

“Lifestyle” Discrimination in Employment

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I.

INTRODUCTION

In recent years, attentive newspaper readers might have noticed a wide variety of instances in which employers have made employment decisions based upon people's conduct *off* the job. Here are some very recent examples: The University of Alabama fired its new football coach after it was reported that he partied with strippers when he was in Florida for a golf tournament.¹ The San Francisco Chronicle dismissed a technology reporter after he was arrested while protesting the war in Iraq on his free time.² A Lockheed employee claimed he was punished by his employer because of jokes he told at a private retirement party honoring a fellow worker.³ The Chicago Tribune forced the resignation of nationally-known columnist Bob Greene after it was disclosed that he had a sexual relationship with a young woman he had earlier featured in a column.⁴ The dean of students at a Catholic high school was forced to resign after his name and photo were

1. Rick Bragg, *In Alabama, Where Coaches Are Revered, Sinning Is Not Tolerated*, N.Y. TIMES, NATIONAL EDITION, May 9, 2003, at C13.

2. Chris Gaither, *Reporter Arrested Protesting War Is Fired*, THE BOSTON GLOBE, April 24, 2003, at E4.

3. Reynolds Holding, *Rogue's Gallery or Sexual McCarthyism?*, S. F. CHRON., Sept. 29, 2002, at D3.

4. *Id.*

found on sexually suggestive websites related to homosexuality, motorcycles and leather.⁵ Going back a few years, different examples of "lifestyle discrimination" were in the news. Turner Broadcasting System adopted a policy of hiring only non-smokers.⁶ Commercial airlines have suspended pilots who smoked marijuana on their days off.⁷ Wal-Mart fired two sales associates who violated the firm's ban on dating between employees who work in the same store.⁸ Coors Brewing offered economic incentives to its workers who pledged to wear seat belts whenever they drive.⁹ The Air Force brought court martial proceedings against officers who committed adultery.¹⁰ Professional sports leagues have disciplined players and owners for gambling and for associating with gamblers.¹¹ The Marines (briefly) announced that they only wanted recruits who were single.¹² Around the nation, workers have been fired or refused jobs for reasons as diverse as having a criminal record to being married to an existing employee of the firm.¹³

In each instance, the employer justified its decision on the ground that the consequences of the off-duty behavior in some way spill over to the

5. S. Mitra Kalita, *Paul VI School Dean Resigns Over Photo on Lurid Web Sites*, WASH. POST, Feb. 26, 2003 at B5.

6. John Elson, *Busybodies: New Puritans. Repent! The Hour of the Meddlers Is at Hand! And They Are Putting Other Americans' Views, Behavior and Even Jobs at Increasing Risk*, TIME, Aug. 12, 1991, at 20. *Can Smoking or Bungee Jumping Get You Canned?*, FORTUNE, August 9, 1993, at 92.

7. Robert Searles, *The Question of Drug Testing*, BUS. & COMM. AVIATION, Mar. 1987, at 40.

8. Randall Samborn, *Love Becomes a Labor Law Issue*, NAT'L LAW JOURNAL, Feb. 14, 1994, at 1; *Inside Business* (Cable News Network broadcast, July 25, 1993); Jacques Steinberg, *Fraternalism and Friction in the Store Aisles*, N.Y. TIMES, July 14, 1993, at B1; *Discount Dating Ban Gets State Judge's OK*, NEWSDAY, Apr. 11, 1994, at A23; Carol Marie Cropper, *That Unwritten Code Against Fraternalism*, N.Y. TIMES, Oct. 26, 1997, at 14. See also Elisabeth Bumiller, *Headmaster at Dalton Resigns Under Pressure*, N.Y. TIMES, Mar. 13, 1997, at B3 (school headmaster resigns due to affair with teacher).

9. Francis W. Clifford, *Wellness on Tap at Coors; Coors Brewing Co.'s Wellness Program; Employee Benefits*, 11 FIN. EXECUTIVE 2, 21 (1995).

