DEVELOPMENTS IN VERMONT LAW

ARTICLES

WORKPLACE DEFAMATION: PUBLIC POLICY, COMPELLED SELF-PUBLICATION, AND THE VERMONT CONSTITUTION

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INTRODUCTION

The law governing employment relationships has changed rapidly and dramatically during the last three decades. In less than a single generation, American society has witnessed a profound shift in the balance of power in the workplace. Employment law, which previously favored the private employer, now offers an increasing means of protection to the employee.

The leading development in this erosion of the employer's superior position has been the demise of the "employment-at-will" doctrine.[1] Once considered a virtually complete insulation for employers from wrongful discharge suits,[2] the effectiveness of this rule has been greatly diluted in recent years.[3] The decline of this doctrine has been so extensive that by the middle of the 1980's a large majority of the states had placed some type of limitation on its application.[4]

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1. The basic formulation of the employment-at-will doctrine traditionally held that, absent a specific contractual or statutory prohibition, an employer may fire an employee at any time and for any reason or for no reason at all. *See infra* notes 136-147 and accompanying text.

2. *See* Payne v. Rozendaal, 147 Vt. 488, 496-501, 520 A.2d 586, 591-93 (1986) (Peck, J., dissenting); Parner v. Americana Hotels, Inc., 65 Haw. 370, 375, 652 P.2d 625, 628 (1982).

3. *See generally* Note, *Employment-At-Will: Defining the Parameters*, 16 CUMB. L. REV. 377 (1986) [hereinafter *Defining the Parameters*]; McOmber, *Emerging Issues in Employment Law: The Debate Shifts to the States*, 4 COOLEY L. REV. 329, 332-36; Payne v. Rozendaal, 147 Vt. at 491, 520 A.2d at 588 (1986) (public policy against age-based employment discharge gives rise to tort action in Vermont).

4. *See* Youngdahl, *The Erosion of the Employment-At-Will Doctrine in Arkansas*, 40

Courts seeking to temper the harsh effect of this previously inflexible rule have established a number of exceptions to its application. These exceptions generally are founded either on contract principles[5] or on public policies that are violated by the actions of employers.[6] Vermont recognizes one such public policy by granting a cause of action to workers discharged solely on the basis of their age.[7]

A second important development in the evolution of employment law in recent years has been a modification of the common law rules of defamation actions. The doctrine of "compelled self-publication" has made recovery possible for workers who have been discharged under circumstances that falsely injure their reputations.[8] This doctrine allows recovery by relaxing the requirement that, in order to be liable, a defendant must communicate (or "publish") the defamatory statement to a third person.[9] The significance of compelled self-publication in employment law is that, although workers are often terminated for false or contrived reasons,[10] those reasons frequently are not expressed to anyone but the employee.[11] The employee then is forced by circumstance to repeat the defamation. This repetition usually occurs when the employee, seeking subsequent employment, is asked to explain why she left her prior employment.[12] Until courts established the doc-

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ARK. L. REV. 545, 547 n.14 (1987).

5. *See Defining the Parameters*, *supra* note 3, at 380-83. Examples of exceptions based on contract principles include implied-in-fact contracts and obligations to deal in good faith. *Id.*

6. *See generally* Note, *Limiting the Right to Terminate At Will — Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201 (1982); Wagenseller v. Scottsdale Memorial Hospital, 147 Ariz. 370, 376-78, 710 P.2d 1025, 1031-33 (1985). As used here, public policy generally falls into one of four categories: (1) exercise by an employee of a statutory right; (2) an employee's refusal to violate a criminal statute; (3) fulfillment by the employee of a statutory duty; or (4) violation of a public policy by the employer. *Defining the Parameters*, *supra* note 3, 16 CUMB. L. REV. at 379-80.

7. Payne v. Rozendaal, 147 Vt. 488, 494, 520 A.2d 586, 589 (1986).

8. *See* Prentice & Winslett, *Employee References: Will A 'No Comment' Policy Protect Employers Against Liability for Defamation?*, 25 AM. BUS. L.J. 207, 210-20 (Summer 1987); Lewis, Ottley & Mersol, *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 MO. L. REV. 797, 836-37 (1989) [hereinafter *Defamation and the Workplace*]; Lewis v. Equitable Life Assurance Society, 389 N.W.2d 876, 886-92 (Minn. 1986).

9. Prentice & Winslett, *supra* note 8, at 210-13.

10. *Id.* at 222-24.

11. Lewis, Mersol & Ottley, *Defamation Actions in the Workplace: How to Protect the Employer*, 5 COMPLEAT LAWYER 44, 44 (Spring 1988) [hereinafter *Protect the Employer*].

12. *Lewis*, 389 N.W.2d 876, 886 (Minn. 1986); *see also* McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980).

trine of compelled self-publication, employers escaped liability for their otherwise defamatory actions because the employee actually published the defamatory statement.[13] Some ten jurisdictions, not including Vermont, have recognized this doctrine in one form or another.[14]

This article suggests that Vermont should recognize both the doctrine of compelled self-publication and a public policy exception to the employment-at-will doctrine based on injury to an employee's reputation. The article will first review the development and present status of the two bodies of law, defamation and wrongful discharge, which underlie this suggestion. It will then propose a state constitutional basis for the expansions of defamation and wrongful discharge, and offer a framework for each.

I. Common Law and Constitutional Defamation and the Doctrine of Compelled Self-Publication

A. Background: Development of the Common Law

The tort of defamation is generally thought of as "an invasion of the interest in reputation and good name"[15] of another person. It is comprised of the complementary torts of libel, generally written defamation, and slander, generally spoken defamation.[16] Because of the more permanent nature of the written word, libel historically was considered to be the more serious of the two.[17]

The earliest origins of defamation law are ecclesiastical. The church courts of medieval England initially claimed exclusive jurisdiction over the action.[18] During the Middle Ages, manorial courts

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13. Prentice & Winslett, *supra* note 8, at 211-13.

14. *See infra* note 133 and accompanying text.

15. W. Keeton, Prosser and Keeton on the Law of Torts § 111, at 771 (5th ed. 1984) [hereinafter Prosser].

16. *Id.* § 112 at 786-88. This classic distinction between written and spoken defamation has become somewhat blurred in recent years. For example, sound in a motion picture has been found by one court to constitute libel, presumably due to its widespread and more permanent nature. Brown v. Paramount Publix Corp., 240 A. 520, 270 N.Y.S. 544, 547 (1934). This blurring is consistent with the position taken by the Second Restatement of Torts, which recognizes that a defamatory radio or television broadcast, for example, potentially does harm similar to printed or written work. Restatement (Second) of Torts § 568A (1977).

17. Prosser, *supra* note 15, § 112. Libel was originally criminal in nature. *Id.; see also* Lent v. Huntoon, 143 Vt. 539, 545, 470 A.2d 1162, 1167 (1983).

18. *See Defamation and the Workplace*, *supra* note 8, at 802 (citing Helmholz, *Canonical Defamation in Medieval England*, 15 Am. J. Legal Hist. 255 (1971); 101 R. Helmholz,

and other local courts also heard defamation actions.[19] It was not until the middle of the sixteenth century, however, that English common law courts began to provide remedies for libel and slander.[20]

At the outset, the only remedy available to a defamation plaintiff was a public apology.[21] The common law courts later developed a second remedy for defamation, money damages for harm suffered by the plaintiff.[22] Finally, the law began to recognize that a deterrent function was served by the imposition of penalties upon the speaker or writer of defamatory statements.[23]

As defamation developed under the early common law, a curious distinction between libel and slander came to be recognized. Libel, being more permanent and therefore considered the more harmful species of defamation, was held to be actionable per se. There was no requirement that the plaintiff allege or prove that any special damages[24] were suffered as a result of the libel. Slander, on the other hand, required that special damages be alleged and proven[25] unless the statement fit into one of three categories: (1) imputation of a crime;[26] (2) statements injurious to one's trade, business, or occupation;[27] or (3) charges of having a "loathsome disease."[28] Slander actions based upon statements falling into one of these categories were, like libel, actionable without proof of special damages.[29]

SELECT CASES ON DEFAMATION TO 1600 (Selden Society 1985)).

19. *Defamation and the Workplace*, *supra* note 8, at 802.

20. *Id.*

21. *See* Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1052 (1962).

22. L. ELDREDGE, THE LAW OF DEFAMATION at 5 (1978).

23. *Id.* at 6; RESTATEMENT (FIRST) OF TORTS § 908 comment a (1938).

24. *Huntoon*, 143 Vt. at 545-46, 470 A.2d at 1167. "Special damages are those of a pecuniary nature, and historically they have included loss of customers or business, loss of contracts, or loss of employment." *Id.* at 546, 470 A.2d at 1167 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS 760-61 (4th. ed. 1971)).

25. *Huntoon*, 143 Vt. at 546, 470 A.2d at 1168.

26. *Id. See also* Gordon v. Journal Pub. Co., 81 Vt. 237, 69 A. 742 (1908).

27. *Huntoon*, 143 Vt. at 546, 470 A.2d at 1167; *see also* Solomon v. Atlantis Development, Inc., 147 Vt. 349, 359, 516 A.2d 132, 138 (1986); *see generally* Crane v. Darling, 71 Vt. 295, 44 A. 359 (1899) (defamatory remarks about competence of practicing physician held actionable); Chipman v. Cook, 2 Tyl. 456 (Vt. 1803) (attack on attorney's integrity and credibility held actionable); Jones v. Roberts, 73 Vt. 201, 50 A. 1071 (1901) (allegation of improper conduct by clergyman held actionable).

28. *Huntoon*, 143 Vt. at 546, 470 A.2d at 1168.

29. *Id.* Most American jurisdictions, including Vermont, added a fourth category allowing an action to be sustained without proof of special damages when the defamatory

At common law, defamation was a strict liability tort. A defamed plaintiff was not required to plead or prove any negligence or greater fault on the part of the defendant.[30] As a result, plaintiffs were generally in a favored position,[31] needing only to establish that the defendant made a defamatory and unprivileged statement about the plaintiff to at least one other person to withstand a demurrer.[32]

Defendants, however, had two significant protections from liability in libel and slander actions. First, truth was considered an absolute defense; a truthful statement was per se not defamatory.[33] This principle remains so well established that it is embodied in a number of state constitutions in the United States.[34] The second significant protection from liability for defamation is the concept of privilege.[35] The common law recognized that the sometimes draconian nature of defamation law could have a "chilling effect" on certain types of socially useful speech.[36] To counter this concern, an elaborate set of privileges developed to promote the public policies favoring particular categories of statements.

Certain types of remarks, which would otherwise constitute actionable defamation, were held to be "absolutely" privileged.[37] Examples of this type of speech include statements made during

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statements involved allegations that a woman was unchaste. *Id.*; *see also* Sheridan v. Sheridan, 58 Vt. 504, 5 A. 494 (1886) (accusation that the plaintiff was "a prostitute" held actionable); Redway v. Gray, 31 Vt. 292, 297-98 (1858).

30. L. ELDREDGE, *supra* note 22, at 15.

31. Ryan v. Herald Ass'n, Inc., 152 Vt. 275, 278, 566 A.2d 1316, 1318 (1989) (citing H. KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (1988)).

32. RESTATEMENT (FIRST) OF TORTS § 558 (1938).

33. PROSSER, *supra* note 15, at § 116. *See also Huntoon*, 143 Vt. at 548, 470 A.2d at 1169.

34. *See, e.g.*, GA. CONST. art. I, §1, ¶ VI ("In all civil or criminal actions for libel, the truth may be given in evidence; and, if it shall appear to the trier of fact that the matter charged as libelous is true, the party shall be discharged."); ILL. CONST. art. I, § 4 ("In trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.").

The Vermont Constitution does not have a specific provision relating to truth as a defense to libel. However, Vermont has a statutory protection, dating to 1804, which provides for truth as a defense to prosecutions for criminal defamation. VT. STAT. ANN. tit. 13, § 6560 (1974).

35. *See generally*, PROSSER, *supra* note 15, at §§ 114, 115; RESTATEMENT (SECOND) OF TORTS §§ 583-598A (1977); *Huntoon*, 143 Vt. at 548-49, 470 A.2d at 1169.

36. Comment, *American Defamation Law: From Sullivan, Through Greenmoss, and Beyond*, 48 OHIO ST. L.J. 513, 515 (1987) [hereinafter *American Defamation Law*].

37. RESTATEMENT (SECOND) OF TORTS §§ 583-592A (1977); *see generally* PROSSER, *supra* note 15, at § 114.

legislative[38] or judicial proceedings,[39] or statements made by public officials acting within the scope of their official duties.[40]

An additional set of privileges existed that did not confer the unconditional protection afforded by the absolute privileges. These conditional or qualified privileges were "based upon a public policy that recognize[d] that it [was] essential that true information be given whenever it [was] reasonably necessary for the protection of one's own interests, the interests of third persons or certain interests of the public."[41] Qualified privileges were generally narrow in scope and could be forfeited if abused or if the statement was made with malice.[42]

This foundation of defamation was well established in the common law by the time American courts began to hear libel and slander cases.[43] Vermont's common law jurisprudence with regard to libel and slander has followed closely the general evolution of defamation law elsewhere in the United States.[44]

B. The Constitutional Law of Defamation

Traditionally, both English and American common law held defendants strictly liable for their defamatory statements.[45] In 1964, however, with the landmark case of *New York Times Co. v. Sullivan*,[46] the U.S. Supreme Court began to revise, drastically and somewhat erratically, the landscape of American defamation law.[47] In *Sullivan*, the Supreme Court first recognized that the free

38. PROSSER, *supra* note 15, at § 114.

39. *Id.*

40. *Id.*

41. RESTATEMENT (SECOND) OF TORTS § 593, scope note preceding (1977).

42. PROSSER, *supra* note 15, at § 115; *Huntoon*, 143 Vt. at 548, 470 A.2d at 1169.

43. *Huntoon*, 143 Vt. at 545, 470 A.2d at 1167; *see also Defamation and the Workplace*, *supra* note 8, at 808-09.

44. *Compare, e.g.*, the elements of defamation as set forth in *Huntoon*, 143 Vt. at 546-47, 470 A.2d at 1168 *with* the elements of the action as set forth in RESTATEMENT (SECOND) OF TORTS § 558 (1977). *See also* RESTATEMENT (FIRST) OF TORTS § 558 (1938).

45. L. ELDREDGE, *supra* note 22, at 15; *see also* PROSSER, *supra* note 15, at § 113; *Ryan*, 152 Vt. at 279, 566 A.2d at 1318.

46. 376 U.S. 254 (1964).

