first draft to the ULC.[202] The reaction of the plaintiffs' bar demonstrated the threat just-cause statutes could pose to further developing the common law path. Like the Montana law, the ULC's draft bill would preempt any discharge-related common law causes of action. To the plaintiffs' bar, this was "unacceptable and probably unconstitutional."[203] Despite winning significant concessions during the drafting process, the plaintiffs' bar could not get the ULC drafters to budge on preemption of common law claims to job security. When the ULC released the final draft of its act, the proposed statute's threat to the common law of job security precluded the support of the plaintiffs' bar.[204]

Unions' terms for supporting the ULC bill also reflect the interactions between common law and legislation. During the 1980s, unions moved into a defensive crouch, facing a hostile NLRB, a recession paired with widespread corporate restructuring, and employers' ever-more sophisticated and effective avoidance efforts.[205] The common law of job security further weakened unions by dampening worker interest in unionizing. The NLRA's focus on arbitration and collective agreements had led courts to find that it preempted common law job security claims, along with their valuable remedies.[206] As a result, workers had better access to those claims outside a union than within one. The proliferation of common law claims, labor law scholars warned, eroded worker support for unions, tilting the balance of power the labor law had struck in favor of employers.[207] The ULC commissioners instructed the drafters of its just-cause statute to exclude union members, thereby duplicating this employer-friendly effect.[208] But labor unions made their members' coverage "a *sine qua non* for [unions] support."[209] The gambit worked and the drafting committee covered union members.[210] The proposed law would tip the balance of power between unions and employers a notch back in unions' favor. When the final act went before the ULC for a last reading and vote, it had labor's backing.[211]

The important concessions won by management-side attorneys illustrated that the common law could undermine just-cause legislation, just as the prospects of legislated job security could undermine the common law incursions on at-will.[212]

---

202 Louis L. Robein, Jr. et al., *Wrongful Discharge: A Panel Discussion*, 6 Lab. Law. 319, 319 (1990).

203 Letter from Monica Farris Linker, Exec. Bd. Mich. Trial Law. Ass'n, to Theodore J. St. Antoine, Professor of Law, U. of Mich. L. Sch. (Nov. 15, 1988) (on file with author).

204 ULC Proc. 1991, *supra* note 201, at 12.

205 Windham, *supra* note 94, at 10. *See generally* Nelson Lichtenstein, State of the Union: A Century of American Labor ch. 6 (2013).

206 Katherine van Wezel Stone, *The Legacy of Industrial Pluralism*, 59 Chic. L. Rev. 575, pt. IV (1992).

207 *Id*. It is ironic—or perhaps a good example of cognitive biases—that workers favored the lottery-like common law causes of action over the more widely available but less lucrative just-cause protections under a union contract. Those common law claims had been generated in part to provide nonunion workers what was widely seen as a watered-down, less protective version of union contracts' just-cause protections.

208 ULC Proc. 1991, *supra* note 201, at 201.

209 E-mail from Theodore, J. St. Antoine, Professor of Law, U. of Mich. L. Sch., to Stephen Sugarman, Professor of Law, U.C. Berkeley Sch. of L. (July 28, 1995) (on file with author).

210 ULC Proc. 1991, *supra* note 201, at 201.

211 *Id*. at 13-14.

212 *See supra* Part III.B.1.

Defense attorneys, well represented on the drafting committee and among the ULC Commissioners, mobilized the common law to weaken the security the ULC bill provided workers and increase that it provided employers. Some proposals narrowed the act's coverage by integrating common law doctrines into the ULC bill's protections. The draft bill's final details were worked out at the ULC's 1991 meeting. There, management's advocates won a definition of just cause that gave deference to employers' "business judgment" and "right to manage."[213] Management lawyers also inserted common law into the ULC's statutory scheme by winning provisions allowing employers to contract around the act's requirements and enforcement framework. One allowed employers to contract out of the just-cause requirement if they provided a minimum amount of severance pay.[214] The breadth of this workaround, the ULC drafters conceded, would depend on the common law's limits on contract formation through doctrines of adhesion, duress, and unconscionability.[215] In another win, a management attorney secured a last-minute provision allowing employers to contract for private arbitration or another (undefined) "alternative dispute resolution procedure" (ADR) in lieu of the public arbitration required by the ULC's draft bill.[216]

