

2017

The Best Way Out is Always Through: Changing the Employment At-Will Default to Protect Personal Autonomy

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THE BEST WAY OUT IS ALWAYS THROUGH:[†] CHANGING THE EMPLOYMENT AT-
WILL DEFAULT TO PROTECT PERSONAL AUTONOMY

Matthew T. Bodie*

Abstract

Employment at-will is the default rule of termination for the vast majority of American employment relationships. The rule creates a presumption—a strong one—that the contract for employment allows either party to terminate the contract at any point in time. Since its inception, this bright line rule has given way to carefully curated exceptions, primarily to protect against discrimination and retaliation. This Article proposes that state courts create a new exception to the at-will rule—or, perhaps more accurately, acknowledge an intricacy within the existing default. The personal-autonomy presumption would modify at-will to make clear that employers will not take any action against an employee based on the employee’s personal autonomy, so long as that autonomy does not interfere with the employer’s business or reputation. Employee personal autonomy would be defined to include political affiliations, religious observance, and recreational activities. The default rule would hold that, as part of the bargain between employer and employee, the employer agrees not to leverage the power that it exercises in the work realm to influence employees improperly in the personal realm. In order to change the default autonomy rule, employers would need to further develop their expectations as to off-duty conduct and communicate those expectations to employees. As a result, the employment contract would provide both employers and employees with a better understanding of performance requirements and of the boundaries of their relationship.

[†] ROBERT FROST, *A Servant to Servants*, in NORTH OF BOSTON 66 (1914) (“He says the best way out is always through./And I agree to that, or in so far/As that I can see no way out but through— . . .”).

* Callis Family Professor, Saint Louis University School of Law; Co-Reporter, Restatement of Employment Law. This Article represents my own perspective and not those of the American Law Institute or my fellow reporters. I am much obliged for comments from participants in the Saint Louis University Faculty Workshop Series and the 2014 Law & Society Annual Meeting, as well as thoughts and suggestions from ALI members and advisors on the multiple iterations of § 7.08 of the Restatement. I am also grateful to Saint Louis University School of Law for funding through its former Summer Research Grant program. I greatly appreciate comments and suggestions from Miriam Cherry, Dennis Corgill, Zev Eigen, Michael Fischl, Ruben Garcia, Charlotte Garden, Jesse Goldner, Tim Greaney, John Griesbach, Rebecca Hollander-Blumoff, Marcia McCormick, Carol Needham, Karen Sanner, Paul Secunda, and Doug Williams. In addition, I was fortunate to receive thoughtful feedback on earlier drafts from students in Miriam Cherry’s “Virtual Work” and “People Analytics” classes. Many thanks to Jim Dougherty and Cody Huffines for excellent research assistance.

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INTRODUCTION

The “employment at-will” doctrine serves as the presumptive default rule for the vast majority of American employment relationships.¹ Despite its hoary provenance and established mien,² the doctrine has been consistently attacked by

¹ See Richard A. Bales, *Explaining the Spread of at-Will Employment As an Interjurisdictional Race to the Bottom of Employment Standards*, 75 TENN. L. REV. 453, 459 (2008) (“Today, the at-will rule remains the default employment rule in every state but Montana . . .”). A classic formulation of the rule can be found in *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518-19 (1884), overruled on other grounds, *Hutton v. Watters*, 179 S.W. 134, 138 (Tenn. 1915) (“[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employe may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.”). The Restatement of Employment Law sets forth the at-will rule as the presumptive default. RESTATEMENT OF EMPLOYMENT LAW § 2.01 (2015) (“Either party may terminate an employment relationship with or without cause unless the right to do so is limited by statute, other law or public policy, or an agreement between the parties, a binding employer promise, or a binding employer policy statement.”).

² HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (John D. Parsons, Jr. ed., 1877). See Rachel Arnow-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513, 1520-21 (2014) (“Since almost every jurisdiction has judicially embraced Wood's statement of the law, it is now firmly ensconced . . .”).

generations of academics.³ Its critics deplore the complete and largely unreviewable control over the employment relationship that it provides to employers. Moreover, some have also argued that the at-will rule represents a poor reading of common-law contract doctrine.⁴ Rather than merely serving as a presumption, the at-will rule has become a much stickier default in many jurisdictions, rolling like a steamroller over evidence of contrary intent.⁵ Combining questionable assumptions about the parties' intent with arguably retrograde policy effects, the at-will rule has all the hallmarks of a creature of *Lochner*-ian laissez-faire jurisprudence, except that it lives on into the present. And yet, no American court has adopted anything to the contrary.⁶

The at-will rule is best understood as a compromise between courts and employers over decisionmaking authority within the employment relationship.⁷ Courts have largely granted to employers unreviewable discretion over that relationship unless outside concerns come into play. The employer is given leeway to judge for itself whether the employee fits within the internal organization of the firm. In return, courts intrude when employers use their power to harm third-party interests.⁸ The balance between impacts outside and inside the boundaries of the firm best explains why courts have provided the at-will presumption with such power. However, this balance has often been lost in many explanations of the rule. Instead of framing the at-will rule as a method of providing the employer with control over business-related functions, it is instead framed as complete and unreviewable discretion to fire someone “for any reason, or no reason at all.”⁹ This wide-open discretion is at odds with workers' actual understanding of the at-will rule,

³ E.g. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967); Matthew Finkin, et al., *Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination*, 13 EMP. RTS. & EMP. POL'Y J. 93, 100 (2009); Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 65-66 (1988); Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 77-78 (2000).

⁴ Finkin et al., *supra* note 3, at 95-107 (arguing that the at-will rule is in greater flux than generally appreciated).

⁵ See Deborah A. DeMott, *Investing in Work: Wilkes As an Employment Law Case*, 33 W. NEW ENG. L. REV. 497, 509 (2011) (suggest that “the at-will rule may be a sticky default more often and for a more complex set of reasons than heretofore believed”).

⁶ RESTATEMENT OF EMPLOYMENT LAW § 2.01 cmt. b (2015) (“The high courts in 49 states and the District of Columbia recognize as the default rule the principle that employment is presumptively an at-will relationship. (The sole exception is Montana, which by statute requires ‘good cause’ . . .).”).

⁷ Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1938 (1996) (arguing that even though most employment relationships have a norm of only for-cause termination, this norm should not be enforced by courts).

⁸ See RESTATEMENT OF EMPLOYMENT LAW § 5.01 (2015) (setting forth the tort of wrongful discharge in violation of public policy).

⁹ See, e.g., *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 280 (Iowa 2000).

in which employees actually expect that employers are limited to something much closer to just cause.¹⁰

In order to restore the balance inherent in the at-will compromise, courts should refine that doctrine by adding another default presumption: that the employer will not make employee-related decisions based on employee actions or beliefs that lie outside of the employment relationship.¹¹ This addendum reflects simply the other side of the at-will coin: complete employer discretion over on-the-job decisions, but no employer discretion over decisions that are not related to employment. Such a reform would make the rule not only a more balanced compromise between the needs of employer and employee, but it would also better reflect the general understanding of the employment relationship. No employee goes into the employment relationship expecting that the employer will use that relationship to pressure the employee into changing her personal life. A carve-out for employee decisions, beliefs, and activities that take place outside the workplace—which I label as “personal autonomy”—puts the at-will rule on more solid footing, both doctrinally and empirically.

Protecting personal autonomy would also provide a principled approach to regulating employer discretion within the workplace. Many of the statutory or common-law doctrines that modify or limit the at-will rule are related to concerns about employee autonomy.¹² And yet specific autonomy protections remain relegated to the public sector (through the First Amendment)¹³ or to state statutory schemes (such as off-duty laws).¹⁴ A common-law recognition for an autonomy carve-out would be in keeping with the role of courts in creating and maintaining the at-will doctrine. And it would provide a principled defense for the at-will rule itself—a defense that currently rests on weak doctrinal and theoretical foundations.

This Article presents the argument for an autonomy addendum to employment at-will. Part I discusses the at-will rule, its role in the employment relationship, and its stickiness as a default. Part II discusses the concept of employee personal autonomy, and it sets forth the numerous existing common-law and statutory protections that address autonomy concerns. Part III discusses two ways in which the common law could protect autonomy: through a wrongful discharge tort

¹⁰ See Rock & Wachter, *supra* note 7, at 1930 (“We know that generally, even in non-union firms, the norm governing termination is “no discharge without cause.”). In an empirical study of worker attitudes, Pauline Kim found that 89% of respondents felt that it would be unlawful for an employer to terminate an employee based on personal dislike. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an at-Will World*, 83 CORNELL L. REV. 105, 134 (1997).

¹¹ This new presumption is set forth in RESTATEMENT OF EMPLOYMENT LAW § 7.08 (2015). This Article represents an extended argument in support of § 7.08.

¹² See Part II.B *infra*.

¹³ See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (noting that constitutional privacy interests include “the interest in independence in making certain kinds of important decisions”); see also Part II.B.6 *infra*.

¹⁴ See Part II.B.5 *infra*.

or through a contractual default rule. It argues that the common law should recognize a personal-autonomy presumption within the overall at-will rule. Although there are merits to mandatory protection through tort, a contractual approach better matches with the at-will rule as well as the nuanced relationship between firms and employees.

I. THE EMPLOYMENT AT-WILL DEFAULT

A. *The Common-Law Doctrine of At-Will*

Employees with indefinite term contracts are presumed to be working at will. That presumption replaced the prior English rule, which assumed that employees had been hired for a year, in order to protect seasonal agricultural workers from being released in the cold of winter.¹⁵ The traditional story lays the blame for this change on Horace Wood, whose treatise somberly laid out the basics: “With us the rule is inflexible, that a general of indefinite hiring is prima facie a hiring at-will, and if the servant seeks to make it out a yearly hiring, the burden is on him to establish it by proof.”¹⁶ Commentators have questioned Wood’s support for his rule, implying that he fabricated it with little precedential backing.¹⁷ Others, however, have argued that the rule was well-established, and in turn questioned the importance of Wood’s actual role.¹⁸ Regardless of its provenance, the rule proved extremely popular with courts, and it is now the unquestioned default rule in forty-nine of the fifty states.¹⁹

¹⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES 425 (Christian, 12th ed. 1793) (finding the rule in employment to be: “[i]f the hiring be general, without any particular time limited, the law construes it to be a hiring for a year”), cited in Feinman, *supra* note JF1, at 119-20.

¹⁶ WOOD, *supra* note 2, § 134, at 272.

¹⁷ An A.L.R. entry was the first to question Wood’s support for his rule. Annotation, Duration of Contract of Hiring Which Specified No Term, but Fixes Compensation at a Certain Amount Per Day, Week, Month, or Year, 11 A.L.R. 469, 475-76 (1921) (saying that the “proposition was without any authority whatever to support it.”). See also Jay Feinman, The Development of the Employment At Will Rule, 20 Am. J. Legal Hist. 118, 126-27 (1976) (questioning whether Wood’s Rule was based on solid doctrinal support); Gary Minda, *The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine*, 36 SYRACUSE L. REV. 939, 970 (1985) (“Commentators now agree that Wood invented his own rule.”).

¹⁸ Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of “Wood’s Rule” Revisited*, 22 ARIZ. ST. L.J. 551, 558 (1990) (“Horace Wood did not make up the rule of employment at will. He just told it like it was.”); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 756 (1994) (finding support for Wood’s Rule at the time of publication).

¹⁹ RESTATEMENT OF EMPLOYMENT LAW § 2.01 cmt. b (2015) (“The high courts in 49 states and the District of Columbia recognize as the default rule the principle that employment is presumptively an at-will relationship. (The sole exception is Montana, which by statute requires ‘good cause’ . . .).”). The at-will rule has been codified in some states. See, e.g., GA. CODE ANN. § 34-7-1 (“An indefinite hiring may be terminated at will by either party.”).

The at-will rule creates a presumption that the employee can be terminated without cause—or, as many courts have framed it, “for any reason, or no reason at all.”²⁰ The notion is that both employers and employees are free to walk away from the relationship at any time. As a presumption, the at-will doctrine serves as a default rule that applies if the parties have not specified otherwise. Employees can receive any sort of protection under contract, if they negotiate for such. Outside of high-level executives or employees represented by unions, however, most employees in the United States work under an at-will regime.²¹

Default rules are a common way of resolving ambiguities or incomplete terms within contracts. The common law recognizes a set of default contract terms,²² as does the Uniform Commercial Code.²³ Default rules are often necessary to fill in gaps when the parties have failed to specify a term that is or becomes necessary to determine whether the contract was formed or has been breached. In choosing which default rule to put into place, most commentators have argued that default rules should mimic what the parties would have chosen on their own.²⁴ Because the purpose of contract enforcement is to enforce the intent of the parties, defaults should arguably follow the intent of the parties, even if the particular intent is not available.

However, the at-will presumption has become more than just a default rule. It has become a “sticky” default—a default that is difficult to overcome as a matter

²⁰ See, e.g., *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 280 (Iowa 2000). This quote can be found in over 475 cases dealing with at-will employment. See Westlaw search, (employ! /s "at will" at-will) /p "for any reason or no reason at all", Allcases database, March 10, 2016 (revealing 476 results).

²¹ Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 28 (1993) (“The empirical claim that most private employees are at will is rarely disputed.”). Unions generally include just-cause provisions within their grievance-arbitration systems. See Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 10 (2010) (“In negotiating collective terms of employment, unions almost always seek and achieve just cause protection for their workers, a fact widely observed in the just cause literature.”).

²² See, e.g., RESTATEMENT SECOND OF CONTRACTS § 63 (1981) (providing default for time when acceptance takes place); *id.* § 222 (providing default rule for trade-usage evidence); *id.* § 223 (providing default rule for course of dealing evidence).

²³ See, e.g., U.C.C. §2-305 (providing for a “reasonable price” as a default when the price is not otherwise set);

§ 2-307 (establishing default rules for delivery lots); § 2-308 (providing default places for place of delivery); § 2-314 (providing for a default warranty of merchantability).

²⁴ Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 89-90 (1989) (“Few academics have gone beyond one-sentence theories stipulating that default terms should be set at what the parties would have wanted.”); see also RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 372 (3d ed. 1986) (arguing that default rules should “economize on transaction costs by supplying standard contract terms that the parties would otherwise have to adopt by express agreement”).

of common-law doctrine.²⁵ Courts generally do not parse the entire context of the employment relationship to divine the actual intentions of the parties as to grounds for termination. Instead, the at-will rule is presumed unless there is fairly convincing evidence to the contrary. In fact, courts have often ignored evidence of contrary intent by using idiosyncratic doctrines that ignore or discount such evidence.²⁶

The primary way in which the at-will rule is doctrinally sticky is the power of the default presumption. The presumption itself is often characterized as “strong” or “heavy.”²⁷ Courts generally require “unequivocal” or “unambiguous” evidence in order to overcome the default.²⁸ To take one example, the Texas Supreme Court has held that for the at-will presumption to be overcome, “the employer must unequivocally indicate a definite intent to be bound not to terminate the employee except under clearly specified circumstances.”²⁹ Even an employer statement that the employee will be discharged only for “good reason” or “good cause” is insufficient “when there is no agreement on what those terms encompass.”³⁰ Even though at-will is only a default, it overrides evidence to the contrary unless that evidence unambiguously sets it aside.³¹

²⁵ DeMott, *supra* note 5, at 498, 509; *see also* Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 677 (2006) (finding the at-will rule to be “highly sticky” as a default).

²⁶ Rachel Arnow-Richman, *The Role of Contract in the Modern Employment Relationship*, 10 TEX. WESLEYAN L. REV. 1, 4 (2003) (“The law of employment contracts is highly idiosyncratic.”); Franklin G. Snyder, *The Pernicious Effect of Employment Relationships on the Law of Contracts*, 10 TEX. WESLEYAN L. REV. 33 (2003) (“The relationship between employment and contract law is peculiar.”).

²⁷ *Southward v. FedEx Freight, Inc.*, 98 F. Supp. 3d 926, 931 (S.D. Ohio 2014) (finding that “[t]here is a strong presumption of at-will employment”); *Ritter v. Pepsi Cola Operating Co. of Chesapeake & Indianapolis*, 785 F. Supp. 61, 63 (M.D. Pa. 1992) (“In Pennsylvania, there is a very strong presumption of at-will employment relationships and the level of proof required to overcome this presumption is arduous.”); *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 440 (Del. 1996) (noting “a heavy presumption that a contract for employment, unless otherwise expressly stated, is at-will in nature, with duration indefinite”).

²⁸ *See, e.g.*, MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 760 (3d ed. 2004) (finding that “[o]ral representations for permanent employment . . . must be clear and unequivocal enough to overcome the presumption that employment is at will”); Paul G. Beers, *Employment Law*, 28 U. RICH. L. REV. 1007, 1040 (1994) (“The employer’s promise of continued employment must be unambiguous.”).

