# Professional Construction of Law: The Inflated Threat of Wrongful Discharge

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Institutional theories of organizational behavior consistently implicate the professions in explaining the diffusion of new organizational practices; yet there has been little empirical study of precisely what role the professions play. We address that issue by exploring the role of the personnel and legal professions in shaping employers' understandings of law and the threat posed by law. We focus on the implied contract theory of wrongful discharge, a recent common law development that allows employees—under a limited set of circumstances—to sue their employers when they are fired without good cause. We first present an analysis of the actual risk posed by the implied contract theory, based on a survey of published cases in six states. Then, by analyzing articles in professional personnel and law journals, we reveal a striking disparity between the actual threat posed by implied contract theory and the threat as constructed by personnel and legal professionals. Our findings support the argument that the professions play an important role in the diffusion of organizational practices and suggest that the professions' constructions of the environment may critically affect how employers respond to environmental threats.

A striking feature of legal systems is that they have no systematic mechanism for the dissemination of information about law. Statutes are enacted and printed in statute books and important judicial decisions are published in reporters, where they are accessible only to those with the time and skills to find them. Some important legal events, such as jury verdicts and settlements between actual or potential litigants, are not officially recorded at all. As a result, virtually all nonlawyers and, under many circumstances, lawyers as well learn about the law not from original sources but rather from professional and popular media sources.

Moreover, as several recent analyses have noted, dissemina-

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tion of information about the law is not a simple or objective process. In the context of jury awards, for example, Galanter (1990:231) argues that information is "affected by the process of creating, communicating, and extracting knowledge." And in his analysis of "the litigation explosion," Galanter (1983:61) notes that our knowledge of disputing "is not the mechanical recording of something out there—it is an interpretation of what we encounter, informed by our hopes and fears and by our pictures of how the world is." Similarly, in a study of knowledge about the *Tarasoff* (1976) decision (which held that psychotherapists owe a duty of care to third parties threatened by their patients), Givelber, Bowers, and Blitch (1948:446) found:

> The court had no control over who learned about the case or what they learned. . . . [O]ther groups such as the media or professional organizations (including the very ones opposed to the duty in the first instance), may have had the primary role in educating therapists as to what they were now supposed to do. The information about *Tarasoff* disseminated by these professional organizations and publications may well have skewed the court's message to reflect the concerns and perspectives of mental health professionals.

It is this process of extraction, interpretation, and dissemination identified by Galanter and by Givelber et al. that we term "the construction of law."

Law governing the employment relation is especially prone to these processes because it is often ambiguous, leaving employers wide latitude to choose whether and how they will respond (Edelman 1992). Common law—that created by court decisions—tends to be especially unclear because it does not directly mandate any actions. When the common law confers employment rights, it does so by simply creating a "cause of action" or theory under which an employee may bring a lawsuit against an employer. Further, common law varies among states and—until the highest court of a state issues a ruling on a particular issue—may even vary among courts within a state, which may create additional uncertainty as to the implications of court decisions for employers.

We focus here on the construction of law and the legal environment within organizations. We argue that given the ambiguity of law, professionals within organizations have a considerable opportunity to construct the law for their employers and hence to influence employers' response to the law. Institutional theories of organizations provide a context for this analysis by calling attention to organizations' efforts to adapt to the normative demands of their environments and, more specifically, because these theories often point to the intermediary role of professions to explain the diffusion of prescriptive models from

the environment (e.g., DiMaggio & Powell 1983; Baron, Dobbin, & Jennings 1986; Edelman 1990, 1992; Abzug & Mezias 1992). However, none of these theories explicitly addresses the process by which professionals convey and institutionalize environmental norms. Our analysis seeks to address that process by elaborating the role that professions play in the institutionalization of responses to law. But we also emphasize that, at least with respect to the legal environment, professions may construct environmental norms in the process of conveying them: professions do not simply adopt the calculus of the courts but rather elaborate and amplify judicial logic.

Specifically, we examine the professional construction of the doctrine of "wrongful discharge," a relatively new common law cause of action that allows employees, under limited circumstances, to sue their employers when they have been terminated without cause. We focus on the role of two professions that are dominant in shaping employers' response to law: the legal profession, which enjoys a well-established jurisdiction over legal issues of all types; and the personnel profession, which has more recently acquired a jurisdiction within organizations over laws affecting the employment relation. We find that the legal and personnel professions act as "filters": they construct not only the meaning of law but also the magnitude of the threat posed by law and the litigiousness of the legal environment. Even within professions however, those individuals with less expertise in a given area tend to rely on others with more expertise to interpret the law. Thus employers' understanding of law may be the result of several layers of filters, each of which has the potential to embellish or alter its meaning and implications.

The balance of the article is organized as follows. In section I, we review institutional theories of organizations and show how an analysis of the role of professionals would contribute to those theories. Section II offers a brief overview of wrongful discharge doctrine and, in particular, the implied contract theory of wrongful discharge, which has received the bulk of the personnel profession's attention. In section III, drawing on a survey of cases in six states, we present an analysis of threat posed by the implied contract theory, and in section IV we show how the personnel and legal professions have constructed the threat of wrongful discharge. In section V, we suggest some factors that may influence those professions' constructions of the law. Finally, in section VI, we summarize the implications of our research for organizations theory.

## I. Organization Theory and the Role of Professions

A study of professional construction of law is most relevant to neo-institutional theories of organizations, which hold that organizations are highly responsive to environmental influences and, in particular, to ideological prescriptions of how organizations ought to look and what they ought to do. These theories suggest that organizations conform to environmental prescriptions ("institutionalized models") for organizational structure and behavior in order to garner legitimacy and governmental resources; hence, over time there will be an isomorphism between organizations and their environments (Meyer & Rowan 1977; DiMaggio & Powell 1983; Scott & Meyer 1983).

The neo-institutional perspective identifies the professions as one important source of institutionalized models, and the personnel profession in particular is thought to be an important source of models for employee governance. In their seminal theoretical article on institutional isomorphism, DiMaggio and Powell (1983) identify the rise of professionalism as one of three principal sources of isomorphism: They suggest that "coercive isomorphism" results from direct pressures from political or other institutions; "mimetic isomorphism" results from copying apparently successful strategies of other organizations; and "normative isomorphism" originates in the rise of professionalism, as professions attempt to influence others while struggling to establish and legitimate their occupational autonomy. Professional ideas diffuse both through formal education and through professional networks, such as trade associations, professional conventions, and professional journals. Since professions are themselves subject to coercive and mimetic pressures, moreover, professions may be important means by which ideas generated elsewhere become institutionalized within organizations.

Several empirical studies of patterns of institutional isomorphism implicate professionals as carriers of prescriptive models. Baron et al. (1986), for example, attribute a diffusion of bureaucratic personnel practices (e.g., job evaluation, employment/promotion testing) during the 1939–46 period in part to an effort by personnel professionals to establish and protect their jurisdiction within firms. Similarly, Edelman (1990, 1992) attributes the diffusion of due process and equal employment opportunity structures within firms in part to the personnel profession. The personnel profession may frustrate as well as promote the spread of organizational practices, as Abzug and Mezias (1992) found to be the case for comparable worth reforms. They suggest that the personnel profession may resist new practices until they reach a threshhold level of institutionalization. The literature also points to other professions as im-

portant players in institutionalization processes. For example, Mezias (1990) argues that the accounting profession played an important role in the diffusion of a financial reporting practice among Fortune 200 corporations.

All these studies, however, demonstrate isomorphism at a macro-societal level. While neo-institutional theorists argue that the professions play a pivotal role in importing environmental norms into organizations, none discuss the process by which prescriptive models of organizational behavior spread among organizations. Our analysis addresses this issue within the context of the legal environment. We seek to illustrate how the personnel and legal professions help to convey ideas about law and the legal environment but also to show that in the process of conveying ideas, those professions help to construct law and the legal environment for employers. First, however, we briefly review the law of wrongful discharge and present an analysis of the actual threat it poses to employers.

## II. Wrongful Discharge and the Theory of "Implied Contract"

For the past century, most employment relationships in the United States have been governed by a common law doctrine known as "employment-at-will." That doctrine holds that if there is no written contract or collective bargaining agreement, an employer may discharge an employee at any time and for any reason, as long as that discharge does not violate a specific statute. The employment-at-will doctrine was recognized by the U.S. Supreme Court in a 1908 case, *Adair v. United States* (1908:175–76).

> In the absence . . . of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be . . . that an employer is under any legal obligation, against his will, to retain an employé in his personal service, any more than an employé can be compelled, against his will, to remain in the personal service of another. The [employee] was at liberty to quit the service without assigning any reason for his leaving. And the [employer] was at liberty, in his discretion, to discharge the [employee] from service without giving any reason for so doing.

Statutory restrictions on employment-at-will apply only under limited circumstances and protect only certain classes of employees. The National Labor Relations Act of 1935, for example, prohibits employers from firing employees because of union activities, and the 1964 Civil Rights Act prohibits employers from firing on the basis of race, color, sex, religion, or national origin. Since most employees are not covered by an individual contract or a collective bargaining agreement and

most discharges are not in violation of a protective statute, the employment-at-will doctrine gave employers virtually unlimited discretion to discharge employees through the 1970s.