47. A large body of commentary has been produced since the *Sullivan* decision analyzing and criticizing the effect of that case and its progeny on American defamation law. *See, e.g.*, Lewis, *Annals of the Law - The Sullivan Case*, The New Yorker, Nov. 5, 1984, at 52; *Defamation and the Workplace*, *supra* note 8, at 797; SACK, LIBEL, SLANDER AND RELATED PROBLEMS (1980); Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975).

speech protections of the First Amendment conflicted with and imposed constitutional limits on the states' traditional interest in protecting the reputations of their citizens.[48]

The Supreme Court held in *Sullivan* that false statements made by media defendants regarding public officials were constitutionally protected unless they were made with "actual malice."[49] Similar protections subsequently were extended to include statements made about "public figures"[50] and statements made concerning matters of "general or public interest," even if the statements referred to private individuals.[51]

The next major pronouncement in the evolving field of constitutional defamation law occurred in another landmark case, *Gertz v. Robert Welch, Inc.*[52] In *Gertz*, the Court withdrew its extension of privilege from matters of public interest but preserved the protections for statements made about public figures and officials.[53]

Initially *Gertz* was understood to impose the requirement of "fault" in defamation actions.[54] It appeared to alter the traditional common law framework of defamation and render it a fault-based tort. The U.S. Supreme Court "invited" the states to set their own standards for liability, so long as they required at least a showing of negligence on the part of the defendant.[55] Vermont, like most states, began to impose this requirement in defamation claims.[56]

In addition to holding that the First Amendment required at least some degree of fault in defamation, *Gertz* confirmed the *Sullivan* rule that public plaintiffs must prove "constitutional malice" to recover against media defendants.[57] However, *Gertz* left conspicuously unanswered the question of whether these rules would apply to defendants who were not members of the media.[58]

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48. *Sullivan*, 376 U.S. at 264; *see also* Lewis, *supra* note 47, at 52.

49. *Sullivan*, 376 U.S. at 279-80.

50. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

51. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971).

52. 418 U.S. 323 (1974).

53. *Id.* at 345-46.

54. *See Huntoon*, 143 Vt. at 546, 470 A.2d at 1168.

55. *Id. See also* Comment, *Greenmoss Builders v. Dun & Bradstreet*, 10 VT. L. REV. 205, 207-09 (1985).

56. *See Huntoon*, 143 Vt. at 546 n.1, 470 A.2d at 1168 n.1.

57. *Gertz v. Robert Welch*, 418 U.S. at 342.

58. *See* Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979) (Burger, C.J., concurring).

The U.S. Supreme Court addressed but did not answer that question eleven years later in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[59] a case which came to it from the Vermont Supreme Court.[60] The Court approached the question in a surprising manner. In *Greenmoss*, the defendant, a commercial credit reporting agency, incorrectly informed five of its subscribers that the plaintiff had filed for bankruptcy.[61] The Vermont Supreme Court held that *"as a matter of federal constitutional law*, the media protections outlined in *Gertz* are inapplicable to non-media defamation actions."[62] Analyzing the case according to the media or non-media status of the defendant, the Vermont court followed the generally accepted rule of the day.[63] The U.S. Supreme Court rejected this analytical approach, however, and returned to an earlier one which focused on whether the statement referred to a matter of public or private concern, rather than on the status of the defendant.[64]

The net effect of the *Sullivan* and *Greenmoss* line of cases on defamation actions involving matters of purely private concern is not yet clear.[65] Confusion still exists with regard to whether it is important that the defendant is a member of the media[66] and whether the *Gertz* requirement of fault is applicable in cases involving private parties and matters that are not of public concern.[67]

Two bodies of defamation law have developed, in part, from this series of decisions. The first may be called "public defamation," which involves statements of general or public concern. As a practical matter, public defamation will often involve media defendants and "public plaintiffs." The second body of defamation law is "private defamation," which is more akin to classic common law principles. Private defamation generally involves private par-

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59. 472 U.S. 749 (1985).

60. Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 143 Vt. 66, 461 A.2d 414 (1983), *aff'd*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

61. *Id.* at 70-71, 461 A.2d at 416.

62. *Id.* at 75, 461 A.2d at 418 (emphasis added).

63. *See generally* Collins & Drushal, *The Reaction of State Courts to Gertz v. Robert Welch, Inc.*, 28 CASE W. RES. L. REV. 306 (1978).

64. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. at 756, 764 (Burger, C.J. concurring), 773 (White, J. concurring); *see Rosenbloom*, 403 U.S. at 44.

65. *See generally American Defamation Law, supra* note 36.

66. *Id. See also* Ryan v. Herald Ass'n, Inc., 152 Vt. 275, 279, n.1, 566 A.2d 1316, 1318-19 n.1 (1989).

67. *Ryan*, 152 Vt. at 280-81 n.2, 566 A.2d at 1319 n.2.

ties and matters which are not of general or public interest, including most cases of workplace defamation.

C. Common Law Defamation in Vermont: An Overview

Spurred by the limitations placed on the common law by the *Sullivan* to *Greenmoss* line of cases, the Vermont Supreme Court revised the state's defamation law to accommodate the new constitutional jurisprudence. The first significant review of Vermont law took place after *Gertz* but before *Greenmoss*, when the court decided *Lent v. Huntoon* in 1983.[68]

Huntoon involved a suit by a dismissed employee who had begun to compete with his former employer. The employer had made defamatory statements to the effect that the plaintiff had a long criminal record, had stolen from the defendant, was incompetent, and was generally untrustworthy.[69] Acknowledging that previous decisions of the court had "seldom, if ever, attempted an overview of this 'odd and somewhat complicated area of tort law,' "[70] Justice Wynn Underwood traced the development of defamation and applied the new First Amendment rules to the common law in a private defamation claim.

Justice Underwood stated the elements of a private defamation action in Vermont as being:

> (1) a false and defamatory statement concerning another;
> (2) some negligence, or greater fault, in publishing the statement;
> (3) publication to at least one third person;
> (4) lack of privilege in the publication;
> (5) special damages, unless actionable per se; and
> (6) some actual harm so as to warrant compensatory damages.[71]

The court acknowledged the impact of *Gertz* by imposing the requirements of fault on the part of the defendant and actual harm to the plaintiff before compensatory damages would be available.[72] *Huntoon*, however, was decided before the U.S. Supreme Court de-

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68. 143 Vt. 539, 545-50, 470 A.2d 1162, 1167-70 (1983).
69. *Id.* at 544-45, 470 A.2d at 1167.
70. *Id.* at 545, 470 A.2d at 1167.
71. *Id.* at 546-47, 470 A.2d at 1168.
72. Lent v. Huntoon, 143 Vt. 539, 546 n.1, 470 A.2d 1162, 1168 n.1 (1983).

cision in *Greenmoss*. These requirements of fault and actual harm therefore, may not be required by federal constitutional law in a purely private defamation action.[73]

Justice Underwood paid particular attention to the role of privilege as a defense to a defamation claim. The court recognized the defendant's right to protect its legitimate business interests as a conditional privilege.[74] The plaintiff could overcome this privilege, the court wrote, by showing, with clear and convincing evidence, that the defendant had acted with malice in making the statement.[75]

The court identified two types of malice sufficient to defeat the privilege. The first was *implied* malice, which the court would infer upon proof "that the defendant knew the statement was false or acted with reckless disregard of its truth."[76] Alternatively, *actual* malice could be proven by showing that the defendant engaged in "spiteful or wanton conduct" in making the statement.[77]

Finally, the court confirmed that a showing of actual malice continued to be a prerequisite to a jury's award of punitive damages.[78] Apparently, although a showing of implied malice will defeat the conditional privilege, it will be insufficient to support an award of punitive damages.

Seven years later, in *Crump v. P & C Food Markets, Inc.*,[79] the Vermont Supreme Court reviewed and updated the state's private defamation law. *Crump* largely confirmed the principles of *Huntoon* and noted that the post-*Greenmoss* confusion regarding the requirement of fault in private defamation remained unresolved.[80]

Crump clarified the terms "implied malice" and "actual malice," used by *Huntoon*, with "full-phrase" definitions.[81] The court replaced implied malice with malice based upon "knowledge of the statement's falsity or with reckless disregard of its truth."[82] The malice previously referred to as actual was defined, using tradi-

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73. *See supra* notes 65-67 and accompanying text.
74. *Huntoon*, 143 Vt. at 548-49, 470 A.2d at 1169.
75. *Id.*
76. *Id.*
77. Lent v. Huntoon, 143 Vt. 539, 549, 470 A.2d 1162, 1169 (1983).
78. *Id.* at 549-50, 470 A.2d at 1169-70.
79. ___ Vt. ___, 576 A.2d 441 (1990).
80. *Id.* at ___, 576 A.2d at 446.
81. *Id.* at ___, 576 A.2d at 447.
82. *Id.*

tional common law language, as "conduct manifesting personal ill will, reckless or wanton disregard of plaintiff's rights, or carried out under circumstances evidencing insult or oppression."[83]

D. Defamation in the Workplace: The Doctrine of Compelled Self-Publication

1. Background

In recent years defamation actions brought by employees against their present and former employers have become increasingly common. One study reported in the Wall Street Journal estimated that as many as 8,000 such suits were filed between 1982 and 1987.[84] Workplace defamation claims in 1987 comprised almost one-third of all libel suits.[85]

The frequency of workplace defamation claims has increased because of a modification to the traditional requirement that the defendant communicate the defamatory statement to a third person. This change is embodied in the developing jurisprudence of compelled self-publication.[86] The leading case in this innovative area of tort law is *Lewis v. Equitable Life Assurance Society of the United States*.[87]

The four plaintiffs in *Lewis* were hired as dental insurance claims approvers for defendant Equitable.[88] They did not enter into written employment contracts, but were hired for an indefinite time under oral agreements.[89] Each received a copy of Equitable's employee handbook, which discussed, among other topics, policies regarding job security, dismissal, and severance pay.[90]

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83. Crump v. P & C Food Markets, Inc., ___ Vt. ___, ___, 576 A.2d 441, 447 (1990). This language consistently has been utilized by the Vermont Supreme Court in a number of defamation cases. *See Huntoon*, 143 Vt. at 550, 470 A.2d at 1170; *Ryan*, 152 Vt. at 281, 566 A.2d 1316, 1319-20 (1989); Shortle v. Central Vermont Public Service Corp., 137 Vt. 32, 33, 399 A.2d 517, 518 (1979).

84. *Defamation and the Workplace*, *supra* note 8, at 798 n.3.

85. *Fired Employees Turn the Reason for Dismissal Into a Legal Weapon*, Wall St. J. Oct. 2, 1986, at 33, col. 2 (referring to a study conducted by Jury Verdict Research, Inc.).

86. *See* ANNOT., *Publication of Allegedly Defamatory Material by Plaintiff ("Self-Publication") As Sufficient to Support Defamation Actions*, 62 A.L.R. 4th 616, 625-30, 633-37 (1988 & Supp. 1990); *Protect the Employer*, *supra* note 11, at 44.

87. 389 N.W.2d 876 (Minn. 1986).

88. *Id.* at 880.

89. *Id.*

90. *Id.*

In the autumn of 1980, the plaintiffs were sent temporarily from their offices in St. Paul, Minnesota to Equitable's facility in Pittsburgh, Pennsylvania.[91] Upon their return to St. Paul, each was commended in writing for her job performance.[92] The plaintiffs, however, were asked to revise their travel expense reports to conform to company guidelines. They amended the expense reports twice but refused to do so again, claiming that the original submissions were correct.[93] All four were dismissed for "gross insubordination" when they refused to amend the expense reports any further.[94]

The plaintiffs encountered difficulties in obtaining subsequent employment because of the circumstances of their discharges. Equitable, like many employers,[95] did not communicate to anyone outside of the company the reasons for the plaintiffs' terminations.[96] The company relied instead on a policy of giving only dates of employment and final job titles of former employees, unless specifically authorized to release additional information.[97] Nevertheless, in their attempts to secure new employment, it was necessary for the plaintiffs to explain the reasons for their discharges.[98]

The four employees sued Equitable for breach of contract[99] and defamation,[100] and the Minnesota Supreme Court held that the plaintiffs had sustainable actions in both.[101] In determining that the elements of the defamation claims were satisfied, the court adopted the doctrine of compelled self-publication.[102] The

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91. Lewis v. Equitable Life Assurance Soc'y of the U.S., 389 N.W.2d 876, 880 (Minn. 1986).

92. *Id.* at 881.

93. *Id.* The plaintiffs were not given written guidelines until after they returned from Pittsburgh and had filed expense reports based on the original, oral instructions. *Id.*

94. *Id.*

95. *Protect the Employer*, *supra* note 11, at 45. Many larger companies not only restrict the nature of information that is made available about former employees, but also limit the number of individuals authorized to give out any personnel information at all. *Id.*

96. *Lewis*, 389 N.W.2d at 882.

97. *Id.*

98. *Id.* Only one plaintiff found employment while being forthright about her dismissal. Another obtained employment only after initially misrepresenting the reason she left Equitable. A third was able to avoid the subject, but the fourth plaintiff was unable to find full-time employment. Each plaintiff gave evidence of emotional and financial hardship caused by their discharges. *Id.*

99. *Id.*

100. Lewis v. Equitable Life Assurance Soc'y of the U.S., 389 N.W.2d 876, 882 (Minn. 1986).

101. *Id.* at 884 (breach of contract), 888 (defamation).

102. *Id.* at 888.

holding represented a significant departure from the basic principles of common law defamation.

2. *Modification of Prior Defamation Law*

a. Publication

In order for a statement to be defamatory, it must be communicated to someone other than the plaintiff.[103] This is the element of publication required under the common law rules.[104] Generally, however, this requirement is not satisfied when the defendant communicates the statement directly and exclusively to the plaintiff, who communicates it to a third person.[105] In *Lewis*, as in many other defamation suits involving discharged employees, the publication occurred when the plaintiffs told prospective employers why they left their prior job.[106]

Thus the issue presented in *Lewis* was "whether a defendant can ever be held liable for defamation when the statement in question was published to a third person only by the plaintiff."[107] The Minnesota Supreme Court, after reviewing treatment of this issue in other jurisdictions, concluded that

> [t]he concept of compelled self-publication does no more than hold the originator of the defamatory statement liable for damages caused by the statement where the originator knows, or should know, of circumstances whereby the defamed person has no reasonable means of avoiding publication of the statement or avoiding the resulting damages; in other words, in cases where the defamed person was compelled to publish the statement. In such circumstances, the damages are fairly viewed as the direct result of the originator's actions.[108]

The *Lewis* court accepted in its holding the rationale advanced by a California appellate court.[109] The California court reasoned that liability may logically arise "where the originator of the

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103. PROSSER, *supra* note 15, at § 113.

104. RESTATEMENT (SECOND) OF TORTS § 577 (1977).

105. *Lewis*, 389 N.W.2d at 886.

106. *Id.*

107. *Id.*

108. *Id.* at 888.

109. Lewis v. Equitable Life Assurance Soc'y of the U.S., 389 N.W.2d 876, 886, 888 (Minn. 1986) (citing McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (Cal. Ct. App. 1980)).

defamatory statement has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third person *after* he has read it or been informed of its contents."[110] Thus the defendant's liability for the *foreseeable* republication by the plaintiff of the defamation was based upon a "strong causal link" between the defendant's actions and the damage caused by the republication.[111]

The Minnesota Supreme Court rejected the defendant's two main arguments against recognition of compelled self-publication. The defense first argued that the court effectively created tort liability for wrongful discharge, contrary to earlier Minnesota decisions.[112] In response, the court distinguished its prior holdings by stating that a tort action can exist "where the defendant's breach of contract constitutes or is accompanied by an independent tort."[113] The opinion further stated that "the fact that the defamation occurred in the context of employment discharge should not defeat recovery" for the tort.[114]

Neither was the court persuaded by Equitable's second argument that adoption of compelled self-publication would discourage plaintiffs from efforts to mitigate damages. This concern can be properly addressed, according to the court, by limiting recovery to circumstances in which "the plaintiff was in some significant way compelled to repeat the defamatory statement and that such compulsion was, or should have been, foreseeable to the defendant,"[115] and by requiring plaintiffs to take "all reasonable steps to attempt to explain the true nature of the situation and to contradict the defamatory statement."[116]

The *Lewis* court acknowledged that the doctrine created a new basis for maintaining a defamation claim and that "as such, it should be cautiously applied."[117] The court reasoned that when

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110. *Id.* at 887 (quoting *McKinney*, 110 Cal. App. 3d at 796, 168 Cal. Rptr. at 93-94 (emphasis in original)).

