LAWYERING SKILLS AND STRATEGIES I
SECTIONS A-4 AND C-4

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CLASS ONE (8/25/14)

Topic: Sources of Legal Authority

Class Preparation:

- Read chapter 2 from the *Coughlin* textbook

Assignment Due: Weight of Authority Exercise

CLASS TWO (SECTION A - 8/26/14) (SECTION C – 8/27/14)

Topic: Deconstructing Judicial Opinions

Class Preparation:

- Read Chapter 3 from the *Coughlin* textbook
- Read "How to Read a Legal Opinion" by *Kerr*

Assignment Due: Case Analysis Exercise (*Sabine Pilot*)

WEIGHT OF AUTHORITY EXERCISE

Please answer the following questions prior to class on Monday, August 25. You will not be required to turn in this assignment, but you must be prepared to discuss your answers in class.

Part 1 – For each question below, assume you are analyzing a legal issue and you find two conflicting primary authorities from the same jurisdiction. Which of the two authorities carries the greatest weight?

1. An agency regulation or a state statute?
2. An opinion of the state's highest court or a ruling by a state agency?
3. A state statute or a common law rule announced by the state's highest court?
4. A state constitutional provision or an opinion from that state's highest court interpreting the meaning of the constitutional provision?

Part 2 – Your firm represents Kay Lang, who sold a piece of commercial property located in Los Angeles, California to Adam Kornfeld. Kornfeld claims that Lang failed to disclose to him the true condition of the property, and he has filed suit against her for damages in a California state trial court. You are researching whether under California law a seller of real property has a duty to disclose to the buyer the condition of the property.

For each of the following authorities, please state (1) **whether the authority is primary or secondary**, and (2) **whether the authority would be binding or persuasive** in the dispute between Lang and Kornfeld.

1. An opinion of the California Supreme Court deciding the duty of a seller to disclose to the buyer the condition of the property
2. An article in the University of California at Los Angeles (UCLA) Law Review discussing the applicable California rule on the seller's duty to disclose to the buyer the condition of the property
3. An opinion of the United States Court of Appeals for the Ninth Circuit applying the applicable California rule on the duty of a seller to disclose to a buyer the condition of the property
4. A California statute on the duty of a seller to disclose to a buyer the condition of the property
5. A section from a treatise explaining the applicable California rule on the duty of a seller to disclose to a buyer the condition of the property

Part 3 – For each of the following primary authorities, please state **whether the authority would be binding or persuasive**.

1. A federal district court in Houston is considering whether an employee's termination violated Title VII of the Civil Rights Act of 1968. The defendant relies on a Fifth Circuit case with similar circumstances. Is this Fifth Circuit opinion binding or persuasive?

2. The Ninth Circuit is considering whether the University of Washington's admission scheme violates the Fourteenth Amendment of the United States Constitution. The Fifth Circuit recently decided a similar case involving the University of Texas. Is the Fifth Circuit opinion binding or persuasive?

3. A state district court in Houston is considering whether an affidavit filed by a party is proper summary judgment evidence under the common law sham affidavit doctrine. The Fifth Circuit recently addressed the Texas sham affidavit doctrine in a case with very similar facts. Is the Fifth Circuit opinion binding or persuasive?

4. A state district court in Houston is considering whether a father negligently entrusted a vehicle to his sixteen-year-old son. An appellate court in Texarkana considered the very same issue 6 years ago. Is the Texarkana decision binding or persuasive?

5. The First Court of Appeals in Houston is considering whether a Houston trail court improperly granted summary judgment based on deemed admissions. Several years ago, the same court decided a remarkably similar case. Is the prior decision by the First Court of Appeals binding or persuasive in the current case?

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How to Read a Legal Opinion

A Guide for New Law Students

Orin S. Kerr

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How to Read a Legal Opinion

A Guide for New Law Students

Orin S. Kerr

This essay is designed to help new law students prepare for the first few weeks of class. It explains what judicial opinions are, how they are structured, and what law students should look for when reading them.

I. What's in a Legal Opinion?

When two people disagree and that disagreement leads to a lawsuit, the lawsuit will sometimes end with a ruling by a judge in favor of one side. The judge will explain the ruling in a written document referred to as an "opinion." The opinion explains what the case is about, discusses the relevant legal principles, and then applies the law to the facts to reach a ruling in favor of one side and against the other.