Although they had little impact on employers prior to 1980, state courts began to recognize common law exceptions to the employment-at-will doctrine as early as 1959, under the rubric of "wrongful discharge." In 1959, California adopted the first of three such exceptions: a violation of public policy theory (*Petermann v. Teamsters* 1959), which allows an employee to sue when the employer discharges the employee for refusing to violate law, exercising a legal right, or for taking other actions that are in the public interest (e.g., warning the public about safety hazards). In 1974, a New Hampshire court recognized a second theory: violation of the implied covenant of good faith and fair dealing (*Monge v. Beebe Rubber Co.* 1974), which precludes bad faith discharges (e.g., an employer fires an employee for refusing to go on a date or an employer fires an employee to avoid having to pay benefits that the employee has earned). And in 1980, a Michigan court articulated a third theory in *Toussaint v. Blue Cross & Blue Shield*: violation of an implied contract, which allows employees to sue when a contract requiring good cause for termination can be inferred from written or oral statements or from company practices.

Our analysis of the professional construction of law focuses on the implied contract theory of wrongful discharge. Of the three exceptions to the employment-at-will doctrine, this theory most clearly restricts employers' long-held rights to set the terms of employment unilaterally. While employers must act in bad faith to violate either the public policy or implied covenant theories, it is possible for employers to violate the implied contract theory simply by failing to follow procedures articulated in their own personnel manuals or other documents or by breaking oral promises. In *Toussaint*, for example, the employer had stated in its personnel manual: "It is the policy of the company . . . to release employees for just cause only." The manual further defined grounds for discharge in terms of the employee's ability and willingness to work and outlined detailed procedures for handling employee grievances. The court held that the terms laid out in the manual constituted an implied contract. Since Blue Cross had not followed its grievance procedure before discharging Toussaint, the court found the company liable for wrongful discharge. The *Toussaint* case was soon followed by a similar case in California (*Pugh v. See's Candies* 1981), and is now accepted in 31 states (Bureau of National Affairs 1989). But because courts in one state are not bound by the decisions of another state, the circumstances under which

the implied contract cause of action is available vary considerably among the states recognizing that theory.[1]

Because the implied contract theory threatens traditional employer rights more than do the other two theories of wrongful discharge, it has received the bulk of the attention in the professional literature. This literature provides a particularly striking example of the professional construction of law, because the personnel profession, with some help from the legal profession, has constructed the law in a way that significantly overstates the threat it poses to employers.

## III. Implied Contract Theory: How Real Is the Threat?

To our knowledge, there are no empirical analyses of the risk to employers of liability under the implied contract doctrine. However, the RAND Institute for Civil Justice has conducted an analysis of the risk posed by all three wrongful discharge theories using data on jury verdicts in 120 California trials from 1980 to 1986 (Dertouzos, Holland, & Ebener 1988). The RAND study found that about 68% of plaintiffs won their wrongful discharge lawsuits and that initial awards averaged $650,000, although the report emphasized that the figure is misleading because of a few multimillion-dollar judgments. The median jury award was $177,000, but about 40% of these awards were for punitive damages, which may be available in claims brought under the public policy or implied covenant theories but are not available in implied contract cases.[2]

The RAND study also points out that few plaintiffs actually

[1] For example, in the 1981 case that established the implied contract cause of action in California, the court held that a contract for job security need not be explicit; rather, it could be inferred from a number of factors such as "the duration of [the employee's] employment, the commendations and promotions he received, the apparent lack of any direct criticism of his work, the assurances he was given, and the employer's acknowledged policies." The court also held that a contract may be "shown by the acts and conduct of the parties, interpreted in light of the subject matter and the surrounding circumstances." New York courts, however, require employees to show that they received an assurance of job security from the employer *before* accepting employment and that they decided to accept that employment specifically because of that assurance (*Leathem v. Research Foundation of the City University of New York* 1987:655). And while New Jersey courts are willing to find implied contracts on the basis of a written policy statement to the effect that an employer will retain any employee who performs efficiently and effectively (*Woolley v. Hoffman-LaRoche, Inc.* 1985), a Pennsylvania court held that similar statements in a policy manual do not create an implied contract (*Richardson v. Charles Cole Mem. Hosp.* 1983).

[2] The implied contract cause of action is based on contract doctrine, which traditionally allows a prevailing plaintiff to collect only damages to compensate the employee for money actually lost as a result of the wrongful discharge. The public policy and implied covenant theories, on the other hand, are tort-based actions: employees who prevail under them may recover punitive as well as compensatory damages. Since punitive damages are imposed to "punish" the employer, they do not depend on the employee's actual monetary loss and can be considerable. In 1988, however, the California Supreme Court held in *Foley v. Interactive Data Corporation* that punitive damages are not available in implied covenant cases. Other states may adopt this ruling as well.

receive the amount initially awarded: As a result of posttrial settlements and appeals, initial verdicts are reduced on average by half. Based on these and other factors, the RAND study reports that the average final payment in all jury trial cases was $208,212 taking into account cases where employers lost and $307,628 based only on cases that plaintiffs won (ibid., p. 40). It concludes: "Despite the uproar over wrongful termination litigation, the aggregate legal costs are really not very large. . . . If the average verdict results in a payment of $208,000, the sample mean after post-trial reductions, the annual cost of jury trials, including legal fees, amounts to only $2.56 per worker" (ibid., p. ix).[3]

The results of the RAND study must be considered in light of the fact that California is one of the states most receptive to wrongful discharge; thus the risks to employers are likely to be even smaller in most other states. Furthermore, when employers win, they often do so at early stages of the litigation process through motions to dismiss on the pleadings or motions for summary judgment; thus studies of jury verdicts only will greatly overstate the frequency with which employees win. Finally, the RAND study does not, for the most part, report separate results for the implied contract theory. In a separate section of the report that shows the number of reported wrongful discharge jury trials nationwide between November 1986 and July 1987, however, the RAND study found that the bulk of jury trials involved the implied covenant cause of action; the "public policy and implied contract exceptions . . . have negligible effects on the volume of litigation" (ibid., p. 18).

### A New Analysis for Six States

To determine the actual threat that the implied contract theory poses to employers, we conducted an analysis of employers' likelihood of being held liable and the size of jury awards where they are held liable in implied contract cases. In view of the limitations of the RAND study, we considered three factors essential to a valid study of the threat of liability: The study should account for state variation in receptivity to the theory; it should be based only on cases involving an implied

[3] Maltby (1990) estimates that of all cases in which employees are unjustly discharged in California, between 4% and 7% actually receive relief. He bases this estimate on the findings of the RAND study together with Bureau of Labor Statistics data on the total number of employees in California, and an estimate by Stieber (1985) that about 150,000 employees in the United States are discharged unfairly each year. His estimate is based on the assumptions that jury verdicts constitute 5% of all cases; the proportion of employees that are wrongfully discharged in California is proportionate to that of the United States; and plaintiffs prevail in pretrial dispositions at the same rate at which they prevail at trial. He argues that these assumptions would tend to overestimate the proportion of employees needing relief who actually receive it in California.

contract claim; and it should be based on litigated cases, whether or not there was a jury verdict.

To assess variation among states, we examined cases in six states, which were chosen to represent three degrees of receptivity to the implied contract theory of wrongful discharge. In the "highly receptive" category, we chose California and Michigan, which allow employees to sue under the implied contract theory merely by proving that they commenced or continued working for the employer after receiving an assurance (verbal or written) that they would not be subject to employment-at-will. In the "less receptive" category, we chose New York and Pennsylvania, which recognize the implied contract theory but require a higher standard of proof from employees than do California and Michigan. And in the "nonreceptive category" we chose Missouri and Delaware, both of which reject the implied contract exception to employment-at-will.

For each state, we reviewed published wrongful discharge cases based on the implied contract theory decided between 1 January 1980 and 31 December 1989.[4] We chose 1980 as the date to begin our observations since the first major implied contract case (*Toussaint* in Michigan) was decided that year. Prior to that date, employers won virtually all implied contract cases. To locate these cases, we used the *Labor Relations Reference Manual* (LRRM) (Bureau of National Affairs 1980–86) and its 1986 successor, *Individual Employment Rights Cases* (IER) (Bureau of National Affairs 1986–89), published by the Bureau of National Affairs (BNA).[5] While these reporters do not provide an exhaustive list of published implied contract cases, they provide the most complete source that is readily available.[6] We read all cases in these states that involved an implied contract cause of action.[7]

[4] Our research also included cases decided by federal courts applying the law of these six states. Pursuant to a doctrine known as diversity jurisdiction, certain state law causes of action may be asserted in lawsuits in federal court. However, that doctrine requires the federal court to apply the same common law that would be applied if the case were brought in the state court.