10. Elaine Sciolino, *From a Love Affair to a Court-Martial*, N.Y. TIMES, May 11, 1997, at A1. See also Peter Truell, *A Fed Official's Romance Raises Issue of Conflict*, N.Y. TIMES, Apr. 9, 1997, at D1 (involvement between Federal Reserve officer and investment banker).

11. See generally PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 31-38 (2nd ed. 1998). The National Football League once ordered famous New York Jets quarterback Joe Namath to sell his stake in a nightclub because it was frequented by gamblers. Major League Baseball temporarily banished New York Yankees owner George Steinbrenner and retired stars Willy Mays and Mickey Mantle from the sport because of their connection with professional gambling. See generally Manny Topol, *Eyeing Players' Pals; Gambling Worries Have Leagues Expanding Scrutiny*, NEWSDAY, June 23, 1993, at 142.

12. See Clifford Krauss, *Marine Leader Contritely Admits He Erred on 'Singles Only' Order*, N.Y. TIMES, Aug. 13, 1993, at A1; *Marine Madness*, N.Y. TIMES, Aug. 13, 1993, at A26; Comdr. E.T. Gomulka, *Marriage Imposes Special Burdens on Marines*, N.Y. TIMES, Aug. 30, 1993, at A16.

13. See, e.g., Irving Kovarsky and Vern Hauck, *The No-Spouse Rule, Title VII, and Arbitration*, 32 LABOR L. J. 366 (1981). See generally the leading treatise on the subject lifestyle discrimination, MARVIN F. HILL, JR. & JAMES A. WRIGHT, EMPLOYEE LIFESTYLE AND OFF-DUTY CONDUCT REGULATION (1993).

workplace, affecting the employer's legitimate interests. But how much should employers be able to intrude into the privacy of workers' off-work, lifestyle choices?

Although most people are willing to give employers wide latitude in controlling employee behavior on the job, many balk at employer practices that are seen to limit what people do off the job.¹⁴ Indeed, when the issue is put in an abstract way, many are quick to assert that how people act on their own time ought to be entirely their own decision and should be of no concern to their employer.¹⁵

On the other hand, when our focus is brought from the lofty plane of abstract principles down to specifics, it is self-evident that, at least in certain circumstances, employers do have some legitimate interests in their employees' off-work activities. Consider first two non-controversial examples. When applying for a job as a lawyer at a law firm, it will hardly do for the applicant to assert that it was her choice to attend business school instead of law school, and that it is an impermissible intrusion on her autonomy to deny her the position because of this out-of-work behavior. Similarly, when a lawyer shows up for work inebriated (slurring her words and unable to walk straight) and is discharged for that, it again won't be acceptable for her to claim that it is none of her employer's business if she chooses to drink excessively on her own time.

Several things may be said about these two examples. First, they illustrate how an individual's autonomy interests can run smack into, and be trumped by, a competing norm—that employers should have the right to insist that their applicants and employees be able to perform the required work. So, while there certainly is considerable sympathy for employees' private right to obtain the sort of education they want and to drink as they wish on their own time, there is little sympathy for the person who seeks to combine either being drunk or having attended business school with being a lawyer.

Secondly, the employer in these examples may also be saying that it doesn't really matter *why* the applicant/employee is unable to perform, and therefore the employer doesn't really care what the applicant/employee did on her own time; it is simply the consequence—worker incompetence—that concerns the employer. It may also be said in these examples that, although

14. Survey Finds Employees, HR Managers Agree on Many Employee Privacy Issues, DAILY LAB. REP., Aug. 19, 1994; Christine Woolsey, Casting a Vote for Privacy; Survey Says Off-Duty Behavior is Off Limits to Human Resources, BUS. INS., July 20, 1992, at 12. See generally, Janice Miller, David B. Balkin & Robert Allen, Employer Restrictions on Employees' Legal Off-Duty Conduct, 44 LAB. L. J. 208 (1993); Jan Duffy, Stephen P. Pepe & Beverly Gross, Big Brother in the Workplace: Privacy Rights Versus Employer Needs, 9 INDUS. REL. L.J. 30 (1987).