²⁹ *Montgomery Cty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex. 1998).

³⁰ *Id.* *See also* *Hayes v. Eateries, Inc.*, 905 P.2d 778, 783 (Okla. 1995) (requiring “definite and specific promises by the employer”); *Rowe v. Montgomery Ward & Co.*, 473 N.W.2d 268, 275 (requiring that “oral statements of job security must be clear and unequivocal to overcome the presumption of employment at will”).

³¹ Not all jurisdictions require clear and definite evidence. *See, e.g.*, *Berube v. Fashion Ctr., Ltd.*, 771 P.2d 1033, 1044 (Utah 1989) (“This presumption can be overcome by an affirmative showing by the plaintiff that the parties expressly or impliedly intended a specified term or agreed to terminate the relationship for cause alone. Such evidence may be found in employment manuals, oral agreements, and all circumstances of the relationship which demonstrate the intent to terminate only for cause or to continue employment for a specified period. Although in the past the presumption in favor of at-will employment has been difficult to overcome, rigid adherence to the at-will rule is no longer

Courts are even less likely to find contextual evidence probative in overcoming the at-will presumption. California courts were at the vanguard in looking to evidence such as length of service, industry norms, and informal company policies in evaluating whether the at-will presumption held in a particular employment relationship.³² However, the California Supreme Court has retreated a bit from its original stance, emphasizing the importance of written personnel documents in evaluating the overall relationship.³³ The Court also specified that while disclaimers of any additional promises of termination protection are not the final word, neither are they meaningless in interpreting the overall employment agreement.³⁴ Outside of California, the implied-in-fact exception to the at-will presumption remains rare, and as in California, it has lost steam over time.³⁵

However, some jurisdictions even go beyond the requirement of strong or unambiguous evidence to hold that oral evidence itself is insufficient to overcome the at-will presumption. This is a fairly remarkable change from the normal rule of contract interpretation. Although the parol evidence rule discharges any agreements stemming from oral or written negotiations prior to the execution of a completely integrated written agreement,³⁶ most employment agreements are oral themselves, and a default “at-will” rule is necessary because the parties have not specified a termination rule.³⁷ Nevertheless, certain jurisdictions require that any deviation from the at-will rule be in writing.³⁸ In a similar vein, some jurisdictions have applied the

justified or advisable.”). *But cf.* Tomlinson v. NCR Corp., 345 P.3d 523, 527 (Utah 2014) (requiring that “the employer must communicate a manifestation of intent to the employee that is sufficiently definite to constitute a contract provision”).

³² *Foley v. Interactive Data Corp.*, 765 P.2d 373, 387 (Cal. 1988) (“In the employment context, factors apart from consideration and express terms may be used to ascertain the existence and content of an employment agreement, including the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.”(citation omitted)).

³³ *Guz v. Bechtel National, Inc.*, 8 P.3d 1089, 1102 (Cal. 2000).

³⁴ *Id.* at 1103-04.

³⁵ Jonathan Fineman, *The Inevitable Demise of the Implied Employment Contract*, 29 BERKELEY J. EMP. & LAB. L. 345, 348 (2008) (“Twenty years later, the implied contract doctrine approach to employment law has been considerably curtailed.”).

³⁶ *See* RESTATEMENT (SECOND OF CONTRACTS) § 213 (1981) (discharging prior agreements to the extent they are “within [the] scope” of the final agreement).

³⁷ 2 CAL. TRANSACTIONS FORMS--BUS. TRANSACTIONS § 12:25 (“Most employees do not work under a written employment agreement.”).

³⁸ *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-1501 (“The employment relationship is severable at the pleasure of either the employee or the employer unless both the employee and the employer have signed a written contract to the contrary setting forth that the employment relationship shall remain in effect for a specified duration of time or otherwise expressly restricting the right of either party to terminate the employment relationship.”); *Payne v. Whole Foods Mkt. Grp., Inc.*, 812 F. Supp. 2d 705, 708 (E.D.N.C. 2011) (“Employers and employees can exempt themselves from the at-will presumption by signing a contract with a definite time period of employment.”).

Statute of Frauds to “permanent” or indefinite contracts that require something more than at-will for termination. One of the Statute of Frauds’ provisions requires that a contract be signed and in writing if it “cannot be fully performed within a year from the time the contract is made.”³⁹ Although an employment contract for an express term longer than a year would fall within the Statute’s one-year provision, a contract of indefinite length would not. Even if the contract were to last for many years, it could be fully performed within a year of its making, as the employee could die or leave for another job. Thus, indefinite term employment agreements do not fall within the one-year provisions, and most courts have so held.⁴⁰ But not all. In Virginia, courts require that contracts that are terminable for cause must be construed as setting a definite term for employment, and that term will extend beyond one year.⁴¹ Thus, for-cause agreements must meet the requirements of the Statute of Frauds. Other courts have held that a contract for lifetime employment falls within the one-year provision, despite the fact that it can be performed within one year. Finding the argument that an employee could die within a year to be “hollow and unpersuasive, one court stated that a lifetime employment contract was “in essence, a permanent employment contract” that “[i]nherently . . . anticipates a relationship of long duration—certainly longer than one year.”⁴² In fact, the court argued that “[t]o hold otherwise would eviscerate the policy underlying the statute of frauds and would invite confusion, uncertainty and outright fraud.”⁴³

In addition to clear and, in some cases, written abrogation of the default at-will rule, some states require additional proof to overcome the presumption. New York requires not only a written statement but also reliance by the employee on the termination protection. As one court has described it: “the plaintiff must rebut the presumption of an at will contract by proving the following: 1) there is an express written policy (often contained in an employee handbook) that limits the employer’s right of discharge; 2) the employer made the employee aware of this policy; and 3) the employee detrimentally relied on the policy in accepting or continuing employment.”⁴⁴ And in perhaps the strangest and most onerous requirement,

³⁹ RESTATEMENT (SECOND OF CONTRACTS) § 130(1) (1981).

⁴⁰ See, e.g., *Elliot v. Carl H. Winslow, Jr., P.A.*, 737 So. 2d 609 (Fla. App. 1999); *Parker v. Crider Poultry Inc.*, 565 S.E.2d 797 (Ga. 2002); *Meng v. Trustees of Boston University*, 693 N.E.2d 183 (Mass. App. 1998); *Montgomery County Hospital Dist. v. Brown*, 965 S.W.2d 501 (Tex. 1998); *French v. Sabey Corp.*, 931 P.2d 204 (Wash. App. 1997).

⁴¹ See, e.g., *Graham v. Cent. Fid. Bank*, 428 S.E.2d 916, 917 (Va. 1993) (“However, if an employment contract is terminable only for cause, it is one for a fixed period.”); *Progress Printing Co. v. Nichols*, 421 S.E.2d 428, 430 (Va. 1992) (“We have held that an employment condition which allows termination only for cause sets a definite term for the duration of the employment. However, the employment term created by a termination for cause condition, while definite, is not one capable of being performed within one year.” (citations omitted)).

⁴² *McInerney v. Charter Golf, Inc.*, 680 N.E.2d 1347, 1351-52 (Ill. 1997)

⁴³ *Id.* at 1352.

⁴⁴ *Azzolini v. Marriott Int'l, Inc.*, 417 F. Supp. 2d 243, 247 (S.D.N.Y. 2005); see also *Waddell v. Boyce Thompson Inst. for Plant Research, Inc.*, 92 A.D.3d 1172, 1173, 940 N.Y.S.2d 331, 332 (2012) (“This

employees in some states must provide additional consideration in exchange for the employer's promise of just cause or "permanent" employment.⁴⁵ A contract needs consideration to be binding, meaning that both parties need to promise to provide a benefit or suffer a detriment in the context of a bargained-for exchange.⁴⁶ But in the context of employment contracts, there is no need for separate consideration for separate terms; the employee exchanges her labor and additional consideration for the employer's wages and additional consideration. Nevertheless, some courts have created this additional requirement as yet one more hurdle to overcome the presumption.⁴⁷

Common-law contract doctrine presumes that each contract has an implied duty of good faith and fair dealing.⁴⁸ However, courts have been reluctant to tamper with the at-will presumption based on principles of good faith. Good faith is not seen as an appropriate vehicle for diluting the at-will presumption. As the New York Court of Appeals put it:

No obligation can be implied . . . which would be inconsistent with other terms of the contractual relationship. Thus, in the case now before us, plaintiff's employment was at will, a relationship in which the law accords

[at-will] presumption may be rebutted by proof establishing that the employer made the employee aware of its express written policy limiting its right of discharge and that the employee detrimentally relied on that policy in accepting the employment." Courts have also interpreted New York law to require a reference in the employer's personnel manual to a policy other than at-will. *See* *Wanamaker v. Columbian Rope Co.*, 907 F. Supp. 522, 540 (N.D.N.Y. 1995) *aff'd*, 108 F.3d 462 (2d Cir. 1997) (finding under New York law "an extremely limited exception to the general rule that no cause of action exists for termination of an at-will employee . . . if the employee demonstrates the following: 1) the employee was induced to leave his prior employment by the assurance that his employer would not discharge him without cause; 2) that assurance was incorporated into the employment application; 3) the employee rejected other offers of employment in reliance on the assurance; 4) a personnel handbook or manual provides that dismissal will be for just cause only.").

⁴⁵ RESTATEMENT OF EMPLOYMENT LAW § 2.03 Reporters' Notes at 69 (2015) ("Some courts remain wary of purported oral agreements promising permanent or lifetime employment, and require 'special' or 'additional' consideration besides the promise to perform service."); ROTHSTEIN ET AL., *supra* note MR1, at 761 (stating that "the doctrine of additional consideration remains relatively intact in cases involving oral promises, especially if the promise is for permanent employment").

⁴⁶ Restatement Second of Contracts § 17.

⁴⁷ *See, e.g.*, *Spacesaver Sys., Inc. v. Adam*, 69 A.3d 494, 507-510 (Md. App. 2013) (noting that "an employment agreement can be negotiated for the life of the employee," but only "in very rare circumstances" and may "require 'special' or 'additional' consideration to be valid."); *Wilder v. Cody Country Chamber of Commerce*, 868 P.2d 211, 218 (Wyo. 1994) ("[A] claim by an employee that the employer promised 'permanent' employment does not alter the at will presumption without additional consideration supplied by the employee or explicit language in the contract of employment stating that termination may only be for cause."); *Murphree v. Alabama Farm Bureau Ins. Co.*, 449 So. 2d 1218, 1221 (Ala. 1984) (holding that lifetime-employment contract is enforceable when employee provides consideration other than a promise to render services); *Henkel v. Educ. Research Council of Am.*, 45 Ohio St. 2d 249, 344 N.E.2d 118 (1976) (same).

⁴⁸ RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); UNIFORM COMMERCIAL CODE § 1-304.

the employer an unfettered right to terminate the employment at any time. In the context of such an employment it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination. The parties may by express agreement limit or restrict the employer's right of discharge, but to imply such a limitation from the existence of an unrestricted right would be internally inconsistent.⁴⁹

Although courts have recognized that employees may have claims under the good faith covenant, they have been limited to situations in which the employee suffers some particularized loss beyond termination of employment, such as the loss of an earned bonus.⁵⁰ In addition, the good faith obligation has been held to forbid the firing of an employee for doing what they were hired to do.⁵¹ However, good faith has not served to alter the basic nature of the at-will rule dramatically, and some states do not recognize any duty of good faith in the at-will employment context.⁵²

The cumulative effect of these alterations to traditional common-law doctrines is to make “at-will” more than just an everyday default rule. Instead, it is a strong or sticky default – a default rule whose presumption is more difficult to overcome.⁵³ The doctrinal primacy of the at-will presumption is one of the key features of the law of the employment contract that renders it such an anomaly within the common law of contracts more generally.⁵⁴

⁴⁹ *Murphy v. American Home Products Corp.*, 448 N.E.2d 86, 93 (N.Y. 1983); *see also* RESTATEMENT OF EMPLOYMENT LAW § 2.07 cmt. b (2015) (“Jurisdictions that recognize the implied duty [of good faith] in the employment setting therefore also recognize that the duty applies to at-will employment in a manner consistent with the essential nature of such an at-will relationship—namely . . . either party may terminate the relationship with or without cause.”).

⁵⁰ *See, e.g.*, RESTATEMENT OF EMPLOYMENT LAW § 2.07(c)(1) (2015) (finding a “duty not to terminate or seek to terminate the employment relationship for the purpose of: (1) preventing the vesting or accrual of an employee right or benefit”); *Fortune v. Nat’l Cash Register*, 364 N.E.2d 1251 (Mass. 1977) (employee was allegedly terminated mere days before he would have earned a substantial bonus in order to deprive him of the bonus).

⁵¹ RESTATEMENT OF EMPLOYMENT LAW § 2.07(c)(2) (2015) (finding an employer duty not to terminate the employee “for the purpose of . . . retaliating against the employee for performing the employee’s obligations under the employment contract or law”). However, New York has rejected this approach outside of the context of the attorney rules for professional conduct. *See Murphy*, 448 N.E.2d at 93; *Sabetay v. Sterling Drug, Inc.*, 506 N.E.2d 919 (N.Y. 1987).

⁵² RESTATEMENT OF EMPLOYMENT LAW § 2.07 Reporters’ Notes to cmt. (a) (2015) (“Some courts do not recognize the implied covenant in at-will employment or significantly limit its scope.”); James J. Brudney, *Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law*, 32 COMP. LAB. L. & POL’Y J. 773, 773-74 (2011) (“The majority of states have declined to apply Good Faith at all when reviewing disputes between employers and individual employees.”).

⁵³ *See DeMott, supra* note 5, at 498.

⁵⁴ *See Samuel Issacharoff, Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1783-84 (1996) (“As many commentators have noted, there is more than a touch of doctrinal peculiarity accompanying decisions purporting to rest on formal contract law but presuming

B. *The Economic Theory of the At-Will Default*

The employment at-will default rule has been the subject of significant debate within the employment law academy as a matter of doctrine.⁵⁵ There has also been a separate debate within the law and economics legal academy on the appropriateness of default rules such as the at-will rule.⁵⁶ And that rule has served as a frequent subject of analysis and discussion within the overall debate on default rules.

The standard law-and-economics theory for setting default rules is that the law should endeavor to match what the parties would have selected had they explicitly bargained over the term.⁵⁷ The reason that default rules are necessary in the first place, according to the incomplete contracting literature, is that the parties face transactions costs in negotiating contractual terms.⁵⁸ The costs of such contracting include information costs—determining what needs to be negotiated into the contract, and how—as well as the costs of negotiating with the other party on that issue, such as legal fees, conflict creation within the relationship, and delay.⁵⁹ The theory provides that parties will negotiate to the most efficient contractual term unless transaction costs outweigh the benefits of contracting.⁶⁰ Therefore, in order to reduce the transaction costs of negotiating, as well as to approximate the efficient result when transaction costs prevent negotiating, the law should set a default rule that best matches what parties would otherwise have agreed to if they bargained themselves.⁶¹

that all of the elements of a contract exist, or those that find a public policy tort based on highly contestable articulations of basic societal values.”).

⁵⁵ Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1113 (2000) (“[T]he employment law academy has long debated whether the proper default rule for employment contracts should be that employers may dismiss employees ‘at will’ or only for ‘just cause.’”).

⁵⁶ See, e.g., Ayres & Gertner, *supra* note AG1; Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032 (2012); Ben-Shahar & Pottow, *supra* note BSP; Eric A. Posner, *There Are No Penalty Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563 (2006).

⁵⁷ See Ayres & Gertner, *supra* note AG1, at 89 (noting the traditional law and economics answer as to the setting of default rules as “one-sentence theories stipulating that default terms should be set at what the parties would have wanted”).

⁵⁸ For a discussion of the incomplete contracting literature, see Richard Craswell, *The “Incomplete Contracts” Literature and Efficient Precautions*, 56 CASE W. RES. L. REV. 151 (2005).

⁵⁹ Ayres & Gertner, *supra* note AG1, at 92-93 (“These transaction costs may include legal fees, negotiation costs, drafting and printing costs, the costs of researching the effects and probability of a contingency, and the costs to the parties and the courts of verifying whether a contingency occurred.”).

⁶⁰ See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

⁶¹ J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: The Just Cause Debate*, 1995 WIS. L. REV. 837, 842 (1995) (“According to majoritarian default theory, the state maximizes the joint returns from contracting by providing parties with the term that they would choose for

The employment at-will default has served as an example of such a “would-have-wanted” default. In his classic defense of the at-will presumption, Richard Epstein argued that the rule best matched with the parties’ interests.⁶² However, like other commentators, Epstein’s analysis assumed the pervasiveness of the rule.⁶³ In an empirical study of the hiring practices at private companies, J. Hoult Verkerke surveyed employer termination policies to determine whether the at-will rule was the choice of the contracting parties.⁶⁴ His study found that just over half of the employment contracts surveyed included an express confirmation of employment at will status.⁶⁵ About one-third of the employers had no specific termination policy, while fifteen percent had express just-cause provisions.⁶⁶ Verkerke interpreted this evidence as a strong indication that the parties preferred the at-will doctrine.⁶⁷ More generally, the predominance of the at-will contract—established empirically as well as anecdotally—is taken as evidence that the at-will default is doing its job.