[5] We used volumes 114–22 of the LRRM (Bureau of National Affairs 1980–86) and the first five volumes of the IER (Bureau of National Affairs 1986–89).

[6] The LRRM and IER reporters are specific to employment law and therefore have the most complete listings of wrongful discharge cases. Other case reporters (such as West) are more general and publish significantly fewer wrongful discharge cases. The Bureau of National Affairs, which publishes the IER cases (and published the LRRM when it included implied contract cases), told us that it is highly unlikely (but not impossible) that there are cases published in general case report manuals that do not appear in the BNA reporters.

[7] We used two procedures to find all of the published implied contract cases published in the LRRM/IER. First, we conducted computer searches using LEXIS, an online data base of cases. LEXIS has a "library" called "BNA" and a file within that library called "LRRIER," which should contain all cases reported in the IER. For each state, we used the search request "(discharge or termin!) and (contract) and date (after 12/79) and court (——) to find all cases in the IER decided after 12/79 in which the above words appeared. For the earlier LRRM cases, we used the following request:

Because the decisions in many litigated cases are never published and because many—probably most—disputes are settled or dropped before trial, our analysis does not provide an estimate of the total number of wrongful discharge cases in each state. However, it does allow us to estimate the likelihood that employees will win wrongful discharge cases in court and to determine the likely size of jury awards where employees win. In deciding which cases to publish, BNA considers whether the case represents a change in the state's common law, whether the case is often cited as authority or precedent by other courts, and whether the case explains the state common law or a particular issue clearly. BNA does not explicitly consider the fact that the plaintiff or defendant prevailed. However, since wrongful discharge is a fairly recent exception to the employment-at-will doctrine, cases in which employees prevail are somewhat more likely to be published than cases in which employment-at-will is upheld (i.e., employers prevail).[8] Therefore, to the extent that the sample of cases we obtained from the BNA reporters is not representative of the entire population of implied contract cases, it is likely to be biased toward producing a conservative estimate of the likelihood that employers will win these cases.

For each case, we coded whether the employer or employee won the case. A case was deemed to have been "won" by the employee if the court allowed the employee to maintain a wrongful discharge cause of action for breach of implied contract. For employee wins, we then distinguished between cases in which employees won on the merits (i.e., they were found to have been wrongfully discharged) and were awarded damages, and those cases in which employers either lost motions to dismiss the case on the pleadings or motions for summary judgment. When employers' motions to dismiss or for summary judgment are denied, it does not mean that the employee will win on the merits of the case; it simply allows the employee to proceed further with the lawsuit. Both the employee and the

"cite (L.R.R.M.) and (discharge or termin!) and (contract) and date (after 12/79) and not collective bargain" to find any case in the LRRM decided after 12/79 in which the above words appeared. Each search was conducted both in the state libraries for each state in our sample and in the federal court library (to find cases decided by federal courts under diversity jurisdiction). Then, as a reliability check, we used tables at the beginning of each volume, which list all cases by state (including federal diversity cases decided under state law). We examined every case in each state and identified the implied contract cases by using "headnotes," the listings at the beginning of each case that summarize the facts and identify the areas of law addressed by that case. Finally, we used the "AUTOCITE" and "SHEPARDS" procedures on LEXIS to find any cases that altered decisions reached in earlier cases. We are confident that we found all implied contract cases published in the LRRM and IER volumes.

[8] In a personal communication, the BNA editorial staff noted that, because the implied contract theory is relatively new and still developing, cases in which plaintiffs prevail are more likely to involve novel arguments or legal issues and, therefore, somewhat more likely to be published than cases in which employers win.

employer then have the opportunity to convince a judge or jury the discharge was or was not wrongful. Finally, in cases where employees won on the merits, we coded the size of the damage awards.

## Findings

Table 1 shows the distribution of published implied contract cases and the pattern of employer and employee wins for the six states. For the states most receptive to implied contract actions, the table shows 59 published implied contract cases in Michigan[9] and 60 in California. In Michigan, about 70% of the cases were decided in favor of the employer. Of the 31% that employees won, half were merely denials of the employer's motion to dismiss the case. In California, employers won 62% of the cases, and of those won by employees, more than half were merely denials of the employers' motion to dismiss the case. Thus, even in the states most receptive to the implied contract theory, employees were found to have been wrongfully discharged in only 15% of the cases.

In New York and Pennsylvania, which recognize the implied contract theory on a more limited basis, there were 43 and 56 published cases, respectively. Employers won in 81% of the New York cases and 71% of the Pennsylvania cases. In both states, employees won only 5% of their cases on the merits; the other cases were denials of the employers' motions to dismiss.

In Missouri, the law was unclear until 1988 when the Missouri Supreme Court held that the implied contract cause of action is unavailable in *Johnson v. McDonnell Douglas* (1988). Prior to that case, the lower courts were divided over whether to allow a plaintiff to recover under the implied contract theory. There have been 19 cases since 1980 in which employees have attempted to sue under that theory. In 17 (89%) of those cases, the courts dismissed the employee's lawsuit outright. The other two cases were decided before the *Johnson* case by lower courts that were willing to allow implied contract claims. In one, the court denied the employer's motion to dismiss; in the other, the employee was found to have been wrongfully discharged. However, had the cases been decided after *Johnson*, both would have been dismissed.

The Delaware Supreme Court announced its refusal to recognize the implied contract cause of action in *Heideck v. Kent General Hospital* (1982).[10] After*Heideck*, the BNA reporters con-

[9] There were 59 cases but only 58 decisions because the *Toussaint* case actually involves two separate cases. Since the two cases had very similar facts, the court considered them together.

[10] In the *Heideck* case, the Delaware supreme court held that policy manuals promulgated by the employer are unilateral expressions and do not create contractual rights.

**Table 1.** Percentage of Published Implied Contract Cases Won by Employer and Employee, 1980–1989

| Receptivity to Implied Contract Theory | Employer Win on the Merits | | Employer Motion Denied | | Employee Win on the Merits | | Total Cases | |
|---|---|---|---|---|---|---|---|---|
| | % | (No.) | % | (No.) | % | (No.) | % | (No.) |
| Very receptive | | | | | | | | |
| California | 61.7 | (37) | 23.3 | (14) | 15.0 | (9) | 100.0 | (60) |
| Michigan | 69.5 | (41) | 15.3 | (9) | 15.3 | (9) | 100.0 | (59) |
| Somewhat receptive | | | | | | | | |
| New York | 81.4 | (35) | 14.0 | (6) | 4.6 | (2) | 100.0 | (43) |
| Pennsylvania | 71.4 | (40) | 23.2 | (13) | 5.4 | (3) | 100.0 | (56) |
| Nonreceptive[a] | | | | | | | | |
| Missouri | 89.5 | (17) | 5.3 | (1) | 5.3 | (1) | 100.0 | (19) |
| Delaware | 100.0 | (2) | 0.0 | (0) | 0.0 | (0) | 100.0 | (2) |

NOTE: Percentages do not always add to 100 due to rounding.

[a] In Missouri, the law was unclear until 1988 when the Missouri Supreme Court held that the implied contract cause of action is unavailable in *Johnson v. McDonnell Douglas* (1988). The case in which an employee won was decided prior to *Johnson*.

tain only *one* case in which a plaintiff even attempted to assert an implied contract cause of action. In that case, as in *Heideck*, the court granted the employer's motion to dismiss the case. Thus, employees have not won any implied contract cases in Delaware.

Obviously, our findings differ from the RAND study of jury verdicts, which showed that 68% of plaintiffs win their wrongful discharge cases. This is likely to be in part because we consider only cases brought under the implied contract theory. But a much more important reason is that when employers win, they often do so at early stages of the litigation process. When all reported cases are considered rather than just those that reach a jury, then, the proportion of cases won by employees is quite low.

Table 2 shows the range, median, and mean awards to plaintiffs in published implied contract cases for 1980 to 1989. All but the last column are based only on cases in which employees actually won damages. In a number of the cases, employees won awards in lawsuits alleging not only breach of an implied contract but also other causes of action (e.g., sex or age discrimination); thus columns (2) and (3) show the range and median awards, respectively, for all claims. Columns (4)–(6) show the range, median, and mean awards for breach of implied contract claims only; these give a more accurate picture of the risk of implied contract liability by itself.[11] Our findings

[11] Some court decisions state how much of the award is allocated to each cause of action. When decisions do not do so but rather state a total amount and state that it applies to several causes of actions, we simply divided the award evenly among the causes of action in which plaintiff was successful. In all likelihood, this will produce a higher range and median for the implied contract causes of action alone, because awards for race, sex, or age discrimination actions tend to be greater than those for wrongful discharge actions.