The ULC drafters were aware that the common law, once inserted into their statutory scheme, could seriously weaken their bill. When the attorney who won the ADR provision tried to additionally allow parties to contract into court adjudication, the drafting committee balked. Their reason underscored why the common law's limits on contract formation would not restrict the statute's newly added contractual workarounds much.[217] "[T]here is too much of a chance at the time that employment begins that an employer would" present such a contract to an employee who would say "'well, okay,'" a member hypothesized.[218] That employee would "not really think very much about it or even know the ramifications of it," but it would "have a very detrimental effect on the purposes of the act," he insisted.[219] In the case of court adjudication, the parties agreed to a compromise that addressed the scope of the loophole by statute instead of common law. The committee allowed parties to agree to court adjudication only *after* a dispute had arisen, when its stakes would be more salient to the worker.[220]

Elsewhere, however, the drafters did not show the same sensitivity to the common law's potential to dramatically undermine the redistribution of risk and security

213 Model Emp. Termination Act § 1(4), (Unif L. Comm'n 1991); ULC Proc. 1991, *supra* note 201, at 352.

214 *Id*. at 386. Note this provision is similar to the approach advocated in Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. Rev. 1 (2010).

215 Proceeding in Committee of the Whole Uniform Employment Termination Act, 1990 Nat'l Conf. of Comm'rs on Unif. State L. 3, 136-37; ULC Proc. 1991, *supra* note 201, at 251-52.

216 ULC Proc. 1991, *supra* note 201, at 262-63. At the time, this tactic was relatively novel. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (applying for the first time a mandatory arbitration clause in an employment contract to an age-discrimination claim); within a decade, however, scholars lamented their widespread use. *See* Eileen Silverstein, *From Statute to Contract: The Law of the Employment Relationship Reconsidered*, 18 Hofstra Lab. & Emp. L.J. 479, 482 (2001).

217 ULC Proc. 1991, *supra* note 201, at 395-96 (statement of Commissioner Ring of Virginia).

218 *Id*. at 396 (statement of Commissioner Richard Morningstar of Massachusetts).

219 *Id*. at 397 (statement of Commissioner Richard Morningstar of Massachusetts).

220 *Id*. at 397-98.

they sought to achieve. Similar concerns were not raised about workers' awareness of the consequences of contracting into private arbitration or ADR, for instance. Instead, once the court alternative was added, the draft act was changed to state that private arbitration or ADR could be contracted into *before or* after a dispute arose.[221] In 1991, the ULC adopted the draft bill as the Model Employment Termination Act (META), ADR workaround and all.[222] It quickly became clear just how fundamentally the drafters' last-minute change had transformed the act's substance and politics. In 1993, the committee's chair reported that allowing employers to contract for private arbitration or ADR before a dispute had arisen was "the most controversial provision of the Act."[223] Clyde Summers, the godfather of just-cause legislation, had deemed it "a potential disaster."[224] Summers observed that, because META did not set any minimum standards for ADR, the provision allowed an employer to contract for just about anything, perhaps "little more than an 'open door' policy."[225] And because the employer could do so before a dispute arose, it raised all the act-gutting concerns as had contracting for court adjudication.[226] The chair tried to get the ULC's Executive Committee to strike the "before or" language from META but was unsuccessful.[227]

Attempting to categorize META highlights the discontinuities and slipperiness among NPL theorists' public and private law categories. As before, the bill's overarching goal of smoothing risk and security across workers and employers would seem to advance the redistributive and social welfarist goals that most NPL theorists associate with public law. Yet the ability for employers and workers to contract into court adjudication injects features of private law for those NPL theorists who define the category by a legal action's institutional home or common law basis. The bilateral and horizontal configuration of actions under the statute might also mark them instances of private law for some. The option of contracting into private arbitration or ADR further complicates the categorization game. The contracts themselves would ostensibly give rise to private law claims for all NPL theorists, though it is unclear how they would categorize the resulting dispute resolution mechanisms.[228]