111. *Id.* at 887 (citing *McKinney*, 110 Cal. App. 3d at 797-98, 169 Cal. Rptr. at 94).

112. *Id.*

113. Lewis v. Equitable Life Assurance Soc'y of the U.S., 389 N.W.2d 876, 887-88 (quoting Wild v. Rarig, 302 Minn. 419, 440, 234 N.W.2d 775, 789 (1975), *cert. denied* 424 U.S. 902 (1976)).

114. *Id.* at 888.

115. *Id.*

116. *Id.*

117. Lewis v. Equitable Life Assurance Soc'y of the U.S., 389 N.W.2d 876, 888 (Minn. 1986).

properly utilized, however, compelled self-publication claims would not substantially expand the scope of liability for defamation. By limiting recovery to situations in which the defendant could reasonably foresee that the plaintiff would be strongly compelled to republish the defamatory statement, the doctrine does no more than allow recovery for damages which are "fairly viewed as the direct result of the originator's actions."[118]

b. Privilege

The *Lewis* court, as have courts in Vermont, considered the role of privilege as a defense to a workplace defamation suit. Both states' courts have held that an action for defamation does not lie if the defendant had an absolute or qualified privilege to publish the statement and if the privilege was not abused.[119]

Like Minnesota, Vermont acknowledges a qualified privilege for the protection of a defendant's legitimate business interests.[120]

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118. *Id.* The Minnesota legislature, responding to the *Lewis* decision, in 1987 enacted MINN. STAT. ANN. § 181.933, which limits the circumstances under which a discharged employee can sue her employer for defamation in connection with the dismissal. That statute provides:

> Notice of Termination
>
> Subdivision 1. Notice required. An employee who has been involuntarily terminated may, within five working days following such termination, request in writing that the employer inform the employee of the reason for the termination. Within five working days following receipt of such request, an employer shall inform the terminated employee in writing of the truthful reason for the termination.
>
> Subd. 2. Defamation action prohibited. No communication of the statement furnished by the employer to the employee under subdivision 1 may be made the subject of any action for libel, slander, or defamation by the employee against the employer.

MINN. STAT. ANN. §181.933 (West Supp. 1991). This statute may offer only illusory protection, if any, to employers. Subdivision 1 requires that a truthful reason for the discharge be provided to the employee. By definition, a truthful statement can never give rise to an action in defamation. *Lewis*, 389 N.W.2d at 888. However, the truthful reason for the discharge may not be substantively accurate. To the extent it requires a specific explanation of the basis for the termination to be provided upon request, it may have the effect of preventing the type of miscommunications which often give rise to wrongful discharge and workplace defamation suits.

119. *Lewis*, 389 N.W.2d at 888-89. *See also* Lent v. Huntoon, 143 Vt. 539, 548-49, 470 A.2d 1162, 1169 (1983) (stating that this rule also applies in Vermont). *See generally* PROSSER, *supra* note 15, at § 115; RESTATEMENT (SECOND) OF TORTS §§ 595-598A (1977).

120. Crump v. P & C Food Markets, Inc., ___ Vt. ___, 576 A.2d 441, 446-47 (1990); *Huntoon*, 143 Vt. at 548-49, 470 A.2d at 1169. The Minnesota Supreme Court reasoned that this privilege was justified because "statements made in particular contexts or on certain

In this context, Vermont recognizes a specific qualified privilege for intra-corporate communications.[121] Minnesota specifically provides, relative to employment recommendations, "a qualified privilege between former and prospective employers as long as the statements are made in good faith and for a legitimate purpose."[122] As a qualified privilege, though, this protection is lost if the plaintiff can show that the defendant acted with malice or somehow abused the privilege.[123]

c. Punitive Damages

In addition, the types of damages available may be limited in actions for compelled self-publication. The *Lewis* court held that punitive damages are not recoverable in actions brought under the doctrine.[124] That holding was based partly on the application of Minnesota's punitive damages statute,[125] which is essentially a codification of prior case law.[126] The court was also concerned, however, that the availability of punitive damages might encourage improper republication by the plaintiff and more importantly might discourage employers from communicating to the employee the real reason for the discharge.[127]

Unlike Minnesota, Vermont does not have a punitive damages statute. Vermont case law on the subject, however, is well developed[128] and generally leaves the award to the discretion of the

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occasions should be encouraged despite the risk that the statements might be defamatory." *Lewis*, 389 N.W.2d at 889.

121. *Crump*, ___ Vt. at ___, 576 A.2d at 446. Although the language of the opinion refers to intra-corporate communications, there is nothing in the court's rationale that apparently limits this privilege to corporate defendants. The principle would seem to be equally applicable to intra-entity communications made by partnerships, unincorporated associations, or other groups when the purpose for the communication reasonably furthers a legitimate interest.

122. Lewis v. Equitable Life Assurance Soc'y of the U.S., 389 N.W.2d 876, 889 (Minn. 1986).

123. *Crump*, ___ Vt. at ___, 576 A.2d at 446 (citing *Huntoon*, 143 Vt. at 549, 470 A.2d at 1169 (malice) and RESTATEMENT (SECOND) OF TORTS §§ 599-605A (1977) (abuse of privilege)).

124. *Lewis*, 389 N.W.2d at 891-92.

125. MINN. STAT. ANN. § 549.20 (West 1988 & Supp. 1990).

126. *Lewis*, 389 N.W.2d at 891-92.

127. *Id.* at 892.

128. *See, e.g.*, Crump v. P & C Food Markets, Inc., ___ Vt. ___, 576 A.2d 441, 449 (1990); Coty v. Ramsey Assocs., 149 Vt. 451, 464-65, 546 A.2d 196, 205-06 (1988); Crabbe v. Veve Assocs., 150 Vt. 53, 58-59, 549 A.2d 1045, 1049 (1988); Ryan v. Herald Ass'n, Inc., 152 Vt. 275, 281, 566 A.2d 1316, 1319 (1989).

jury.[129] The amount of punitive damages need not bear any particular relationship to the amount of compensatory damages.[130] Vermont permits the award to stand as long as the evidence is sufficient to support the required showing of malice.[131] The court will interfere with the jury's grant of punitive damages only if the award is "manifestly and grossly excessive."[132]

To date, at least ten jurisdictions, including Minnesota, have recognized the doctrine of compelled self-publication in defamation actions.[133] Those jurisdictions, with the exception of Georgia,[134] have expanded upon the basic common law rules, generally for reasons of fairness. As the *Lewis* court noted, "often the defamed person has no reasonable means of avoiding publication of the statement or avoiding the resulting damages . . . ."[135] The issue of compelled self-publication has not yet come before the Vermont Supreme Court.

II. Development and Status of the Employment-at-Will Doctrine

A. Historical Development

The employment-at-will doctrine is widely regarded as uniquely a creature of American law.[136] Its generally recognized or-

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129. *Crump*, ___ Vt. at ___, 576 A.2d at 449.

130. Appropriate Technology Corp. v. Palma, 146 Vt. 643, 648, 508 A.2d 724, 727 (1986).

131. *Ryan*, 152 Vt. at 281, 566 A.2d at 1319.

132. *Crump*, ___ Vt. at ___, 576 A.2d at 450; *Coty*, 149 Vt. at 466, 546 A.2d at 206.

133. *Lewis*, 389 N.W.2d at 876; McKinney v. County of Santa Clara, 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 (1980) (*see supra* text accompanying notes 109-111); Churchy v. Adolph Coors Co., 759 P.2d 1336, 1333-34 (Colo. App. 1988) (adopting the *McKinney* rule); Belcher v. Little, 315 N.W.2d 734, 737-38 (Iowa 1982) (adopting the *McKinney* rule); Polson v. Davis, 635 F. Supp 1130, 1147 (D. Kans. 1986); Heberholt v. DePaul Community Health Center, 625 S.W.2d 617, 625 (Mo. 1985); First State Bank of Corpus Christi v. Ake, 606 S.W.2d 696, 701 (Tex. Civ. App. 1980); Grist v. Upjohn Co., 16 Mich. App. 452, 168 N.W.2d 389 (Mich. Ct. App. 1969); Bretz v. Mayer, 1 Ohio Misc. 59, 203 N.E.2d 665 (Ct. Common Pleas 1963); Colonial Stores v. Barrett, 73 Ga. App. 839, 38 S.E.2d 306 (Ga. Ct. App. 1946) (exception applies where a new plaintiff would be required by regulation to disclose statement to prospective employers). Two federal courts have held to the contrary without elaboration: Carson v. Southern R.R. Co., 494 F. Supp 1104, 1112 (D.S.C. 1979) and Church of Scientology of Cal., Inc. v. Green, 354 F. Supp. 800 (S.D.N.Y. 1973).

134. *See* Colonial Stores v. Barrett, 73 Ga. 839, 38 S.E. 2d 306 (basing its holding on the application of a statute which, in effect, mandated re-publication by the plaintiff).

135. *Lewis*, 389 N.W.2d at 888.

136. *See* Feinman, *The Development of the Employment at Will Rule*, 20 Am. J. Legal Hist. 118, 118-19 (1976); Tepker, *Oklahoma's At-Will Rule: Heeding the Warnings of*

igin is an 1877 treatise by New York attorney Horace G. Wood,[137] in which Wood wrote:

> With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof . . . [I]t is an indefinite hiring and is terminable at the will of either party. . . .[138]

This represented an abrupt departure in the United States from the application of the so-called "English rule," which stated that a hiring was presumed to be for one year unless the parties agreed otherwise.[139] The English rule was ripe for abandonment in mid-nineteenth century America, at a time when freedom of contract and the value of unimpeded economic growth and expansion were emphasized.[140]

American courts were quick to embrace the new rule.[141] Beginning in 1884 with Tennessee,[142] the individual states rapidly adopted Wood's formulation, which came to be known as the "American rule."[143] By the turn of the century, the employer's right to discharge "for good cause, for no cause or even for cause morally wrong"[144] was generally regarded as absolute.[145]

The principal basis for the American rule was the notion that either party to an employment contract of unspecified duration was equally free to terminate the relationship at any time and for

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America's Evolving Employment Law?, 39 OKLA. L. REV. 373, 379-82 (1986).

137. H. G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877).

138. *Id.* at § 135. Wood is generally regarded as having had no basis for his inflexible rule, as none of the four cases he cited supported his formulation. Nonetheless, it quickly became widely accepted by American courts.

139. Parnar v. Americana Hotels, Inc., 65 Haw. 370, 374, 652 P.2d 625, 628 (1982) (quoting 1 W. Blackstone, Commentaries, *426) ("If the hiring be general without any particular time limited, the law construes it to be a hiring for a year . . . and no master can put away his servant, or servant leave his master, after being so retained, either before or at the end of his term, without a quarter's warning; unless upon reasonable cause to be allowed by a justice of the peace: but they may part by consent, or make a special bargain.").

140. *Id.*; *see also* Feinman, *supra* note 136, at 131.

141. Payne v. Western & Atlantic R.R., 81 Tenn. 507 (1884) (overruled on other grounds in Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915)) (generally regarded as the first judicial application of the doctrine as expressed by Wood); *see also* Martin v. New York Life Insurance Co., 148 N.Y. 117, 42 N.E. 416 (1895); *Parnar*, 65 Haw. at 375, 652 P.2d at 628.

142. *Payne*, 81 Tenn. at 519-20.

143. *Parnar*, 65 Haw. at 375, 652 P.2d at 628 (supporting authorities cited therein).

144. *Payne*, 81 Tenn. at 519-20.

145. *Parnar*, 65 Haw. at 375, 652 P.2d at 628.

any reason. This reliance on the idea of mutuality originally was embraced by courts and commentators.[146] By the middle of the twentieth century, however, the fiction of equal bargaining strength between employer and employee gave way to a recognition that in most circumstances workers were disadvantaged by strict application of the rule.[147]

B. Erosion of the Strict Concept of Employment-at-Will

Since the New Deal era of the 1930's,[148] the trend in many courts, Congress, and the states has been to limit application of the harsh rule in order to afford some degree of relief to wrongfully discharged workers.[149] Legislative restrictions and judicial adoption of both tort and contract causes of action for wrongful discharge limit an employer's ability to terminate employees-at-will.

1. Statutory Exceptions

Congress and the various state legislatures have enacted statutes that restrict the right of an employer to terminate employees. At the federal level, these restrictions prohibit employers from discharging employees because of their service on grand or petit juries,[150] age,[151] participation in union activity,[152] exercise of rights under federal workplace safety legislation,[153] and race, color, religion, gender or national origin,[154] and when the employer tries to prevent pension rights from vesting.[155]

Vermont, like many other states, has adopted a series of statutory provisions which preclude or restrict an employer's right to

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146. *See* Tepker, *supra* note 136, at 387 (citing Casebeer, *Teaching an Old Dog Old Tricks: Coppage v. Kansas and At-Will Employment Revisited*, 6 CARDOZO L. REV. 765, 771 n.23 (1985)).

147. *See* Comment, *Brockmeyer v. Dun & Bradstreet: The Narrow Public Policy Exception to the Terminable-At-Will Rule*, 38 U. MIAMI L. REV. 565, 569 (1984) [hereinafter *The Narrow Public Policy Exception*].

148. Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 567, 335 N.W.2d 834, 837 (1983).

149. *See id.* at 568, 335 N.W.2d at 837-38.

150. The Judiciary and Judicial Procedure Act § 6(a)(1), 28 U.S.C. § 1875 (1988).

151. The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (1988).

152. The National Labor Relations Act of 1935, 29 U.S.C. §§ 157, 158(a)(3) (1988).

153. The Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1988).

154. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1988).

155. The Employment Retirement Income Security Act of 1974, §§ 510, 511, 29 U.S.C. §§ 1140, 1141 (1988).

discharge an at-will employee.[156] In Vermont, employees may not be discharged for absence due to military service,[157] for jury duty,[158] for appearing as a subpoenaed witness in a judicial proceeding,[159] for legislative service,[160] for properly refusing to submit to drug testing[161] or a polygraph test,[162] for exercising maternity leave rights,[163] for asserting a workers compensation claim,[164] or due to the imposition of a wage assignment for child support payments.[165] In addition, the Vermont Fair Employment Practices Act generally prohibits the dismissal of workers based on race, color, religion, ancestry, national origin, sex, place of birth, age, or a non-limiting handicap.[166] These provisions notwithstanding, however, the Act states that it is not intended to "limit the rights of employers to discharge employees for good cause shown."[167]

2. *Judicially Created Exceptions*

Though once reluctant, courts have begun to go beyond specific statutory restrictions on employee discharges and have developed a number of exceptions to the employment-at-will doctrine.[168] Depending upon the source of protection and on the remedy provided, these exceptions can be characterized generally as based in either tort or contract.