**Table 2.** Size of Awards in Wrongful Discharge Cases

| | No. of Cases with Awards (1) | Awards (Excluding Cases Won by Employer) | | | | | Mean Award, Contract Claims (Including Cases Won by Employer) (7) |
|---|---|---|---|---|---|---|---|
| | | All Claims | | Contract Claims | | | |
| | | Range (2) | Median (3) | Range (4) | Median (5) | Mean (6) | |
| | | **Very Receptive to Implied Contract Theory** | | | | | |
| California | 9[a] | $22,858–$700,000 | $237,000 | $22,858–$600,000 | $93,750 | $188,278 | $28,720 |
| Michigan | 9 | $10,000–$740,000 | $110,000 | $10,000–$560,000 | $100,000 | $168,072 | $25,000 |
| | | **Somewhat Receptive to Implied Contract Theory** | | | | | |
| New York | 2[b] | $94,689–$304,000 | $199,345 | $94,689–$304,000 | $199,345 | $199,345 | $9,272 |
| Pennsylvania | 2 | $50,000–$200,000 | $140,000 | $10,000–$200,000 | $127,000 | $127,083 | $6,808 |
| | | **Not Receptive to Implied Contract Theory** | | | | | |
| Missouri | 1 | $22,500 | $22,500 | $7,500 | $7,500 | $7,500 | $395 |
| Delaware | 0 | — | — | — | — | — | — |

NOTE: Col. (4): In several Michigan and California cases, awards were made for combined claims (e.g., Age Discrimination Employment Act violations and breach of implied contract). Where the published opinion did not state how much of the award was for each claim, we divided the award evenly among the various claims. This technique is likely to produce high estimates for breach of implied contract awards, since awards for violations of civil rights statutes tend to be greater than awards for breach of implied contracts.

Col. (7): The mean jury award for each state for all published cases involving implied contract claims was averaged over the total number of such cases for that state; see Table 4, col. (1).

[a] One case involved three employees, each of whom received an award under the ADEA and the implied contract theory. The amount awarded to each employee was different under both theories. Since our unit of analysis is the case rather than the employee, we use the mean award for that case as the value of the award.

[b] One case involved nine employees, each of whom received a different amount. Since our unit of analysis is the case rather than the employee, we use the mean award for that case as the value of the award.

show a somewhat lower median award for California ($93,750) than the amount reported by RAND ($177,000) and a much lower mean award ($188,278 as opposed to $650,000); this makes sense, since contract awards do not include punitive damages. Column (7) shows the mean jury award calculated on the basis of all the implied contract cases we coded, including cases where employers won. We view these figures as more realistic estimates of the risks employers face from the implied contract theory. To some extent, even our figures overstate the threat to employers, since they do not account for posttrial reductions based on appeals or settlements. In quite a few of the cases, an appeals court had remanded the case to the jury to reduce the damage award.[12]

Furthermore, a state's receptivity to the implied contract doctrine affects the threat to employers considerably. Although employers win the vast majority of cases in all states, Table 1 shows that the percentage of cases in which employers win on the merits increases as receptivity declines. Similarly, Table 2 shows that awards are generally lower in states that are less receptive to the doctrine (especially when one looks at column (7), which includes cases won by employers).

A further consideration in evaluating the threat of the implied contract theory is the ease with which employers may avoid liability through the use of disclaimers, at least in some states. Courts have repeatedly held that an employer can avoid liability by having applicants and employees sign statements acknowledging their at-will status in writing. Sears, Roebuck & Company, for example, has won dismissal motions in several implied contract cases because Sears requires all applicants for employment to sign such a disclaimer.[13] Several of these cases, moreover, were decided under the law of Michigan, one of the states most receptive to implied contract actions.

## IV. Implied Contract Theory: Professional Construction of the Threat

Of course, employers do not determine the character of the legal environment by measuring the amount of litigation, the number of judicial rulings favoring employers, and the size of

[12] In *Ritchie v. Michigan Consolidated Gas* (1987) the prevailing party in an implied contract lawsuit was awarded $560,000—$40,000 in back pay and $520,000 in front pay. On appeal, although the jury was authorized to award front pay, the case was remanded to the jury to reduce the amount. Even when the damage awards were less substantial, the cases were often remanded to the jury to reduce the damages awarded. See also *Walker v. Consumers Power Co.* (1987) (case remanded to jury to reduce the damages awarded).

[13] *Reid v. Sears, Roebuck & Co.* 1986; *Novosel v. Sears, Roebuck & Co.* 1980; *Summers v. Sears, Roebuck & Co.* 1982; *Ringwelkski v. Sears, Roebuck & Co.* 1985; *Eliel v. Sears, Roebuck & Co.* 1985; and *Scott v. Sears, Roebuck & Co.* 1986.

damage awards. Rather they rely on the characterizations of others—who, by profession, appear to have expertise in assessing the character of the legal environment. These professions act as filters for this information and, as a result, have an opportunity to construct the magnitude of the threat and the character of the legal environment. For employment law, the personnel and legal professions are the primary filters. We offer some suggestions in our conclusion about why these two professions have emerged as the main interpreters of employment law; at this point, we focus on how they construct law and how they help to diffuse constructions of law among organizations.

The legal profession, which enjoys a publicly accepted jurisdiction over the legal arena, serves as the first-line interpreter of legal events. Within the legal profession, however, there is a division between academics in law (professors and other scholars of law) and practicing lawyers. The academic branch provides a knowledge base for the profession, which lends legitimacy to the profession as a whole (Abbott 1988). Academics construct the law when they write critiques of judicial decisions and commentary on what they see as developing legal trends; law reviews are the primary repository for academic legal commentary, although academics also write treatises or "hornbooks." Practicing lawyers construct law in their daily activities: for example, when they give employers (and other clients) advice, when they decide what legal actions to take, and when they write briefs and argue before courts. Some practicing lawyers also construct law by writing books or articles, which are aimed at other lawyers with less expertise or at a (potential) clientele.

The personnel profession constructs the law through communications with other managers; through recommendations regarding personnel policy manuals, employee handbooks, application forms, and other written documents; and in the general handling of employee relations. Professional personnel journals, which are aimed primarily at personnel professionals but also secondarily at employers, are a primary source of the diffusion of ideas.

Just as employers tend to rely on the personnel and legal professions for their understandings of law, the personnel profession generally relies on the legal profession, and most legal professionals rely on experts within that field. Books written by legal experts, articles in professional trade journals, and presentations at professional meetings and special workshops all help diffuse characterizations of law and legal threats among professional communities and then among organizational communities. At each stage, there is potential to alter the construction of law, and this tends to occur as each group interjects its

own professional considerations and interests into the construction.

One question that may be raised at this point is why individual members of a profession should behave similarly, so that the profession as a whole tends to transmit a cohesive view of the legal environment. While there may be some variation within a profession, the professional journals and books that help to diffuse responses to law among organizations should also—along with social networks and professional meetings—create a fairly strong consensus within professions as to what problems (or opportunities) the law creates and what the appropriate responses are.

### Professional Portrayals of Wrongful Discharge: An Empirical Analysis

We now turn to an analysis of how the law and personnel professions have characterized the law of wrongful discharge. Because the professional personnel and law literatures are an important means of conveying the threat of wrongful discharge to the legal and corporate communities, we use these literatures as data to study the constructed threat of wrongful discharge. We were interested in differences in the construction of wrongful discharge both across types of journals and among professions.

Because professional personnel and law journals are oriented toward different audiences, we expected that they would offer different constructions of the threat of wrongful discharge. Audience can affect the construction of the legal environment in two ways: (1) authors design the content and message of their articles to fit the audience; (2) editors of journals publish articles that convey the message they wish to emphasize, and they may edit articles to convey that message. Personnel journals are aimed at, and edited by, professionals in the personnel field. Thus the articles in these journals provide a means of studying the picture of wrongful discharge doctrine that personnel professionals wish to convey, both to others in their profession and to their superiors in the organizational hierarchy. Law journals may be divided into two categories: law reviews, which are aimed primarily at the academic community and the judiciary (and to a lesser extent at the general legal community); and journals aimed at practicing attorneys, which we refer to as "law-practice journals." Thus, we analyzed differences across three types of journals: law reviews, law-practice journals, and personnel journals.

We also expected constructions of wrongful discharge to vary by the author's profession. Professions have different educational prerequisites, different goals, and different interests

and fears with respect to law. Further, norms about the form and content of articles are likely to vary by profession. Norms about academic writing, for example, make it likely that law and management professors' analyses will be relatively more even-handed and cover a broader range of issues than would practicing lawyers or personnel managers. All these factors are likely to create variation in how the different professions portray the threat of wrongful discharge. We analyze differences across three professions: academics (in law and management), practicing lawyers, and personnel managers.

To locate the personnel journal articles, we first chose nine prominent professional personnel journals. Our choice of journals was based on discussions with personnel officers regarding the most widely read journals and based on the circulations of the journals themselves.[14] For those nine journals, we reviewed all articles published between January 1980 (the effective "birth" of the implied contract doctrine) and December 1989 that addressed the wrongful discharge doctrine or employers' right to terminate employees. There were 43 such articles in the nine journals. None of these articles was specific to the implied contract cause of action, but all addressed the implied contract theory either directly or indirectly.