Modern judicial opinions reflect hundreds of years of history and practice. They usually follow a simple and predictable formula. This

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Orin Kerr is a professor of law at the George Washington University Law School.

section takes you through the basic formula. It starts with the introductory materials at the top of an opinion and then moves on to the body of the opinion.

The Caption

The first part of the case is the title of the case, known as the "caption." Examples include *Brown v. Board of Education* and *Miranda v. Arizona*. The caption usually tells you the last names of the person who brought the lawsuit and the person who is being sued. These two sides are often referred to as the "parties" or as the "litigants" in the case. For example, if Ms. Smith sues Mr. Jones, the case caption may be *Smith v. Jones* (or, depending on the court, *Jones v. Smith*).

In criminal law, cases are brought by government prosecutors on behalf of the government itself. This means that the government is the named party. For example, if the federal government charges John Doe with a crime, the case caption will be *United States v. Doe*. If a state brings the charges instead, the caption will be *State v. Doe*, *People v. Doe*, or *Commonwealth v. Doe*, depending on the practices of that state.[1]

The Case Citation

Below the case name you will find some letters and numbers. These letters and numbers are the legal citation for the case. A citation tells you the name of the court that decided the case, the law book in which the opinion was published, and the year in which the court decided the case. For example, "U.S. Supreme Court, 485 U.S. 759 (1988)" refers to a U.S. Supreme Court case decided in 1988 that appears in Volume 485 of the *United States Reports* starting at page 759.

The Author of the Opinion

The next information is the name of the judge who wrote the opinion. Most opinions assigned in law school were issued by courts

[1] English criminal cases normally will be *Rex v. Doe* or *Regina v. Doe*. Rex and Regina aren't the victims: the words are Latin for "King" and "Queen." During the reign of a King, English courts use "Rex"; during the reign of a Queen, they switch to "Regina."

with multiple judges. The name tells you which judge wrote that particular opinion. In older cases, the opinion often simply states a last name followed by the initial "J." No, judges don't all have the first initial "J." The letter stands for "Judge" or "Justice," depending on the court. On occasion, the opinion will use the Latin phrase "per curiam" instead of a judge's name. Per curiam means "by the court." It signals that the opinion reflects a common view among all the judges rather than the writings of a specific judge.

The Facts of the Case

Now let's move on to the opinion itself. The first part of the body of the opinion presents the facts of the case. In other words, what happened? The facts might be that Andy pulled out a gun and shot Bob. Or maybe Fred agreed to give Sally $100 and then changed his mind. Surprisingly, there are no particular rules for what facts a judge must include in the fact section of an opinion. Sometimes the fact sections are long, and sometimes they are short. Sometimes they are clear and accurate, and other times they are vague or incomplete.

Most discussions of the facts also cover the "procedural history" of the case. The procedural history explains how the legal dispute worked its way through the legal system to the court that is issuing the opinion. It will include various motions, hearings, and trials that occurred after the case was initially filed. Your civil procedure class is all about that kind of stuff; you should pay very close attention to the procedural history of cases when you read assignments for your civil procedure class. The procedural history of cases usually will be less important when you read a case for your other classes.

The Law of the Case

After the opinion presents the facts, it will then discuss the law. Many opinions present the law in two stages. The first stage discusses the general principles of law that are relevant to cases such as the one the court is deciding. This section might explore the history of a particular field of law or may include a discussion of past cases (known as "precedents") that are related to the case the court is de-

ciding. This part of the opinion gives the reader background to help understand the context and significance of the court's decision. The second stage of the legal section applies the general legal principles to the particular facts of the dispute. As you might guess, this part is in many ways the heart of the opinion: It gets to the bottom line of why the court is ruling for one side and against the other.

Concurring and/or Dissenting Opinions

Most of the opinions you read as a law student are "majority" opinions. When a group of judges get together to decide a case, they vote on which side should win and also try to agree on a legal rationale to explain why that side has won. A majority opinion is an opinion joined by the majority of judges on that court. Although most decisions are unanimous, some cases are not. Some judges may disagree and will write a separate opinion offering a different approach. Those opinions are called "concurring opinions" or "dissenting opinions," and they appear after the majority opinion. A "concurring opinion" (sometimes just called a "concurrence") explains a vote in favor of the winning side but based on a different legal rationale. A "dissenting opinion" (sometimes just called a "dissent") explains a vote in favor of the losing side.