However, a series of commentators have taken issue with different aspects of this traditional theory. First, Omri Ben-Shahar and John Pottow argued that Verkerke’s study contained the seeds of contradiction within its analysis. Noting that states had varying approaches as to the power of the at-will presumption, Verkerke predicted that employers in states with more employee-friendly versions of the default rule would opt out of that rule less frequently, if that default rule was indeed preferable.⁶⁸ However, he found no difference in opt-outs between employers in states with different versions of the rule.⁶⁹ Verkerke saw this as evidence that a pro-employer at-will rule was equally preferable, but Ben-Shahar and Pottow saw the same evidence as support for the stickiness of the default.⁷⁰ In their view, a plausible hypothesis is simply that the at-will rule has become “highly sticky” and thus is adopted simply by default.⁷¹ In support of this view, they noted that the Canadian province of British Columbia has a default “just cause” rule that can, in fact, be

themselves if there were no transaction costs.”). For an example in the corporate law context, see Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1444-45 (1989) (“Corporate law—and in particular the fiduciary principle enforced by courts—fills in the blanks and oversights with the terms that people would have bargained for had they anticipated the problems and been able to transact costlessly in advance.”).

⁶² Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 963 (1984) (discussing reasons “why the at-will contract usually works for the benefit of both sides in employment”).

⁶³ Verkerke, *supra* note JHV, at 840-41 (discussing the reliance on “theoretical speculation” and “secondary and unsystematic” empiricism as to the actual contracting practices in employment).

⁶⁴ *Id.* at 865.

⁶⁵ *Id.* at 867.

⁶⁶ *Id.*

⁶⁷ *Id.* at 913 (“The revealed preference of market participants resoundingly endorses an at will relationship.”).

⁶⁸ *Id.* at 881.

⁶⁹ *Id.* (discussing Virginia & California).

⁷⁰ Ben-Shahar & Pottow, *supra* note BSP, at 676-77.

⁷¹ *Id.* at 677.

contracted around.⁷² Relying on anecdotal evidence, they found that most employers and employees do not contract around the default just-cause rule to get back to an at-will status.⁷³ Although Canadian employers and employee may, in fact, have a preference for just cause that their American counterparts do not share, Ben-Shahar and Pottow did note that transaction costs—at least in the traditional, narrow sense—do not seem to be responsible for the stickiness of just cause.⁷⁴

Default rules may also be sticky for reasons other than transaction costs. Numerous commentators have pointed out that adverse inferences or signals that may be sent when one party wishes to depart from a default rule.⁷⁵ Using an employment relationship in professional sports as an example, Kathryn Spier argued that an athlete might be loath to negotiate on his own behalf for an injury-protection clause, for fear that it would signal that he is injury-prone or liable to fake an injury.⁷⁶ In the context of at-will, an employee who requests just-cause protection is signaling that she is more likely to have the need of such a clause, and thus more likely to cause trouble in some fashion.⁷⁷ In this way, as Walter Kamiat has argued, the market for an individual employment agreement is like the market for used cars: because of information asymmetries between buyer and seller, a buyer is prone to overread signals and suspect the worst when it comes to the quality of the seller's goods or services.⁷⁸ Ultimately, employees may not request just-cause protection, despite their strong desire for it, because they would be punished too severely in the market for making such a request.⁷⁹

Other factors may further compound the stickiness of the at-will default. One of the cornerstones of research into behavioral heuristics is the endowment effect: the notion that individuals value something that they own or possess more

⁷² *Id.* at 678-79. The British Columbian system allows for at-will but provides for mandatory termination benefits. *Id.* at 678.

⁷³ *Id.*

⁷⁴ *Id.* at 680 (“[I]t cannot simply be a story of transaction costs, because a one-page letter in Canada can just as effortlessly become a one-and-a-quarter page letter, with a further sentence setting by contract the termination benefits.”).

⁷⁵ See, e.g., Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L.J. 59, 70-72 (1993) (discussing how parties may draw adverse inferences when the other party seeks to depart from the default rule); Kathryn E. Spier, *Incomplete Contracts and Signalling*, 23 RAND J. ECON. 432, 433 (1992) (discussing the signaling effects from a departure from a default rule).

⁷⁶ Spier, *supra* note KES, at 433.

⁷⁷ See Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PENN. L. REV. 1953, 1958 (1996).

⁷⁸ See *id.* at 1957 (discussing George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970)).

⁷⁹ Employees can signal as a group that they desire just-cause protection, and they often do so through their union representatives. The fact that unions uniformly request just-cause protections has been seen as evidence that all employees actually desire this protection enough to demand it in their contract. However, this argument is less powerful because of the steep decline in private-sector unionization.

than something that they can acquire.⁸⁰ Although the original empirical evidence for the effect involved mugs,⁸¹ scholars have noted the potential for the endowment effect to apply to legal entitlements such as default rules.⁸² The endowment effect would make the default rule stickier by making the default more valuable to the holder of the default and the alternative rule less valuable to the party that would negotiate away from it. This effect may be at play in the context of the at-will rule, as employers may place a higher value on the freedom the at-will rule provides and employees might undervalue the protections they would receive from just cause.⁸³ Employees may even believe that they already have some legal form of just-cause protection and therefore not be interested in (redundantly) bargaining for that protection.⁸⁴ Finally, there may also be network effects supporting the at-will rule as a default. The collective advantages from employer use of and comfort with the rule may enshrine standardization and render deviance from the rule more costly.⁸⁵

As a result of all of these effects, there may be inefficient “pooling” of employees around the at-will default, even when such a rule is inefficient.⁸⁶ In the face of the hardness of the at-will rule, there are reasons to consider a change to a just-cause presumption. A just-cause rule may foster more efficient bargaining between the parties, as employers are more likely to be informed about the law of

⁸⁰ Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979); Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 *J. POL. ECON.* 1325 (1990); Christine Jolls et. al., *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1484 (1998). *But see* Gregory Klass, Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, 61 *UCLA L. REV.* 2, 5 (2013) (“Although endowment theory continues to enjoy considerable influence in the legal literature, recent experimental data have cast doubt on the hypothesis that ownership sets the reference point and loss aversion generates reluctance to trade.”).

⁸¹ *See* Kahneman & Tversky, *supra* note KT1.

⁸² *See, e.g.*, Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 *CORNELL L. REV.* 608, 612 (1998); Cass R. Sunstein, *Switching the Default Rule*, 77 *N.Y.U. L. REV.* 106, 109 (2002).

⁸³ Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 *CAL. L. REV.* 1051, 1113 (2000) (“The fact that parties rarely contract around the ‘at will’ rule might mean that ‘at will’ employment is efficient for most parties, but it also might mean that the status quo bias swamps a preference many parties would otherwise have for a ‘just cause’ term.”); Sunstein, *supra* note CS1, at 124 (discussing how both at-will and just-cause defaults could remain sticky even if parties could bargain freely around it).

⁸⁴ For empirical evidence on employee beliefs as to termination laws, see Kim, *supra* note PK-Cornell; Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers’ Legal Knowledge*, 1999 *U. ILL. L. REV.* 447 (1999). *See also* David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 *MICH. L. REV.* 1815, 1838-39 (1991) (“Workers, for example, might not realize that they should not consent to be fired at will, either because they underestimate the costs that this would impose on them or because they misapprehend the importance of the term to employers.”).

⁸⁵ *See, e.g.*, Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting Increasing Returns, Herd Behavior and Cognitive Biases*, 74 *WASH. U. L.Q.* 347, 354 (1996) (“The relative certainty that standard terms offer may lead a lawyer to employ such a term even if the expected value of the term to his client is lower than the expected value of a customized term.”).

⁸⁶ *See* Ayres & Gertner, *supra* note AG1, at 94-95 (discussing pooling and separating equilibria).

termination and understand which default is in place.⁸⁷ They are therefore more likely to bargain with employees if they wish to change to an at-will regime.⁸⁸ This argument aligns with the general notion of “penalty defaults” as a way of overcoming information asymmetries or strategic bargaining behavior.⁸⁹ In addition, there are a set of arguments for a “just cause” regime as a preferable termination rule.⁹⁰ These arguments generally focus on the power imbalance between employer and employee, and the need for some level of protection against termination.⁹¹ To the extent that any default would be sticky, those who prefer a just-cause rule would prefer that it be the default, even if the parties could contract around it.

Thus, despite the bedrock doctrinal foundation of employment at-will, there is strong support from law-and-economic theory to question its efficiency as a default rule. Its bright glow in the legal firmament may overshadow nuances in the preferences of employers and employees that would lead to a rule that is less blunt and one-sided. In other words, there is room for reconsidering the contours of the at-will rule given its stickiness as a default. If a better crafted rule would better serve the parties’ interests, it may be unlikely that they would arrive at such a rule through their own bargaining.

II. PERSONAL AUTONOMY AND THE EMPLOYMENT RELATIONSHIP

A. Defining Personal Autonomy in Employment

Autonomy is the right and ability to control one’s own decisions and actions. In the context of political science and international relations, autonomy is used to

⁸⁷ See Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 608 (2014) (discussing the potential for employees to “hold systematically optimistic beliefs about the default terms of at-will employment contracts”); Charny, *supra* note DC1, at 1842 (discussing how a just-cause default may be more efficient, even if it is not the majoritarian contracting choice, if transaction costs for a just-cause rule are disproportionately high).

⁸⁸ Sunstein, *supra* note CS1, at 119 (“[A] switch of entitlement from employer to employee will increase the likelihood that workers will know what the law has and has not given them, and bargain accordingly. The optimistic view would be that a switch of that sort might even overcome a market failure, in the form of inadequate information on the part of employees.”).

⁸⁹ See Ayres & Gertner, *supra* note AG1, at 98-99 (discussing how default rules can help incentivize the sharing of information). See also Ian Ayres and Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591, 1592 (1999) (“The effect of a particular default rule on information revelation, and thus on efficiency, depends on numerous characteristics of the contracting environment that are independent of the ‘hypothetical contracting’ inquiry—that is, merely assessing what the parties would have contracted for if there were no private information. Other factors, including the distribution of types, the magnitude of transaction costs, and the distribution of bargaining power, will all affect the likelihood that a particular penalty default will induce separation and enhance efficiency.”).

⁹⁰ See, e.g., Blades, *supra* note LB1.

⁹¹ See *id.*

describe the governance of a nation as independent from outside control or interference.⁹² This notion of self-government has carried over from nations to individuals, as personal autonomy means that the person is in control of her destiny.⁹³ An autonomous person is one who is independent from the control of others—free to make decisions about her own life and to act on those decisions without undue interference from others.⁹⁴ As Joseph Raz has defined it:

The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is (part) author of his own life. The idea of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.⁹⁵

The term “employee autonomy” covers two different aspects of personal autonomy: autonomy within the scope of one’s employment, and autonomy outside of the workplace. Employee autonomy at the workplace means the worker’s right of control over important aspects of her own working life. For example, Anne Marie Lofaso has described worker autonomy as “answer[ing] the question: what does it mean to be part author of one’s working life?”⁹⁶ Within the context, courts and commentators have sharply disagreed over the policy ramifications of protecting that autonomy. The Supreme Court cited to worker autonomy in striking down New Deal workplace regulations, arguing in *Lochner v. New York*⁹⁷ that prohibiting employees from working overtime was akin to treating them as “wards of the

⁹² HENRY CAMPBELL BLACK, BLACK’S LAW DICTIONARY 173(3d ed. 1933) (defining autonomy in terms of state political autonomy: “the political independence of a nation; the right (and condition) of self-government; the negation of a state of political influence from without or from foreign powers”); AMERICAN HERITAGE DICTIONARY (2d College ed. 1982) (defining autonomy as “the condition or quality of being self-governing” or “self-government or the right of self-government; self-determination; independence”).

⁹³ See MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 19 (2004) (“[A]utonomy entails being left alone to satisfy our needs and provide for our own families without undue restraint.”); C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 253 (2011) (“A person’s autonomy might reasonably be conceived as her capacity to pursue successfully the life she endorses—self-authored at least in the sense that, no matter how her image of a meaningful life originates, she now can endorse that life for reasons that she accepts.”).

⁹⁴ Complete autonomy is, of course, impossible within a society. See Baker, *supra* note CEB, at 253 (“Surely complete autonomy in this sense is never perfectly realized but will exist only more or less on various continuums.”).

⁹⁵ JOSEPH RAZ, THE MORALITY OF FREEDOM 369 (1986).

⁹⁶ Anne Marie Lofaso, *Toward a Foundational Theory of Workers’ Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1, 39 (2007). She goes on to define worker autonomy as “employees who (1) know what issues affect their working lives and know how to resolve those issues according to their own interests; (2) have access to information relevant to making informed decisions; and (3) are free to effectively decide how to resolve those issues.” *Id.* at 41.

⁹⁷ 198 U.S. 45 (1905).

state.”⁹⁸ Other commentators argued, however, that the freedom provided under *laissez-faire* capitalism crushes worker autonomy, rather than promoting it.⁹⁹

Worker autonomy within the employment relationship is really about the role of the employee within the firm.¹⁰⁰ To what extent can employees control their own work, control the governance of their firm, or control the culture of the firm itself? These concerns are indeed vital to an employee’s sense of autonomy, but they involve the relationship between the employee and the firm—namely, the individual employee’s relationship with the rest of those who are involved in the ongoing business.¹⁰¹ These are a very different set of issues that the relationship between the firm and the employee outside of the employment relationship—where, in theory, there is no reason for the firm to interfere.

Rather than exploring the role of autonomy within the working relationship, this article addresses the second meaning of “employee autonomy”: personal autonomy outside of the workplace. In this context, autonomy represents the employee’s freedom from employer interference in personal matters. Within this personal sphere, certain types of beliefs, associations, or activities have been more closely identified with autonomy. In the constitutional context, the Supreme Court has identified “matters relating to marriage, procreation, contraception, family relationships, and child rearing and education” as particularly important to personal autonomy.¹⁰² Participation in civic life—speaking on matters of public concern, voting, joining a political party—has also been accorded particular emphasis.¹⁰³

⁹⁸ *Id.* at 57 (“There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state.”). *See also* *Adair v. United States*, 208 U.S. 161, 174 (1908) (“The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.”).

⁹⁹ *See* Clyde W. Summers, *Individualism, Collectivism, and Autonomy in American Labor Law*, 5 *EMPLOYEE RTS. & EMP. POL’Y J.* 453, 455 (2001) (“The individualism of freedom of contract in employment, however, does not always, in practice, promote personal autonomy for the workers.”); Lofaso, *supra* note AML2007, at 38-48 (arguing that collective rights and actions are necessary to provide workers with autonomy within the workplace); Jason Bosch, Note, *None of Your Business (Interest): The Argument for Protecting All Employee Behavior with No Business Impact*, 76 *S. CAL. L. REV.* 639, 658 (2003) (using the term “employee autonomy” to refer to off-the-job activities).

¹⁰⁰ *See* Matthew T. Bodie, *Employees and the Boundaries of the Corporation*, in *RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW* (Claire Hill & Brett McDonnell eds., 2012) (discussing the role of employees within the corporation).

¹⁰¹ *See* Matthew T. Bodie, *Participation as a Theory of Employment*, 89 *NOTRE DAME L. REV.* 661, 706 (2013) (defining employees as those who participate in the ongoing business enterprise of the firm).

¹⁰² *Whalen v. Roe*, 429 U.S. 589, 600 n.26 (quoting *Paul v. Davis*, 424 U.S. 693, 713 (1976)).

¹⁰³ The First Amendment’s protection of speech is often justified on the grounds of personal participation in a system of popular government. *See, e.g., Baker, supra* note CEB, at 251 (“The

Others have singled out recreational activities for their role in personal meaning and self-fulfillment.¹⁰⁴ These groupings each have their own set of value justifications as to why they foster a sense of self and human flourishing related to the concept of autonomy. However, they also each represent a facet of our overall perceptions of personal autonomy.