To locate articles in law reviews and law practice journals, we used two on-line data bases of legal periodicals (the *Index to Legal Periodicals* and the *Legal Resource Index*) to assemble a list of all articles addressing wrongful discharge between 1980 and 1989. As with the personnel journals, none of the articles was specific to the implied contract theory. Because we used broad subject headings to conduct the search, many articles found in the initial search addressed wrongful discharge doctrine only tangentially. We eliminated those articles and retained those that were primarily concerned with wrongful discharge doctrine. This procedure resulted in 30 articles from law reviews and 14 articles from law-practice journals.

Our analysis of these articles is twofold. We first present a qualitative analysis of the themes and style of articles, using examples from the articles to illustrate patterns in the portrayal of wrongful discharge doctrine in personnel and law journals. Second, we present a statistical analysis of the differences between personnel and law journals, using data coded from the articles on the type of journal, the author's profession, and our

[14] The nine personnel journals we searched (and their circulation figures, as provided by *Ulrich's International Periodicals Directory 1990–1991* or the journals themselves) are *Personnel Administrator* (41,250); *Personnel Journal* (30,000); *Personnel* (20,000); *Personnel Psychology* (3,330); *Public Personnel Management* (9,700); *Harvard Business Review* (204,555); *Nation's Business* (860,000); *Management Review* (150,000); *Journal of the College and University Personnel Association* (5500).

assessment of how each article characterized the threat posed by wrongful discharge doctrine.

*Portrayals of Wrongful Discharge: A Qualitative Assessment*

Personnel journals significantly inflate the threat of wrongful discharge and devote most of their attention to the threat posed by the implied contract theory. Articles in professional personnel journals typically emphasize the *rapidly growing* threat of wrongful discharge doctrine: they portray employees as increasingly likely to sue for wrongful discharge and courts as increasingly likely to rule in employees' favor. However, few give numbers; they tend instead to use extreme language (and ominous titles) to depict the threat. In this sense the reports are very similar to what Galanter (1983:65) has observed about the "litigation explosion" more generally: "Images of a destructive, elemental force pervade the literature. We are told of an epidemic, avalanche, . . . or deluge of litigation. . . . Previously healthy systems have become pathological and the world is heading toward catastrophe." For wrongful discharge litigation, the threat is portrayed as being as much from the existence of the doctrine as from the amount, but the phenomenon is similar. For example, a 1984 article in *Management Review*, written by two lawyers, stated that "the explosion of wrongful discharge litigation presents an important challenge for managers" (Bakaly & Grossman 1984:41). A 1985 article in *Personnel Administrator* titled: "Wrongful Discharge: The Tip of the Iceberg?" (Bradshaw & Deacon 1985:74), also written by lawyers, claimed: "[W]rongful discharge lawsuits are proliferating across the country against employers. It is an era that will be marked by growing challenges to the traditional concept of employment at will, posed by the wrongful discharge assault." And a 1985 article in *Harvard Business Review*, "How to Safeguard Your Right to Fire" (Condon & Wolff 1985:16), warned:

> Acceptance of the employment-at-will doctrine—the right of an employer to fire an employee at any time without giving a reason—has declined so fast in the last few years that many companies have been caught unprepared. . . . When imposing a standard, a court will often review all company-related literature to discover any phrase, clause, or sentence on which a legally enforceable contract can be constructed. Once this "contract" is found, a judge can use it to bypass the employment-at-will doctrine and try the case on its merits. . . . To avoid such predicaments, the company may take the extreme measures we lay out in this article.

When statistics are provided, they are usually based on California cases. Since California is one of the states most receptive to wrongful discharge lawsuits, California data create a more threatening picture of the legal environment than is the

case for employers in other states. Articles in personnel journals rarely point out, however, that the California statistics are not representative of the rest of the country.[15] And more important, the articles rarely give citations to studies that produced the statistics, which makes the validity of the claims difficult to evaluate. The following example from a 1984 issue of *Personnel Journal* appeared under the heading "Employees Winning 91% of the Time" (Colosi 1984:56) provides an example: "[T]he employer success rate is approximately 9%. That means that employees are winning 91% of the time, at least in California, and with an average jury award of $400,000." As is often the case, no citations are provided to justify these figures. Moreover, some of the unsubstantiated figures cited in the personnel journals are absurd. For example, the author of the excerpt just quoted, who is a vice president of human resources (personnel), later warns readers that when one considers related grounds for litigation such as equal employment opportunity legislation, the employer success rate declines exponentially. "As a matter of fact, each time the employer wins in a particular case, the odds increase against the employer for victories in other defenses. That is, the odds for an employer's victory decrease as follows: one in two; one in four; one in eight; one in 16; one in 32 and one in 64; one in 128; and one in 256."

It is also not uncommon for articles in personnel journals to underscore the threat of liability by stating that jury sympathy almost always lies with plaintiffs, which deprives employers of fair trials. A 1988 article in *Personnel* (Bacon & Gomez 1988:70), for example, cites a study conducted by a law firm, which consisted of interviews with the jurors from 20 wrongful discharge lawsuits: "The verdict is in for employers engaged in wrongful termination lawsuits filed by former employees. In most cases, jury panels side with employees and shift the burden to employers, despite judicial instructions to the contrary and strong evidence that the former worker was terminated for good cause."

Eleven of the 43 articles from personnel journals use statistics on jury awards to make the case for a hostile environment.[16] Six of the eleven give figures for the "average" jury award; the figures they give range from $178,184 to $732,591. Of those six, five use California statistics. The other five articles

[15] Similarly, in their analysis of the *Tarasoff* case, Givelber et al. (1984) found that even though *Tarasoff* was a California case, because of the wide dissemination of professional literature discussing it, the decision was known by psychiatrists, psychologists, and social workers throughout the country. They also infer that professional discussions of *Tarasoff* tended not to emphasize its limited jurisdiction.

[16] Five law journals and four law-practice journals refer to jury awards; two of the law journals and three of the law-practice journals use jury verdicts as part of an argument that there is a major threat of liability.

give examples of jury awards; although one article gives an example of an award of $750,000, the other examples are exceptionally high: they range from "above the one million mark" to $4.5 million. These articles create the impression that jury awards are considerably higher than those reported in Table 2. They do so by reporting California statistics without pointing out that few other states are as receptive to wrongful discharge actions; reporting mean rather than median jury awards (means are more skewed by a few multimillion-dollar verdicts); basing their statistics on initial awards rather than awards after post-trial reductions due to settlement or appeal; excluding cases where plaintiffs lose (and thus receive nothing) from their calculations; and failing to point out that awards made under the implied covenant and public policy theories are generally much higher than those under the implied contract cause of action.

The majority of the articles, moreover, provide either no citations or vague citations for the figures they give. The Bacon & Gomez 1988 *Personnel* article (p. 71), for example, reports: "A recent survey published in the *Los Angeles Times* indicated that the average jury verdict in the wrongful termination area is in excess of $500,000 and that plaintiffs prevailed in 70% of the jury trials. Jury verdicts in excess of $1 million in favor of a single terminated employee are not uncommon." The article does not provide the date of the *Los Angeles Times* survey, and we were unable to locate it using an extensive computer search.[17] Again there is a similarity here to reports of the litigation explosion more generally. That literature is replete with what Galanter (1983:62) has called "familiar nuggets and favorite horror stories," anecdotes that arouse the reader's emotion and come to be taken as fact (see also Brill & Lyons 1986; Hayden 1989).

When articles do provide citations, they sometimes distort the arguments of the studies they cite. Two articles in personnel journals, for example, cite the RAND study (Dertouzos et al. 1988) discussed earlier, which concluded that the threat of liability for wrongful discharge was slight, even though there had been substantial awards in California. One of those two articles (Duffy 1989) gives a fairly accurate account of the mean and median jury awards. However, the article does not report RAND's conclusion that the legal costs are modest and instead emphasizes that a few claims were quite large, stating that the RAND study "prove[s] that losing one wrongful discharge case involving one employee can be extremely expensive" (ibid., p. 3). The other article (Eyres 1989) gives the impression that the major conclusion of the RAND study is that there has been an

[17] Although we had a professional industrial relations/law librarian conduct an extensive computer search, we were not able locate any articles reporting surveys of wrongful discharge cases prior to the date of the *Personnel* article (Feb. 1988).

explosion of wrongful discharge cases and that employers rarely win. In its only reference to the RAND study, Eyres states:

> In September 1988, the Rand Corp.'s Institute for Civil Justice released the results of a study of employee lawsuits charging wrongful termination. . . . [R]esearchers found in Los Angeles County alone wrongful dismissal actions mushroomed sixfold. . . . The Rand study concluded that employees are three times more likely to sue their employers than they were in 1980. As a result of the litigation explosion, employers are under increasing pressure to ensure their performance appraisal procedures not only are supported by sound business practices, but also are defensible legally. The costs of defending the company in a lawsuit are significant. (Ibid., p. 58)

Without including any of the qualifying information from the RAND study, Eyres goes on to give advice on revising performance appraisal systems to avoid or minimize the risks of wrongful discharge lawsuits.