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156. As used herein, the term "at-will employee" means a private sector worker who is not covered by a union contract or any other specific agreement which specifies the term of employment and/or the standards for discharge from employment.

157. VT. STAT. ANN. tit. 21, §§ 491, 493 (1987).

158. *Id.* tit. 21, § 499(a).

159. *Id.* tit. 21, § 499(b).

160. *Id.* tit. 21, § 496.

161. VT. STAT. ANN. tit. 21, §§ 511-520 (1987).

162. *Id.* tit. 21, §§ 494-494e.

163. *Id.* tit. 21, §§ 471-474 (1987 & Supp. 1990).

164. *Id.* tit. 21, § 710(b) (1987).

165. VT. STAT. ANN. tit. 15, § 790 (Supp. 1990).

166. *Id.* tit. 21, §§ 495-495g (1987). Because of the provisions of these statutory sections, Vermont is a deferral state within the meaning of the Federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1987) and also within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17. With deferral states, federal enforcement of these federal statutes must defer to the appropriate state agencies for specific periods of time in order to permit the state to initiate enforcement proceedings. *See* Galvin v. State, 598 F. Supp. 144 (D. Vt. 1984); Valente v. Moore Business Forms, Inc., 596 F. Supp. 1280 (D. Vt. 1984).

167. VT. STAT. ANN. tit. 21, § 495(b) (1987).

168. Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 376, 710 P.2d 1025, 1031 (1985).

a. Contract

The contract basis for a wrongful discharge claim usually takes one of two forms. The first contractual exception to the doctrine is an action for breach of an implied contract or contract provision.[169] A common example of this type of claim is one in which the employee can establish that statements in an employee handbook or other expressions of the terms of the employment create a contract right.[170] Such rights may be created by the promise of continued employment, posted safety policies, employee performance review procedures, or even an established course of conduct in dealing with workers or workplace matters.

A second contract exception created by the courts is an implied duty to terminate an employee only in good faith.[171] In jurisdictions which have adopted this exception, an employer may be liable upon a showing that a termination was motivated by bad faith or malice.[172] This arguably provides the broadest range of protection to employees and the greatest potential liability to employers.[173] The exception is founded upon the idea that an element of good faith and fair dealing is imposed by the law in every contractual relationship.[174] The availability of contract-based actions

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169. *See* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1820-21 (1980) [hereinafter *Protecting At Will Employees*]. *See also* Rowe v. Noren Pattern & Foundry Co., 91 Mich. App. 254, 283 N.W.2d 713 (1979) (employee reliance on assurance of job security as inducement to leave employ of defendant's competitor).

170. Sherman v. Rutland Hosp., Inc., 146 Vt. 204, 207, 500 A.2d 230, 232-33 (1985); Benoir v. Ethan Allen, Inc., 147 Vt. 268, 270, 514 A.2d 716, 718 (1986).

171. Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (discharge of an employee for refusing to date her foreman violated the requirement of good faith and fair dealing which is implied in every contract). *See also* Fortune v. National Cash Register Co., 373 Mass. 961, 364 N.E.2d 1251, 1256 (1977); Satink v. National Life Ins. Co., Docket No. S462-86 WnC, Washington (Vermont) Superior Court, Opinion and Order dated November 3, 1987 (unpublished opinion).

172. *See, e.g.*, Olsen, *Wrongful Discharge Claims Raised By At Will Employees: A New Legal Concern for Employers*, 32 LAB. L.J. 265, 268 (1981). *See also Monge*, 114 N.H. at 133, 316 A.2d at 551.

173. *See* McOmber, *Emerging Issues in Employment Law: The Debate Shifts to the States*, 4 COOLEY L. REV. 329, 335 (1987).

174. *See generally* J. CALAMARI & J. PERILLO, CONTRACTS § 11-38 (3rd ed. 1987). One important consideration in an action for breach of an implied covenant of good faith is whether, in fact, the action sounds in contract or if it more properly is one sounding in tort. If the case is governed by contract rules, damages are necessarily limited to the traditional contract remedies. On the other hand, if the breach triggers tort liability, the employer could be liable for the full range of damages available in tort actions. McOmber, *supra* note 173, at 335.

for wrongful discharge has received significant attention by Vermont courts lately,[175] but is outside of the scope of this article.

b. Tort: The Public Policy Exception

Perhaps the most dynamic area of employment law, and currently one of the most important, is the emergence of a tort action based upon the discharge of an employee in violation of an expressed public policy.[176] This claim permits recovery in tort upon a finding that the employer's conduct undermined an important public interest.[177] The public policy exception to the employment-at-will doctrine began with a narrow rule which permitted discharged employees to sue their employers where a statute expressly prohibited their dismissal.[178] This basic formulation then was expanded to include any discharge in violation of a "statutory expression of public policy."[179]

The seminal case in the development of the public policy exception is *Petermann v. International Brotherhood of Teamsters Local 396*.[180] In *Petermann*, the plaintiff alleged that he was discharged for refusing to commit perjury before a legislative committee.[181] The court held that the state's public policy, embodied in the California Penal Code, would be offended if an employee could be discharged for refusing to commit a criminal act.[182]

The courts then expanded the doctrine by permitting wrongful discharge claims based on violations of public policy which were derived from sources other than specific statutory provisions. The Oregon Supreme Court found that discharging an employee for absence for jury duty violated that state's public policy, even though no statute expressly prohibited a dismissal for that reason.[183] In

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175. *See, e.g.*, Larose v. Agway, Inc., 147 Vt. 1, 508 A.2d 1364 (1987); *Sherman*, 146 Vt. 204, 500 A.2d 230; Soucy v. Soucy Motors, Inc., 143 Vt. 615, 471 A.2d 224 (1983) (overruling Brower v. Holmes Transp., Inc., 140 Vt. 114, 435 A.2d 952 (1981)).

176. *See generally* Kroeger, *Welcome to the Big World: The Emerging Tort of The Public Policy Exception to Employment At Will and Its Chaotic Encounter with Conflict of Laws*, 1989 U. ILL. L. REV. 795; McOmber, *supra* note 173, at 332, 342-45.

177. *Wagenseller*, 47 Ariz. at 376, 710 P.2d at 1031.

178. *Id.* (citing Kouff v. Bethlehem-Alameda Shipyard, 90 Cal. App. 2d 322, 202 P.2d 1059 (1949) (statute prohibiting discharge for serving as an election officer)).

179. *Id.*

180. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

181. *Id.* at 187, 344 P.2d at 26.

182. *Id.* at 189, 344 P.2d at 27.

183. Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

perhaps the broadest identification of a public policy, the New Hampshire Supreme Court held that an employee who was discharged for refusing to date her supervisor had a claim for wrongful discharge.[184] Although a contract remedy was provided, the court held that a discharge "motivated by bad faith or malice or based on retaliation is not [in] the best interest of the economic system or the public good . . . ."[185]

c. Determining Public Policy

As the public policy exception has developed, courts have grappled with two fundamental issues: the definition of public policy and the identification of legitimate sources of that policy. The classic definition of public policy originated in the English case of *Egerton v. Earl Browlow* in 1853.[186] In *Egerton*, Lord Truro wrote that

> [p]ublic policy . . . is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.[187]

Lord Truro's effort notwithstanding, formulating a workable definition of public policy has proven difficult. The *Petermann* court offered a definition of public policy that has been widely accepted. The court stated that public policy may include "that which has a tendency to be injurious to the public or against the public good"[188] and "whatever contravenes good morals or any established interests of society."[189]

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184. Monge v. Beebe Rubber Co., 114 N.H. 130, 133, 316 A.2d 549, 551 (1974).

185. *Id.* at 133, 316 A.2d at 551. *Monge* is widely regarded as the most expansive application of this cause of action. The scope of *Monge* was later restricted by the New Hampshire Supreme Court in Howard v. Dorr Woolen Co., 120 N.H. 295, 414 A.2d 1273 (1980), where the court held that the *Monge* doctrine applied "only to a situation where an employee is discharged because he performed an act that public policy would encourage, or refused to do that which public policy would condemn." *Howard*, 120 N.H. at 297, 414 A.2d at 1274.

186. 4 H.L. Cas. 1 (1853).

187. *Id.* at 196.

188. Petermann v. International Brotherhood of Teamsters Local 396, 174 Cal. App. 2d 184, 188, 344 P.2d 25, 27 (1959) (quoting Safeway Stores v. Retail Clerks Int'l Ass'n, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953) (emphasis added by the *Petermann* court deleted)).

189. *Id.*

This is obviously an open-ended formulation which offers little specific guidance. Courts consistently have recognized the difficulty inherent in attempting to craft an encompassing definition. They have focused, therefore, on identifying, rather than affirmatively defining, public policy. For instance, the Illinois Supreme Court wrote

> [t]here is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively . . . . Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed.[190]

Perhaps the most comprehensive definition of public policy recognized the elusive relationship between defining that policy and identifying its sources. In 1916, the Ohio Supreme Court, in *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney*,[191] stated:

> In substance, [public policy] may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.
>
> Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people — in their clear consciousness and conviction of what is naturally and inherently just and right between man and man. It regards the primary principles of equity and justice and is sometimes expressed under the title of social and industrial justice, as it is conceived by our body politic. When a course of conduct is cruel or shocking to the average man's conception of justice, such course of conduct must be held to be obviously contrary to public policy, though

190. Palmateer v. International Harvester Co., 85 Ill.2d 124, 130, 421 N.E.2d 876, 878-79 (1981).

191. 95 Ohio St. 64, 115 N.E. 505 (1916).

> such policy has never been so written in the bond, whether it be Constitution, statute, or decree of court. It has frequently been said that such public policy, is a composite of constitutional provisions, statutes, and judicial decisions, and some courts have gone so far as to hold that it is limited to these. The obvious fallacy of such a conclusion is quite apparent from the most superficial examination. When a contract is contrary to some provision of the Constitution, we say it is prohibited by the Constitution, not by public policy. When a contract is contrary to a statute, we say it is prohibited by a statute, not by a public policy. When a contract is contrary to a settled line of judicial decisions, we say it is prohibited by the law of the land, but we do not say it is contrary to public policy. Public policy is the cornerstone — the foundation — of all Constitutions, statutes, and judicial decisions; and its latitude and longitude, its height and its depth, greater than any or all of them. If this be not true, whence came the first judicial decision on matter of public policy? There was no precedent for it, else it would not have been the first.[192]

The search for a definition of public policy, therefore, has included a search for its sources. The permissible bases from which public policy may be discerned vary among jurisdictions. The most restrictive inquiry is one in which a court limits itself to consideration of specific legislative pronouncements.[193] More commonly, courts will recognize not only statutes but also constitutions and prior judicial decisions as legitimate expressions of public interests.[194] Courts in other jurisdictions have widened the inquiry further by holding that public policy may be discerned from administrative regulations and executive orders,[195] or even in codes of professional ethics.[196]

In establishing the parameters of what constitutes public policy, courts have necessarily drawn a line between public and private interests and have carefully excluded the latter from the definition. In the context of the employment-at-will doctrine, the

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192. *Id.* at 68-69, 115 N.E. at 507.

193. *See, e.g.*, Martin v. Platt, 179 Ind. App. 688, 691-93, 386 N.E.2d 1026, 1028 (1979).

194. *See, e.g.*, Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 378-79, 710 P.2d 1025, 1033-34 (1985).

195. Kovalesky v. A.M.C. Associated Merchandizing Corp., 551 F. Supp. 544, 547-48 (S.D.N.Y. 1982).

196. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 71-72, 417 A.2d 505, 512 (1980) (holding that discharge of a physician for refusal to violate the precepts of her Hippocratic oath may be actionable).

Arizona Supreme Court noted that not all expressions of policy are sufficiently public to create an exception to the doctrine.[197] "Only those which have a singular *public* purpose will have such force."[198]

C. *Public Policy Exceptions to the Employment-at-Will Doctrine in Vermont*

Prior to 1986, the Vermont Supreme Court followed the traditional view of the employment-at-will rule which left unrestricted the employer's right to discharge employees absent a specific prohibition. The rigid application of the rule in Vermont stemmed from the 1923 case of *Mullaney v. C.H. Goss Co.*[199] In *Mullaney*, the court affirmed the American tenet that a contract for employment for an indeterminate period of time may be terminated by either party at any time.[200] *Mullaney* was followed in 1979 in *Jones v. Keogh*[201] and in 1981 in *Brower v. Holmes Transportation, Inc.*[202]

In *Keogh* and in *Brower*, the court indicated that the creation of a public policy exception to the employment-at-will doctrine was properly a legislative rather than a judicial concern.[203] *Keogh* is particularly noteworthy, however, for its recognition of the principal that public policy exceptions to the employment-at-will doctrine may exist. The *Keogh* court held that absent a "*clear and compelling* public policy against the reason advanced for the discharge,"[204] it was unwilling to recognize a cause of action for the dismissed employee.[205]

The American rule was applied consistently in 1985 in *Sherman v. Rutland Hospital, Inc.*,[206] and again the next year in *Larose v. Agway*[207] and *Benoir v. Ethan Allen, Inc.*[208] In these cases,

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197. *Wagenseller*, 147 Ariz. at 379, 710 P.2d at 1034.
198. *Id.*
199. Mulanney v. C.H. Goss Co., 97 Vt. 82, 122 A. 430 (1923).
200. *Id.* at 87, 122 A. at 432.
201. Jones v. Keogh, 137 Vt. 562, 409 A.2d 581 (1979).
202. Brower v. Holmes Transp., Inc., 140 Vt. 114, 116-17, 435 A.2d 952, 953-54 (1981), *rev'd on other grounds*, Soucy v. Soucy Motors, Inc., 143 Vt. 615, 471 A.2d 224 (1983).
203. *Keogh*, 137 Vt. at 564, 409 A.2d at 582; *Brower*, 140 Vt. at 117, 435 A.2d at 954.
204. *Keogh*, 137 Vt. at 564, 409 A.2d at 582 (emphasis in original).
205. *Id.*
206. Sherman v. Rutland Hospital, Inc., 146 Vt. 204, 207, 500 A.2d 230, 232 (1985).
207. Larose v. Agway, Inc., 147 Vt. 1, 3, 508 A.2d 1364, 1365-66 (1986).
208. Benoir v. Ethan Allen, Inc., 147 Vt. 268, 270, 514 A.2d 716, 717-18 (1986).

however, the Vermont Supreme Court began to temper its strict adherence to the old rule by carving out contract-based exceptions, though no formal employment agreements were present.[209]

The 1986 case, *Payne v. Rozendaal*,[210] offered the court an opportunity to re-examine its acceptance of the employment-at-will doctrine. *Payne* was an age discrimination case which was tried before Vermont enacted its statutory prohibition on age-based employment termination.[211] In the majority opinion, Justice William Hill first noted that "[a]lthough the parties to an at-will employment contract have substantial leeway in terminating their contract, such rights are not absolute."[212] The opinion then acknowledged the range of exceptions to the doctrine based on various sources of public policy which had been embraced in other jurisdictions.[213]

The court also considered whether the *subsequent* legislative enactment of a restriction on age-based employment discrimination effectively precluded the plaintiffs' claims. The defendants argued that because no statutory prohibition existed at the time of the discharge, there was no public policy to violate and therefore no cause of action. The majority, in rejecting this argument, held that subsequently enacted age discrimination legislation did not prevent the court from determining that a public policy predated the statute and that the plaintiffs' discharges violated that policy.[214]

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209. In *Sherman*, the Vermont Supreme Court set out the basic rule that an employer and employee may contractually bind themselves to certain termination procedures even in the absence of an employment agreement for a fixed term. Sherman v. Rutland Hospital, Inc., 146 Vt. 204, 207, 500 A.2d 230, 232, (1985). The court, however, held that, in order to create such a binding contractual provision, the parties must bargain for and agree to be bound by the termination provisions set forth in an employment manual, "even though those provisions may not be binding against the employer as to any other employee." *Id.* at 208, 500 A.2d at 232. By imposing this bargaining requirement, the court sought to eliminate the mutuality of obligation problems involved in *Keogh* and in the *Rozendaal* dissent. As a practical matter, employees rarely actually "bargain for and agree to be bound by" the termination policies and procedures in such handbooks. Most often, employees who are presented with policies and procedures in such handbooks understand them to be controlling on both employer and employee. *See* Aiello v. United Air Lines, Inc., 818 F.2d 1196 (5th Cir. 1987) (statement in employment regulations that the regulations did not constitute contractual rights held not controlling).