This Article defines employee personal autonomy as that zone of activity outside of the employment relationship that should be outside the employer's purview. As one court has framed it: "It may be granted that there are areas of an employee's life in which his employer has no legitimate interest."¹⁰⁵ Personal autonomy represents that zone of activity and belief. And the argument against this interference is fairly straightforward: it is wrong for the employer to leverage its power over the employment relationship to change employee behavior that is unrelated to the relationship. It is taking power in one realm and using it to distort behavior in another. As Sam Bagenstos has argued, in the context of political speech:

[I]n each case, an employer is using its economic power over its employees as leverage to obtain greater power in the political sphere. Workers, fearful of losing their jobs, will suppress their own political views or express views with which they do not agree. The result will be a skewed political discourse, in which employers' voices are amplified and workers' are squelched.¹⁰⁶

At the same time, however, the employer may in fact have significant interests in an employee's beliefs, activities, or memberships that make up her personal

legitimacy of the legal order depends, in part, on it respecting the autonomy that it must attribute to the people whom it asks to obey its laws. Despite the plethora of values served by speech, the need for this respect, I claim, provides the proper basis for giving free speech constitutional status."); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011) (defending the view that "contemporary American free speech doctrine is best explained as assuring the opportunity for individuals to participate in the speech by which we govern ourselves"). See also NEIL RICHARDS, *INTELLECTUAL PRIVACY* 95 (2015) (discussing intellectual privacy—"a zone of protection that guards our ability to make up our minds freely").

¹⁰⁴ See, e.g., Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 250 (2013) ("The opportunity to choose one's own recreational and avocational activities is a key part of what it means to be a full member of our society. Those are often the activities in which individuals develop their sense of personal identity and their ties with like-minded people in the community.").

¹⁰⁵ *Geary v. U.S. Steel Corp.*, 319 A.2d 174, 184 (Pa. 1974). The court went on to say: "An intrusion into one of these areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly when some recognized facet of public policy is threatened." *Id.*

¹⁰⁶ Bagenstos, *supra* note SB1, at 256. See also Bosch, *supra* note JB1, at 644 ("The market fails here, or at least is suspect, because the employer has the ability to use its power over the employee's livelihood to gain leverage over other, non-work areas of the employee's life. . . . In essence, strict at-will employment allows employers to use economic influence to gain social, moral, and even political influence over their employees.").

autonomy.¹⁰⁷ Those activities may reflect on the employer’s reputation, may impact the employee’s relationships with her coworkers, or may create suspicion about the employee’s unobservable job performance. As a result, the law cannot simply draw a bright line between on-duty and off-duty conduct. To get a better sense of how the law has actually managed such conflicts to this point, we now turn to the existing legal doctrine.

B. Existing Legal Protections for Employee Personal Autonomy

This Article argues for a default common law presumption that employees and employers agree to shield employee personal autonomy from collateral employer attack. Before we build the argument for this presumption, however, it is useful to review the various protections provided under current law for concepts included within the notion of personal autonomy. These protections provide evidence that employee personal autonomy is deserving of legal protection.

1. Contractual protections.

Because of the strength of the at-will presumption, the overwhelming majority of employees have no contractual protections for their own personal autonomy.¹⁰⁸ As argued below,¹⁰⁹ there is likely an implicit understanding between most employees and employers that employees’ private lives are their own business, and the employers have little interest in the details of those lives. But whatever the level of these understandings, they are not currently represented within the employment contract. Instead, employers maintain the right to fire employees “for any reason, or no reason at all.”¹¹⁰

At-will is just a presumption, however, and employees are free to negotiate for express protections for their autonomy. The primary way in which employees receive such protection is through an umbrella “just cause” provision. Individual employees can negotiate for a “just cause” clause, and there is evidence that a significant number of high-level executives, academics, and professionals attain such clauses.¹¹¹ In addition, unions generally negotiate a “just cause” regime with an

¹⁰⁷ Bagenstos, *supra* note SB1, at 258 (noting that “[a]ny protection of private employee speech must take account of legitimate employer interests”).

¹⁰⁸ % of employees at-will

¹⁰⁹ See Part III.B *infra*.

¹¹⁰ See, e.g., *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 280 (Iowa 2000).

¹¹¹ As to executives, see Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 246 (2006) (finding that “overwhelmingly, the CEO contracts around at-will default in one way or another”); *id.* at 248 (“The overwhelming bulk of CEO contracts . . . are just-cause contracts in the sense that the CEO gets greater rights if he or she is dismissed without cause.”). As to academics, see John M. Badagliacca, *The Decline of Tenure: The Sixth Circuit’s Interpretation of Academic Tenure’s Substantive Protections*, 44 SETON HALL L. REV. 905, 905-06 (2014) (“Tenure provides both substantive and

attendant grievance-arbitration process.¹¹² Public sector workers, whether unionized or not, often are protected by civil service laws that require just cause.¹¹³ Employees whose contracts are for a definite period of time are presumed to have “just cause” provisions in their contracts.¹¹⁴

In colloquial terms, “just cause” means that the employer must have a good reason to terminate the employee. However, the set of permissible “good reasons” expands or contracts in different circumstances. In the context of definite-term employment, just cause is generally limited to an employee’s failure to perform her job adequately.¹¹⁵ Executive contracts similarly provide for discharge based on failure to perform or willful misconduct.¹¹⁶ “Just cause” clauses in collective-bargaining agreements generally focus on whether the employee broke a specific workplace rule, and if so whether the rule “reasonably related to the orderly, efficient, and safe operation of the company’s business and the performance that the company might properly expect of the employee.”¹¹⁷ For the most part, one would expect that the zone of personal autonomy would lie outside the reasonable or “just” concerns of employers for purposes of termination decisions. However, even just cause provisions make allowances for discharge based on “moral turpitude”¹¹⁸ or “misconduct.”¹¹⁹ In fact, CEO “just cause” clauses often leave out poor performance as a reason for discharge.¹²⁰ In such circumstances, discharge may be limited to the kind of heinous off-duty misconduct that would render the executive unfit to continue, such as arrest or conviction for a serious crime. However, for less

procedural protections to the tenured employee. The substantive protections prevent unlawful dismissal—dismissal without adequate cause—while the procedural protections ensure that employers follow a certain process during the employment and dismissal of any tenured employees.”).

¹¹² RESTATEMENT OF EMPLOYMENT LAW § 2.02 cmt. b (2015) (“These collective agreements typically provide for an employment relationship other than at-will employment through a ‘just cause’ limit on discharge and other disciplinary decisions, and a multi-step grievance procedure culminating in final, binding arbitration before a neutral decisionmaker jointly selected by the parties.”).

¹¹³ Pauline T. Kim, *Market Norms and Constitutional Values in the Government Workplace*, 94 N.C. L. REV. 601, 615 (2016) (“Civil service provisions often require good cause in order to discharge a public employee, and these protections significantly limit public employers’ ability to act arbitrarily, including in ways that burden their employees’ constitutional rights.”).

¹¹⁴ See RESTATEMENT OF EMPLOYMENT LAW § 2.03(a) (2015) (“An employer must have cause . . . for termination of . . . an unexpired agreement for a definite term of employment . . .”).

¹¹⁵ *Id.* § 2.04 cmt. b (“Cause, if not defined in the parties’ agreement, will in these circumstances usually refer to misconduct, other malfeasance by the employee, or other material breach of the agreement, such as persistent neglect of duties, gross negligence, or failure to perform the duties of the position due to a permanent disability.”).

¹¹⁶ Schwab & Thomas, *supra* note SSRT2006, at 248.

¹¹⁷ See *Enterprise Wire Co.*, 46 LA 359, 363-364 (Daugherty, 1966).

¹¹⁸ Schwab & Thomas, *supra* note SSRT2006, at 248-49 (finding “moral turpitude” clauses in over seventy percent of CEO contracts).

¹¹⁹ RESTATEMENT OF EMPLOYMENT LAW § 2.04 cmt. b (2015).

¹²⁰ Schwab & Thomas, *supra* note SSRT2006, at 248-49 (“Poor performance on the job does not constitute cause in most CEO contracts.”).

prominent employees, cause generally focuses on work-related reasons or the legitimate business interests of the employer. The inquiry is broader on the business side, as reasons unrelated to the employee herself may come into play, such as a business downturn or change in market needs.¹²¹ Reasons unrelated to the employees' performance or an employer's legitimate business needs would almost always fail to meet the cause standard. Arbitrators have followed similar lines in the collective bargaining context.¹²²

Even in otherwise at-will arrangements, an employer may provide protection for employees' private lives by contract. In certain rare circumstances, courts have determined that an employer impliedly agreed to leave an employee's private life alone. In *Rulon-Miller v. International Business Machines Corp.*,¹²³ an employee was fired for failing to end a romantic relationship with a former employee who had moved to a rival company. Critical to the employee's case was the "Watson Memo," a memorandum that the then-chairman of the company had provided on the separation of work life from personal life. The memo stated in part:

The line that separates an individual's on-the-job business life from his other life as a private citizen is at times well-defined and at other times indistinct. But the line does exist, and you and I, as managers in IBM, must be able to recognize that line.

I have seen instances where managers took disciplinary measures against employees for actions or conduct that are not rightfully the company's concern. These managers usually justified their decisions by citing their personal code of ethics and morals or by quoting some fragment of company policy that seemed to support their position. Both arguments

¹²¹ RESTATEMENT OF EMPLOYMENT LAW § 2.04 cmt. c (2015) (finding that the "reasonable presumption" about the definition of just cause in indefinite contracts is "that the parties intended not only that the employee's misconduct, malfeasance, inability to perform the work due to permanent disability, or other material breach may constitute cause for termination, but also that significant changes in the economic circumstances of the employer can supply such cause"). Cf. *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 928 (1981) ("Care must be taken, however, not to interfere with the legitimate exercise of managerial discretion. 'Good cause' in this context is quite different from the standard applicable in determining the propriety of an employee's termination under a contract for a specified term.").

¹²² STEVEN L. WILLBORN, STEWART J. SCHWAB, JOHN F. BURTON, JR. & GILLIAN L.L. LESTER, *EMPLOYMENT LAW: CASES AND MATERIALS* 265 (5th ed. 2012) ("Arbitrators interpreting union contracts with just-cause provisions rarely uphold discharges for off-work conduct unless the employer can demonstrate a clear detriment to the workplace."); *Indian Head, Inc.*, 71 Lab. Arb. (BNA) 82, 85 (1978) ("arbitrators have long held that what an employee does on his own time and off Company premises is not a proper basis for disciplinary action unless it can be shown that the employee's conduct has an adverse effect on the Company's business or reputation, the morale and well-being of other employees, or the employee's ability to perform his regular duties.").

¹²³ 208 Cal. Rptr. 524 (1st Dist. 1984), overruled on other grounds, *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988).

proved unjust on close examination. What we need, in every case, is balanced judgment which weighs the needs of the business and the rights of the individual.

* * *

We have concern with an employee's off-the-job behavior only when it reduces his ability to perform regular job assignments, interferes with the job performance of other employees, or if his outside behavior affects the reputation of the company in a major way. When on-the-job performance is acceptable, I can think of few situations in which outside activities could result in disciplinary action or dismissal.¹²⁴

The Watson memo was unusual both for the specificity of its concern (as to personal autonomy) as well as its focus on company policies relating to discipline and discharge.¹²⁵ Although not framed in terms of an employee's contract, the memo provided strong evidence of a company policy protecting employee personal autonomy. The court held that "this company policy insures to the employee both the right of privacy and the right to hold a job even though 'off-the-job behavior' might not be approved of by the employee's manager."¹²⁶ However, most companies have not embraced a version of the Watson memo for their own employees, nor have courts hastened to imply contractual protections for employee personal autonomy in other cases. Thus, contract law currently does not provide specific protections for employee personal autonomy, and the parties generally do not contract for such protections.

2. *Privacy protections.*

Theorists and law-makers have long struggled over the definition of privacy.¹²⁷ Famously, Samuel Warren and Louis Brandeis described privacy protection as "the right to be let alone," which they further elucidated as "the right of determining, ordinarily, to what extent [a person's] thoughts, sentiments, and emotions shall be communicated to others."¹²⁸ Scholars have attempted different definitions, but most break down privacy into different sets of privacy interests.¹²⁹

¹²⁴ *Id.* at 530.

¹²⁵ *Id.* ("When such situations do come to your attention, you should seek the advice and counsel of the next appropriate level of management and the personnel department in determining what action—if any—is called for. Action should be taken only when a legitimate interest of the company is injured or jeopardized. Furthermore the damage must be clear beyond reasonable doubt and not based on hasty decisions about what one person might think is good for the company.")

¹²⁶ *Id.*

¹²⁷ See ANITA L. ALLEN, *PRIVACY LAW AND SOCIETY* 3 (2011) ("The right to privacy' frustrates theorists who believe the law's use of the term 'privacy' has been especially confusing.")

¹²⁸ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195, 198 (1890).

¹²⁹ For example, Daniel Solove has identified four sets of privacy invasions: information collection, information processing, information dissemination, and invasions into private affairs. DANIEL

Certain of these privacy interests line up fairly closely with out notions of personal autonomy. In its breakdown of privacy interests, the Supreme Court described a person’s “interest in independence in making certain kinds of important decisions” as one kind of privacy interest.¹³⁰ Similarly, California has interpreted its constitutional privacy protections,¹³¹ which extend into the private sphere, to include the interest in “making intimate personal decisions or conducting personal activities without observation, intrusion, or interference .”¹³² One example of the so-called “autonomy privacy” interest in the context of employment comes from a case in which an employer requested private medical information from an employee’s doctors and then, based on that information, required the employee to undertake an alcohol treatment program or be fired.¹³³ Along with his privacy interest in keeping his medical history to himself, the employee also “had an ‘autonomy privacy’ interest in making intimate personal decisions about an appropriate course of medical treatment for his disabling stress condition, without undue intrusion or interference from his employer.”¹³⁴ The California appeals court analyzed this right under the state’s constitutional privacy doctrine, and found that the employee had a reasonable expectation of privacy as making his own medical decisions, and that the intrusion into the employee’s privacy was a serious one.¹³⁵ Similarly, courts have at times treated employer efforts to influence private employee decisions as invasions of privacy.¹³⁶

SOLOVE, UNDERSTANDING PRIVACY 103-05 (2008). Anita Allen has identified six types of privacy from everyday usage: physical privacy, informational privacy, decisional privacy, proprietary privacy, associational privacy, and intellectual privacy. ALLEN, *supra* note AA2011, at 4-5. And William Prosser identified four types of privacy invasions deserving of protection through tort: intrusion upon seclusion, unreasonable publicity to private life, publicity that places another in a false light, and appropriation of name or likeness. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

¹³⁰ *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977). *See also* *Vega-Rodriguez v. Puerto Rico Telephone Co.*, 110 F.3d 174,183 (1st Cir. 1997) (“The autonomy branch of the Fourteenth Amendment right to privacy is limited to those decisions arising in the personal sphere—matters relating to a marriage, procreation, contraception, family relationships, child rearing, and the like.”).

¹³¹ CAL. CONST. art. I, § 1.

¹³² *See also* *Hill v. National Collegiate Athletic Ass’n*, 865 P.2d 633, 654 (Cal. 1994) (“Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information (‘informational privacy’); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference (‘autonomy privacy’).”).

¹³³ *Pettus v. Cole*, 49 Cal. App. 4th 402, 457 (Cal. App. 1996).

¹³⁴ *Id.* at 458.

¹³⁵ *Id.* at 458-63.

¹³⁶ In *Cunningham v. Dabbs*, 703 So. 2d 979 (Ala. Civ. App. 1997), a supervisor subjected the plaintiff-employee to frequent episodes of sexual harassment. When the supervisor learned that plaintiff was getting married, he fired her. The court rejected the employee’s wrongful-discharge claim, but it denied summary judgment as to her intrusion-upon-seclusion and outrage claims. *Id.* at 982 (noting that marriage and “sexual concerns” are entitled to privacy protections).

However, other concepts of privacy also relate to our notions of autonomy, albeit more peripherally. The Supreme Court's definition of autonomy includes not only the interest in independence in making important personal decisions,¹³⁷ but also the interest in "avoiding disclosure of personal matters."¹³⁸ This more common definition of privacy¹³⁹ does not directly relate to the employee's ability to engage in off-duty activities outside of the workplace. However, it can help to facilitate personal, non-workplace autonomy by providing a zone of private activity and information into which the employer cannot penetrate. The Fourth Amendment's protection against unreasonable searches can protect public employees from having to disclose activities or beliefs that occur off-duty.¹⁴⁰ The Court has held that constitutional reasonableness requirements apply to "searches" of the employee's body, blood, or urine which may reveal personal conduct outside of employment.¹⁴¹ Similarly, the Supreme Court has assumed the existence of a right to informational privacy, which allows employees to keep certain kinds of information private, including information about off-duty activities.¹⁴² It is important to differentiate between information privacy interests and autonomy interests, as the right to informational privacy only protects the employee from an inquiry or surveillance of such activity; it does not protect the employee's autonomy interests in engaging in the activity. However, these concepts work together. Privacy protects employees against employer efforts to delve into matters of personal autonomy. Autonomy reflects the employee's ability to engage in autonomous behavior, whether publicly or not; privacy allows her to keep this behavior private.