Personnel journals make the threat of wrongful discharge lawsuits more vivid by giving employers advice on what actions they must take to minimize the likelihood of being sued and of liability should lawsuits occur. There is surprisingly little variation among the articles in the advice that is given, which suggests that certain types of responses to law become institutionalized within professions. The following excerpt from Condon & Wolff's (1985) *Harvard Business Review* article, "Procedures that Safeguard Your Right to Fire," is typical.

> Look for any clause, phrase, or sentence that might be interpreted to mean that an employee will be discharged only for "just cause" . . . Reword any such promise so that you preserve the company's rights. . . . [S]ome companies insert in their literature disclaimer clauses intended to reserve their right to terminate the employee at any time. . . . Make it clear in your disclaimer that the policies are subject to change at any time. . . . Avoid any suggestion that passing a probationary period leads to "guaranteed" or "lifetime" job security. . . . If your literature mentions a disciplinary program . . . make sure the company follows it to the letter. . . . Set up an internal review mechanism for any who want to question termination or other disciplinary actions. . . . Look for language in your employee literature that's vague, unclear, or misleading. (Ibid., pp. 16–18)

Other common advice includes warnings against verbal references to just cause and advice to document all employee problems in writing, to create a paper trail of grounds for termination. Most of the advice given relates to avoiding an inference of an implied contract, so that employers can continue to discharge employees at will. (Very few articles mention an al-

ternative method of avoiding liability: avoid discharging employees without good cause and, perhaps, demonstrate good cause by providing employees with an opportunity to appeal the action.)

In general, then, personnel journal articles tend to magnify the threat of wrongful discharge through language that connotes excessive litigiousness among employees, examples of exceptional cases with very large jury awards, warnings about jury bias, using statistics in misleading ways (often without providing data or references to support those statistics), and emphasizing the need to purge all documents of language that might be construed as an implied contract.

In contrast to the personnel journals, articles in law reviews were much more likely to emphasize that the overall threat of wrongful discharge suits to employers is still quite small. An article in the *Employee Relations Law Journal*, for example, characterizes the legal environment as increasingly favoring the employer:

> [As the] flood of wrongful termination decisions unleashed by the early court decisions [is] reaching the appellate level, . . . these decisions have created new hope that employers not only can win wrongful termination cases, but in many circumstances, they can win at early stages of litigation by a motion to dismiss, a demurrer, a motion of summary judgment, or some other form of summary disposition. (Baxter & Wohl 1984–85:269)

Articles in law reviews are also much more likely to emphasize that California and Michigan are exceptionally receptive to wrongful discharge lawsuits, to explain that few cases go to trial, and to point out that awards containing punitive damages tend to skew mean figures upward. For example, a 1985 article in the *Labor Law Journal* (Stieber 1985:559–60) states:

> California leads the states in the number of cases decided and in the size of awards to plaintiffs. One study of decisions rendered in California from October 1979 to January 1984 found that, of the 51 cases that went to trial, plaintiffs won 70 percent and awards averaged $178,184 for the 36 cases in which awards were granted. Nineteen cases contained punitive damage awards averaging $533,318.[18] . . . But even in California, Michigan, and other states where the courts have been moving away from rigid adherence to employment-at-will, the number of cases going to trial is quite small. Most cases are still dismissed at the lower court level, and appeals are denied on the ground that a legitimate claim under a recognized exception to at-will employment has not been demonstrated.

Law review articles are less likely to give advice on remov-

[18] Stieber (1985) cites the *San Francisco Examiner*, 3 Sept. 1984, as the source of these statistics. The article does not identify the study they came from.

ing contractual language and, when they do give advice, are somewhat more likely to discuss the alternative option of simply treating workers more fairly. For example, one article states: "[I]n the long run, striving for fair treatment for employees through personnel manuals and procedural safeguards may save more than it costs" (Jung & Harkness 1988:257).

These examples illustrate what we see as the critical differences between portrayals of wrongful discharge doctrine in personnel and law reviews. Law-practice journals are less consistent and contain articles fitting both models.

*Variation across Journal Types and Professions: A Statistical Analysis*

To show that the articles we have quoted exemplify a general pattern, we now turn to a statistical analysis of the articles. For each article we coded the type of journal and the author's profession. We also coded four dimensions of threat, each coded as a dichotomous variable that is set equal to 1 if an article included the element of threat and 0 otherwise.[19] The first two dimensions contribute to the threat of wrongful discharge:

*Major Threat of Liability:* The threat of liability is the most critical dimension of the threat of wrongful discharge. We coded this variable "1" when the threat of liability was portrayed as particularly ominous (e.g., claims that the number of cases was expanding rapidly, that the courts were holding employers liable with rapidly increasing frequency, or that juries virtually always sided with plaintiffs and made large damage awards).[20]

*Advice on How to Avoid Liability:* Advice on how to avoid liability also helps to construct the threat of law and the legal environment. Since the advice generally requires extensive changes to personnel policy, it creates a sense of urgency, and reinforces the seriousness of the threat. We coded whether the article offered advice on how to avoid being sued or losing lawsuits. The second two dimensions modify the threat of wrongful discharge. They are:

*State Variation:* Since virtually all the statistics on plaintiff success rates and the statistics and examples of jury awards are based on California cases, and California is one of the states most receptive to wrongful discharge, any mention of state variation would have to point out that plaintiffs are

[19] Two coders, Edelman and an undergraduate research intern, each coded the first 45 articles independently. There were no discrepancies between the codes entered by the two coders, although the intern asked Edelman's advice on coding the high threat of liability item in two cases. Once a high degree of intercoder reliability had been established, the rest of the articles were coded only by the undergraduate intern.

[20] The threat of liability is a function both of the probability of being sued and the likelihood of losing lawsuits. Since these elements were often mentioned together, we coded the presence of either as a threat of liability.

less likely to be successful in most other states. Thus references to state variation will mitigate the threat of wrongful discharge. We coded whether or not the article discussed distinctions among states in receptivity to wrongful discharge suits.

*Differences among Theories:* Punitive damages are available under the public policy theory and are available under the implied covenant theory in most states that recognize the theory, but they are never available under the implied contract theory. Yet, since employers must act in bad faith to incur liability under the public policy or implied covenant theories, but may incur liability under the implied contract theory through inadvertent statements in personnel manuals or handbooks, it is the latter that is of greatest concern to employers. Thus, articles that point out differences among the three theories of wrongful discharge mitigate the overall threat by making it clear that only compensatory damages may be assessed in implied contract cases. We coded whether the article discussed these differences among the theories.

To compare the effect of type of journal and the author's profession on the likelihood of each of these elements of threat, we estimated logit models. Logit analysis is an extension of linear regression analysis that is appropriate for modeling determinants of discrete dependent variables; it yields the effects of the explanatory variables (here, author's profession and type of journal) on the log-odds of the dependent variable. The logit analysis assumes a logistic distribution of the probabilities and estimates models of the form

$$\log \frac{P_j}{1-P_j} = \alpha + \beta X,$$

where $P$ is the probability that articles will employ threat dimension $j$, $\alpha$ is an intercept, and $\beta$ is a vector of coefficients representing the effects of a vector of the explanatory factors, $X$, on the log-odds of $P$.

We use a series of dummy variables to represent the categories of type of journal (law review, law-practice, and personnel) and author's profession (academic, lawyer, personnel manager). We omit the first category in each set; thus the coefficients for personnel and law-practice journals are relative to law reviews, and the coefficients for personnel manager and lawyer are relative to academics.[21]

[21] We used LIMDEP statistical software to obtain maximum likelihood estimates of the coefficients.

## Results

Table 3 shows the distribution of the coded articles across type of journal and author's profession. Of the 43 articles found in the nine personnel journals we searched, only 12 were written by personnel professionals; 19 were written by lawyers and 12 by professors of law or management.[22] Since the editors of professional personnel journals make choices about which articles merit publication, these figures support the argument that the personnel profession considers it beneficial to publish articles written by legal professionals and academics. Articles on wrongful discharge written by lawyers and academics help to draw attention to the issue, regardless of their content. It is the content of the articles, however, that we are most interested in.

Table 4 shows logit analyses that measure the effect of both type of journal and author's profession for each of the four threat-related characteristics. The most notable finding is that there are statistically significant differences between personnel and law journals on every dimension of threat. Personnel journals are more likely than law reviews to characterize the threat of liability as high and to give advice on how to avoid liability, both of which accentuate the threat of wrongful discharge. And they are less likely to discuss state differences and differences among the theories, factors that modify the threat of wrongful discharge. The differences between law-practice journals and law reviews follow the same pattern but are statistically significant only with respect to pointing out state differences.[23]

The effects of the author's profession are less pronounced but notable nonetheless. In particular, the differences among professions in probability of portraying the threat of liability as high (Model 1) are statistically significant: both personnel managers and practicing lawyers are more likely than academics to portray the threat of liability as serious. Of the four dimensions of threat, the threat of liability is the most important to employers. Although not statistically significant, the differences between personnel managers and academics on the other dimensions of threat are in the expected directions.