II. Common Legal Terms Found in Opinions

Now that you know what's in a legal opinion, it's time to learn some of the common words you'll find inside them. But first a history lesson, for reasons that should be clear in a minute.

In 1066, William the Conqueror came across the English Channel from what is now France and conquered the land that is today called England. The conquering Normans spoke French and the defeated Saxons spoke Old English. The Normans took over the court system, and their language became the language of the law. For several centuries after the French-speaking Normans took over England, lawyers and judges in English courts spoke in French. When English courts eventually returned to using English, they continued to use many French words.

Why should you care about this ancient history? The American colonists considered themselves Englishmen, so they used the English legal system and adopted its language. This means that American legal opinions today are littered with weird French terms. Examples include plaintiff, defendant, tort, contract, crime, judge, attorney, counsel, court, verdict, party, appeal, evidence, and jury. These words are the everyday language of the American legal system. And they're all from the French, brought to you by William the Conqueror in 1066.

This means that when you read a legal opinion, you'll come across a lot of foreign-sounding words to describe the court system. You need to learn all of these words eventually; you should read cases with a legal dictionary nearby and should look up every word you don't know. But this section will give you a head start by introducing you to some of the most common words, many of which (but not all) are French in origin.

Types of Disputes and the Names of Participants

There are two basic kinds of legal disputes: civil and criminal. In a civil case, one person files a lawsuit against another asking the court to order the other side to pay him money or to do or stop doing something. An award of money is called "damages" and an order to do something or to refrain from doing something is called an "injunction." The person bringing the lawsuit is known as the "plaintiff" and the person sued is called the "defendant."

In criminal cases, there is no plaintiff and no lawsuit. The role of a plaintiff is occupied by a government prosecutor. Instead of filing a lawsuit (or equivalently, "suing" someone), the prosecutor files criminal "charges." Instead of asking for damages or an injunction, the prosecutor asks the court to punish the individual through either jail time or a fine. The government prosecutor is often referred to as "the state," "the prosecution," or simply "the government." The person charged is called the defendant, just like the person sued in a civil case.

In legal disputes, each party ordinarily is represented by a lawyer. Legal opinions use several different words for lawyers, includ-

ing "attorney" and "counsel." There are some historical differences among these terms, but for the last century or so they have all meant the same thing. When a lawyer addresses a judge in court, she will always address the judge as "your honor," just like lawyers do in the movies. In legal opinions, however, judges will usually refer to themselves as "the Court."

Terms in Appellate Litigation

Most opinions that you read in law school are appellate opinions, which means that they decide the outcome of appeals. An "appeal" is a legal proceeding that considers whether another court's legal decision was right or wrong. After a court has ruled for one side, the losing side may seek review of that decision by filing an appeal before a higher court. The original court is usually known as the trial court, because that's where the trial occurs if there is one. The higher court is known as the appellate or appeals court, as it is the court that hears the appeal.

A single judge presides over trial court proceedings, but appellate cases are decided by panels of several judges. For example, in the federal court system, run by the United States government, a single trial judge known as a District Court judge oversees the trial stage. Cases can be appealed to the next higher court, the Court of Appeals, where cases are decided by panels of three judges known as Circuit Court judges. A side that loses before the Circuit Court can seek review of that decision at the United States Supreme Court. Supreme Court cases are decided by all nine judges. Supreme Court judges are called Justices instead of judges; there is one "Chief Justice" and the other eight are just plain "Justices" (technically they are "Associate Justices," but everyone just calls them "Justices").

During the proceedings before the higher court, the party that lost at the original court and is therefore filing the appeal is usually known as the "appellant." The party that won in the lower court and must defend the lower court's decision is known as the "appellee" (accent on the last syllable). Some older opinions may refer to the appellant as the "plaintiff in error" and the appellee as the "defendant

in error." Finally, some courts label an appeal as a "petition," and require the losing party to petition the higher court for relief. In these cases, the party that lost before the lower court and is filing the petition for review is called the "petitioner." The party that won before the lower court and is responding to the petition in the higher court is called the "respondent."