210. Payne v. Rozendaal, 147 Vt. 488, 520 A.2d 586 (1986).

211. VT. STAT. ANN. tit. 21, § 495 (1987); *Rozendaal*, 147 Vt. at 492, 520 A.2d at 588.

212. *Rozendaal*, 147 Vt. at 491; 520 A.2d at 588.

213. *Id.* at 491-92, 520 A.2d at 588.

214. Payne v. Rozendaal, 147 Vt. 488, 492-94, 520 A.2d 586, 588-89 (1986). However, Justice Louis P. Peck, in dissent, argued that the absence from the statute of age as a basis

The court specifically adopted the Ohio Supreme Court's expansive definition of public policy from *Kinney*.[215] By doing so, the Vermont court necessarily rejected the premise that "public policy exceptions to at-will employment contracts must be legislatively defined."[216] Such statutory pronouncements are, in the court's view, "separate from any public policy exception,"[217] and therefore "the *later* passage of such a statute [does not] preempt a common law cause of action."[218]

Justice Hill acknowledged that in order to support an exception to the employment-at-will doctrine, the public policy must be both clearly expressed and compelling in nature.[219] The majority had no difficulty in identifying such an expression of policy regarding age, finding that "discharge of an employee solely on the basis of age is a practice so contrary to our society's concern for providing equity and justice that there is a *clear and compelling* public policy against it."[220] The opinion distinguished this case from employment cases involving "private concerns for which courts have generally held no public policy exists."[221] The court specifically restated the *Keogh* position that "[w]hile full employment and employer-employee harmony are noble goals to which society aspires, they alone do not present the clear and compelling public policies upon which courts have been willing to rely . . . ."[222]

To find the clear and compelling public policy necessary for judicial cognizance, the Vermont Supreme Court looked at federal[223] and state[224] legislation, and to a 1975 gubernatorial procla-

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for a discrimination claim at the time of the plaintiffs' discharge should preclude retroactive recognition of the claim. *Id.* at 499-502, 520 A.2d at 592-94. He urged that the statutory listing of the prohibited employment practices is *inclusive* in nature, specifically defining what constitutes actionable discrimination. In Justice Peck's view, therefore, "the long established and applied maxim of *inclusio unius est exclusio alterius*" (the inclusion of one thing implies the exclusion of all others) excludes age from consideration by the court as prohibited discrimination. *Id.* at 500, 520 A.2d at 593.

215. *Id.* at 492-93, 520 A.2d at 588-89. *See supra* note 192 and accompanying text.

216. *Id.* at 493, 520 A.2d at 489.

217. *Id.*

218. Payne v. Rozendaal, 147 Vt. 488, 493-94, 520 A.2d 586, 589 (1986) (emphasis in original).

219. *Id.* at 491, 520 A.2d at 589.

220. *Id.* at 494, 520 A.2d at 589 (emphasis added).

221. *Id.* at 494-95, 520 A.2d at 589-90.

222. Payne v. Rozendaal, 147 Vt. 488, 494, 520 A.2d 586, 589 (1986) (quoting Jones v. Keogh, 137 Vt. 562, 564, 409 A.2d 581, 582 (1979)).

223. 29 U.S.C. § 623 (1988).

224. VT. STAT. ANN. tit 21, § 495 (1987).

mation.[225] Under these circumstances, Justice Hill found that, if the court failed to acknowledge a common law cause of action, it would be "shirk[ing] . . . [its] responsibility to recognize and act upon societal changes as they affect and help develop the law of this state as interpreted by its courts."[226]

Whether the evidence of a Vermont public policy against age discrimination actually rose to the level of a clear and compelling standard is open to question. Subsequent legislation and a gubernatorial proclamation are not weighty sources of public policy. By extending the inquiry to these materials, especially a pronouncement by a governor, the court has indicated its willingness to consider a wide variety of bases for the identification of protectable interests in employment discharge cases.

III. A State Constitutional Basis for Workplace Defamation Actions in Vermont

A. The Emergence of State Constitutional Jurisprudence

In the 1970's, courts throughout the United States began to develop bodies of law based upon their individual states' constitutions.[227] According to one study, between 1970 and 1985 more than 250 cases were reported in which state appellate courts found the scope of individual rights under their state constitutions to be broader than comparable rights under the United States Constitution.[228] These courts, and those that follow their lead, have taken to heart Justice William Brennan's strong admonition that guaranteeing Americans the full range of constitutional protections to which they are entitled requires analysis and application of state constitutional provisions. In Justice Brennan's words,

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225. Payne v. Rozendaal, 147 Vt. 488, 495, 520 A.2d 586, 589 (1986) (designation by Gov. Thomas Salmon of "Older Worker Week," in which Gov. Salmon stated that "the State of Vermont has initiated efforts to hasten elimination of an unrealistic bias against older workers").

226. *Id.* at 495, 520 A.2d at 590.

227. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978); *Developments in the Law — The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324 (1982) [hereinafter *Developments in the Law*]; Abrahamson, *The Reincarnation of State Courts*, 36 Sw. L.J. 951 (1982).

228. State v. Jewett, 146 Vt. 221, 222, n.1, 500 A.2d 233, 234, n.1 (1985) (citing Collins, *Reliance on State Constitutions*, in Developments in State Constitutional Law 2 (B. McGraw ed. 1985)).

> state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law - for without it, the full realization of our liberties cannot be guaranteed.[229]

In the early 1980's, the Vermont Supreme Court began to demonstrate a willingness, if not an eagerness, to decide cases by reference to the Vermont Constitution.[230]

This inclination to develop a body of Vermont constitutional law reached, by jurisprudential standards, a fever pitch in 1985. In *State v. Jewett*,[231] Justice Thomas B. Hayes eloquently decried the dearth of state constitutional law, lamenting that "[a]ll too often legal argument consists of a litany of federal buzz words memorized like baseball cards."[232] Justice Hayes advised both bench and bar to argue, develop, and apply the precepts of the state constitution aggressively and creatively.[233]

Acknowledging the limited extent to which state constitutional jurisprudence had been developed, Justice Hayes offered specific guidance on how to implement the *Jewett* marching orders. The first approach he suggested was the "use of fundamentally historical materials,"[234] including arguments based upon legislative history,[235] or "on the social and political setting in which [a constitutional provision] originated, or on the fate of the [provision] in subsequent constitutions."[236]

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229. Brennan, *supra* note 227, at 491.

230. *See, e.g.*, Beauregard v. City of St. Albans, 141 Vt. 624, 450 A.2d 1148 (1982) (religious discrimination); State v. Badger, 141 Vt. 430, 450 A.2d 336 (1982) (admissability of evidence in a criminal case); *In re* E.T.C., 141 Vt. 375, 449 A.2d 937 (1982) (right of a juvenile to adequate legal representation); State v. Ludlow Supermarkets, Inc., 141 Vt. 261, 449 A.2d 791 (1982) (Sunday closing laws). *See also* Watkin, *Vermont Court Drawing a Line Around Rights*, The Sunday Rutland Herald, Nov. 13, 1983, at 1 col. 1.

231. 146 Vt. 221, 500 A.2d 233 (1985).

232. State v. Jewett, 146 Vt. 221, 223, 500 A.2d 233, 235 (1985). He noted that as of the date of the opinion, only about a dozen law schools offered courses in state constitutional law. *Id.* at 224, 500 A.2d at 235.

233. *Id.* at 229, 500 A.2d at 238.

234. *Id.* at 225, 500 A.2d at 236.

235. State v. Jewett, 146 Vt. 221, 226, 500 A.2d 233, 236 (1985).

236. *Id.* (quoting Linde, *E Pluribus — Constitutional Theory and State Courts*, in DE-

Further, Justice Hayes urged a plain language application of the contents of the state charter, noting that a straightforward "textual approach to state constitutional law needs little explanation."[237] He urged attorneys to look to sibling states to observe how other jurisdictions have interpreted identical or similar provisions.[238] And, referring to the Brandeis brief, he welcomed the use of economic and sociological materials in appellate arguments. This technique offers the reviewing court a substantial volume of comparative and supportive material that is not necessarily jurisprudential.[239] Finally, Justice Hayes directed readers' attention to Philip Bobbitt's discussion of six types of constitutional argument,[240] the study of which "would be of great help to the advocate who approaches for the first time the task of briefing a state constitutional question."[241]

The reliance on state constitutional doctrine is not based solely on a desire to strike an independent posture, nor is it intended to fabricate opportunities to circumvent federal constitutional jurisprudence. Instead, the focus on state constitutions was catalyzed by the belated recognition that state constitutions, including Vermont's, are not identical to their federal counterpart,[242] and are not "mere reflection[s] of the federal charter."[243] As Justice Hill, another proponent of reliance on state constitutional law,[244] wrote,

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VELOPMENTS IN STATE CONSTITUTIONAL LAW 279, 285 (B. McGraw ed. 1985)).

237. *Jewett*, 146 Vt. at 226, 500 A.2d at 236.

238. *Id.* at 227, 500 A.2d at 237.

239. State v. Jewett, 146 Vt. 221, 227, 500 A.2d 233, 237 (1985). The concept of the "Brandeis brief" originated in Muller v. Oregon, 208 U.S. 412 (1908) in which then-attorney (and later U.S. Supreme Court Justice) Louis D. Brandeis submitted a brief in which he "assembled a list of similar state and foreign statutes, 'extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women,' and 'extracts from similar reports discussing the general benefits of short hours from an economic aspect of the question,' all supporting the contention that the statute at issue bore a reasonable relationship to the public health and safety, concededly legitimate exercises of the police power." *Jewett*, 146 Vt. at 227, 500 A.2d at 237 (citing *Muller*, 208 U.S. at 419-20 n.1).

240. *Jewett*, 146 Vt. at 227, 500 A.2d at 237. Bobbitt's six types of argument, as summarized by Justice Hayes, included historical, textual, doctrinal, prudential, structural and ethical bases. P. BOBBITT, CONSTITUTIONAL FATE - THEORY OF THE CONSTITUTION (1982).

241. *Jewett*, 146 Vt. at 227, 500 A.2d at 237.

242. State v. Badger, 141 Vt. 430, 448, 450 A.2d 336, 347 (1982).

243. *Id.*

244. Hayes, *Clio in the Courtroom*, 56 VERMONT HISTORY 147, 148 (Summer 1988). Justice Hill authored the opinion in *State v. Badger*, which is generally viewed, along with

> [w]e have never intimated that the meaning of the Vermont Constitution is identical to the federal document. Indeed, we have at times interpreted our constitution as protecting rights which were explicitly excluded from federal protection. We are free, of course, to provide more generous protection to rights under the Vermont Constitution than afforded by the federal charter. Thus, the Vermont Constitution provides an independent authority which, on the facts of this case, is of equal importance with the federal charter.[245]

In Justice Hill's view, Vermont courts owe a special allegiance to the state constitution. Justice Hill noted that the "Vermont Constitution is the fundamental charter of our state, and it is this [c]ourt's duty to enforce [it]. . . . It is an independent authority, and Vermont's fundamental law."[246]

The relationship between state and federal constitutional law presents, in Justice Hill's view, a potential for friction between state and federal courts. When applying federal law, a state supreme court is "no more than an intermediate court."[247] However, when it decides an issue utilizing "an adequate and independent state ground,"[248] a state supreme court generally has the last word because federal review is necessarily limited to ascertaining whether the state law violates federal law.[249] Due to the independence of state constitutions, a number of state supreme courts, after federal reversal, have "belatedly" discovered adequate state bases for circumventing the holdings of the United States Supreme Court.[250] The highest federal court "should not be so vulnerable to collateral attack,"[251] according to Justice Hill. Therefore, "[f]ullfillment of . . . [the Vermont Supreme Court's] responsibilities as a member of the federalist system *requires* it to consider the availability of state grounds *before* federal appeal."[252]

Nonetheless, the heightened interest in state constitutional law is based partly upon the desire of state courts to achieve re-

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Jewett, as one of the leading Vermont opinions on the significance of the state constitution.

245. *Badger*, 141 Vt. at 449, 450 A.2d at 347.

246. *Id.* at 448-49, 450 A.2d at 347.

247. *Id.* at 448, 450 A.2d at 346.

248. State v. Badger, 141 Vt. 430, 448, 450 A.2d 336, 346 (1982).

249. *Id. See also* Brennan, *supra* note 227, at 501.

250. *Badger*, 141 Vt. at 448, 450 A.2d at 346 (citing *Developments in the Law*, *supra* note 227, at 1389-90).

251. *Badger*, 141 Vt. at 448, 450 A.2d at 347.

252. State v. Badger, 141 Vt. 430, 448, 450 A.2d 336, 347 (1982) (emphasis added).

sults not possible under current federal doctrine. In a speech to the Vermont Historical Society in 1986, Justice Hayes candidly acknowledged that the Vermont Supreme Court's concern with developing state constitutional jurisprudence came about, at least in part, because "[a]fter 1972, we had seen a whittling away of the federal protection afforded the accused in criminal cases."[253] He spoke approvingly of other state courts which have extended to criminal suspects additional protections regarding the scope of permissible searches and the use of statements taken in violation of *Miranda* rights to impeach a criminal defendant on the witness stand.[254]

Justice Hayes also was an advocate for the principled extension of state constitutional law in civil cases involving individual rights.[255] He applauded, for example, courts in New Jersey and California which applied the free speech guarantees in their states' charters to protect political leafletting in shopping centers, although the United States Supreme Court had held that no such protection existed under the First Amendment.[256] Such state constitutional provisions are, in Justice Hayes' words, "fountainheads that provide new causes of action and new defenses for civil litigants."[257]

Even during this heady period of expanding state constitutional lawmaking, the Vermont Supreme Court was not without a voice calling for caution and reserve. Throughout the 1980's, Justice Louis P. Peck, whose passion and eloquence matched that of Justice Hayes, advised against what he feared was the "narcotic" of judicial activism.[258] Justice Peck often expressed his view that undue judicial activism creates the danger of improper intrusion into that area of lawmaking which is traditionally (and constitu-

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253. Hayes, *supra* note 244, at 149.