Converting the coefficients obtained from the logit analyses

[22] We did not distinguish between academics in law and management because several of the articles were coauthored by a professor of management and a professor of law. Also, there were not a sufficient number of articles written by academics to merit further distinctions.

[23] Since all but one of the articles in law-practice journals are written by practicing lawyers, this result suggests that the practicing lawyers (as a group) portray the threat of wrongful discharge as greater when they are writing for personnel journals than when they are writing for an audience of other lawyers. To test this argument empirically, we estimated models that included variables representing the interaction effects of (lawyer × personnel journal) and (lawyer × law-practice journal). The effects of these variables were not statistically significant but were in the expected directions.

**Table 3.** Wrongful Discharge Articles: Author's Profession by Type of Journal

| Type of Journal | Author's Profession | | | |
|---|---|---|---|---|
| | Academic | Lawyer | Personnel | Total |
| Law review | 15 | 15 | 0 | 30 |
| Law practice | 1 | 13 | 0 | 14 |
| Personnel | 12 | 19 | 12 | 43 |
| Total | 28 | 47 | 12 | 87 |

**Table 4.** Logit Models of How Journal Articles Characterize the Threat of Wrongful Discharge (Standard Errors in Parentheses)

| Dependent Variables: (Dimensions of Threat) | Model 1 High Threat of Liability | Model 2 Advice on How to Avoid Liability | Model 3 State Differences | Model 4 Theory Differences |
|---|---|---|---|---|
| Constant | −1.697 | −0.595 | 0.307 | 0.007 |
| | (.579) | (.462) | (.466) | (.451) |
| Type of journal: | | | | |
| Law review[a] | — | — | — | — |
| Personnel | 1.854*** | .961* | −1.859*** | −1.060* |
| | (.625) | (.539) | (.586) | (.545) |
| Law | .356 | .922 | −1.357* | −0.531 |
| practice | (.715) | (.731) | (.729) | (.692) |
| Author's profession: | | | | |
| Academic[a] | — | — | — | — |
| Personnel | 2.241* | .327 | −0.058 | −1.345 |
| manager | (1.162) | (.783) | (.968) | (1.167) |
| Lawyer | 1.174*** | .640 | .495 | 0.254 |
| | (.609) | (.524) | (.571) | (.531) |

[a] The omitted category of journal is law review and the omitted category of profession is academic. The coefficients shown represent the additive effect of the variable on the log-odds of a value of 1 for the dependent variable, relative to the omitted categories.

*Significance Levels* (two-tailed test)
* $p < .1$ ** $p < .05$ *** $p < .01$

into probabilities for each of the journal type and profession combinations makes them more easily interpretable.[24] Table 5 shows such a conversion for two of the four dimensions of threat: portraying the threat of liability as high and distinguishing among states.[25] (We do not report probabilities for cells with fewer than 12 cases.) While the results in Table 5 help to illustrate the differences across type of journal and profession, they do not take statistical significance into account and should

[24] We used the following formula to derive probability estimates from the coefficients ( and ) produced by the logit analyses:

$$P = \frac{e^{\alpha+\beta X}}{1+e^{\alpha+\beta X}}.$$

[25] Probabilities of the likelihood of giving advice and distinguishing among theories showed similar patterns.

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**Table 5.** Probabilities of Threat by Author and Journal Type

| | Author's Profession | | |
|---|---|---|---|
| | Academic | Lawyer | Personnel Manager |
| | **A. Probability of Portraying the Threat of Liability as High** | | |
| Law review | .15 | .51 | — |
| Law practice | — | .60 | — |
| Personnel | .54 | .87 | .92 |
| | **B. Probabilities of Distinguishing among States** | | |
| Law review | .58 | .69 | — |
| Law practice | — | .36 | — |
| Personnel | .17 | .26 | .17 |

therefore be interpreted cautiously.[26] Panel A, which shows probabilities of portraying the threat of liability as high, is particularly informative since the logit analysis showed all categories except law-practice journal to be statistically significant. Profession makes a substantial difference for this dimension of threat: when writing for personnel journals, the probability of portraying the threat of liability as high is .92 for personnel managers, .87 for practicing lawyers, and .54 for academics. As predicted, lawyers are less likely to characterize the threat of liability as high when they are writing for law-practice journals (.60) and law reviews (.51) than when they are writing for personnel journals. Interestingly, however, this effect also shows up for academics; the probability that academics will characterize the threat of liability as great is only .15 when they write for law reviews but jumps to .54 when they write for personnel journals. This finding is probably due in part to the selection processes used by the editors of the two types of journals and in part because different lawyers may be writing for the two types of journals.

Overall, these results show that law is subject to multiple constructions and that different professions offer different constructions of law. Comparisons across types of journals show that professional personnel journals tend to portray the threat of wrongful discharge as more ominous than do law reviews and that both personnel professionals and practicing lawyers depict the threat as greater than do academics. Furthermore, when the characterizations discussed in this section are compared with the analysis we presented in section II, it is clear that the personnel profession and, to a slightly lesser extent, the legal profession significantly inflate the threat of the implied contract, especially when they are writing for personnel

[26] We used the logit coefficients to calculate probabilities regardless of whether they are statistically significant. The alternative would have been to set the nonsignificant coefficients equal to 0. Either technique involves some error, requiring caution in interpretation of the results.

journals. Thus, the two professions that have the most direct interaction with employers construct wrongful discharge doctrine as a major threat. They give especially ominous warnings with respect to the implied contract theory, coupled with arguments about the necessity of major changes in written documents and oral statements to employees.

## V. Power, Markets, and Legal Threats

In this section, we draw on the professions and organizations literatures to develop one plausible explanation for why the personnel and legal professions might inflate the threat wrongful discharge, which might be called the "professional power explanation." We then briefly discuss several other possible explanations. Since our data do not permit us to test hypotheses on the motivations or interests underlying professional construction of law, we intend this discussion only as a first step toward future analysis and research.

### The Professional Power Explanation

Theories of power and professional jurisdiction in the professions and organizations literatures suggest that by constructing the legal environment as hostile and threatening, and claiming to be able to contain that threat, personnel professionals seek to heighten the importance of their role—thus gaining power and status within bureaucratic hierarchies—while lawyers seek to expand the market for their services. We consider the role of the personnel profession first.

### Legal Threats and Power within the Firm

Aspiring professions must often create a market for their services, claim and demonstrate expertise in servicing that market, and establish, maintain, and legitimate their professional jurisdiction (Johnson 1967; Larson 1977; Abbott 1988). For the personnel profession, this is particularly important. The personnel profession is, in Margali Larson's terms, "technobureaucratic": it is generated by, and dependent on, the existence of the corporation. Larson (1977:180) argues that for technobureaucratic professionals, advancement depends on "the capacity to claim esoteric and identifiable skills—that is, to create and control a cognitive and technical basis" and that the "claim of expertise aims at gaining social recognition and collective prestige." The growth of laws regulating the employment relation can be seen as providing the personnel profession with precisely such a basis for asserting claims of expertise.

Unlike such traditional professions as medicine and law, which have better established monopolies over their bodies of knowledge, the personnel profession has always had to work to establish its professional status and prestige. Jacoby (1985) argues that the profession came into play as an important force after World War I, when capitalists were struggling with problems of labor turnover and absenteeism as well as the incipient labor movement, and personnel professionals claimed to have solutions to those problems. The profession lost ground during the Depression, when unemployment reduced the need for control over turnover and absenteeism, but regained status during the late 1930s as unions gained strength. During that period, personnel professionals claimed that they could help employers avoid unions and help them negotiate with unions. The status of the personnel profession, then, has been to a large extent dependent on environmental threats to organizations: it tends to lose status when the environment favors employers and to gain status when environmental conditions (appear to) favor employees.

Just as the personnel profession as a whole has greater influence when it can arguably offer protection against a threatening legal environment, individual personnel managers are likely to gain prestige and power within their organizations by emphasizing their ability to protect their employers from the uncertainty of the legal environment (Pfeffer 1981). But the power and prestige to be gained from the ability to contain legal threats depends on employers' perceiving law and the legal environment as hostile and as a source of uncertainty. The personnel profession, therefore, seems to have a substantial interest in constructing the legal environment in that way.

Whereas a hostile and uncertain legal environment can increase the power and prestige of the personnel profession, the main effect for the legal profession may be a larger market for its services. Employers' in-house counsel may benefit from increased demands for their services within the firm and, like personnel professionals, may attain power by helping to curb the perceived threat of wrongful discharge lawsuits. Lawyers in outside firms are often employed in an advisory capacity, for example, to review proposed policy changes and to work with personnel officers in recommending change. The threat of wrongful discharge, then, may help practicing lawyers in the field of employment law expand the market for their services.

### Claiming Expertise and Establishing Jurisdiction

In claiming expertise over the legal environment—and specifically wrongful discharge doctrine—the professional power perspective emphasizes the need for the personnel profession

to establish the legitimacy of its jurisdiction. (For a thorough development of the idea of professional jurisdiction, see Abbott 1988.) Two issues arise. First, the personnel profession must demonstrate expertise in the area of employment law generally, and wrongful discharge doctrine in particular. Second, the personnel profession must legitimate its jurisdictional claim over the legal turf itself, which would seem to be within the realm of the legal profession.