Confused yet? You probably are, but don't worry. You'll read so many cases in the next few weeks that you'll get used to all of this very soon.

III. What You Need to Learn from Reading a Case

Okay, so you've just read a case for class. You think you understand it, but you're not sure if you learned what your professor wanted you to learn. Here is what professors want students to know after reading a case assigned for class:

Know the Facts

Law professors love the facts. When they call on students in class, they typically begin by asking students to state the facts of a particular case. Facts are important because law is often highly fact-sensitive, which is a fancy way of saying that the proper legal outcome depends on the exact details of what happened. If you don't know the facts, you can't really understand the case and can't understand the law.

Most law students don't appreciate the importance of the facts when they read a case. Students think, "I'm in law school, not fact school; I want to know what the law is, not just what happened in this one case." But trust me: the facts are really important.[2]

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[2] If you don't believe me, you should take a look at a few law school exams. It turns out that the most common form of law school exam question presents a long description of a very particular set of facts. It then asks the student to "spot" and analyze the legal issues presented by those facts. These exam questions are known as "issue-spotters," as they test the student's ability to understand the facts and spot the legal issues they raise. As you might imagine, doing well on an issue-

Know the Specific Legal Arguments Made by the Parties

Lawsuits are disputes, and judges only issue opinions when two parties to a dispute disagree on a particular legal question. This means that legal opinions focus on resolving the parties' very specific disagreement. The lawyers, not the judges, take the lead role in framing the issues raised by a case.

In an appeal, for example, the lawyer for the appellant will articulate specific ways in which the lower court was wrong. The appellate court will then look at those arguments and either agree or disagree. (Now you can understand why people pay big bucks for top lawyers; the best lawyers are highly skilled at identifying and articulating their arguments to the court.) Because the lawyers take the lead role in framing the issues, you need to understand exactly what arguments the two sides were making.

Know the Disposition

The "disposition" of a case is the action the court took. It is often announced at the very end of the opinion. For example, an appeals court might "affirm" a lower court decision, upholding it, or it might "reverse" the decision, ruling for the other side. Alternatively, an appeals court might "vacate" the lower court decision, wiping the lower-court decision off the books, and then "remand" the case, sending it back to the lower court for further proceedings. For now, you should keep in mind that when a higher court "affirms" it means that the lower court had it right (in result, if not in reasoning). Words like "reverse," "remand," and "vacate" means that the higher court though the lower court had it wrong.

Understand the Reasoning of the Majority Opinion

To understand the reasoning of an opinion, you should first identify the source of the law the judge applied. Some opinions interpret the Constitution, the founding charter of the government. Other cases

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spotter requires developing a careful and nuanced understanding of the importance of the facts. The best way to prepare for that is to read the fact sections of your cases very carefully.

interpret "statutes," which is a fancy name for written laws passed by legislative bodies such as Congress. Still other cases interpret "the common law," which is a term that usually refers to the body of prior case decisions that derive ultimately from pre-1776 English law that the Colonists brought over from England.[3]

In your first year, the opinions that you read in your Torts, Contracts, and Property classes will mostly interpret the common law. Opinions in Criminal Law mostly interpret either the common law or statutes. Finally, opinions in your Civil Procedure casebook will mostly interpret statutory law or the Constitution. The source of law is very important because American law follows a clear hierarchy. Constitutional rules trump statutory (statute-based) rules, and statutory rules trump common law rules.

After you have identified the source of law, you should next identify the method of reasoning that the court used to justify its decision. When a case is governed by a statute, for example, the court usually will simply follow what the statute says. The court's role is narrow in such settings because the legislature has settled the law. Similarly, when past courts have already answered similar questions before, a court may conclude that it is required to reach a particular result because it is bound by the past precedents. This is an application of the judicial practice of "stare decisis," an abbreviation of a Latin phrase meaning "That which has been already decided should remain settled."