The Restatement of Employment Law breaks down employee privacy interests into three categories: (1) the privacy of places, such as the physical person,

¹³⁷ Interestingly, this autonomy aspect to the right to privacy within the U.S. Constitution has been interpreted in such a way that it is largely irrelevant in the workplace context. The Court has interpreted "interest in independence in making certain kinds of important decisions" to focus on "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Whalen v. Roe*, 429 U.S. 589, 600 n.26 (1977) (citing *Paul v. Davis*, 424 U.S. 693, 713 (1976)).

¹³⁸ *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977).

¹³⁹ In her study of privacy, Christena Nippert-Eng found overwhelming support for the definition of privacy as "the ability/power to control access to some thing, place, or piece of information and its dissemination." CHRISTENA NIPPERT-ENG, *ISLANDS OF PRIVACY* 7 (2010). Defining privacy as "[t]he freedom to do/live/make decisions, without regulation/restriction" received significantly less support. *Id.*

¹⁴⁰ The Fourth Amendment protects individuals "against unreasonable searches and seizures." U.S. CONST. amend. IV. This protection applies to employees when the government acts in its capacity as employer. *See Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989) ("[T]he Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer").

¹⁴¹ *See id.* (upholding the reasonableness of the search); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (same).

¹⁴² *National Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 151-54 (2011) (discussing the employer's inquiry into drug use and wide-ranging opinions of personal references).

homes, workplaces, or electronic “locations,” (2) the privacy of personal information, and (3) the privacy of preventing disclosure to third parties of private employee information disclosed to the employer.¹⁴³ All three of these privacy interests can facilitate an employee’s personal autonomy interests. Protections against invasions into private places can help keep an employee’s personal life free from employer observation or influence. Courts have found that employees have privacy interests in their homes,¹⁴⁴ hotel rooms,¹⁴⁵ lockers,¹⁴⁶ bathrooms,¹⁴⁷ laptops,¹⁴⁸ and text messages.¹⁴⁹ These are all areas where personal autonomy activities may take place. Similarly, privacy protections have applied to personal information—including information about conduct or beliefs related to autonomy.¹⁵⁰ In particular, courts have provided privacy protections to information about an employee’s sexual practice or history.¹⁵¹ However, almost all courts have held that romantic relationships between coworkers—particularly those between supervisors and subordinates—are matters of workplace concern and do not constitute private

¹⁴³ RESTATEMENT OF EMPLOYMENT LAW §7.02 (2015).

¹⁴⁴ *Saldana v. Kelsey-Hayes Co.*, 443 N.W.2d 382, 384 (Mich. Ct. App. 1989) (finding intrusion (but no liability) when investigator took pictures inside employee’s home using a telephoto lens).

¹⁴⁵ *Sowards v. Norbar, Inc.*, 605 N.E.2d 468, 474-75 (Ohio Ct. App. 1992) (finding intrusion and liability when employer searched employee’s hotel room).

¹⁴⁶ *K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632, 637-38 (Tex. App. 1984).

¹⁴⁷ See, e.g., *Elmore v. Atlantic Zayre, Inc.*, 341 S.E.2d 905, 906-07 (Ga. 1986); *Harkey v. Abate*, 346 N.W.2d 74, 76 (Mich. App. 1983); *Kjerstad v. Ravellette Publications, Inc.*, 517 N.W.2d 419, 422 (S.D. 1994).

¹⁴⁸ *Hilderman v. Enea TekSci Inc.*, 551 F. Supp. 2d 1183, 1204 (S.D. Cal. 2008) (“Whether [former employee] had a reasonable expectation of privacy in the personal data saved on the computer depends on whether [the employer] still had a policy of allowing employees to purchase their laptops.”).

¹⁴⁹ *City of Ontario v. Quon*, 560 U.S. 746, 766-67 (2010) (assuming that police employees had a reasonable expectation of privacy in personal text messages, but upholding police department’s search as reasonable under the Fourth Amendment).

¹⁵⁰ As one court stated: “highly personal questions or demands by a person . . . may be regarded as an intrusion on psychological solitude or integrity and hence an invasion of privacy.” *Van Jelgerhuis v. Mercury Finance Co.*, 940 F. Supp. 1344, 1368 (S.D. Ind. 1996). See also *Cort v. Bristol-Myers Co.*, 431 N.E.2d 908, 912 n.9 (Mass. 1982) (“This opinion simply acknowledges that in the area of private employment there may be inquiries of a personal nature that are unreasonably intrusive and no business of the employer and that an employee may not be discharged with impunity for failure to answer such requests.”).

¹⁵¹ See *Van Jelgerhuis*, 940 F. Supp. at 1368 (series of questions and suggestions about employees’ sex lives); *Aguinaga v. Sanmina Corp.*, Not Reported in F. Supp., 1998 WL 241260, *1 (N.D. Tex. 1998) (supervisor asked employee intrusive and suggestive questions about her sexual activity); *Busby v. Truswas Sys. Corp.*, 551 So. 2d 322, 323 (Ala. 1989) (plant supervisor intruding into employees’ sex lives); *Phillips v. Smalley Maintenance Services*, 435 So. 2d 705, 711 (Ala. 1983) (employer questioning of employee about sexual activities with husband); *Cunningham v. Dabbs*, 703 So. 2d 979 (Ala. Civ. App. 1997) (improper inquiries into personal sexual proclivities); *Guccione v. Paley*, 2006 WL 1828363, *2 (Conn. Super. June 14, 2006) (employer questions about employee’s sexual relation; s with her boyfriend); *Bonanno v. Dan Perkins Chevrolet*, 2000 WL 192933, *1 (Conn. Super. Feb. 4, 2000) (defendant’s comments regarding plaintiffs’ sex life, appearance, and values).

behavior.¹⁵² As to the last category, employers may have information about an employee's off-duty conduct, such as health-related matters or aptitude, that deserves protection against further dissemination.¹⁵³

3. *Antidiscrimination protections.*

Title VII of the 1964 Civil Rights Act provides employees with protections against discrimination based on race, color, religion, sex, or national origin.¹⁵⁴ Many states and localities also provide protection against similar kinds of status discrimination.¹⁵⁵ Discrimination against employees with regard to their relatively

¹⁵² See, e.g., *Rogers v. International Business Machines*, 500 F. Supp. 867, 869 (W.D. Pa. 1980) (finding that employee's termination because of a relationship with a subordinate was based on employer's "legitimate interest in preserving harmony among its employees and in preserving its normal operational procedures from disruption"); *Barbee v. Household Automotive Finance Corp.*, 6 Cal. Rptr. 3d 406, 411 (App. 2003) (recognizing employer interests in avoiding conflicts of interest between work-related and family-related obligations, reducing favoritism or even the appearance of favoritism, and preventing sexual harassment); *Crosier v. United Parcel Service, Inc.*, 198 Cal. Rptr. 361, 366 (App. 1983) (finding that the employer was "legitimately concerned with appearances of favoritism, possible claims of sexual harassment and employee dissension created by romantic relationships between management and nonmanagement employees"), disapproved of on other grounds by *Foley v. Interactive Data Corp.*, 765 P.2d 373 (Cal. 1988); *Patton v. J.C. Penney Co.*, 719 P.2d 854, 857 (Or. 1986) (finding no tortious conduct for termination based on relationship with coworker), abrogated on other grounds by *McGanty v. Staudenraus*, 901 P.2d 841 (Or. 1995); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 842-43 (Wis. 1983) (same). However, at least one court has held open the possibility in dicta that an employer's actions concerning a consensual relationship between employees could be tortious. *Mercer v. City of Cedar Rapids*, 104 F. Supp. 2d 1130, 1180 (N.D. Iowa 2000) (stating that "intrusion upon the privacy of an employee's off-duty, consensual relationship with another coworker might be highly offensive in private sector employment").

As a corollary, off-duty contact between coworkers would fall outside the protections for autonomy. See, e.g., *Manning v. Department of Employment Sec.*, 850 N.E.2d 244, 245-46 (Ill. App. Ct. 1st Dist. 2006) (employee's conduct in leaving a vulgar message on a coworker's personal voice mail after work was misconduct harmful to the employer). However, note that collective activity between employees is protected under the National Labor Relations Act. See 29 U.S.C. §§ 157, 158(a)(1) (2012).

¹⁵³ See, e.g., *Miller v. Motorola, Inc.*, 560 N.E.2d 900 (Ill. App. 1990) (holding that employer had a duty not to disseminate information about employee's mastectomy); *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831 (7th Cir. 2005) (finding that employer had a responsibility as to its handling of the personality and aptitude test results); *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105 (3d Cir. 1987) (same).

¹⁵⁴ 42 U.S.C. § 2000e-2(a)(1).

¹⁵⁵ Harvey S. Mars, *The Conflicting Legal Standards for Mixed-Motive Employment Discrimination Claims: A Comparison of the ADEA and Title VII*, N.Y. ST. B.J., May 2015, at 34 ("There are a great many federal, state, and local laws that prohibit employment discrimination on the basis of statutorily protected classifications—such as gender, race, color, disability, national origin, religion, and age."); Chad A. Readler, *Local Government Anti-Discrimination Laws: Do They Make A Difference?*, 31 U. MICH. J.L. REFORM 777 (1998) ("Legislation protecting individuals from discrimination in private employment has been enacted throughout the United States at the federal, state, and local levels.").

fixed characteristics such as race, color, sex, or national origin does not fall within the definition of infringements upon autonomy, as autonomy is based on voluntary beliefs and conduct.¹⁵⁶ Similarly, federal protections against age discrimination¹⁵⁷ and disability discrimination¹⁵⁸ do not affect employee activities or beliefs, but rather aspects of their person. Title VII has been construed to provide protection against stereotypical notions about how an employee of a certain sex or race should act.¹⁵⁹ However, this approach has had its limits.¹⁶⁰ Employers are still entitled to mold employees into a certain image on the job.¹⁶¹ And for our purposes, Title VII's protections against stereotyping are largely related to employee autonomy on the job, rather than off.¹⁶²

Protections provided by Title VII against sexual harassment can also protect employee autonomy. The Supreme Court has defined sexual harassment as “permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment.”¹⁶³ But a harasser seeks to invade the employee’s personal zone of privacy and may even seek a romantic or sexual relationship with the employee. It is no surprise that many cases of harassment allege not only Title VII violations, but also invasions of personal privacy.¹⁶⁴

Personal autonomy considerations become even stronger when the employer seeks to discriminate based on religion. Rather than being a largely immutable characteristic, one’s religion is largely a personal decision that can be subject to employer pressure. Religion and religious practice is a zone of activity and belief that falls in the heartland of employee personal autonomy.¹⁶⁵ Title VII’s protections for religion offer important safeguards for this aspect of employee autonomy. In fact,

¹⁵⁶ Cf. Sharon Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1545 (2011) (making the case that if federal antidiscrimination protections are based on immutability, they should also extend to “immutable characteristics such as sexual orientation, appearance, parental and marital status, and political affiliation”).

¹⁵⁷ 29 U.S.C. § 623 (2012).

¹⁵⁸ 42 U.S.C. § 12112 (2012).

¹⁵⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (recognizing sex stereotyping as a method of discrimination).

¹⁶⁰ See *Jespersen v. Harrah’s Operating Company, Inc.*, 444 F.3d 1104, 1109-10, 1112 (2006) (holding that differential grooming requirements based on sex do not violate Title VII if they do not impose unequal burdens and do not impose “impermissible” stereotypes).

¹⁶¹ For a critique of the branding requirements on employees, see Marion Crain, *Managing Identity: Buying into the Brand at Work*, 95 IOWA L. REV. 1179 (2010).

¹⁶² See Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL’Y 13, 24 n.57 & 31 (2007) (discussing the importance of appearance autonomy to workers).

¹⁶³ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (quoting in part *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 67 (1986)).

¹⁶⁴ See Part II.B.2 *supra*.

¹⁶⁵ E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 PENN ST. L. REV. 485, 491 (2009) (discussing religion as a matter of personal autonomy).

Title VII extends beyond the personal and into the workplace, as the employer has a duty to accommodate the employee's religion in a reasonable fashion.¹⁶⁶

Sexual orientation is another area of personal autonomy that has received antidiscrimination protection.¹⁶⁷ The Equal Employment Opportunity Commission has recently brought suit alleging that discrimination based on sexual orientation is "because of" sex.¹⁶⁸ Under current law, many states and localities specifically prohibit sexual orientation discrimination in employment,¹⁶⁹ and a federal law to that effect has been proposed and passed the United States Senate.¹⁷⁰

4. *Tort of wrongful discharge in violation of public policy.*

The wrongful discharge and discipline tort protects employees against employer discrimination based on their actions in support of public policy.¹⁷¹ The tort is intended to encourage employee behavior in the workplace that benefits third parties. But in a larger sense, the tort calls upon the notion that employees are not only participants within their firm, but also citizens within a larger community.¹⁷² Employees are at times expected to heed the call to a higher sense of duty, and it makes sense for society to protect them while they engage in that type of activity.

¹⁶⁶ 29 C.F.R. § 1605.2 (finding that the employer violates Title VII if it "It is a violation of the statute to "fail[s] to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business").

¹⁶⁷ *Cf. Vega-Rodriguez v. Puerto Rico Telephone Co.*, 110 F.3d 174,183 (1st Cir. 1997) ("The autonomy branch of the Fourteenth Amendment right to privacy is limited to those decisions arising in the personal sphere—matters relating to a marriage, procreation, contraception, family relationships, child rearing, and the like.").

¹⁶⁸ *See* Complaint, EEOC v. Scott Medical Health Center, P.C., (W.D. Pa., No. 2:16-cv-00225-CB, filed March 1, 2016) (alleging that employer discriminated against employee on the basis of sex in violation of Title VII when it subjected him to harassment because of his sexual orientation and/or because he did not conform to the employer's gender-based expectations, preferences, or stereotypes).

¹⁶⁹ SHANNON MINTER, 1 SEXUAL ORIENTATION AND THE LAW § 10:9 (March 1, 2016 ed.) ("Twenty-one states and the District of Columbia prohibit employment discrimination on the basis of sexual orientation.").

¹⁷⁰ Employment Non-Discrimination Act (ENDA) of 2013, S. 815, 113th Cong. (as passed by Senate, Nov. 7, 2013). ENDA passed the U.S. Senate in 2013 but was never brought up for a vote in the U.S. House of Representatives. Aglae Eufrazio, *Venturing into A Minefield: Potential Effects of the Hobby Lobby Decision on the LGBT Community*, 18 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 107, 140 (2016). President Obama wrote an op-ed article in support of ENDA. Barack Obama, *Congress Needs to Pass the Employment Non-Discrimination Act*, HUFF. POST, Nov. 3, 2013, http://www.huffingtonpost.com/barack-obama/enda-congress_b_4209115.html.

¹⁷¹ For a discussion of the tort, see RESTATEMENT OF EMPLOYMENT LAW §§ 5.01-5.03 (2015).

¹⁷² *See, e.g.,* *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385, 388 (Conn. 1980) ("We are . . . mindful of the myriad of employees without the bargaining power to command employment contracts for a definite term are entitled to a modicum of judicial protection when their conduct as good citizens is punished by their employers.").

Courts have thus focused on employer discrimination that “strike[s] at the heart of a citizen’s social rights, duties, and responsibilities.”¹⁷³

Many of the protected activities under the public policy tort fall within the zone of personal autonomy or its penumbra. One of the earliest and most influential of the public policies to be protected under the common law was the duty of jury service.¹⁷⁴ Courts have also protected employees for engaging in the criminal justice process,¹⁷⁵ participating in a judicial or regulatory process,¹⁷⁶ or abiding by professional ethics.¹⁷⁷ However, courts have also rejected certain public policy claims for being too closely related to personal interests.¹⁷⁸ The crux of the tort is the protection of socially-advantageous behavior. As described by one court: “public policy must concern behavior that truly impacts the public in order to justify interference into an employer’s business decisions.”¹⁷⁹ As such, autonomy concerns are generally secondary to the primary concern: encouragement of actions that benefit the public.

One court endeavored to establish one aspect of personal autonomy—namely, political beliefs and participation—as a public policy worthy of protection under the wrongful discharge and discipline tort. In *Novosel v. Nationwide Insurance Co.*,¹⁸⁰ the Third Circuit read Pennsylvania law as permitting wrongful discharge claims where a clear mandate of public policy has been violated.¹⁸¹ According to the complaint, John Novosel had worked as a district claims manager at Nationwide Insurance until he refused to participate in the employer’s lobbying effort for a particular reform to Pennsylvania insurance regulation. Novosel claimed that his refusal to bow to the employer’s political will violated Pennsylvania public policy. The Third Circuit agreed. Citing to a line of political expression protections for

¹⁷³ *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 878-79 (Ill. 1981).