The personnel profession demonstrates expertise in part by locating the solution to the threat of wrongful discharge well within its jurisdiction. The personnel profession construes wrongful discharge doctrine as requiring a rationalization of personnel practices: a systematic formalization of hiring, evaluation, discipline, and dismissal procedures in such a way as to protect employers from allegations of wrongful discharge. In addition, personnel professionals advocate the use of protective clauses designed to exempt organizations from any implied contracts that might be inferred from written or oral statements. Thus, the personnel profession claims to know and be able to implement a set of personnel policies that will minimize the risk of legal liability for wrongful discharge.

However, by claiming expertise in the legal arena, the personnel profession faces a dilemma, since their professional training is usually in management techniques rather than in law. Even if a management background were to provide the necessary legal knowledge, it would not be clear to the public (or to top management) that the personnel profession was adequately versed in the relevant law. Locating the solution to the legal threat within the realm of personnel activities helps to invalidate claims that others—particularly lawyers—would be better suited to manage that threat.

Moreover, rather than competing with lawyers for jurisdiction over organizational response to the legal environment, the personnel profession has developed an informal alliance with the legal profession. Because the legal profession's expertise over law-related matters enjoys widespread social acceptance, the personnel profession benefits from, and is legitimated by, the alliance between the two professions. The alliance takes at least two forms.

First, personnel professionals bring attorneys into their organizations as consultants to review existing and proposed personnel policies for possible legal problems. Because alliances with expert consultants can significantly enhance the power of groups within organizations (Pfeffer 1981), consultation with, and approval from, the legal profession is likely to lend considerable legitimacy to the personnel professionals' claims and proposals. And since the legal profession expands its market

both by consulting and by representing employers in wrongful discharge lawsuits, the alliance is not one-sided.

Second, the professional personnel journals publish many articles written by lawyers with expertise in employment-related matters, and specifically in wrongful discharge. As shown in Table 3, 19 of the 43 articles we reviewed in personnel journals were written by practicing lawyers and an additional 12 were written by academics in law. Although, as we showed earlier, the articles written by legal academics tend to be more moderate in characterizing the threat posed by wrongful discharge doctrine, the attention they give to the doctrine helps to legitimate the role of the personnel profession by providing a visible knowledge base that ties legal theory to organizational problems. Articles in the professional personnel journals written by lawyers and legal academics are extremely important in legitimating the personnel profession's claim to expertise and in legitimating its proffered solution to the threat of wrongful discharge.

Third, law firms and other legal organizations (including the Bureau of National Affairs) offer workshops on wrongful discharge and lawyers have written a number of books and manuals for dealing with wrongful discharge. All these forums serve to substantiate the threat of wrongful discharge, to offer advice on how to avoid liability, and to convince the personnel profession that lawyers are critical players in the wrongful discharge arena. While most, if not all, of the advice given locates the solution to the threat of wrongful discharge within the realm of personnel professionals, there is a clear and often explicit message that lawyers ought to review personnel policies for potential problems.

In sum, the professional power perspective suggests that personnel professionals and practicing lawyers have a shared interest in constructing the threat of wrongful discharge in such a way that employers perceive the law as a threat and rely upon those professions to curb the threat. That threat—and the proffered solution—would help both professions to gain a symbiotic jurisdiction[27] over corporate response to the legal environment.

The limitation of the professional power perspective is that

[27] In his systems theory of professions, Abbott 1988 emphasizes modes of shared jurisdiction that result from jurisdictional disputes. One form of shared jurisdiction is "advisory jurisdiction" in which one profession enjoys full jurisdiction over an area but another (often the legal profession) operates in an advisory capacity. But whereas Abbott portrays advisory jurisdiction as the resolution of a jurisdictional dispute, we see it in this case as a symbiotic relationship from the onset. The personnel profession claims expertise in protecting the organization from the legal environment and grounds that expertise on the law, as characterized by lawyers. Lawyers retain a paid advisory role that exists because the personnel profession has constructed the legal environment as sufficiently threatening.

it has a somewhat conspiratorial tone, implying that professions (or individual professionals) pay conscious attention to issues of power and jurisdiction. Of course, motivations and interests are extremely difficult to measure. But even without empirical verification of the argument we have set out, the perspective may be useful in pointing to the effect of professions' activities, regardless of their motivations.

### Alternative Explanations

One alternative explanation that could produce the same effects but focuses on a different motive is that the personnel and legal professions are simply fulfilling their role obligations—acting as agents of employers and looking out for their welfare by minimizing the likelihood of liability, however remote. There is always a significant amount of uncertainty surrounding a new common law doctrine, and a few notable cases, such as *Pugh* and *Toussaint*, may appropriately dictate caution on the part of employers. It may be necessary to exaggerate the legal threat in order to motivate organizational executives to take defensive action.

Another explanation might be that by calling attention to wrongful discharge doctrine, writers are self-consciously attempting to protect employees. But if this were correct, the primary theme of articles on wrongful discharge would be the need for employers to avoid arbitrary dismissals. In fact, the opposite is the case. The general advice given in the articles we reviewed is that employers purge their employee handbooks of anything that could be construed as a contract for permanent employment and that they explicitly inform employees that they are employed at-will and may discharged at any time. Further, the personnel and legal professions put little emphasis on an alternative method of avoiding wrongful discharge liability, which is simply to avoid dismissing workers unless there is good cause. Although some articles mention this possibility, most do not. And where a fairness standard is recommended, it tends to be portrayed as a fall-back measure—in case employers are not able to preserve their at-will status.

Finally, it might be argued that the warnings about wrongful discharge lawsuits are part of a strategic political effort to generate support for wrongful discharge legislation. Employers would be expected to oppose such legislation, unless they can be persuaded to fear unpredictable and large jury verdicts more than they fear statutory protection of employees (Perritt 1987). This explanation may be correct in some cases, especially among legal academics, but seems less likely to explain the dire warnings by legal practitioners and personnel managers. Since we found that the personnel profession inflated the

threat of wrongful discharge the most and academics the least, this explanation seems problematic.

Overall, we find the professional power explanation, which focuses on the power, jurisdiction, and market of the personnel and legal professions, to be the most consistent with our findings and, hence, the most compelling. Clearly, however, future research ought to test these hypotheses explicitly.

## VI. Implications for Organizations Theory

Regardless of the motivations underlying professionals' constructions of law, our analysis illustrates how the legal and personnel professions actively seek to influence employers' perceptions of law and to construct methods of response to law. It thus complements the macro-level neo-institutional studies discussed earlier, which find that certain organizational practices tend to diffuse quickly among organizations and suggest that professional norms and networks may play a role in that diffusion. Further, by examining several recent studies that look at employers' responses to wrongful discharge doctrine, the link between micro and macro becomes more clear.

Recent studies (Westin and Feliu 1988; Reuter 1988) report that employers are increasingly making precisely the types of changes that personnel and legal professionals recommend to avoid wrongful discharge liability: for example, the formalization of employee performance appraisals (to document deficiencies that might be used to justify future dismissals); formal requirements that any disciplinary action be approved by higher level officials; the establishment of internal grievance procedures; and most important, the use of "employment-at-will clauses" in employee handbooks or applications to notify employees that they are at-will employees and may be fired at any time and that nothing they see or hear should be construed as contractual rights to job security.

The increasing use of employment-at-will clauses in particular shows employers' concern over the implied contract theory of wrongful discharge. A 1984 survey of 48 corporations asked what changes they had made "to make clearer that employment is at will and terminable at the option of the employer." In response, 43% reported that they had revised their personnel handbooks, 36% had revised their application forms, 25% had issued a policy statement notifying employees that they were employed at-will, and 20% included an employment-at-will clause in their offer letters (Westin & Feliu 1988:11). And a survey conducted in 1985 found that of 279 organizations, 25% had adopted some form of employment-at-will clause (Sutton, Dobbin, Meyer, & Scott 1992). More important, the Sutton et al. study clearly demonstrates a diffusion of

employment-at-will clauses over time (the rate of adoption had risen exponentially between 1980 and 1985 and showed no signs of decline) and shows that the presence of a personnel office significantly increased the likelihood that an organization would have an employment-at-will clause, suggesting that the personnel professions' constructions of law have indeed affected employers' actions.[28]

In sum, there seems to be significant albeit not conclusive evidence that employers' responses to wrongful discharge doctrine are in large part a result of *constructions* of the legal environment by the personnel and legal professions, which significantly overstate the risks of wrongful discharge doctrine to employers. More generally, our analysis has two implications for studies of organizational change. First, it is clear that professionals participate in the achievement of institutional isomorphism by communicating and publishing methods of response to law. And second, at least in the realm of law, professionals help to construct the environment with which organizations seek to become isomorphic; they do so by shaping employers' understandings of law and the threat posed by law.

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