In other settings, courts may justify their decisions on public policy grounds. That is, they may pick the rule that they think is the best rule, and they may explain in the opinion why they think that rule is best. This is particularly likely in common law cases where judges are not bound by a statute or constitutional rule. Other courts will rely on morality, fairness, or notions of justice to justify

[3] The phrase "common law" started being used about a thousand years ago to refer to laws that were common to all English citizens. Thus, the word "common" in the phrase "common law" means common in the sense of "shared by all," not common in the sense of "not very special." The "common law" was announced in judicial opinions. As a result, you will sometimes hear the phrase "common law" used to refer to areas of judge-made law as opposed to legislatively-made law.

their decisions. Many courts will mix and match, relying on several or even all of these justifications.

Understand the Significance of the Majority Opinion

Some opinions resolve the parties' legal dispute by announcing and applying a clear rule of law that is new to that particular case. That rule is known as the "holding" of the case. Holdings are often contrasted with "dicta" found in an opinion. Dicta refers to legal statements in the opinion not needed to resolve the dispute of the parties; the word is a pluralized abbreviation of the Latin phrase "obiter dictum," which means "a remark by the way."

When a court announces a clear holding, you should take a minute to think about how the court's rule would apply in other situations. During class, professors like to pose "hypotheticals," new sets of facts that are different from those found in the cases you have read. They do this for two reasons. First, it's hard to understand the significance of a legal rule unless you think about how it might apply to lots of different situations. A rule might look good in one setting, but another set of facts might reveal a major problem or ambiguity. Second, judges often reason by "analogy," which means a new case may be governed by an older case when the facts of the new case are similar to those of the older one. This raises the question, which are the legally relevant facts for this particular rule? The best way to evaluate this is to consider new sets of facts. You'll spend a lot of time doing this in class, and you can get a head start on your class discussions by asking the hypotheticals on your own before class begins.

Finally, you should accept that some opinions are vague. Sometimes a court won't explain its reasoning very well, and that forces us to try to figure out what the opinion means. You'll look for the holding of the case but become frustrated because you can't find one. It's not your fault; some opinions are written in a narrow way so that there is no clear holding, and others are just poorly reasoned or written. Rather than trying to fill in the ambiguity with false certainty, try embracing the ambiguity instead. One of the skills of top-flight lawyers is that they know what they don't know: they know

when the law is unclear. Indeed, this skill of identifying when a problem is easy and when it is hard (in the sense of being unsettled or unresolved by the courts) is one of the keys to doing very well in law school. The best law students are the ones who recognize and identify these unsettled issues without pretending that they are easy.

Understand Any Concurring and/or Dissenting Opinions

You probably won't believe me at first, but concurrences and dissents are very important. You need to read them carefully. To understand why, you need to appreciate that law is man-made, and Anglo-American law has often been judge-made. Learning to "think like a lawyer" often means learning to think like a judge, which means learning how to evaluate which rules and explanations are strong and which are weak. Courts occasionally say things that are silly, wrongheaded, or confused, and you need to think independently about what judges say.

Concurring and dissenting opinions often do this work for you. Casebook authors edit out any unimportant concurrences and dissents to keep the opinions short. When concurrences and dissents appear in a casebook, it signals that they offer some valuable insights and raise important arguments. Disagreement between the majority opinion and concurring or dissenting opinions often frames the key issue raised by the case; to understand the case, you need to understand the arguments offered in concurring and dissenting opinions.

IV. Why Do Law Professors Use the Case Method?

I'll conclude by stepping back and explaining why law professors bother with the case method. Every law student quickly realizes that law school classes are very different from college classes. Your college professors probably stood at the podium and droned on while you sat back in your chair, safe in your cocoon. You're now starting law school, and it's very different. You're reading about actual cases, real-life disputes, and you're trying to learn about the law by picking up bits and pieces of it from what the opinions tell

you. Even weirder, your professors are asking you questions about those opinions, getting everyone to join in a discussion about them. Why the difference?, you may be wondering. Why do law schools use the case method at all?

I think there are two major reasons, one historical and the other practical.