254. *Id.* at 151.

255. *See generally* Hand, *The Intellectual Legacy of Justice Thomas Hayes*, 56 VERMONT HISTORY 141 (Summer 1988).

256. Hayes, *supra* note 244, at 151.

257. *Id.*

258. Interview with Louis P. Peck, Associate Justice of the Vermont Supreme Court (Oct. 18, 1984). *See also* State v. Rusin, 153 Vt. 36, 568 A.2d 403 (1989) (Justice Peck's opinion also expressing this concern). Although he was not addressing a state constitutional issue in *Rusin*, Justice Peck criticized the majority for indulging in "out-and-out word games and bald speculation to which appellate courts all too often resort when that is the only route to a desired result." *Id.* at 41-42, 568 A.2d at 407 (Peck, J., concurring in part and dissenting in part).

tionally) left to the legislature. His ringing dissent in *Payne*[259] is an articulate commentary on the dangers of usurpation by the courts of the legislative function.[260] From Justice Peck's perspective, when courts take too much initiative, especially in addressing social issues, the result may be a body of law which is "all sail and no anchor."[261]

B. A Historical Perspective: State Constitutional Protection of Reputation

Justice Peck's reservations notwithstanding, *Jewett*'s call to arms remains the law of the land in Vermont. Following *Jewett*, references to the state constitution began to appear regularly in Vermont Supreme Court decisions, although they are less numerous than one might expect.[262] The Vermont court has invoked the state charter in a broad range of cases, but the court has applied it only once in a defamation case, which predated *Jewett*.[263] Even taking into account the relative infancy of state constitutional jurisprudence, this virtual omission in such cases is surprising.

1. Article Four: Express Constitutional Protection of Reputation

Thirty-one state constitutions, including Vermont's, grant a right to redress, at law, for harm or wrong done to the character or reputations of their citizens.[264] The guarantee of the Vermont Con-

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259. *See supra* notes 210-226 and accompanying text.

260. Justice Peck's dissent in *Payne* illustrates well his concerns about judicial legislating and the respective roles of the court and the legislature in fashioning state law. Payne v. Rozendaal, 147 Vt. 488, 496-505, 520 A.2d 586, 591-96 (1986).

261. Interview with Justice Peck, *supra* note 258.

262. *See, e.g.*, State v. Sequin, 153 Vt. 128, 569 A.2d 475 (1989) (waiver of jury trial in criminal case decided by reference to Vermont Constitution); State v. Coita, 153 Vt. 18, 568 A.2d 424 (1989) (same); State v. Brown, 153 Vt. 263, 571 A.2d 643 (1989) (court declined to rule on defendant's claim of right to counsel under state constitutional provision); Choquette v. Perrault, 153 Vt. 45, 569 A.2d 455 (1989) (question of whether a state law requiring maintenance of boundary fence violated state constitution); State v. Saari, 152 Vt. 510, 568 A.2d 344 (1989) (constitutionality of statutory minimum criminal sentences); Dingemans v. Board of Bar Examiners, 152 Vt. 494, 568 A.2d 354 (1989) (claim of violation of Common Benefit Clause, ch. I, art. 7, and claim of violation of ch. II, § 66 of Vermont Constitution not reached); *In re* Club 107, 152 Vt. 320, 566 A.2d 966 (1989) (applicability of state constitutional guarantee of free speech as challenge to regulation of Liquor Control Board regarding "obscene, lewd, or indecent entertainment").

263. *See infra* note 281 and accompanying text.

264. ALA. CONST. art. I, § 13; ARK. CONST. art. II, § 13; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12;

stitution is typical of many state constitutions. It provides that

> [e]very person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property *or character*; he ought to obtain right and justice, freely, and without being obliged to purchase it; completely and without any denial; promptly and without delay; conformably to the laws.[265]

The United States Constitution contains no comparable guarantee.

Recalling Justice Hayes' instruction to consider the textual basis for identifying state constitutional protections,[266] one can fairly interpret this language on its face as guaranteeing a judicial remedy for injury to one's "reputational interest." Even read as merely a guarantee of access to the courts, one can logically infer that the drafters of the Vermont Constitution believed that the protection of a person's character merited a special constitutional safeguard.

Until recently, conventional wisdom regarded the Vermont Constitution as essentially a carbon copy of the Pennsylvania Constitution, adopted with relatively little modification by the Windsor Convention of July, 1777.[267] Recent scholarship, however, has revealed that the two documents differ in at least twenty-seven provisions.[268] Although there is no record of the framer's deliberations,[269] it is a fair guess that careful consideration went into at least some of the changes made to the Pennsylvania template.[270]

KAN. CONST. BR, § 18; KY. CONST. BR, § 14; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MASS. CONST. DR, art. XI; MINN. CONST. art. I, § 8; MISS. CONST. art. 3, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt. I, art. 14; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; UTAH CONST. art. I, § 11; VT. CONST. ch. I, art. 4; W.VA. CONST. art. III, § 17; WIS. CONST. art. I, § 9; WYO. CONST. art. I, § 8.

265. VT. CONST. ch. 1, art. 4 (emphasis added).

266. State v. Jewett, 146 Vt. 221, 226, 500 A.2d 233, 236 (1985).

267. Shaffer, *A Comparison of the First Constitutions of Vermont and Pennsylvania*, 43 VERMONT HISTORY 33 (Winter 1975).

268. *Id.* at 35; *see also* Aichele, *Making a Vermont Constitution: 1777-1824*, 56 VERMONT HISTORY 166 (Summer 1988).

269. Aichele, *supra* note 268, at 176.

270. *Id.* As Professor Aichele noted, the Pennsylvania and Vermont documents had significantly different provisions with regard to the election of statewide officers (Pennsylvania provided for no statewide elective office, and Vermont provided for twenty-eight); "Vermont also eliminated the Pennsylvania prohibition[s] on re-election" and on holding multiple offices under the constitution simultaneously. *Id.* Of particular significance was the complete omission in the Vermont Constitution of the Pennsylvania Constitution's section on the organization of the judiciary. The Vermont Constitution was silent on the issue of "judicial

2. *The Ratification of Article Four*

Like the United States Constitution, neither the Pennsylvania Constitution of 1776 nor the Vermont Constitution of 1777 guaranteed a remedy at law for wrongs to person, property, or character. The guarantees of Article Four first appeared in the second Vermont Constitution, which was adopted in 1786.[271]

The original Vermont Constitution provided for the election of the "Council of Censors" at seven year intervals beginning in 1785.[272] This body was charged with determining whether the Constitution had been "preserved inviolate, in every part" during the preceding seven years.[273] The Council also could propose the abolition or amendment of existing constitutional provisions or propose new provisions, subject to their ratification at a constitutional convention called by the Council.[274]

In October, 1785, the Council of Censors proposed a revision, including the present Article Four, of the state's charter. Although no specific reference was made to the Article in the February, 1786, Address of the Council of Censors, the Council apparently was concerned that during the preceding septenary the Legislature had been usurping authority of the executive and judicial branches.[275] This usurpation was viewed with some indignation and alarm by the Censors. For example, in response to one legislative act restricting the authority of the courts to hear certain cases involving title to land, the Council asked rhetorically

> how courts can with propriety be called open, within the meaning of the constitution, or justice be administered

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qualifications, method of selection, composition, jurisdiction, tenure, and compensation" of judges. *Id.*

271. *See* THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS, Vol. 6, at 3737, note (b) (1906).

272. VT. CONST. ch. II, art. XLIV (1777).

273. *Id.*

274. *Id.*

275. *See Address of the Council of Censors*, February 14, 1786, reported in VERMONT STATE PAPERS 1779-1786, compiled and published by William Slade, Jr., Secretary of State (1823), at 536-40. "It is the opinion of this Council, that the General Assembly, in all the instances where they have vacated judgments, recovered in due course of law, . . . have exercised a power not delegated, nor intended to be delegated to them, by the Constitution. This mode of proceeding is an assumption of judicial power . . . ." *Id.* at 540. The Council was apparently reacting to several legislative actions involving, for instance, title to property, imposition of corporal punishment, suspension of criminal prosecutions, and satisfaction of debts. *Id.* at 538-40.

> therein impartially, without unnecessary delay, when they are disenabled to take cognizance on any matter wherein the title of land is concerned, and of any action founded upon a contract[?][276]

The ideas and some of the language of the Council's Address and Article Four are similar. That this new constitutional provision was inserted as a deliberate and reasoned response to the perceived overreaching of the Legislature, therefore, is probable.

Accepting the premise that Article Four was carefully crafted for inclusion in Vermont's second constitution, it follows that the language "person, property or character" was also selected with some degree of forethought and precision. The reference to a remedy at law for "all injuries or wrongs . . . [to] person, property or character"[277] can be viewed as a reasoned, calculated, and specific statement by the framers of the state's charter concerning the constitutional protection afforded to the reputational interests of Vermonters. Put another way, it is the constitutional expression of state *public policy* regarding those interests.

The public policy expressed in Article Four was reflected in an early Vermont Supreme Court opinion. In 1824, Justice Asa Aikens specifically referred to Article Four, stating that

> [t]his constitution is the fundamental law of the State . . . . [T]here is none so humble but that he may demand his remedy, and is entitled to it, without delay, according to the laws, of which this is the chief. For this remedy, the injured citizen is referred to the Courts of Justice. The interpretation of the laws is the proper and peculiar province of the Courts. It must therefore belong to them to ascertain the meaning of the constitution . . . .
>
> It is our *duty*, therefore, as well as our prerogative, to declare that alone to be the law, which is reconcilable with this *fundamental law* — this *fiat* of the sovereign people.[278]

Here, the Vermont Supreme Court recognized the fundamental principle that the interpretation of the will of the people, as expressed in the state constitution, was within the province of the courts.

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276. *Id.* at 536.

277. VT. CONST. ch. I, art. 4 (1786).

278. Bates v. Kimball, 2 D. Chip. 77, 80 (1824). This case represented the first occasion upon which the Vermont Supreme Court invalidated an act of the Legislature by declaring it to be unconstitutional. *See* Aichele, *supra* note 268, at 188.

3. The Relationship Between Article Four and Article Thirteen

The plain language of Article Four indicates a state public policy allowing defamation actions to be brought in Vermont courts to protect "character." This public policy prevails against a state constitutional backdrop of heightened free speech and press protection (beyond that found in the First Amendment), also evidenced in the Vermont Constitution. Article Thirteen of the Vermont Constitution augments, for Vermonters, the individual rights of free speech and press guaranteed by the First Amendment of the United States Constitution. The language of Article Thirteen states:

> [t]hat the people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained.[279]

In Vermont, individuals have a heightened protection of acceptable free speech and press concerning transactions of government, beyond that granted under the First Amendment. Although the increased protection of Article Thirteen may *limit* the success of defamation actions brought in the context of government transactions in Vermont, it does *not* preclude defamation actions generally.

Another indication of heightened state protection of free speech and press is the absence of an express provision in Article Thirteen making the speaker responsible for the abuse of the right of free speech.[280] Again, however, the absence of this language does not negate the state public policy of Article Four, which specifically recognizes defamation as a cause of action.

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279. VT. CONST. ch. I, art. 13.

280. The constitutions of forty-four states have this limiting language. The reason for the omission in Vermont is not apparent from reviewing available historical resources. ALA. CONST. art. I, § 4; ALASKA CONST. ART. I, § 5; ARIZ. CONST. art. I, § 6; ARK. CONST. art. II, § 6; CALIF. CONST. art. I, § 2(a); COLO. CONST. art. II, § 10; CONN. CONST. art. I, § 4; FLA. CONST. art. I, § 4; GA. CONST. art. I, ¶V; IDAHO CONST. art. I, § 9; ILL. CONST. art. I, § 4; IND. CONST. art. I, § 9; IOWA CONST. art. I, § 7; KAN CONST. BR, § 11; KY. CONST. BR, § 8; LA. CONST. art. I, § 7; ME. CONST. art. I, § 4; MD. CONST. DR, art. 40; MICH. CONST. art. I, § 5; MINN. CONST. art. I, § 3; MO. CONST. art. I, § 8; MONT. CONST. art. II, § 7; NEB. CONST. art. I, § 5; NEV. CONST. Art. 1, § 9; N.J. CONST. art. I, § 6; N.M. CONST. art. II, § 17; N.Y. CONST. art. I, § 8; N.C. CONST. art. I, § 4; N.D. CONST. art. I, § 4; OHIO CONST. art. I, § 11; OKLA. CONST. art. II, § 22; OR. CONST. art. I, § 8; PA. CONST. art. I, § 7; S.D. CONST. art. VI, § 5; TENN. CONST. art. I, § 19; TEX. CONST. art. 1, § 8; UTAH CONST art. I, § 5; VA. CONST. art. I, § 12; WASH. CONST. art. I § 5; W. VA. CONST art. III, § 7; WIS. CONST. art. I, § 3; WYO. CONST. art. I, § 20.

When defamation actions have reached the Vermont Supreme Court, the court has analyzed the scope of individual free speech rights under both the federal and state constitutions to determine whether the speech is protected or, alternatively, whether actionable defamation has occurred. In 1981, the Vermont Supreme Court analyzed a defamation action, *Blouin v. Anton*,[281] in light of both First Amendment and Article Thirteen protections. Although the court held for the defendant, it recognized defamation or protection of character as a matter appropriate for state constitutional analysis. In 1987, the Vermont Supreme Court balanced an employee's right to free speech against defamation of his state employer under the First Amendment and Article Thirteen.[282] Again, within the context of a defamation action, the court recognized and further defined the relationship between the federal and state constitutions regarding free speech protection.

Although this interaction between federal and state constitutions provides a basis for analyzing defamation actions, it does not lessen the impact of Article Four as a legal basis for them in Vermont. It is a well developed principle that the federal charter establishes a "floor" or "safety net" delineating the minimum individual rights of Americans.[283] States are free to interpret their own constitutions as providing additional, but not inconsistent, rights.[284] In Vermont, Article Thirteen may provide such addi-

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281. 139 Vt. 618, 431 A.2d 489 (1981). In *Blouin*, the plaintiff sued a political opponent who had allegedly defamed him in a newspaper interview. He also brought suit against the reporter and newspaper. *Id.* at 619, 431 A.2d at 489. The issue before the court was whether the characterizations of the plaintiff by his opponent as a "horse's ass," "a jerk," "an idiot," and "paranoid," constituted actionable libel. *Id.* at 621, 431 A.2d at 490. The court held that because the defendant was speaking in obviously hyperbolic terms, the publication of his remarks was protected both by the First Amendment and by Article Thirteen. *Id.* at 622, 431 A.2d at 491. The court offered no guidance on the relative roles of the federal and state provisions, nor did it indicate whether its analysis differed under one or the other.

282. Grievance of Morrissey, 149 Vt. 1, 538 A.2d 678 (1987). In their opinion, the court declined to extend any specific additional protection under Article Thirteen to the employee. However, the court noted that Article Thirteen could be particularly applicable in the case of a "whistleblower" whose comments on the affairs of government presumably would be of greater importance than those of a "disgruntled state officer." *Id.* at 18, 538 A.2d at 689. The court reserved final judgment regarding the extent, if any, to which Article Thirteen mandates greater deference to a public employee's right of free speech than does the First Amendment. *Id.*

283. *Badger*, 141 Vt. at 449, 450 A.2d at 347. *See also* Hand, *supra* note 255, at 144.