15. See David Dishneau, *Workers Say Company Spying Goes Too Far*, S.F. CHRON., Jan. 10, 1994, at A8.; Lewis Maltby & Bernard J. Dushman, *Whose Life Is It Anyway—Employer Control of Off-Duty Behavior*, 13 ST. LOUIS U. PUB. L. REV. 645 (1994).

it may not be absolutely certain that the employer would be harmed by putting the person in question to work, we are rather confident that this would happen. Put differently, although some people may be surprisingly effective workers even when they are considerably impaired from alcohol, and although some business school graduates may be surprisingly effective lawyers without having had legal training ("unauthorized practice of law" problems aside), we are quite content to let the employer lean towards caution.

The difficulty, as we will see, is that for just about all of the situations to be canvassed, the employer can also make at least a plausible claim that its legitimate interests are adversely endangered by the employee's private behavior. This is readily seen if we alter the facts of our two examples. Imagine that a law firm learns that a law graduate already working in its office is attending business school at night. Suppose the firm concludes that the law associate will probably seek a new position after completing business school so that it is no longer worth it for the firm to invest further in her training. Similarly, imagine that a law firm learns that an applicant for a law job has a reputation of becoming inebriated on weekends. Suppose the firm concludes that the applicant may some day come to work drunk, or will embarrass the firm in a public setting, or will be unreliable in safeguarding client confidences. Is it all right for the firm to release the night student and refuse to hire the weekend drinker?

More generally, the question is: should employer interests always trump the employee's privacy interests? Or, put the other way around and more precisely, should society intervene—and if so, when and through what legal mechanisms—to preclude employers from making hiring, promotion, discharge, discipline and other job decisions based on off-the-job conduct? This Article explores that issue.

In the end, it may well be that some, but not all, off-work conduct should be protected. Consider the example of a person who is fired because she has married someone of another race. Nowadays, most people would find this intrusion by an employer on marital autonomy outrageous. Suppose the employer argues that having this person continue in the workforce will be harmful to the business because of how other employees and customers will react to the inter-racial marriage. Our instinct is to reject this sort of justification and to want to forbid the discharge (regardless of whether or not it precisely amounts to racial discrimination against the employee under existing discrimination law). Yet, the employer's *interests* put forward in this example should not be dismissed out-of-hand. Consider, instead, the person who is fired for those same general reasons—that is, the reactions of fellow employees and customers—after it is publicly revealed that he just sexually molested his neighbors' young child. Certainly if the discharged employee were an

elementary school teacher, it would be hard to find anyone sympathetic to providing him a legal right to keep his job.¹⁶

The general problem now having been introduced, the analysis will proceed in several steps. Part I describes the wide range of interests that employers may claim are endangered by employee conduct outside of working hours—interests that go well beyond the employer's interest in having workers with the technical ability to perform the job. Part II canvasses employee off-duty behavior that may be said to clash with these various employer interests. Part III examines the methods employers use to implement their concerns about off-duty conduct. Part IV explores the privacy-based objections to employment decisions that turn on off-duty behavior. Part V describes the variety of existing legal rules the bear on this issues—rules that differ considerably from state to state. Part VI presents a more comprehensive set of solutions that might be utilized to resolve this conflict between employer interests and employee privacy interests. Part VII offers thoughts about the future of lifestyle discrimination law.

II.

EMPLOYER INTERESTS

It is generally agreed that it is quite proper for employers, including non-profit and government employers, to protect and advance their legitimate *financial* interests. This Part begins, therefore, with the variety of ways that employees can impact the organization's bottom line.