The Historical Reason

The legal system that we have inherited from England is largely judge-focused. The judges have made the law what it is through their written opinions. To understand that law, we need to study the actual decisions that the judges have written. Further, we need to learn to look at law the way that judges look at law. In our system of government, judges can only announce the law when deciding real disputes: they can't just have a press conference and announce a set of legal rules. (This is sometimes referred to as the "case or controversy" requirement; a court has no power to decide an issue unless it is presented by an actual case or controversy before the court.) To look at the law the way that judges do, we need to study actual cases and controversies, just like the judges. In short, we study real cases and disputes because real cases and disputes historically have been the primary source of law.

The Practical Reason

A second reason professors use the case method is that it teaches an essential skill for practicing lawyers. Lawyers represent clients, and clients will want to know how laws apply to them. To advise a client, a lawyer needs to understand exactly how an abstract rule of law will apply to the very specific situations a client might encounter. This is more difficult than you might think, in part because a legal rule that sounds definite and clear in the abstract may prove murky in application. (For example, imagine you go to a public park and see a sign that says "No vehicles in the park." That plainly forbids an automobile, but what about bicycles, wheelchairs, toy automobiles? What about airplanes? Ambulances? Are these "vehicles" for the purpose of the rule or not?) As a result, good lawyers

need a vivid imagination; they need to imagine how rules might apply, where they might be unclear, and where they might lead to unexpected outcomes. The case method and the frequent use of hypotheticals will help train your brain to think this way. Learning the law in light of concrete situations will help you deal with particular facts you'll encounter as a practicing lawyer.

Good luck!

CASE ANALYSIS EXERCISE

Please brief the following case prior to class on Tuesday, August 26 (section A) or Wednesday, August 27 (section C). You will not be required to turn in your brief, but you must be prepared to discuss this case in class. To help with this exercise, I have attached an article entitled "How to Read a Legal Opinion."

There are many different ways to brief a case – some people write notes in the margins of the case, others use a method involving several different colors of highlighters, and others do a separate written document for each case. Over the next few weeks you will determine what method works best for you. No individual method is required for this exercise. Instead, the point of this exercise is for you to be familiar enough with this case to discuss it during class.

119 L.R.R.M. (BNA) 2187
Supreme Court of Texas.

SABINE PILOT SERVICE, INC., Petitioner,
v.

Michael Andrew HAUCK, Respondent.

No. C-3312.April 3, 1985.

Action was brought alleging wrongful termination of employment. The 58th District Court, Jefferson County, Ronald L. Walker, J., rendered summary judgment for former employer, and former employee appealed. The Court of Appeals, 672 S.W.2d 322, reversed and remanded, holding that former employee stated cause of action based on allegation he was discharged for failing to heed employer's direction to commit an illegal act. Employer appealed. The Supreme Court, Wallace, J., held that narrow exception to the employment-at-will doctrine exists for employee who is discharged for sole reason that the employee refused to perform an illegal act.

Judgment of the Court of Appeals affirmed.

Kilgarlin, J., filed a concurring opinion in which Ray, J., joined.

West Headnotes (5)

1 **Appeal and Error**🔑Judgment

In reviewing grant of a summary judgment the Supreme Court must accept as true nonmovant's version of the evidence and make every reasonable inference in the nonmovant's favor.

30 Cases that cite this headnote

2 **Judgment**🔑Existence or non-existence of fact issue

To sustain summary judgment the movant must establish as a matter of law that no genuine issue of material fact exists.

14 Cases that cite this headnote

3 **Courts**🔑Highest appellate court

Supreme Court is free to judicially amend a judicially created doctrine.

11 Cases that cite this headnote

4 **Labor and Employment**🔑Refusal to Engage in Wrongdoing
Labor and Employment🔑Causal connection; temporal proximity

Public policy requires a narrow exception to the employment-at-will doctrine for an employee who was discharged for the sole reason that the employee refused to perform an illegal act.

466 Cases that cite this headnote

5 **Labor and Employment**🔑Presumptions and burden of proof
Labor and Employment🔑Exercise of rights or duties; retaliation

In wrongful discharge action brought by employee at will based on allegations that the employee was discharged for refusal to perform an illegal act, it is the employee's burden to prove by preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act.

390 Cases that cite this headnote

Attorneys and Law Firms

*734 Orgain, Bell & Tucker, Gilbert I. Low and Robert J. Hambright, Beaumont, Long, Parker, Doyle & Cichowaki, Carl A. Parker, Port Arthur, for petitioner.
Provost, Umphrey, McPherson & Swearingen, Greg Thompson, Port Arthur, for respondent.