284. *Id.* In any event, neither the Vermont Constitution nor that of any other state can be interpreted to limit freedom of expression to an extent that offends the First Amendment. *See generally* Pollack, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 709-20 (1983).

tional rights. Article Four, however, is a separate and clear expression of state public policy regarding the protection of reputation or character. As such, Vermont courts can, consistent with that expression, broaden the legal basis upon which Vermonters may seek redress for injuries to character or reputation.

C. A Proposal for Actions in Vermont Based upon Compelled Self-Publication and upon a Reputational Injury Public Policy Exception to the Employment-at-Will Doctrine

Operating under the impetus provided by Article Four, the Vermont Supreme Court should establish two causes of action previously not recognized in Vermont. The first is a defamation claim based upon the theory of compelled self-publication. The second is a wrongful discharge claim which carves out an exception to the employment-at-will doctrine based upon the state public policy expressed in the Article Four protection of reputational interests of the citizens of Vermont.

1. Compelled Self-Publication

The Vermont Supreme Court should explore and define the parameters of a cause of action based upon compelled self-publication, taking into account negative and affirmative obligations of both plaintiff and defendant. Although such claims are likely to arise most commonly in the context of workplace defamation, the constitution does not mandate a preference for employment-related libel or slander. There is no logical basis for strictly limiting the doctrine of compelled self-publication to workplace defamation. A further definition of the rules, however, under which compelled self-publication actions may be brought will likely result in the majority of such claims being related to employment.

Three principal issues presented in Vermont are the same as those addressed by the Minnesota Supreme Court in *Lewis*.[285] First, under what circumstances does the action arise? Second, what is the role and the extent of privilege? And third, what limitations on damages, if any, are appropriate?

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285. *See supra* notes 87-127 and accompanying text.

a. Circumstances

The *Lewis* court held that a plaintiff must prove two factors in order for a self-published defamatory statement to be actionable. First, the plaintiff must be under a compulsion to publish it, and second, "it [must be] foreseeable to the defendant that the plaintiff would be so compelled."[286]

i. Compulsion

The *Lewis* court required that the plaintiff be under a strong compulsion to communicate the defamation.[287] The Minnesota Supreme Court recognized that a worker discharged for a defamatory reason generally would have only two choices regarding publication of the statement when seeking subsequent employment. First, the worker may lie or misrepresent the reason for the termination. Second, the worker may repeat, that is, publish the defamatory statement.[288] The court held that under such circumstances, fabrication "is an unacceptable alternative."[289]

At least three levels of compulsion have been established by courts in self-publication situations. A Texas appellate court applied a "reasonably prudent person" test in determining whether the defendant should have anticipated plaintiff's compelled self-publication.[290] This test appears to impose the least restrictive burden on the plaintiff. In contrast, a California court, like the Minnesota court in *Lewis*, required a showing of "strong compulsion,"[291] a heavier burden on the plaintiff. And, in one of the earliest cases, *Colonial Stores v. Barrett*, a Georgia court recognized, but did not specifically require, an element of compulsion or necessity where the plaintiff was under a statutory obligation to repeat the defamatory statement.[292] This strict compulsion in *Barrett*, representing the greatest burden on the plaintiff, apparently is limited to cases where a specific legal duty to publish is imposed on the plaintiff.[293]

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286. *Lewis*, 389 N.W.2d at 888.

287. *Id.* ("plaintiff was in some significant way compelled . . ."); *see also* McKinney v. County of Santa Clara, 110 Cal. App. 3d at 798-99, 168 Cal. Rptr. at 94 (compulsion also was considered a factor).

288. *Lewis*, 389 N.W.2d at 888.

289. *Id.*

290. Chasewood Construction Co. v. Rico, 696 S.W.2d 439, 445 (Tex. Ct. App. 1985).

291. *McKinney*, 110 Cal. App. 3d at 795, 168 Cal. Rptr. at 94.

292. 73 Ga. App. 839, 840, 38 S.E.2d 306, 307 (1946).

293. *Id.*

To be legally sufficient, the compulsion to publish the defamatory statement should be grounded in a genuine necessity.[294] The *Lewis* court found that it was necessary for the plaintiffs to explain truthfully the circumstances of their discharges when asked about them by prospective employers.[295]

Another example of necessity, recognized as sufficient to warrant liability, is the sending of letters containing defamatory statements to blind or illiterate persons, where it was reasonably foreseeable that the recipient would ask a third person to read the letter to him.[296] Coercion and duress are other circumstances in which publication by the plaintiff of the defamatory material may be considered a necessity.[297] Of the three standards of compulsion outlined above, Vermont should adopt the strong compulsion standard of the Minnesota and California courts. This standard would require a showing that the publication of the defamatory statement was made by a plaintiff who was under a strong compulsion to do so. This compulsion should result from a legal, physical, or practical necessity.[298] The burden would be on the plaintiff to prove the existence, the nature, and the degree of the compulsion. All of these proofs should be treated as questions of fact rather than law.[299]

ii. Foreseeability

The second factor of a compelled self-publication action, namely whether it was foreseeable that the plaintiff would be compelled to publish the defamatory statement, has been imposed by

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294. *Id.*

295. *Lewis*, 389 N.W.2d at 888.

296. *See* Prentice & Winslett, *supra* note 8, at 213.

297. Hedgpeth v. Coleman, 183 N.C. 309, 111 S.E. 517 (1922). In *Hedgpeth*, the defendant sent a letter to a fourteen year old boy accusing him of theft and threatening legal action. The boy showed the letter to his parents. Because the publication was coerced by the defendant's threatening acts, the court imposed liability. *Id.* at 314, 111 S.E. at 520. *See also* Prentice & Winslett, *supra* note 8, at 214-15 n.49 and accompanying text.

298. Plaintiffs should also be obliged to show that they have taken steps to mitigate the damage done by the self-published defamation. The *Lewis* court stated that plaintiffs should take "all reasonable steps to attempt to explain the true nature of the situation and to contradict the defamatory statement." *Lewis*, 389 N.W.2d at 888. It is not clear whether or not the Minnesota Supreme Court in *Lewis* made this a requirement of the action.

299. Regarding an applicable evidentiary standard, there seems to be no reason for imposing any greater burden of proof than a preponderance of the evidence. This burden on the plaintiff is consistent with basic principles of tort law and with the constitutional foundation upon which the theory of compelled self-publication rests.

every court recognizing compelled self-publication.[300] It is a factual burden carried by the plaintiff. As a practical matter, this element should not be difficult to establish. It is foreseeable that a person applying for work would be asked why she had left her previous employment.[301]

b. The Role of Privilege

As discussed earlier, Vermont has developed a body of law which defines the nature and extent of privileges available at common law to defamation defendants.[302] It is appropriate to apply this recognized common law role of privilege to a libel or slander case involving compelled self-publication.

Privilege is an affirmative defense, which must be raised and proven by the defendant.[303] The existence of the privilege is a matter of law to be determined by the court. An absolute privilege effectively ends the inquiry and defeats the plaintiff's claim.[304] A qualified privilege can be overcome by a clear and convincing showing that the defendant acted with malice or abused the privilege.[305]

Vermont recognizes a qualified privilege for the protection of an employer's legitimate business interests.[306] Additionally, a Vermont employer enjoys a specific privilege for intracorporate communications to protect those interests.[307] Whether the privilege extends to the sharing of worker recommendations between former and prospective employers, as in Minnesota,[308] has not been fully explored in Vermont, although there are indications that the privilege covers those types of communications.[309]

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300. *See, e.g., Lewis*, 389 N.W.2d at 888.

301. *See generally* Prentice & Winslett, *supra* note 8, at 209 n.15. However, outside of the context of employment discharge, this element probably would be harder for a plaintiff to prove because the publication might not be so readily foreseeable.

302. *See, e.g., Ryan*, 152 Vt. at 284-85, 566 A.2d at 1321; *Huntoon*, *143 Vt.* at 548-49, 470 A.2d at 1169.

303. *Huntoon*, 143 Vt. at 548-49, 470 A.2d at 1169.

304. PROSSER, *supra* note 15, at § 111.

305. *Huntoon*, 143 Vt. at 548-49, 470 A.2d at 1169.

306. *Id.*

307. *Crump*, _Vt. at _, 576 A.2d at 446.

308. *Lewis*, 389 N.W.2d at 889.

309. In *Huntoon*, the court, in effect, adopted the position of the RESTATEMENT (SECOND) OF TORTS § 595, comment d. *Huntoon*, 143 Vt. at 548-549, 470 A.2d at 1169. This is a relatively broad expression of the scope of the privilege, appearing to cover inter-employer communications so long as the statement was made with a reasonable belief that it was

The Minnesota court, in *Lewis*, recognized the wisdom of extending the qualified privilege protecting legitimate business interests to defendants in defamation actions whether the publication was direct or was made by a plaintiff operating under a compulsion.[310] This privilege is logically the only reasonable means of addressing the employer's well-founded concern that every employee discharge may lead to a defamation suit. The *Lewis* court recognized the existence of a "significant privilege" for employers to share employment recommendations, based on the public's interest that such information be readily available.[311] Given its policy of protecting legitimate business interests, Vermont should adopt the same approach.

Defamation can occur and the privilege can apply in workplace situations other than those involving employment discharges. For example, employee performance evaluations can give rise to defamation actions.[312] Other contexts that may generate a qualified employer privilege include statements made to co-workers, to the media, or to government agencies (such as reports of criminal activity to the police).[313] The proposed compelled self-publication rules should, however, be applicable to these situations.

Under Vermont law, a plaintiff can overcome the privilege by showing that the defendant acted with malice in publishing the defamatory statement or that the defendant abused the privilege. With regard to malice, the Vermont Supreme Court has held that a demonstration of either "constitutional malice" or "common law malice" is sufficient for the plaintiff to defeat the privilege.[314] Although there is no uniform definition of what actually constitutes an abuse of privilege in defamation cases, it is generally held under the common law that privilege could be forfeited due to publica-

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necessary to protect the legitimate interests of the third person to whom it was communicated (in this context, the prospective employer).

310. *Lewis*, 389 N.W.2d at 889-90.

311. *Id.* at 890.

312. *Defamation and the Workplace*, *supra* note 8, at 828. The courts which have addressed this issue in private employment actions have generally recognized a qualified privilege for job evaluation reports. *Id.* at 828-29, nn. 205-15.

313. *Id.* at 830-35.

314. *Crump*, _ Vt. at _, 576 A.2d at 447. The *Crump* court used the full-phrase definitions of "knowledge of the statement's falsity or with reckless disregard of its truth" (constitutional malice) and "conduct manifesting personal ill will, reckless or wanton disregard of plaintiff's rights, or carried out under circumstances evidencing insult or oppression" (common law malice). These definitions were first established in *Huntoon*. *See also Ryan*, 389 N.W.2d at 281, 566 A.2d at 1319-20.

tion for an improper purpose, in an improper manner, or if made without a reasonable belief in the truth of the statement.[315] The privilege also can be lost through abuse if the defamatory statement is made to someone outside of the scope of the privilege.[316]

In summary, Vermont should extend its privilege for protection of legitimate business interests to cover communications made between employers in connection with employment recommendations. The courts should, however, clearly define the employee's interest as significant and the privilege should apply only when the employer has acted reasonably and fairly to the employee. Consequently, defendant employers should enjoy protections from liability only when they have reasonably met their responsibilities, guaranteeing that the information shared is accurate. This showing of reasonableness would be required, as a practical matter, to counter the plaintiff's clear and convincing proof of malice or abuse of the privilege by the defendant. The plaintiff's burden thus remains high. The countervailing privilege is reasonable in scope, and is meaningful in the depth of protection it provides.

c. Fault, Actual Harm, and Punitive Damages

Whether fault is required to recover damages in private defamation actions in Vermont and throughout the United States is not clear. Following *Gertz v. Robert Welch*, Vermont courts required that plaintiffs show "some negligence, or greater fault" on the part of the defendant to recover damages for actual injury.[317] After the United States Supreme Court's decision in *Greenmoss*, however, there remains considerable doubt about whether fault is required to recover general or compensatory damages in private defamation actions.[318] In light of this uncertainty, however, the plaintiff suing her employer in a compelled self-publication action should plead and prove, at a minimum, negligence on the part of

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315. RESTATEMENT (SECOND) OF TORTS §§ 599-605 (1977).

316. *Id.* at § 604 (excessive publication). Vermont specifically recognizes this basis for forfeiting the qualified privilege. *Crump*, _ Vt. at _, 576 A.2d at 447. Additionally, the privilege is generally regarded as vulnerable when there is publication which uses information unnecessary to accomplish the protected purpose, which uses excessive or intemperate language, which is based upon an unreasonable belief in the existence of a protected interest, or which is motivated by common law malice (or without reasonable inquiry into the truthfulness of the statement). *See* Larson, *Employee Defamation Claims: Who Really Wins?*, 15 BARRISTER 44, 47 (Spring 1988).

317. *Huntoon*, 143 Vt. at 546, 470 A.2d at 1168.

318. *Ryan*, 152 Vt. at 280, 566 A.2d at 1318-19, n.2.

the defendant.

To resolve this uncertainty, Vermont courts should require at least negligence on the part of the defendant as a threshold element in private defamation cases, including compelled self-publication actions. The *Gertz* reasoning and the components of private defamation actions set out in *Huntoon*[319] are logical bases for liability under Vermont law. Additionally, negligence is an appropriate threshold element because nothing in the *Sullivan-Greenmoss* line of cases suggests that private defamation should be treated as a strict liability tort. In balancing the public policy underlying the free communication of ideas and information against the substantial reputational interests of the plaintiffs, the weight of public policy requires that defamation claims be founded on at least some degree of negligence on the part of the defendant.

Whether actual harm is required in private defamation cases and compelled self-publication actions is unclear.[320] The *Gertz* Court required that recovery should be based upon actual harm,[321] thus reversing the common law rule that "presumed damages" were available without a showing of actual harm. After *Greenmoss*, however, the requirement of actual harm may be limited to matters of public concern.[322] The prudent plaintiff in a compelled self-publication action will avoid uncertainty by demonstrating actual harm.

The rules on punitive damages in private defamation actions turn on whether the plaintiff shows that the defendant acted with malice and whether the defendant can effectively assert a privilege. In Vermont, the availability of punitive damages in private defamation actions rests upon a showing of common law malice by a preponderance of the evidence.[323] The plaintiff must, however, show constitutional or common law malice by the heavier burden of clear and convincing proof in order to defeat the qualified privi-

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319. *Huntoon*, 143 Vt. at 546-47, 470 A.2d at 1168.

320. *Id.* at 282, 566 A.2d at 1320.

321. *Gertz*, 418 U.S. at 349; *Huntoon*, 143 Vt. at 549, 470 A.2d at 1169.

322. *Ryan*, 152 Vt. at 282, 566 A.2d at 1320.