A central point to emphasize is that, although individual performance on the job is often an employer's central concern, a person's *capability* is certainly not the only consideration in deciding whether a firm wishes to hire or retain someone. It is not enough that you have the qualifications to do the job well, but rather, that you actually are, or are likely to be, a productive worker. Therefore, in deciding who to employ, it is understandable that employers would be eager, for example, to have workers who won't be lazy, tardy, or irresponsibly absent and who will want to remain with the firm for some time (so as to limit training and other turnover costs). In the same vein, loyalty to the enterprise is generally valued because it is likely to be associated with making a strong effort on behalf of the firm. By contrast, conflicts of interest can be risky and undesirable—such as when an employee aids a competitor or favors a fellow employee over the firm itself. And, of course, it is important for employers not to have workers who engage in misconduct on the job (such

16. See generally Marvin Hill, Jr. & Emily Delacenseri, Procrustean Beds and Draconian Choices: Lifestyle Regulations and Officious Intermeddlers—Bosses, Workers, Courts and Labor Arbitrators, 57 MO. L. REV. 51 (1992).

as stealing from the firm or telling lies in connection with their employment).

As employees generally don't work in isolation and because turmoil is likely to impair the firm's effectiveness, employers also worry about organizational strife among ordinary employees and between employees and management (or supervisors). Hence, they are probably going to want employees who are cooperative, energetic, and friendly; by comparison, those whose behavior is offending, grudging, harassing or demoralizing will be avoided.

Certain employees may impose extra financial burdens on their employers and may be less desirable for that reason. For example, some may require a re-arrangement of the work environment in order to perform effectively (e.g., disabled people or those needing special work hours);¹⁷ others may impose extra paperwork burdens on the firm (e.g., those subject to wage assignments). Indeed, even people who have good reasons for missing work can be a problem for employers. Absence is not only likely to impair productivity, but employee absence due to illness or injury, for instance, will typically generate claims both on the employer's health care plan and for paid sick leave.

Finally, employers have outward-looking interests. Most importantly, the enterprise usually cares a great deal about its image or general reputation and the attitudes of customers and the public at large toward the firm's products and services. Hence, employers may well be leery of any employee behavior that undermines the firm's position in the marketplace, thereby causing, or threatening, a loss of patronage.¹⁸

As we will see—and *this is the key point*—many employers conclude that a worker's off-duty conduct either has sufficiently endangered one or more of these financial interests, or is sufficiently likely to do so, that they don't want that person as an employee.

Although the emphasis in this Part has so far been on employer *financial* interests, it is important to appreciate that the *personal values* of upper management may also be at stake in employment decisions. Forming and operating an enterprise is one way for its owners/sponsors to create associational relationships that allow them to shape their sense of their selves. This is especially likely in small or family-owned firms and non-profit groups. Yet sometimes these personal values of the founders and

17. As discussed in Section IV.E, *infra*, society forces employers to absorb some of these costs through the enforcement of discrimination laws.

18. Terry Leap, *When Can You Fire for Off-Duty Conduct?*, HARVARD BUS. REV., Jan.-Feb. 1998, at 28. Some firm's off-duty restrictions specifically reflect this interest. For example, the Nynex Corporation adopted a policy of allowing an off-work activity unless it "affects the reputation or legitimate business interests of Nynex." See Kimberly Blanton, *Tough Questions Follow Bank Party: Should Firms Police Workers' Private Actions?*, BOSTON GLOBE, July 11, 1994, at 18.

management clash with off-duty conduct by applicants and employees. As a result, a conflict of privacy interests may arise—for example, “we’re all vegetarians at this health food store” and the new applicant is a meat eater. This illustration is readily varied: “we’re all Republicans at this political consulting firm” and the new applicant is a Democrat; or “we’re all lesbians at this personal therapy agency” and the new applicant is straight. Employers who care enough about their own personal values may actually be willing to forego greater profits than might possibly come from hiring or retaining someone who is not “like us.”

Finally, it should be noted that in larger firms, employment decisions are delegated and often fairly discretionary in practice. Hence, regardless of the organization’s official policies, those acting on behalf of the organization may actually base their employment decisions on factors that they independently believe will benefit the firm, or on factors reflecting their own personal values, or on factors that they believe will best improve their own standing in the organization. For example, if someone’s off-duty behavior is controversial, a supervisor making an employment decision may well conclude that, rather than taking a risk of possibly getting in trouble with higher-ups, the safe strategy is to have nothing to do with the person.