Opinion

WALLACE, Justice.

This is a suit for wrongful discharge brought by an

employee, Michael Andrew Hauck. The trial court rendered summary judgment for Sabine Pilot Service, Inc., the employer. The court of appeals reversed the judgment of the trial court and remanded the cause for trial. 672 S.W.2d 322. We affirm the judgment of the court of appeals.

Hauck was a deckhand for Sabine. He testified in deposition that he was instructed that one of his duties each day was to pump the bilges of the boat on which he worked. He observed a placard posted on the boat which stated that it was illegal to pump the bilges into the water. He called the United States Coast Guard and an officer confirmed that pumping bilges into the water was illegal; therefore, he refused to do so. He further testified that he was fired for refusing to illegally pump the bilges into the water.

Sabine testified through one of its officers that Hauck was discharged because he refused to swab the deck, man a radio watch and other derelictions of duty.

1 2 In reviewing the granting of a summary judgment we must accept as true the non-movant's version of the evidence and make every reasonable inference in the non-movant's favor. *Gulbenkian v. Penn,* 151 Tex. 412, 252 S.W.2d 929 (1952). To sustain the summary judgment the movant must establish as a matter of law that no genuine issue of material fact exists. *City of Houston v. Clear Creek Basin Authority,* 589 S.W.2d 671 (Tex.1979).

The sole issue for our determination is whether an allegation by an employee that he was discharged for refusing to perform an illegal act states a cause of action. This court in *East Line & R.R.R. Co. v. Scott,* 72 Tex. 70, 75, 10 S.W. 99, 102 (1888), held that employment for an indefinite term may be terminated at will and without cause. The courts of Texas have steadfastly refused to vary from that holding. However, in the last 30 years the courts of 22 states have made exceptions to the employment-at-will doctrine and numerous commentators have advocated exceptions to the doctrine. The exceptions advocated by the commentators and adopted by various courts range from very liberal and broad exceptions to very narrow and closely defined ones. *See* Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship,* 36 Baylor L.Rev. 667 (1984) for a thorough discussion of the reasoning and decisions of other states concerning this issue.

3 Sabine contends that any exception to the employment-at-will doctrine should be statutorily created. The Legislature has created exceptions to this doctrine. TEX.REV.CIV.STAT.ANN. art. 8307c (discharge for filing a worker's compensation claim); TEX.REV.CIV.STAT.ANN. art. 5207a (discharge based on union membership or nonmembership); TEX.REV.CIV.STAT.ANN. art. 5765 § 7A (discharge because of active duty in the State Military Forces); TEX.REV.CIV.STAT.ANN. art. 5207b (discharge because of jury service); *735 TEX.REV.CIV.STAT.ANN. art. 5221k § 1.02, Texas Commission on Human Rights Act (discharge based on race, color, handicap, religion, national origin, age or sex). Although the Legislature has created those exceptions to the doctrine, this court is free to judicially amend a judicially created doctrine.

4 5 Upon careful consideration of the changes in American society and in the employer/employee relationship during the intervening 97 years since the *East Line & R.R.R. Co. v. Scott* decision, we hold that the situation which led to that decision has changed in certain respects. We now hold that public policy, as expressed in the laws of this state and the United States which carry criminal penalties, requires a very narrow exception to the employment-at-will doctrine announced in *East Line & R.R.R. Co. v. Scott.* That narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act. We further hold that in the trial of such a case it is the plaintiff's burden to prove by a preponderance of the evidence that his discharge was for no reason other than his refusal to perform an illegal act.

The judgment of the court of appeals is affirmed.

KILGARLIN, J., files a concurring opinion in which RAY, J., joins.

KILGARLIN, Justice, concurring.

I concur with this judgment which gives Michael Hauck an opportunity to prove to a trier of fact that he was discharged for refusing to violate a law. Moreover, I heartily applaud the court's acknowledgement of the vital need for a public policy exception to the employment at will doctrine. Absolute employment at will is a relic of early industrial times, conjuring up visions of the sweat shops described by Charles Dickens and his contemporaries. The doctrine belongs in a museum, not in our law. As it was a judicially promulgated doctrine, this court has the burden and the duty of amending it to reflect social and economic changes. Our duty to update this doctrine is particularly urgent when the doctrine is used as leverage to incite violations of our state and federal laws. Allowing an employer to require an employee to break a law or face termination cannot help but promote a thorough disrespect for the laws and legal institutions of our society.