However categorized, the ADR loophole, with its common law-sculpted limits, helped kill META. Once adopted, the drafting committee chair predicted that META would be "strongly opposed by business interests and favored by labor unions and the plaintiffs' bar."[229] But labor, which went into the ULC's 1991 meeting a supporter, was cool to META as adopted. The labor organization's counsel "expressed concern

221 Model Emp. Termination Act § 4(i), (Unif L. Comm'n 1991).
222 *Id.* at §§ 7-8.
223 Memorandum from Stanley Fisher, Chairman, Standby Comm. Model Emp. Termination Act, to Exec. Comm., Nat'l Conf. of Comm'rs on Unif. State L. (Sep. 9, 1993) (on file with author) [hereinafter Fisher to Exec. Comm. (Sep. 9, 1993)].
224 Quoted in *id.*
225 Quoted in *id.*
226 *See supra* notes 219-220.
227 *Minutes of the Scope and Program Committee*, 102 ULC Handbook 139, 154-55 (1993); Fisher to Exec. Comm. (Sep. 9, 1993).
228 *See supra* note 90.
229 Fred H. Miller, *Report of the Vice President*, 100 ULC Handbook 92, 100 (1991).

about META's acceptance of employer-sponsored alternative dispute resolution procedures."[230] That left the ULC relying on a fly-by-night ACLU workers' rights project to promote META on employees' behalf.[231] The plaintiffs' bar also had not met the chair's expectations. "Curiously," the committee's drafter reported in 1994, "plaintiffs' attorneys are the most outspoken opponents of META."[232] Since the chair had been right about employers, that left not much more than legal academics and some ULC Commissioners in META's corner. In 1995, with only two states having debated the bill and none having adopted it, the ULC disbanded the META committee against its chair's wishes.[233]

* * *

In terms of providing comprehensive job security to the mass of nonunionized private-sector workers, by the close of the 1990s both the common law and statutory paths had petered out. A mix of public policy torts and whistleblower statutes added a couple of targeted protections to the list of exceptions to at-will employment.[234] Otherwise, for ordinary workers, the common law push had largely helped employers learn how to make morale-boosting promises they would not have to keep. This was not an ideal regime for employers either: a RAND study found that they expended far more out of fear of litigation than on litigation itself.[235] But that was not enough to win employers' support for the risk-and-security-redistributing statutes that labor law scholars had proposed. Instead, the Montana statute became an exception that proved the rule of legislative failure. Meanwhile, employers used the tools forged to fight just cause to erode work law writ large. Private arbitration agreements that joined the technology of the at-will disclaimer with the logic of the ADR loophole proliferated. Union density also declined precipitously, leaving far fewer workers with the job security provided by union contracts. As a result, in place of comprehensive just-cause protection, nearly all U.S. workers today have only the limited security provided by a handful of employment statutes and whittled-down common law causes of action. These protections, regardless of arbitration's public/private categorization, are resolved in a manner far from NPL theorists' interpersonal justice-seeking ideal.

230 Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 Wash. L. Rev. 380, 381 (1994).

231 Letter from Theodore J. St. Antoine, Professor of Law, U. of Mich. L. Sch., to Lewis L. Maltby, Coordinator, Nat'l Task Force on C.L. in the Workplace, Am. C.L. Union (Feb. 9, 1989) (on file with author). The project began in 1989 and was reporting funding difficulties by 1995. Letter from Stanley M. Fisher, Arter & Hadden, to Lewis L. Maltby, Dir., Nat'l Taskforce on C.L. in the Workplace, Am. C.L. Union (Jan. 19, 1995) (on file with author).