323. In private defamation actions, common law malice ("conduct manifesting personal ill will, reckless or wanton disregard of plaintiff's rights, or carried out under circumstances evidencing insult or oppression") is required before punitive damages may be awarded. *Crump*, _ Vt. at _, 576 A.2d at 449. In public defamation actions, both common law and constitutional malice ("knowledge of the statement's falsity or with reckless disregard of it's truth") must be shown before punitive damages are available. *Ryan*, 152 Vt. at 286, 566 A.2d at 1322.

lege.[324] In *Lewis*, the Minnesota Supreme Court held that punitive damages were not available based on its interpretation of a Minnesota punitive damage statute and its determination that punitive damages "are not advisable as a deterrent."[325] The long-held view in Vermont, however, is that punitive damages are awarded to "stamp the condemnation of the jury upon the acts of the defendant on account of their malicious character."[326] Also, unlike Minnesota, Vermont lacks a statutory directive concerning punitive damages. Therefore, upon a showing of malice, it would seem appropriate to leave this function of the jury intact.

2. *A Public Policy Exception to the Employment-at-Will Doctrine*

The concern for protecting reputational interests that justifies acceptance of compelled self-publication also justifies recognition in Vermont of a public policy exception to the employment-at-will doctrine for defamatory wrongful discharge. The rationale for heightened protection of reputation is especially compelling in the context of wrongful discharge from employment.

a. Justifications for a Public Policy Exception

In general, we no longer accept the fiction of equal bargaining positions between employers and employees.[327] America is a nation of employees working within an economic system that gives employers a disproportionate share of power.[328] A worker who loses

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324. *Crump*, _ Vt. at _, 576 A.2d at 447.

325. *Lewis*, 389 N.W.2d at 892; MINN. STAT. § 549.20 (1984). *See* Note, *Speak No Evil: The Minnesota Supreme Court Adopts Self-Publication Defamation:* Lewis v. Equitable Life Assurance Society of the United States, 71 MINN. L. REV. 1092, 1106-08 (1987) (criticizing the court's disallowance of punitive damages).

326. *Greenmoss*, 143 Vt. at 76, 461 A.2d at 419.

327. *See The Narrow Public Policy Exception*, *supra* note 147, at 569 (noting the development of legislative response to the disparity). *See generally Protecting At Will Employees*, *supra* note 169, at 1826-28.

328. Prentice & Winslett, *supra* note 8, at 221 n.85 (citing F. TANNENBAUN, A PHILOSOPHY OF LABOR 9 (1951)):

> We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they loss [sic] every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for *all* of their income is something new in the world. *For our generations, the substance of life is in another man's hands.*

her job for any reason can be expected to suffer not only loss of income during her unemployment, but also the mental and emotional hardship which often attend involuntary termination.[329] Moreover, when a discharge is based on a defamatory statement, the consequences to the employee may be greatly exacerbated.[330] In addition to the difficulty in obtaining subsequent employment,[331] discharged workers who are defamed in the process may sustain significantly greater emotional injury.[332]

A defamatory deprivation of one's livelihood is offensive to our society. The right to protect one's reputation pre-dates the Magna Charta.[333] And, "[m]odern Americans value their reputations as much as any material possession."[334] Nowhere is reputation more important than within the context of employment.[335] Estimates of the number of employees who are wrongfully discharged annually vary, with some estimates as high as 200,000.[336] Often these terminations are accompanied by improper motives,[337] and many involve false or fabricated reasons as a basis for the dismissal.[338] As one pair of commentators have stated, "wrongful terminations and defamatory excuses for those terminations go hand-in-hand."[339]

The Vermont Supreme Court looked inside and outside the law when it identified the state's public policy against age-based employment discrimination in *Payne v. Rozendaal*.[340] The court coupled a subsequent statutory expression with a prior executive pronouncement in order to find *inside* the law what the court recognized *outside* the law: our society is offended when a worker is deprived of her livelihood solely on the basis of her age.

Vermont has long recognized a public interest in protecting its

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329. Prentice & Winslett, *supra* note 8, at 221.

330. *See* Post, *The Sociological Foundations of Defamation Law: Regulation and the Constitution*, 74 CALIF. L. REV. 691, 694-95 (1986).

331. *See* Prentice & Winslett, *supra* note 8, at 222.

332. *See* Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 339 (1974).

333. Prentice & Winslett, *supra* note 8, at 220 n.79 (citing Veeder, *The History and Theory of the Law of Defamation I*, 3 COLUM. L. REV. 546, 548-49 (1903)).

334. Prentice & Winslett, *supra* note 8, at 221. *See generally* Bellah, *The Meaning of Reputation in American Society*, 74 CALIF. L. REV. 743 (1986).

335. Bellah, *supra* note 334, at 744.

336. Prentice & Winslett, *supra* note 8, at 222-23, n.93.

337. *Id.* at 223.

338. *Id.*

339. *Id.* at 224.

340. *See supra* notes 210-226 and accompanying text.

citizens from libel and slander. In addition to both the constitutional protection afforded by Article Four,[341] and the statutory provision of truth as a defense to criminal libel,[342] the Vermont Supreme Court began to develop a common law jurisprudence of defamation as early as 1802.[343]

A public policy exception to the employment-at-will doctrine is warranted under Vermont law when workers are terminated under circumstances which wrongfully injure their reputations. Recognition of this exception balances the rights of employers and employees and the State's interest in insuring fairness in the workplace.

b. Defamatory Wrongful Discharge as a Tort

Defamatory wrongful discharge should be based on principles of tort rather than contract.[344] Contract-based claims for wrongful discharge generally have proven to be inadequate,[345] in part because a contract-based remedy for breach of an employment agreement can be ineffective in compensating workers for their nonmonetary injuries.[346] A contract-based claim is restricted to compensatory damages limited to the dollar value of the contract, which generally does not address the collateral consequences of the breach, such as emotional suffering and injury to reputation. Also, as a general rule, punitive damages are not available in contract-based claims.[347]

In contrast, a successful plaintiff in defamatory wrongful discharge should be able to recover both compensatory and punitive damages.[348] These damages are especially appropriate given the fault-based nature of the public policy exception being urged herein. A defamatory discharge can occur under circumstances

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341. *See supra* notes 264-284 and accompanying text.

342. VT. STAT. ANN. tit. 13, § 6560 (1974).

343. *See, e.g.*, Harris v. Huntington, 2 Tyl. 129 (Vt. 1802); Smith v. Shumway, 2 Tyl. 74 (Vt. 1802).

344. *See, e.g.*, Tameny v. Atlantic Richfield Co., 27 Cal. App. 3d 167, 176, 164 Cal. Rptr. 839, 844, 610 P.2d 1330, 1335 (1980).

345. Note, *Legislative Attempts to Modify the Employment-At-Will Doctrine: Will the Public Policy Exception Be the Next Step?* 14 J. CORP. LAW 241, 254-56 (1988) (arguing in favor of a legislative solution to inadequacies of present employment-at-will law).

346. *See supra* notes 328-332 and accompanying text.

347. *See, e.g.*, Phillips v. Aetna Life Ins. Co., 473 F. Supp. 984 (D. Vt. 1979).

348. *See* Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 569, 335 N.W.2d 834, 841 (1983).

ranging from mildly insulting to egregiously offensive. The availability of compensatory and punitive damages allows a jury to fashion an appropriate award, taking into account the particular circumstances and the parties' relative degrees of fault. This approach fits the basic Vermont view that the purpose of punitive damages, when warranted, is to "stamp the condemnation of the jury"[349] upon the actions of the defendant.

c. The Wisdom of Recognizing Compelled Self-Publication and a Defamation-Based Public Policy Exception

One scholar, in considering Article Four as the basis for both compelled self-publication and a defamation-based public policy exception, asked why Vermont law should recognize both causes of action. The scholar suggested that they may be viewed as duplicative remedies.[350] The question is well put because both causes of action sound in tort and could trigger standard tort remedies. The answer lies not in the constitutional, jurisprudential, or societal underpinnings of the theories, but rather in the legitimate goal of providing a complete remedy to a wrongfully discharged employee.

First, compelled self-publication is not limited to workplace defamation claims by constitutional or common law. Thus if the court recognizes this cause of action, it should impose restrictions, such as foreseeability,[351] strong compulsion,[352] and an obligation to mitigate damage[353] in order to prevent a flood of litigation. These restrictions, however, may unintentionally exclude some legitimate suits by discharged workers who have been defamed.

Further, as Justice Underwood noted, defamation continues to be an "odd and somewhat complicated area of tort law."[354] Uncertainty in defamation law remains regarding the status of the parties, the nature of the defamatory statement, and the nature and

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349. Pezzano v. Bonneau, 133 Vt. 88, 92, 329 A.2d 659, 662 (1974) (quoting Goldsmith's Adm'r v. Joy, 61 Vt. 488, 17 A. 1010 (1889)).

350. Interview with Prof. Peter Teachout, Vermont Law School, South Royalton, Vermont (Nov. 16, 1990).

351. *See supra* notes 300-301 and accompanying text.

352. *See supra* notes 287-298 and accompanying text.

353. *See supra* note 298.

354. Lent v. Huntoon, 144 Vt. 539, 545, 470 A.2d 1162, 1167 (1983). There are those who may believe that Justice Underwood evidenced a talent for understatement by that observation.

degree of fault.[355] In addition, employers may escape liability if they can assert a defense of privilege, which may make proof of a plaintiff's case more difficult or impossible.[356]

A public policy exception to the rigid employment-at-will doctrine, on the other hand, represents a more specific and reasoned response to the needs of the wrongfully discharged worker. In adopting a defamation-based exception, the court can start from scratch and fashion a remedy appropriate to the nature and scope of the public policy. In particular, the court could design protections not only for the employee, but also for the employer. Without such protections, the employer may withdraw into an undesirable silence regarding all aspects of employee termination, including the explanation to which the employee herself is entitled.[357]

d. Elements of the Defamation-Based Public Policy Exception

What then, is the nature of the defamation-based public policy exception, and by what rules is recovery permitted? Common law defamation can be used as a template for this exception to the employment-at-will doctrine. The elements of a defamation-based public policy exception could include:

> 1) the reason given for the employee's discharge was wrongful in that it was false or inaccurate in some material way;
> 2) the wrongful discharge caused an injury to the employee's personal or professional reputation;
> 3) the employer was at least negligent in injuring plaintiff's reputation;
> 4) the employer reasonably should have foreseen that the employee might sustain a reputational injury as a result of the discharge;
> 5) the employer was not privileged; and

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355. *See supra* notes 65-67 and accompanying text.

356. In this writer's experience in representing terminated workers, few have the knowledge of law, the foresight, or the opportunity to worry about the legal necessities of a wrongful discharge claim at the time of their dismissal. Typical of the workplace relationship in general, employers usually have the advantage, retaining much of the evidence needed by the plaintiff to prove his case. Often the displaced employee lacks the practical, financial, or emotional wherewithal to pursue a claim. Especially in a circumstance where a privilege applies, and the plaintiff's evidentiary burden is consequently elevated, application of the myriad of common law defamation rules can serve to defeat an otherwise meritorious claim because it does not fit neatly into a complicated and, in some ways, archaic framework.

357. *See* Prentice & Winslett, *supra* note 8, at 234-35.

> 6) the employee took reasonable steps to limit or mitigate the damage.

The court could elaborate on each of these elements, especially the uncertain issues of fault and privilege. First, a clear rule requiring the plaintiff to prove at least negligence would avoid the confusion attending current defamation law.[358] A negligence standard would be consistent with conventional personal injury tort law and would achieve a reasonable balance between the parties' respective interests.

Second, a defendant should be allowed to assert a limited privilege in order to protect certain types of communications in society's interest.[359] Given the plaintiff's substantial interest in her reputation and character, however, proof of malice or abuse by a preponderance of the evidence, rather than the clear and compelling showing required by defamation law, should defeat the privilege.[360]

e. The Wisdom of Recognizing Both Causes of Action Revisited

In short, both compelled self-publication and the defamation-based public policy exception are theoretically sound and justified by law and circumstance. Each cause of action can stand independently of the other. Why, then, as asked earlier, recognize both?

First, a plaintiff who is discharged under defamatory circumstances has suffered two distinct injuries: wrongful discharge and damage to reputation. Each can occur independent of the other. If Vermont recognized only a public policy exception to wrongful discharge, workplace defamation involving self-publication not directly related to termination would not be actionable. Alternatively, an unjust dismissal can occur under circumstances which injure the discharged worker's reputation but which fail to meet the elements of defamation. The courts' proper role is the protection of the reputational interest. To achieve that end within the context of the workplace, the complementary and *non-duplicative* remedies of compelled self-publication and a defamation-based public policy exception are necessary. Neither cause of action alone is a complete response to the problem of reputational injury in the employment context.

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358. *See, e.g., Ryan*, 152 Vt. at 279-80, 566 A.2d at 1319 n.2.
359. *See supra* notes 35-42 and accompanying text.
360. *See supra* notes 75-78 and accompanying text.

Second, Article Four of the Vermont Constitution specifically protects reputation. That the reputational protection of Article Four has been heretofore overlooked should not diminish its significance. It is a clear and compelling expression of public policy. The Vermont Constitution remains, in Justice Aikens' words, the "fiat of the sovereign people."[361]

CONCLUSION

Law changes with society, and an understanding of the evolution of any body of law requires consideration of the political, sociological, and historical context in which those changes occurred. America, once a country whose workforce was largely self-employed, has become a nation of employees.[362] During the heady period of economic and geographic expansion in the late-nineteenth and early-twentieth centuries, policies of laissez-faire created an economic and legal climate which favored the employer over the employee.[363] In recent times, however, the balance has shifted away from the employer to a more equal sharing of power in the workplace between employers and employees.[364] With this change came a recognition of the threats to the reputations of employees that were posed by a legal system that passively countenanced even the most egregious terminations.

The interest in protecting one's reputation and good name predates even the Magna Charta.[365] It is found in our religions[366] and emphasized in our art.[367] And, significantly, this public interest is guaranteed in the constitutions of thirty-one of the United States, including Vermont.[368]

Consequently, the value of a person's character and reputation, especially within the context of one's livelihood, "should not

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361. Bates v. Kimball, 2 D. Chip. 77, 80 (Vt. 1824).

362. Note, *Sterling Drug v. Oxford: Arkansas Adopts the Public-Policy Exception to the Employment-at-Will Doctrine*, 42 ARK. L. REV. 187, 187 nn.1-2 and authority cited therein.

363. *Id.* at 190-91.

364. *See supra* notes 148-198 and accompanying text.

365. *See supra* note 333 and accompanying text.

366. *See, e.g.*, in the Judeo-Christian Bible, "good name is better than precious ointment," PROVERBS 22:1; "[a] good name is rather to be chosen than great riches . . . ." ECCLESIASTES 7:1.

367. W. SHAKESPEARE, OTHELLO, act III, scene iii, 11, 155-56; RICHARD II, act I, scene i, 11, 177-78.

368. *Supra* notes 264-265 and accompanying text.

be underestimated by our legal system."[369] Vermonters are guaranteed, in their constitution, a remedy at law for "all injuries or wrongs . . . [to] person, property *or character*."[370] Vermont courts have demonstrated a willingness, indeed, an enthusiasm, to extend to the people of the state the fullest range of protections for their rights and liberties. Consistent with the societal and personal values involved and existing jurisprudence, Vermont courts should extend the protections of compelled self-publication and a defamation-based public policy exception to the citizens of the State.

369. Prentice & Winslett, *supra* note 8, at 238.
370. VT. CONST. ch. I, art. 4 (emphasis added).