The court admittedly carves out but one exception to

employment at will, but I do not fault the court for the singleness of its exception. The issue before the court was whether a cause of action existed under this particular fact situation: termination of an employee for his refusal to violate a law with a criminal penalty. There was no need for the court to create any other exception to employment at will in order to grant Hauck his requested relief. But, our decision today in no way precludes us from broadening the exception when warranted in a proper case.

As the court opinion recognizes, over twenty-two jurisdictions have carved exceptions to the employment at will doctrine in the last thirty years. The characteristics of the cause of action for wrongful discharge in those states vary. For example, Wisconsin has instituted a narrow contract-based exception to the employment at will doctrine. *Brockmeyer v. Dun & Bradstreet,* 113 Wis.2d 561, 335 N.W.2d 834, 838 (1983). Wisconsin law now implies into each employment at will contract a provision that the employer will not "discharge an employee for refusing to perform an act that violates a clear mandate of public policy." 335 N.W.2d at 841. The Wisconsin court narrowly defined public policy to include constitutional and statutorily enunciated public policy only. The employee has to show that the dismissal violated such a policy. Then it becomes the employer's burden to go forward with evidence to show that the firing resulted from just cause, not from the employee's refusal to commit an illegal act. Hawaii has a similar exception, but uses a broader definition of public policy. Judicial decisions are included in the scope of public policy which an employer is not permitted to ask an employee *736 to violate. *Parnar v. Americana Hotels, Inc.,* 65 Hawaii 370, 652 P.2d 625 (1982).

Washington uses the same definition of public policy as Hawaii, but the burden of proof varies slightly. The Supreme Court of Washington requires the employee to plead and prove that a public policy may have been contravened. Once the employee has met this relatively easy task, "the burden shifts to the employer to prove that the dismissal was for reasons other than those alleged by the employee." *Thompson v. St. Regis Paper Co.,* 102 Wash.2d 219, 685 P.2d 1081, 1089 (1984).

On the opposite end of the scale are New Hampshire and Massachusetts. New Hampshire may have announced the broadest of exceptions to the employment at will doctrine when it recognized a cause of action for terminations resulting from "bad faith, malice or retaliatory motives." *Monge v. Beebe Rubber Co.,* 114 N.H. 130, 316 A.2d 549 (1974). Massachusetts simply implies a good faith and fair dealing clause into each employment contract. *See Fortune v. National Cash Register Co.,* 373 Mass. 96, 364 N.E.2d 1251 (1977).

The court opinion today does not extend an employee's protection as far as any of the other states and Texas may never extend the exception to the *Monge* limit. Yet, the examples of other states will be valuable in examining exactly how broadly the exception in Texas can evolve. In the meantime, an employee in Texas finally has a cause of action when he can show that his employer fired him for his refusal to commit an illegal act.

The employee has the burden of proof and persuasion. The judge will then have to determine if a statute with a criminal penalty is involved. The jury or fact finder then must decide if the employer sought to have the employee commit an illegal act. Finally, the jury will have to answer a question similar to the following:

> Do you find from a preponderance of the evidence that the only reason for the employee's termination was his (her) refusal to commit an illegal act?

Finally, because of the limited issues presented in this case, the court does not address the matter of Hauck's measure of damages. Logically, Tex.Rev.Civ.Stat.Ann. art. 8307c (prohibition of firing an employee for filing a worker's compensation claim) should serve as a guide. If so, damages would include loss of wages, both past and those reasonably anticipated in the future, and employee and retirement benefits that would have accrued had employment continued. It would also include punitive damages. *See Carnation Co. v. Borner,* 610 S.W.2d 450 (Tex.1980).

Although I might have defined the employment at will exception differently, I concur in the court's result and am pleased that an antiquated doctrine has been overcome by the realization that modern times require modern law. I, too, would affirm the judgment of the court of appeals.

RAY, J., joins in this concurring opinion.

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