III.

OFF-DUTY WORKER BEHAVIOR THAT MAY CLASH WITH EMPLOYER INTERESTS

The purpose of this Part is to canvas a wide range of off-duty conduct that may lead to the employer concerns described in Part I. The examples are largely drawn from real disputes, some of which were briefly mentioned in the Introduction. Keep in mind that not all employers will react to the same off-duty conduct in the same way. This is partly a result of the differing jobs in question, partly a matter of employer experience and management style, and perhaps, as we will see later, partly a consequence of changing market pressures and of existing legal constraints that vary greatly from state to state.

A. Personal (Social/Sexual) Relationships

Many of the sharpest clashes between employers and employees arise out of what may be termed “personal relationships.”¹⁹ These include

19. See, e.g., Stuart Silverstein, *New Rules Crafted for Office Romance*, L.A. TIMES, Sept. 29, 1998, at 13; Lisa Jenner, *Office Dating Policies: Is There a Workable Way?*, HUMAN RES. FOCUS, Nov. 1993, at 5; Cynthia Hanson, *Office Romance Can Bloom Into a Real Allergy*, PLAIN DEALER, Nov. 16, 1993, at 4C; Ellen Rapp, *Dangerous Liaisons (Office Romances)*, WORKING WOMAN, Feb. 1992, at 56. For a relatively early court case on this issue, see *Patton v. J.C. Penney Co., Inc.*, 719 P.2d 854 (Or. 1986).

private matters of great importance to the employee, such as whether or not one is married, to whom one is married, and one's out-of-marriage social/sexual relationships including dating, having an "affair," and having a gay or lesbian relationship. It is important to see that an employer may say that the worker's private relationships are in conflict with employer interests.

For example, in several cases, the employer asserted fears about its *reputation* among those clients it serves: (1) an employee was discharged when he persisted in living with a woman without marrying her;²⁰ (2) a company dismissed one of its executives for attending a convention with a woman other than his spouse;²¹ (3) a school teacher was fired after an undercover police officer observed her at a "swingers' club" engaging in sexual acts with three men;²² and (4) another employee was let go due to his inter-racial marriage.²³

Employee *loyalty* was the issue in a much-publicized case some years back when a computer company demoted a woman who married an employee of a competitor company.²⁴ More recently, eyebrows were raised (although apparently no job was lost) when it was revealed that the head of the Federal Reserve Bank in Boston had a romantic relationship with a top executive of a prominent investment banking firm whose economic interests were linked to the Bank's actions.²⁵

Sometimes, an employer's policy regulating private relationships is justified on more than one ground. For example, many employers have, or have had, anti-nepotism policies.²⁶ From the Latin "nepos" for nephew, these policies were originally aimed at preventing the employment of an employee's children or the children of an employee's sibling. Such policies seek to protect the firm from incompetents, to preclude the risk that family member employees might put family loyalty over loyalty to the firm, and/or to maintain employee morale that might otherwise be eroded by a belief that favoritism was being shown to family members. In more recent times,

20. State v. Porter Farms, 382 N.W. 2d 543 (Minn. Ct. App. 1986).

21. Staats v. Ohio National Life Insurance Co., 620 F. Supp. 118 (W.D. Pa 1985).

22. Pettit v. State Bd of Ed., 109 Cal. Rptr. 665 (1973). See also Clifford Hooker, *Terminating Teachers and Revoking Their Licensure for Conduct Beyond the Schoolhouse Gate*, 96 ED. LAW REP. 1 (1995).