¹⁷⁴ *See, e.g., People v. Vitucci*, 199 N.E.2d 78, 79 (Ill. App. 1964) (stating that an employer who discharged an employee who was absent because of jury duty was guilty of contempt of court); *Nees v. Hocks*, 536 P.2d 512 (Or. 1975).

¹⁷⁵ *Palmateer*, 421 N.E.2d at 879 (employee was fired for participating in “the enforcement of [the] State’s criminal code”); *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1336 (Cal. 1980) (same).

¹⁷⁶ *See, e.g., Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 357 (Ill. 1978) (employee filed a workers compensation claim).

¹⁷⁷ *LoPresti v. Rutland Regional Health Services, Inc.* 865 A.2d 1102 (Vt. 2004); *Rocky Mtn. Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519 (Colo. 1996). *See Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505 (N.J. 1980) (“The sources of public policy include legislation; administrative rules, regulations, or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy.”).

¹⁷⁸ *See, e.g., Scrogan v. Kratco Corp.*, 551 S.W.2d 811, 812 (Ky. App. 1977) (no claim when employee terminated after announcing his intentions to attend law school at night).

¹⁷⁹ *Rocky Mtn. Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 525 (Colo.1996).

¹⁸⁰ 721 F.2d 894 (3d Cir. 1983).

¹⁸¹ *Id.* at 898 (citing *Geary v. United States Steel Corp.*, 319 A.2d 174, 180 (Pa. 1974), and *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119, 120 (Pa. Super. 1978)).

public sector employees,¹⁸² the *Novosel* court held that “these cases suggest that an important public policy is in fact implicated wherever the power to hire and fire is utilized to dictate the terms of employee political activities.”¹⁸³ The court remanded the case for further consideration as to whether *Novosel* met the specific requirements of the tort.

The *Novosel* decision has received substantial criticism from courts both inside and outside of Pennsylvania. Nine years after the decision, the Third Circuit declined to extend the *Novosel* approach of relying on a federal constitutional provision to provide public policy.¹⁸⁴ Citing to a series of lower-court opinions in Pennsylvania, the circuit found that “the clear trend of those cases indicates that the Pennsylvania courts would be highly unlikely to extend *Novosel*.”¹⁸⁵ Other courts have disapproved of *Novosel*'s notion that the First Amendment's protections for political activity and speech extend to the private sector.¹⁸⁶ Rather, they have applied the general rule as stated in *Truly v. Madison General Hospital*,¹⁸⁷ that “one does not always insure his own retention in employment by wrapping oneself in the first

¹⁸² *Id.* at 899-901 (citing *inter alia* *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); and *Connick v. Myers*, 461 U.S. 138 (1983)).

¹⁸³ *Id.* at 900.

¹⁸⁴ *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 620 (3d Cir. 1992).

¹⁸⁵ *Id.* Interestingly, one judge on the Pennsylvania Court of Common Pleas went on a jeremiad against *Novosel*, stating that the decision was “[p]erhaps the most glaring example of the federal courts pre-disposition toward dictating policy preferences that are contrary to Pennsylvania's.” *Shick v. Shirley*, 1995 WL 864462, at *10 n.7 (Pa. Com. Pl. 1995). However, that court's ruling—that the tort of public policy did not extend to the filing of a workers' compensation claim—was later overruled by the Pennsylvania Supreme Court. *Shick v. Shirley*, 716 A.2d 1231, 1238 (Pa. 1998). And more recently, two Pennsylvania opinions have cited *Novosel* favorably, although as to the general notion of public policy. *Weaver v. Harpster*, 975 A.2d 555, 564 (Pa. 2009); *Nazar v. Clark Distribution Systems*, 2000 WL 1616785, *34 (Pa. Com. Pl. 2000).

¹⁸⁶ *See, e.g.*, *Dixon v. Coburg Dairy, Inc.*, 330 F.3d 250, 262 (4th Cir. 2003) (applying S.C. law) (declining to reach “the absurd result of making every private workplace a constitutionally protected forum for political discourse”), *rev'd on other grounds*, 369 F.3d 811 (4th Cir. 2004) (en banc); *Grinzi v. San Diego Hospice Corp.*, 14 Cal. Rptr. 3d 893, 900 (Cal. App. 4th 2004) (“We do not find [*Novosel*] persuasive and also decline to adopt it.”); *Edmondson v. Shearer Lumber Products*, 75 P.3d 733, 738-739 (Idaho 2003) (*Novosel* policy not “endorsed by any other court”); *Shovelin v. Central New Mexico Elec. Co-op., Inc.*, 850 P.2d 996, 1010 (N.M. 1993) (“We did not, however, adopt the approach taken by the Third Circuit in *Novosel* and are not inclined to adopt that approach now.”); *Tiernan v. Charleston Area Medical Center, Inc.*, 506 S.E.2d 578, 588-591 (W. Va. 1998) (rejecting the *Novosel* approach in a lengthy discussion); *Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354, 1356 (Ill. 1985) (constitutional guarantee of free speech provided by Illinois and U.S. Constitutions does not provide protection or redress against private individuals or corporations that seek to abridge free expression of others); *Graebel v. American Dynatec Corp.*, 604 N.W.2d 35 (Table), 1999 WL 693460 (Wis. App. 1999) (“Although we recognize a wrongful discharge claim when an employer's actions violate a clearly mandated public policy, the public policy exception may not be used to extend constitutional free speech protection to private employment.” (quoting *Bushko v. Miller Brewing Co.*, 396 N.W.2d 167, 172 (Wis. 1986))).

¹⁸⁷ 673 F.2d 763 (5th Cir.1982).

amendment and launching attacks on one's employer from within its folds. At some point, while the employer has no right to control the employee's speech, he does have the right to conclude that the employee's exercise of his constitutional privileges has clearly over-balanced his usefulness and destroyed his value and so to discharge him.”¹⁸⁸

The *Novosel* court clearly believed that First Amendment protections extended into the workplace to protect the employee's political expression.¹⁸⁹ The case presents a tough question as to whether the political expression at issue would be included in a notion of personal autonomy that existed outside of the workplace. On the one hand, the employer wanted the employee to provide support during work time, and the political issue directly involved the employer's business.¹⁹⁰ On the other hand, the employer may have been looking for the employee's personal endorsement as to the issue, rather than simply his support as an employee.¹⁹¹ It is unclear whether employees were simply expected to solicit signatures from others, or whether the employees were also expected to personally endorse the bill through their own signatures.¹⁹² If the employer was looking for the employee to simply obtain signatures, it appears that the conduct at issue was wholly within the scope of *Novosel*'s employment. Along these lines, the cases that have rejected the *Novosel* holding involved employee conduct that was within the employment relationship, was potentially unlawful, or infringed upon the employer's legitimate business interests.¹⁹³ Thus, the many rejections of *Novosel* are not necessarily rejections of legal protections for personal autonomy interests.

¹⁸⁸ *Id.* at 767.

¹⁸⁹ *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 900 (3d Cir. 1983).

¹⁹⁰ *Id.* at 896.

¹⁹¹ The opinion states that the employer “solicit[ed] the participation of all employees in an effort to lobby the Pennsylvania House of Representatives. Specifically, employees were instructed to clip, copy, and obtain signatures on coupons bearing the insignia of the Pennsylvania Committee for No-Fault Reform.” *Id.*

¹⁹² Samuel Bagenstos has argued that employer efforts to direct employee political activity “threaten social equality because they enable the company to transform its economic power over its employees into an additional voice in the political realm. And that additional voice enhances the company's political power while at the same time squelching the political power of its employees.” Bagenstos, *supra* note SB2013, at 227.

¹⁹³ See *Dixon*, 330 F.3d at 254-255 (no public-policy protection for Confederate flag on tool box that would be visible to coworkers); *Grinzi*, 14 Cal. Rptr. 3d at 896 (no protection for employee's membership in Women's Garden Circle, an investment group that the employer believed to be an illegal pyramid scheme); *Edmondson*, 75 P.3d at 736 (no protection for employee's involvement in local-government task force that concerned issues vital to the employer's interest, particularly when employee opposed employer's interests); *Shovelin*, 850 P.2d at 1010 (no protection for employee serving as local mayor; employer warned employee prior to election that mayoral duties would interfere with employee's ability to perform the job); *Tiernan*, 506 S.E.2d at 588-591 (no protection for employee's letter, published by newspaper, that was critical of and sarcastic towards the employer); *Barr*, 478 N.E.2d at 1355 (plaintiffs had, prior to said discharge by the defendants, informed fellow

5. State off-duty activity statutes.

Personal autonomy takes the front seat when it comes to state “off-duty” or “lawful activity” statutes. These statutes can be grouped in several categories of protections. At the thinnest level, a set of state statutes protect employees from discharge or discipline because of their use of “lawful products,” sometime specified as alcoholic beverages and tobacco.¹⁹⁴ These protections, passed through the influence of purveyors of those products, require that employees use the products outside of the employment relationship—off duty, and not on employer premises.¹⁹⁵ Five states offer significantly broader protections for all off-duty conduct, with some variations. Mississippi’s provision protects against interference with employees’ “social, civil, or political rights,” but it only provides for civil damages of \$500.¹⁹⁶ California, Colorado, and North Dakota provide for protections for all lawful activities off the employer’s premises and outside of working hours.¹⁹⁷ Finally, New York provides protection specifically for “legal recreational activities.”¹⁹⁸

employees of layoff procedures being utilized); *Graebel*, 604 N.W.2d 35, 1999 WL 693460 at *1 (employee fired because of letter to local newspaper using racially inflammatory expressions).

¹⁹⁴ CONN. GEN. STAT. §31-40s (applying solely to smoking or tobacco products); D.C. CODE ANN. §7-1703.03 (smoking or tobacco); 820 ILL. COMP. STAT. § 55/5 (applying to “lawful products”); IND. CODE ANN. §22-5-4-1 (tobacco products); KY. REV. STAT. ANN. § 344.040 (smoking); LA. REV. STATE. ANN. § 23:966 (smoking); ME. REV. STAT. ANN. tit. 26, § 597 (tobacco products); MINN. STAT. § 181.938 (lawful consumable products); MISS. CODE ANN. § 71-7-33 (smoking or tobacco products); MO. REV. STAT. § 290.145 (lawful alcohol or tobacco products); MONT. CODE ANN. §§ 39-2-313 (lawful products); NEV. REV. STAT. § 613.333 (lawful use of a product); N.H. REV. STAT. §275:37-a (tobacco products); N.J. STAT. ANN. §34:6B-1 (tobacco products); N.M. STAT. § 50-11-3 (smoking or tobacco products); N.C. GEN. STAT. § 95-28.2 (lawful products); OKLA. STAT. tit. 40, § 500 (smoking or tobacco products); OR. REV. STAT. § 659A.315 (tobacco products); R.I. GEN. LAWS § 23-20.10-14 (smoking or tobacco products); S.C. CODE ANN. § 41-1-85 (tobacco products); S.D. CODIFIED LAWS § 60-4-11 (tobacco products); TENN. CODE ANN. § 50-1-304 (referring to “product” or “agricultural product” that is “not regulated by the alcoholic beverage commission”); VA. CODE ANN. § 15.2-1504 (smoking or tobacco products); W. VA. CODE § 21-3-19 (tobacco products); WIS. STAT. ANN. § 111.321 (lawful products); WYO. STAT. § 27-9-105 (tobacco products).

¹⁹⁵ Matthew W. Finkin, “*Lawful Activity*” Laws, in *WORKPLACE PRIVACY: PROCEEDINGS OF THE NEW YORK UNIVERSITY 58TH ANNUAL CONFERENCE ON LABOR* 409, 412 (2010) (“At the behest of commercial interests a large number of states have protected the specific right to consume a lawful product—alcohol, tobacco, or both—off the employer’s premises and on the employee’s own time.”).

¹⁹⁶ MISS. CODE § 79-1-9 (providing for a penalty of \$250 along with damages to the employee of an equal amount).

¹⁹⁷ See CAL. LAB. CODE § 98.6 (providing a private cause of action for discharges based on Cal. Labor Code § 96(k), which protects “lawful conduct occurring during nonworking hours away from the employer’s premises”); COLO. REV. STAT. ANN. § 24-34-402.5(1) (stating that employers may not terminate an employee “due to that employee’s engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction (a) [r]elates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees . . . or (b) [i]s necessary to avoid a conflict of interest with any responsibilities to the employer”); N.D. CENT. CODE ANN. § 14-02.4-03, -08 (outlawing discrimination “because of . . . participation in a lawful activity that is off the employer’s

The intent of these broader statutes is clearly to protect employee personal autonomy outside of work. As one court described the Colorado law:

[T]he law was meant to provide a shield to employees who engage in activities that are personally distasteful to their employer, but which activities are legal and unrelated to an employee's job duties. In application, this statute should protect the job security of homosexuals who would otherwise be fired by an employer who discriminates against gay people, members of Ross Perot's new political party who are employed by a fervent democrat, or even smokers who are employed by an employer with strong anti-tobacco feelings. . . . The one common thread that links all of these examples is that the statute shields employees who are engaging in private off-the-job activity, that is unrelated to the employees['] job duties, from termination for participation in the non-work related activities.¹⁹⁹

However, courts are wary of any activities that actually infringe upon the employer's interests. A sharp line is meant to be drawn between activities in which the employer has a legitimate business interest, and those in which it does not. For example, in the case excerpted above, the Court found that the employee was not protected when he wrote a letter to a newspaper critical of the company.²⁰⁰ Even if an activity takes place while the employee is not at work, the employer can generally take action against the employee if the off-duty conduct harms the employer's reputation or ability to carry on business with the employee.

There are also some points of debate about whether certain kinds of activities fall within the "lawful activities" definition. For example, a Colorado employee's use of marijuana off the job for medical reasons was held not to be a "lawful" activity since it was illegal under federal law, even though it was legal under state law.²⁰¹ New York has had more ongoing disputes about the content of its definition, as courts have taken the "recreational" part of the term as a critical piece. Anti-fraternization policies which prohibit employees from engaging in romantic or sexual relationships have been upheld under the statute, as dating was held not to constitute a recreational activity. As the court explained in *New York v. Wal-Mart Stores, Inc.*:²⁰²

premises and that takes place during nonworking hours" unless the participation is "in direct conflict with the essential business interests of the employer" or "contrary to a bona fide occupational qualification that reasonably and rationally relates to employment activities").

¹⁹⁸ N.Y. LAB. LAW § 201-d (outlawing discrimination because of "an individual's legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property").

¹⁹⁹ *Marsh v. Delta Airlines, Inc.*, 952 F. Supp. 1458, 1462-63 (D. Colo. 1997).

²⁰⁰ *Id.* at 1463.

²⁰¹ *Coats v. Dish Network, LLC*, 350 P.3d 849, 853 (Colo. 2015) ("Coats's use of medical marijuana was unlawful under federal law and thus not protected by section 24-34-402.5.").

²⁰² 207 A.D.2d 150 (N.Y. App. 1995).

To us, “dating” is entirely distinct from and, in fact, bears little resemblance to “recreational activity”. Whether characterized as a relationship or an activity, an indispensable element of “dating”, in fact its *raison d’etre*, is romance, either pursued or realized. For that reason, although a dating couple may go bowling and under the circumstances call that activity a “date”, when two individuals lacking amorous interest in one another go bowling or engage in any other kind of “legal recreational activity”, they are not “dating”.²⁰³

The dissent, however, argued that “[t]he statute, by its terms, appears to encompass social activities, whether or not they have a romantic element, for it includes *any* lawful activity pursued for recreational purposes and undertaken during leisure time.”²⁰⁴ And while the Second Circuit adopted *Wal-Mart’s* reading of the statute, one judge attacked the interpretation in a concurrence, stating: “It is repugnant to our most basic ideals in a free society that an employer can destroy an individual’s livelihood on the basis of whom he is courting, without first having to establish that the employee’s relationship is adversely affecting the employer’s business interests.”²⁰⁵

6. *Constitutional and statutory protections for political speech and affiliation.*

In *Pickering v. Board of Education*,²⁰⁶ the Supreme Court held that the First Amendment protected public-sector employee speech. The famous “*Pickering* balancing test”²⁰⁷ has since been modified to require that the speech be on a matter of public concern²⁰⁸ and outside of the scope of their employment.²⁰⁹ However, government employees do enjoy significant protections to engage in political and free speech expression without employer interference. “The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict,

²⁰³ *Id.* at 152.

²⁰⁴ *Id.* at 153 (Yesawich Jr., J., dissenting).

²⁰⁵ *McCavatt v. Swiss Reinsurance American Corp.*, 237 F.3d 166, 169-70 (2d Cir. 2001) (McLaughlin, C.J. concurring).

²⁰⁶ 391 U.S. 563 (1968).

²⁰⁷ *See Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (“*Pickering* and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.” (citations omitted)).

²⁰⁸ *Connick v. Myers*, 461 U.S. 138 (1983).