232 St. Antoine, *supra* note 230, at 381.

233 *Minutes of the Executive Committee—Midyear Meeting*, 104 ULC Handbook 147, 150 (1995); Marion W. Benfield, *Report of the Vice President*, 104 ULC Handbook 109, 112 (1995).

234 For whistleblower statutes see 2 Henry H. Perritt, Jr., Employee Dismissal Law and Practice 212 n.93 (3d ed., 1982).

235 James M. Dertouzos & Lynn A. Karoly, Labor-Market Responses to Employer Liability xiii (1992).

Conclusion

Writing in 1996, labor law scholar Cynthia Estlund identified the greatest hurdle that broad just-cause protections faced.[236] Public policy torts and whistleblower statutes had recently been added to the list of terminations deemed contrary to the public interest. Since then, she noted, the scholarly conversation had shifted to prohibiting terminations that were "unjustified" in ways that seemed to "affect only the interests of . . . the parties to the employment contract."[237] So narrowed, critics of at-will employment had "largely concede[d] the field to economic analysis and to the powerful paradigm of freedom of contract."[238] She thought this highly unfavorable, if not futile, terrain.[239] As a countermeasure, she sought to map a public interest in barring merely unjustified discharges so as to escape the economists' frame.[240] At-will employment, Estlund argued, "undermines and distorts the operation of" the laws that had limited its reach.[241] Proving those laws' targeted exceptions to at-will was often hard, leaving their protections only partially fulfilled. Extending just-cause protections to all, she argued, would pick up this slack, thereby bolstering such laws' public-interest aims.[242]

Whereas Estlund used workplace laws' public-regarding purposes to beat back legal economists' efficiency claims, today's NPL theorists pursue her goal by insisting that private law serve interpersonal normative ends. There is good reason for labor and employment law scholars to welcome NPL theorists' engagement with work law. But the history of the failed push for comprehensive just-cause protections, to which Estlund was responding, raises some challenges NPL theorists may want to consider.

First, the history is replete with line-drawing puzzles for NPL theorists' approach to distinguishing private law from public law. These include where to fit arbitration and whether it matters if it is publicly mandated or funded? If such arbitration falls on the public side of the line, how should redistributive statutes that allow parties to contract out of public arbitration and into its private counterpart, or into court, be categorized? And where do redistributive statutes that are implemented via horizontal litigation in courts fall? Or, conversely, common law contract and tort doctrines that advance redistributive policies? To some extent the answer will turn on NPL theorists' variable approach to defining the categories. But these examples also highlight ways in which any single approach may benefit from further refinement.

Second, however NPL theorists draw the line between public and private law, the push for job security provides a warning for those who hope the common law can strengthen worker protections. Some NPL theorists allow that statutory actions

236 Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 Tex. L. Rev. 1655 (1996).
237 *Id*. at 1656.
238 *Id*. at 1656, 1667-68.
239 *Id*. at 1656-57.
240 *Id*. at 1657.
241 *Id*. at 1669.
242 *Id*. at 1686.

can have public and private law aspects or that aims can be shared on both sides of the public-private law divide.[243] As this history shows, however, the common law and statutory paths were dynamically interrelated, fomenting and forestalling, inflecting and infecting each other. They neither run in parallel nor merely overlap. Instead, they are intertwined: the course of each shapes that of the other. That capacity for interrelationship raises questions about the ability of NPL theory to save workplace law from erosion at the hands of legal economists.[244] When common law causes of action protected job security, they spurred legislative activity vulnerable to the consequentialist arguments that NPL theorists hope to override. When the common law was incorporated into legislation, it gutted those laws' protections. The common law's corrosive potential is especially potent given the fundamental role of contract in work law. History cannot predict the future or establish enduring causal relationships; it can, however, offer cautionary tales. Here, the lesson of history is that the common law, however just its normative goals, can undercut social welfare-enhancing statutes rather than shore them up.

243 *See supra* notes 52-55, 103 and accompanying text.
244 *See*, *e.g.*, Dagan & Dorfman, *supra* note 24, at 209.