²⁰⁹ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.”

These protections are even stronger in the context of political associations. Public employees cannot be fired for belonging to a particular political party unless such an affiliation is an appropriate requirement for effective performance of the office.²¹⁰

Although private-sector employees are not protected by the First Amendment, many states prohibit employer adverse actions based on employee political activities and expressions.²¹¹ Nine states make it a crime to try to prevent, restrain, or influence an employee’s political activity by threatening discharge or otherwise trying to prevent the conduct.²¹² A number of other states provide protection for political activity, political-party affiliation, campaign contributions, and exercising the right to vote.²¹³ Federal law provides for a civil action against a conspiracy to “prevent, by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner” to a federal elected official.²¹⁴ New Mexico makes it a felony to discharge or threaten to discharge an employee “because of the employee’s political opinions or belief, or because of such employee’s intention to vote or refrain from voting for any candidate, party, proposition, question, or constitutional amendment.”²¹⁵ Two states prohibit discrimination against employees on the basis of party membership.²¹⁶ Three states protect employees against discrimination based on engagement in

²¹⁰ *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). Individuals who hold policymaking positions where “the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office,” *Branti*, 445 U.S. at 518, are protected against politically-motivated dismissal. See, e.g., *Embry v. City of Calumet City, Illinois*, 701 F.3d 231 (7th Cir. 2012).

For a description of the differences between the First Amendment’s protections for free speech and political affiliation, see Craig D. Singer, Comment, *Conduct and Belief: Public Employees’ First Amendment Right to Free Expression and Political Affiliation*, 59 U. CHI. L. REV. 897-98 (1992).

²¹¹ Eugene Volokh, *Private Employees’ Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 297 (2012) (“About half of Americans live in jurisdictions that protect some private employee speech or political activity from employer retaliation.”).

²¹² See CAL. LAB. CODE §§ 1101, 1102; COLO. REV. STAT. ANN. § 8-2-108 (misdemeanor); LA. REV. STAT. ANN. §§ 23:961, 23:962 (misdemeanor); MINN. STAT. ANN. § 10A.36 (gross misdemeanor); MO. ANN. STAT. §§ 115.637(6); 130.028 (misdemeanors); NEB. REV. STAT. ANN. § 32-1537 (class IV felony); NEV. REV. STAT. § 613.040, S.C. CODE ANN. § 16-17-560; W. VA. CODE ANN. § 3-8-11 (misdemeanor). California, Colorado, and Louisiana have specific provisions for employees to seek damages for violations of their provisions.

²¹³ For a comprehensive discussion of these statutes, see Volokh, *supra* note EV2012, at 303-34.

²¹⁴ 42 U.S.C. § 1985(3) (2012).

²¹⁵ N.M. STAT. ANN. §§ 1-20-13, 3-8-78.

²¹⁶ See IOWA CODE ANN. § 39A.2(c)(4); LA. REV. STAT. ANN. § 18:1461.4(A)(1); see also D.C. CODE §§ 2-1401.02(25), 2-1402.11(a); P.R. LAWS ANN. tit. 29, § 140 (Puerto Rico); V.I. CODE ANN. tit. 10, § 64-1(a) (U.S. Virgin Islands).

electoral activities.²¹⁷ Eight states provide protections for the signing of electoral petitions, such as referenda and recall elections.²¹⁸ Louisiana, Massachusetts, and Oregon have specific protections for campaign contributions.²¹⁹

Connecticut has taken the significant step further of applying First Amendment protections as a whole to private sector employees through a state statute.²²⁰ The statute provides that employers, including both private and government employers, must not subject employees to discipline or discharge on account of their exercise of First Amendment rights “provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between the employee and the employer.”²²¹ Although the statute has been interpreted to cover First Amendment activity on the job as well as off,²²² the Connecticut courts have imported in the “matters of public concern” test²²³ as well as the absence of protection for speech that is part of the employee’s job duties, as applied to First Amendment claims.²²⁴ Even prior to the Supreme Court’s decision in *Garvetti*, claims under § 31-51q had been subjected to fairly stringent “public concern” analysis, which did not include speech that was “directed

²¹⁷ See 10 ILL. COMP. STAT. ANN. § 5/29-17; N.Y. LAB. LAW § 201-d; WASH. REV. CODE ANN. § 42.17A.495(2).

²¹⁸ ARIZ. REV. STAT. ANN. §§ 19-116, 19-206; GA. CODE ANN. § 21-4-20(b); IOWA CODE ANN. § 39A.2; LA. REV. STAT. ANN. § 18:1461.4(A)(1); MINN. STAT. ANN. § 211C.09; MO. ANN. STAT. § 115.637(6); OHIO REV. CODE ANN. § 731.40; OR. REV. STAT. ANN. § 260.665(1)-(2); WASH. REV. CODE ANN. §§ 29A.84.250(4), 29A.94.220(5).

²¹⁹ LA. REV. STAT. ANN. § 18:1461.4(A)(1); MASS. GEN. LAWS ANN. ch. 56, § 33; OR. REV. STAT. ANN. § 260.665(1)-(2).

²²⁰ CONN. GEN. STAT. § 31-51q.

²²¹ *Id.*

²²² *Cotto v. United Techs. Corp.*, 738 A.2d 623, 632 (Conn. 1999) (finding that § 31-51q “extends protection of rights of free speech under the federal and the state constitutions to employees in the private workplace”). Not all Connecticut justices have agreed. *See id.* at 634 (Borden, J., concurring and dissenting) (concluding that “the statute is intended to reach only speech or conduct of a private employee that, based on its location or circumstance, is or would be protected against governmental, and not private, action”); *Trusz v. UBS Realty Inv’rs, LLC*, 123 A.3d 1212, 1235 (2015) (Zarella, J., concurring) (“A proper reading of § 31–51q extends protections to private sector employees only from discipline or discharge [resulting from] the exercise of their constitutionally guaranteed free speech rights outside of the workplace.”).

²²³ *Connick v. Myers*, 461 U.S. 138 (1983).

²²⁴ *Garvetti v. Ceballos*, 547 U.S. 410 (2006); *Schumann v. Dianon Sys., Inc.*, 43 A.3d 111, 128 (Conn. 2012) (applying the *Garvetti* threshold test to claims under § 31-51q). The Court went on to hold that the employee speech at question in the case would also not have received protection under the traditional *Pickering* test as well. *Id.* at 134-37. The Connecticut Supreme Court recently held that it would not apply *Garvetti* in its interpretation of speech rights under the Connecticut Constitution. *Trusz v. UBS Realty Inv’rs, LLC*, 123 A.3d 1212, 1228 (Conn. 2015) (“Because we find *Pickering* and *Connick* to be more persuasive than *Garvetti*, we conclude that the weight of persuasive federal precedent favors a broader reading of the free speech provisions of the state constitution than of the first amendment.”).

‘only’ at issues concerning [the employee’s] employment.”²²⁵ The Connecticut Supreme Court recently held that “only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee’s favor when an employee is speaking pursuant to official job duties.”²²⁶ In other words—there must be a public policy component to the workplace speech if it is to be protected.

III. PROTECTING EMPLOYEE AUTONOMY THROUGH THE COMMON LAW

The multitude of protections for employee personal autonomy, appearing in various shapes and guises, demonstrate its importance within the employment relationship. But this patchwork of coverages has little doctrinal or logical consistency. Courts and legislatures have selected small pieces of autonomy to protect, or have carved out larger chunks for a limited set of employees, such as those in the public sector. Stepping back, as if from a pointillist painting, we can see a broader picture of coverage for autonomy interests. But the collection of individual dots lacks the comprehensiveness that the subject deserves.

State legislatures, or even Congress, could step in and protect employee personal autonomy through off-duty or lawful activity statutes.²²⁷ Numerous commentators have proposed the widespread adoption of such statutes.²²⁸ However, this Article specifically looks at the ways in which the common law could approach the issue of employee personal autonomy. Courts control the basic dynamics of the employment relationship through the common law of contract. Although federal and state statutes provide manifold overlays on top of this foundation, the common-law core represents the basis for

²²⁵ *Daley v. Aetna Life & Cas. Co.*, 734 A.2d 112, 125 (Conn. 1999). In *Daley*, the employee had complained about the employer’s failure to abide by its public statements regarding its family-friendly workplace. The jury found that such speech was not on a matter of public concern, and the Connecticut Supreme Court affirmed. *Id.*

²²⁶ *Trusz*, 123 A.3d at 1228.

²²⁷ Colorado or North Dakota off-duty activities statutes could serve as models. COLO. REV. STAT. ANN. § 24-34-402.5(1); N.D. CENT. CODE ANN. § 14-02.4-03, -08.

²²⁸ See, e.g., Rafael Gely & Leonard Bierman, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 HARV. J.L. & TECH. 287, 326-28 (2007); Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 680-83 (2004); Bosch, *supra* note JB1, at 660 (“[T]he legislatures of all fifty states should adopt expanded lifestyle protection legislation that fully protects all employee activities that do not have a sufficient impact on the employer’s legitimate business interests.”); Joseph Lipps, Note, *State Lifestyle Statutes and the Blogosphere: Autonomy for Private Employees in the Internet Age*, 72 OHIO ST. L. J. 645, 673-85 (2011) (proposing federal and state legislation). See also Lewis L. Maltby & Bernard J. Dushman, *Whose Life Is It Anyway - Employer Control of Off-Duty Behavior*, 13 ST. LOUIS U. PUB. L. REV. 645, 658 (1994) (supporting reform to existing state off-duty statutes as well as the implementation of such statutes in states without one).

any agreement between employer and employee. As such, courts have a duty to manage the law surrounding this relationship. The at-will presumption only increases the role of courts, as that presumption dictates the tone for much to follow. Because the at-will rule plays such an important role in shaping the employment relationship, courts must attend to the at-will doctrine and make the changes necessary to reflect the appropriate balance between parties. And, on a pragmatic level, courts could implement a tort or mandatory contract rule that would work similarly to an off-duty or political activity wrongful discharge statute. Thus, discussion of both would be in some senses duplicative.

This Part considers two ways in which courts could change the common law to protect employee personal autonomy. First, courts could use the tort of wrongful discharge to protect the public policy of employee autonomy. Second, courts could modify the at-will doctrine to include a presumption that the employer will not discharge an employee based on activities or beliefs that take place within the zone of personal autonomy. These possible approaches will be taken in turn.

A. Protecting Personal Autonomy through the Tort of Wrongful Discharge

Courts could protect employee personal autonomy through the tort of wrongful discharge for violations of public policy.²²⁹ The purpose behind the tort is to protect broader societal interests within the employment relationship. The tort provides mandatory, nonwaivable protections to employees because the interests at stake go beyond the two parties involved.²³⁰ The third-party or public interests provide the employee with the prerogative to deviate from the dictates of the relationship to respond to the higher calling. In order to encourage and protect employees to serve the public, they are given immunity from employer retaliation.²³¹

Certain aspects of the tort mesh well with the notion of protecting employee autonomy. Courts are responsive to the notion that civic responsibilities need public protection. It was relatively straightforward for courts to provide protections for jury service²³² and participation in criminal investigations.²³³ It is a relatively small

²²⁹ See RESTATEMENT OF EMPLOYMENT LAW § 5.01-5.03 (2015) (describing the wrongful discharge tort).

²³⁰ See *id.* § 5.01 cmt. a (“A principal justification for this public-policy cause of action is that, regardless of the terms of the employment, certain discharges that contravene well-established norms of public policy harm not only the specific employees but also third parties and society as a whole.”).

²³¹ A specific example of a public interest is the enforcement of the nation’s laws, which can be found in the Supreme Court’s antiretaliation jurisprudence. See Richard Moberly, *The Supreme Court’s Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 378 (2010) (describing the Court’s “Antiretaliation Principle” as “the notion that protecting employees from retaliation will enhance the enforcement of the nation’s laws”).

²³² See, e.g., *People v. Vitucci*, 199 N.E.2d 78, 79 (Ill. App. 1964); *Nees v. Hocks*, 536 P.2d 512 (Or. 1975).

²³³ *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 878-79 (Ill. 1981); *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330, 1336 (Cal. 1980).

step to include participation in political life, through association or expression, as public policy worthy of nurturing. Expanding the coverage to include religious participation stays within the First Amendment, and may seem relatively uncontroversial given the protections provided for religion under Title VII.²³⁴

At its core, however, the public policy tort is designed to protect public interests. Protecting jury service and criminal investigations allows the judicial system to function. Protecting reports of wrongdoing to the press or law enforcement facilitates the flow of information that may save lives. There is a strong argument that protecting political expression and association inures to the benefit of the public, but the rewards are less tangible. And protecting other recreational or off-duty activities does not have the same power of public policy that the traditional tort has required.²³⁵

The reaction of many courts to the *Novosel v. Nationwide Insurance Co.*²³⁶ demonstrates the perils of protecting autonomy through the wrongful discharge tort. Although the response has become more muted, courts were initially quite hostile to the *Novosel* decision, even at a time when courts were more willing to entertain challenges to the at-will doctrine.²³⁷ Some of this blowback may reflect simply an unwillingness to move beyond the at-will rule. However, other courts argued that the extension of public policy to cover First Amendment values had gone too far. The First Amendment restricts the government, not private actors, they argued.²³⁸ As such, it was a misconception to bring in public policy concerns to police the conduct of purely private actors as to First Amendment expression and conduct.

Courts have also been concerned about the First Amendment rights of employers. Those rights may be infringed upon if government requires employers to continue to associate with employees even when the employer would otherwise terminate the relationship based on the employee's political, religious, or moral expressions.²³⁹ In *Nelson v. McClatchy Newspapers, Inc.*,²⁴⁰ the Washington Supreme

²³⁴ 42 U.S.C. § 2000e-2 (2012).

²³⁵ Gely & Bierman, *supra* note GB1, at 326 (“It is one thing for state courts to say that employees cannot be fired for being on jury duty—virtually all do so—and quite another to say that employees cannot be fired for anything related to a very broadly construed notion of ‘public concern.’”).

²³⁶ 721 F.2d 894 (3d Cir. 1983).

²³⁷ *See* notes 184-188 *supra*.

²³⁸ *See, e.g.*, *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 620 (3d Cir. 1992), as amended (May 29, 1992) (predicting that “if faced with the issue, the Pennsylvania Supreme Court would not look to the First and Fourth Amendments as sources of public policy when there is no state action”); *Bushko v. Miller Brewing Co.*, 396 N.W.2d 167, 172 (Wis. 1986) (“Although we recognize a wrongful discharge claim when an employer’s actions violate a clearly mandated public policy, the public policy exception may not be used to extend constitutional free speech protection to private employment.”).

²³⁹ *See* Bagenstos, *supra* note SB1, at 259 (“There remains the question whether a law prohibiting private employers from controlling their workers’ political speech—even with the exceptions I have suggested—would be consistent with current First Amendment doctrine. After all, an employer’s interests in this context—in avoiding having others attribute speech with which it disagrees to it, and

Court held that an employee was statutorily protected against termination for participating in political rallies while off-duty.²⁴¹ However, the court then went on to find the statute to be an unconstitutional restriction on the company's First Amendment rights to freedom of the press.²⁴² The newspaper's requirement that its reporters not engage in partisan political activity was an editorial decision vital to the content of its reporting, found the court.²⁴³ These concerns may arguably be limited to First Amendment institutions such as media outlets, churches, universities, and political parties.²⁴⁴ However, the need to protect the heightened speech, association, and free exercise rights of these organizations underlines the more general point that all organizations have First Amendment interests. The Supreme Court highlighted these interests in *Citizens United v. Federal Communications Commission*,²⁴⁵ finding that First Amendment protects extend to political speech by a corporation.²⁴⁶ And in *Burwell v. Hobby Lobby Stores, Inc.*,²⁴⁷ the Court held that corporations can have religious identities sufficient to deserve protections for their religious-exercise rights as organizations.²⁴⁸ Imposing a tort framework to protect these interests would make it more difficult for corporations to balance their own expressive concerns with those of their individual employees.

Ultimately, tort protection represents a commitment to vindicate public values through a cause of action that imposes requirements upon the employment relationship. It is thus more akin to statutory protection for off-duty autonomy (whether as a whole or just component pieces such as political participation). It is a societal judgment. Such judgments generally come from the legislative branch, which explains why courts have insisted upon constitutional or legislative pronouncements to derive the meaning of public policy.²⁴⁹ Moreover, a tort places the ultimate judgment on the interests to be protected in the hands of courts. Courts would define the type of employee conduct that deserves protection and the strength

in engaging in political speech of its own—are interests that the Supreme Court has found to be constitutionally based.”).

²⁴⁰ 936 P.2d 1123 (Wash. 1997).

²⁴¹ *Id.* at 1128. The statute in question—Washington's Fair Campaign Practices Act—protected employees against discrimination based on the employee's actions “in any way supporting or opposing a candidate, ballot proposition, political party, or political committee.” Rev. Code Wash. § 42.17.680(2).

²⁴² *Nelson*, 936 P.2d at 1129.

²⁴³ *Id.* at 1131 (“Editorial integrity and credibility are core objectives of editorial control and thus merit protection under the free press clauses.”).

²⁴⁴ See PAUL HORWITZ, FIRST AMENDMENT INSTITUTIONS (2013) (discussing the role of such institutions in First Amendment jurisprudence).

²⁴⁵ 558 U.S. 310 (2010).

²⁴⁶ *Id.* at 899-900.

²⁴⁷ 134 S. Ct. 2751 (2014).

²⁴⁸ *Id.* at 2771 (“If for-profit corporations may pursue such worthy [humanitarian and altruistic] objectives, there is no apparent reason why they may not further religious objectives as well.”).

²⁴⁹ RESTATEMENT OF EMPLOYMENT LAW §§ 5.03 (2015) (discussing sources of public policy).

of the employer interests required to overcome that protection.²⁵⁰ There are advantages to putting the court in the position to judge the balancing of interests, as employers are likely to undervalue the employee interests at stake and overvalue employer interests.²⁵¹ However, there are also disadvantages in taking this balancing out of the hands of the parties, especially when the balancing can be so context-dependent on the company's business, the employee's role within the company, and the employee conduct, membership, or belief at issue.

Regardless of whether society wishes to impose this new requirement on the employment relationship, it makes sense first to explore whether the relationship itself already accounts for the concerns.²⁵² An appropriate reading of the at-will rule should, in fact, take into account the separation between the employee relationship and the employee's off-duty conduct. We should begin with the notion that the parties themselves have agreed to protect employee autonomy before we turn to tort.

B. Contractual Protection for Personal Autonomy: Changing the At-Will Default

As discussed in Part I, the employment at-will default rule is extremely robust both in doctrine and practice. As a matter of doctrine, it is more than just a simple gap-filler, as courts have erected procedural and even consideration hurdles for parties seeking to overcome the presumption.²⁵³ And as a matter of economic theory, there is reason to believe that the default rule might remain in place even when a change to that rule might result in greater efficiency.²⁵⁴ Rather than a simple default rule, it is a sticky default—a default that is hard to shake.²⁵⁵

The stickiness of the employment at-will doctrine is particularly problematic, because the justifications for the rule do not support its stickiness. One justification, both for at-will and for default rules more generally, is that the default rule makes sense because it is the rule that most of the sets of parties would jointly choose for

²⁵⁰ See Bagenstos, *supra* note SB1, at 258-59 (describing exemptions for a regime of employees political speech protections for “cases in which speaking or refusing to speak on a particular topic can be regarded as a BFOQ”).

²⁵¹ *Id.* at 259 (arguing that tort-based or statutory protections for employee speech “would eliminate some of the employer's traditional prerogative to define employees' jobs” and “resist[] an employer's ability to casually and opportunistically leverage its economic power over the speech of employees whom the employer can control simply because of the employees' economic dependence on the enterprise”); Finkin, *supra* note MF-2010, at 422 (“If what one does off the job, in one's private life, however lofty or trivial, is an aspect of one's personality, a component of one's being human, it remains to be seen why the law should presume it to be an element of the wage bargain; why, that is, it should be considered a commodity subject to almost no legal restraint on the market.”).

²⁵² See Ayres & Gertner, *supra* note AG1, at 88 (“Immutable rules displace freedom of contract. Immutability is justified only if unregulated contracting would be socially deleterious because parties internal or external to the contract cannot adequately protect themselves.”).

²⁵³ See Part I.A *supra*.

²⁵⁴ See Part I.B *supra*.

²⁵⁵ See Ben-Shahar & Pottow, *supra* note BSP, at 677 (calling the at-will rule “highly sticky”).

their contract if they were required to bargain over the issue. Thus, the argument goes, the default rule should match what most parties would have chosen in the absence of transaction costs.²⁵⁶ However, it makes no sense for such a rule to be sticky, because the whole point is to save the parties from needless transaction costs while at the same time making it as easy as possible for them to depart from the default rule, should they wish. If the justification for the rule is to save transaction costs, it makes no sense to make it more difficult to switch out of the default. Instead, the rule should be as unsticky—as greased—as possible to allow the parties to switch out to a more efficient solution.

There is also little justification for making the at-will rule sticky as a penalty or information-forcing default. First, in order to be a penalty default, the rule would have to *not* be what most parties would choose—that is what makes it a penalty. So a penalty default justification is off the table for those accounts that justify employment at-will as a “would have wanted” default.²⁵⁷ But assuming that we take that off the table, employment at-will is constructed poorly to force information out of the parties.²⁵⁸ The employer is the party with better information about the costs of at-will versus just cause, at least on a broader, economic scale. Employers are also less likely to suffer significant reputational consequences from changing the default rule: it is more damaging to an individual employee to be seen as a malcontent or poor performer, as the individual has much less market power and has few ways in which to provide other information to counteract the negative signaling.²⁵⁹

Finally, a third justification for the at-will rule is that it is a superior termination rule to any alternative. Were this agreed to be true, then we would want the at-will rule to be as sticky as possible to prevent the parties from mistakenly choosing a different option. Richard Epstein, notably, provided a zealous defense of at-will making several arguments: because at-will allows the parties to better monitor each other’s contract performance; because employers will suffer reputational consequences if they abuse their at-will discretion; because at-will allows for risk diversification in the midst of imperfect information; and because the administrative costs of an at-will regime are less than just cause.²⁶⁰ But these points do not seem indisputable enough to justify a sticky default. As Epstein himself acknowledged, the efficiency and equity of the at-will rule have been contested by numerous other academics.²⁶¹ Moreover, Epstein noted that the default nature of at-will is one of its

²⁵⁶ Ayres & Gertner, *supra* note AG1, at 92-93.

²⁵⁷ *Id.* (explaining the “would have wanted” term). Examples of such accounts include Epstein, *supra* note RE1, and Verkerke, *supra* note RHV1.

²⁵⁸ See Ayres & Gertner, *supra* note AG1, at 97 (justifying penalty defaults for “1) giving both contracting parties incentives to reveal information to third parties, especially courts, or 2) giving a more informed contracting party incentives to reveal information to a less informed party”).

²⁵⁹ See Kamiat, *supra* note WK1.

²⁶⁰ Epstein, *supra* note RE1, at 962-73.

²⁶¹ *Id.* at 948 (noting that academic commentators “have been almost unanimous in their condemnation of the at-will relationship”). More recent critiques include: Cynthia L. Estlund,

beneficial features.²⁶² He argued against a just cause default on the grounds that courts might in fact make it too sticky to be shed.²⁶³

Because defaults are by their nature sticky, to varying degrees, and the at-will presumption seems to be particularly sticky, it is important that the rule be tailored to match the expectations of the parties to the extent possible. The at-will rule, in its purest form, is an extremely untailored default: it gives unalloyed discretion to the employer to terminate the relationship for any reason. Over time, however, the rule has been eaten away at, both through the common law and by statutes.²⁶⁴ The wrongful discharge tort prohibits terminations that harm public interests, while a panoply of antidiscrimination regimes make it illegal to fire based on race, sex, sexual orientation, disability, religion, and age. These impositions on at-will are mandatory rules, not default ones. They indicate the need to manage the stark and unbridled discretion that at-will would otherwise allow.

This Article argues that we need further tailoring of the at-will rule, but this time as a default. The law should presume that the parties did not agree that an employee could be terminated for conduct that does not occur within the context of the employment relationship and has no significant impact upon the employment relationship. This “personal-autonomy presumption” makes sense within the at-will doctrine: it assumes that the parties will not base decisions affecting the contractual relationship on factors that take place outside of that relationship.²⁶⁵ It assumes that the employer will not leverage its employment power to force workers to follow its dictates that are unrelated to employment. It keeps contractual performance within the contractual sphere, which is exactly where we would expect the parties to place it. Thus, an at-will rule with a personal-autonomy presumption is thus best considered as a “tailored default”—an effort to frame the contract as what the parties would have agreed to in the absence of transaction costs, reputation costs, behavioral heuristics, and other bargaining obstructions.²⁶⁶

Wrongful Discharge Protections in an at-Will World, 74 TEX. L. REV. 1655, 1657 (1996) (arguing that the at-will regime imposes underappreciated costs on employee discrimination and retaliation claims); David Millon, *Default Rules, Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security*, 146 U. PA. L. REV. 975, 1028-30 (1998) (arguing that the default rule should be changed from at-will employment to a “just cause” regime because the just cause regime may better represent an efficient outcome between the parties); and Summers, *supra* note CS-2000.

²⁶² Epstein, *supra* note RE1, at 951 (“[T]he parties should be permitted as of right to adopt this form of contract if they so desire.”).

²⁶³ *Id.* at 952 (“By degrees, the original presumption against the contract at will could so gain in strength that a requirement that is waivable in theory could easily become conclusive in fact.”).

²⁶⁴ See Estlund, *supra* note CE-1996, at 1655 (“The at-will rule now coexists with numerous important exceptions—statutory and common law, state and federal—that prohibit the discharge of employees for particular bad reasons.”).

²⁶⁵ Cf. Fineman, *supra* note JF-2008, at 356 (“Employers should not be able to foster employee expectations about job security, and then act in contravention of those expectations after reaping increased employee productivity and loyalty.”).

²⁶⁶ See Ayres & Gertner, *supra* note AG1, at 91.

The personal-autonomy presumption also provides another layer of protection for off-duty employee conduct, activities, and beliefs. The plethora of statutory and common-law provisions described in Part II.B offer variegated protections for different aspects of employee autonomy. These protections provide indirect evidence that the parties expect some level of personal autonomy as a matter of contracting. But they also show that society as a whole values personal autonomy and has put in place different legal regimes to shield it from employer attack. Given the many mandatory rules in place regarding aspects of personal autonomy, it makes sense to switch the default rule to a setting that also protects personal autonomy. For these reasons, the personal-autonomy presumption makes sense even as a penalty default. Assuming that employers would strongly prefer to contract back to an at-will rule without the personal-autonomy presumption, changing the default would penalize employers who are not clear about their expectations as to important personal conduct outside of the workplace. By forcing employers to address the issue, the autonomy default would promote clearer interactions between employers and employees as to the boundaries of the employment relationship.²⁶⁷ For these reasons, a default rule that requires “clear” or “unambiguous” intent to circumvent it may do a better job of forcing information out of the employer. For example, a personal-autonomy presumption could require employers to specifically explain under what circumstances they will consider off-duty conduct to be relevant to the workplace. Such a “stickier” default could force the employer to be clearer to the employee about the employer’s expectations for personal behavior and the behavior or conduct when not at work. There is no doubt that off-duty employees can behave in ways that embarrass their employers or damage their employer’s reputations.²⁶⁸ Setting expectations early on in the relationship can help both employers and employees get more out of the relationship for the long term.

How would a personal-autonomy default work? The Restatement of Employment Law sets forth one possible avenue. Section 7.08 of the Restatement states that “[u]nless the employer and employee agree otherwise, an employer is subject to liability for intruding upon an employee’s personal autonomy interests if the employer discharges the employee because the employee exercises a personal autonomy interest.”²⁶⁹ Personal autonomy interests are defined as beliefs, conduct, or activities that take place outside of the employment relationship, including lawful conduct, political or religious beliefs, and participation in lawful associations.²⁷⁰ The employer does not face liability if the employee’s autonomy interests interfered with the employer’s legitimate business interests, including its “orderly operations and

²⁶⁷ See *id.* at 97 (discussing the information-forcing properties of the penalty default).

²⁶⁸ See Matthew Bodie, *The Internet Wants You to Lose Your Job*, QUARTZ.COM, Feb. 3, 2016, <http://qz.com/608697/the-internet-wants-you-to-lose-your-job/> (discussing examples).

²⁶⁹ RESTATEMENT OF EMPLOYMENT LAW § 7.08(b) (2015).

²⁷⁰ *Id.* § 7.08(a).

reputation in the marketplace.”²⁷¹ This approach to the personal-autonomy default tailors the rule to provide an explicit exception to the exception. This tailoring is likely what most employment relationships would settle on, as no employer wants to suffer serious reputational consequences from having an employee with off-duty misconduct.²⁷²

The need to provide for employer protection is thus best accomplished through a modification to the at-will default rule. Some employers may have reputations or businesses that are more sensitive to harm from employee off-duty conduct, or may care more about such conduct. The Republican Party may care if one of its employees is a Bernie Sander supporter; a religious university may care if one of its employees no longer shares its religious faith; an anti-alcohol educational group may care if its employee is captured on video while intoxicated.²⁷³ It makes sense to, at the very least, begin with the personal-autonomy presumption and see how employers adapt to the new default before moving to a mandatory and comprehensive approach.

CONCLUSION

This Article advocates for a change to the employment at-will default to make clear that the employer will not terminate employees for exercising their personal autonomy, as long as that exercise does not interfere with the employer’s business or reputation. But is the very notion of employee personal autonomy a doomed project—an ever-shrinking zone of personal space? The threats are manifold. Employees are conducting more and more of their personal life while at work and on employer-provided equipment, and more and more of their employment duties at home.²⁷⁴ The field of people analytics, which applies big data to human resources and personnel matters, looks to capture insights about employees from a dizzying array of data sources—the more unconventional, the better.²⁷⁵ As the reach of the analytics technology expands, employers may look to

²⁷¹ *Id.* § 7.08(c).

²⁷² For examples, see *Wiegand v. Motiva Enterprises, LLC*, 295 F. Supp. 2d 465 (D.N.J. 2003) (employee selling white supremacy paraphernalia); *Graebel v. American Dynatec Corp.*, 230 Wis. 2d 748, 604 N.W.2d 35 (Table) (Ct. App. 1999) (employee fired because of letter to local newspaper using racially inflammatory expressions).

²⁷³ See *Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751, 2771 (2014) (discussing corporations with different missions and orientations).

²⁷⁴ Nick Bilton, *The Temptation of Co-Working Spaces*, N.Y. TIMES, Feb. 3, 2016, <http://www.nytimes.com/2016/02/04/fashion/co-working-spaces-neuehouse-rvcc-wework.html> (“Technology has upended where we work. The line between work and play has been blurred, and the difference between the office and home has all but disappeared.”).

²⁷⁵ For a discussion of people analytics, see Matthew T. Bodie, Miriam A. Cherry, Marcia L. McCormick & Jintong Tang, *The Law & Policy of People Analytics*, Working Paper (on file with author).

what the employee had for breakfast, what she reads in her spare time, how much sleep she gets, and how much caffeine she drinks in calculating and managing the sources of employee productivity. Employees' personal reputations are now more easily connected to their employers, such that a drunken Friday night tirade or an offensive tweet can bring down the weight of thousands or even millions of social media participants onto the person and their employer.²⁷⁶ And in the platform economy, the employee/independent service-provider is a locus of reputation to an even greater extent.²⁷⁷ All of these are sources of pressure on the divide between our employment relationship and our personal lives.

It may be that the separation of “work” and “home” was only a temporary and perhaps illusory manifestation of historical patterns in business and culture. And if employees do become more of their own individual “brand,” they may not mind the diminishment of autonomy if they have more power and control over their work lives. But the opposite is also possible: employees may be drawn ever further into the employer, such that they have to conform even their personal lives and identities to the employer’s brand.²⁷⁸ Their entire existence could be oriented around maximizing their performance for their employer.²⁷⁹

The ferment around employee personal autonomy is demonstrated by the many legal doctrines which deal with the subject.²⁸⁰ Changing the at-will default to accommodate personal autonomy is a small step, but an important one. The personal-autonomy presumption recognizes the common law’s role in managing the employment relationship and in tailoring the at-will default to recognize the parties’ reasonable expectations. And it promotes the exchange of information over the employer’s approach to off-duty conduct, associations, and beliefs. Although the future of employee autonomy is uncertain, the law needs to change so that the at-will rule does not hasten autonomy’s demise—unnecessarily and inappropriately.

²⁷⁶ See Bodie, *supra* note MTB-QZ (discussing the Ramkisson and Sacco cases).

²⁷⁷ See Orly Lobel, *The Law of the Platform*, MINN. L. REV. (forthcoming 2016) (discussing the importance of reputation).

²⁷⁸ Crain, *supra* note MC-2010, at 1183 (“In a service business, the front-line employee literally embodies the brand.”).

²⁷⁹ Sports stars arguably live within this existence. See, e.g., Greg Bishop, *Given the Way He Prepares, Tom Brady Will Not Be Slowing Down Anytime Soon*, SPORTSILLUSTRATED.COM, Dec. 11, 2014, <http://www.si.com/nfl/2014/12/10/tom-brady-new-england-patriots-age-fitness>.

²⁸⁰ See Part II.B *supra*.