23. Adams v. Governor's Committee on Post-Secondary Education, 26 Fair. Empl. Prac. Cases (BNA) 1348 (N.D. Ga. 1981).

24. Rulon-Miller v Int'l Bus. Mach. Corp., 162 Cal. App. 3d 241 (1984). See also *N.Y. Federal Courts Split on Live-Ins*, NAT'L L.J., Aug. 21, 1995, at A8 (woman was demoted for continuing relationship with a fired employee).

25. Truell, *supra* note 10. See generally Constance Hays, *Earning It: Keeping the Shop Talk out of the Pillow Talk*, N.Y. TIMES, Sept. 28, 1997, at C1 (discussing problems faced by married couples in business).

26. Christine M. Reed, *Dual-Career Couples in the Public Sector; A Survey of Personnel Policies and Practices*, PUB. PERSONNEL MGMT., June 22, 1993, at 187.

these policies frequently have had their main impact on spouses, typically wives.²⁷ Indeed, in college towns, for example, if someone wants to be a college professor but is married to, or wants to marry, someone who is already employed as a teacher by the college, an anti-nepotism policy may block all professional opportunities for one of the spouses.²⁸

Somewhat similar are policies, illustrated above, that firms have forbidding dating among employees.²⁹ These too are justified by efficiency concerns—that the employees will pay more attention to each other than to their work, that someone might give unfair job preferences to a romantic partner, and that sexual harassment problems and claims are thereby avoided.³⁰ Such policies made headlines not too long ago when, as noted earlier, Wal-Mart took action against two members of the sales force in one of its stores who were dating.

In addition to its anti-dating policy, however, Wal-Mart asserted in that case a second justification for the firing, one that appeared to rest on *moral values* of the enterprise's founder: the dating couple had violated the firm's policy against "extramarital affairs" (the woman employee was separated from, but not divorced from, her husband).³¹ This policy has since been abandoned. In the same vein, the military's ban on "adultery" made headlines because of the Air Force's celebrated troubles—initially with its first female B-52 bomber pilot (who had an affair with a civilian who was married to an Air Force employee) and then, in the fallout, with several of its high ranking generals (who admitted to having affairs while married).³² Exactly why, in the 1990s, the Air Force should consider such off-duty behavior "conduct unbecoming an officer" is not entirely clear. What is clear is that all officers clearly understood adultery to be against the "rules"—albeit rules that have been rather haphazardly enforced.³³ Arguably, the Air Force was worried about sexual harassment of the

27. See Joan G. Wexler, *Husbands and Wives: The Uneasy Case for Antinepotism Rules*, 62 B.U. L. REV. 75 (1982); Kovarsky & Hauck, *supra* note 13.

28. See Wexler, *supra* note 27, at 88-90.

29. See Rapp, *supra* note 19 (viewing boss-subordinate affairs negatively, but reporting a 1991 survey by the Society for Human Resource Management found that 70 percent of employers accept dating among co-workers, and 92 percent have no policy to prevent dating); Jenner, *supra* note 19 (Du Pont and Apple policies discussed); Loraine O'Connell, *More than Friends, Less than Lovers*, CALGARY HERALD, Aug. 28, 1992, at D6 (sexual attraction between workers can be acceptable if not acted on); Hanson, *supra* note 19 (reporting that an increasing number of companies are considering adopting regulations and citing a study by National Institute of Business Management finding that 10% of those surveyed had been in an office romance, and 25% of those experienced negative consequences); Cropper, *supra* note 8 (GM, Walmart, AT&T policies discussed).

30. See generally Jeffrey Rosen, *Fall of Private Man*, NEW REPUBLIC, June 12, 2000, at 22.

31. *New York v. Wal-Mart Stores, Inc.*, 9 Indiv. Empl. Rts. Cas. (BNA) 143, 144 (N.Y. Sup. Ct. Dec 16, 1993), *rev'd*, 621 N.Y.S.2d 158 (N.Y. App. Div. 1995). See also Steinberg, *supra* note 8.

32. Sciolino, *supra* note 10.

33. *Id.* at A21.

spouses (read "wives") of those junior to the rule-offending officers; or it may have wanted to provide assurance to stay-at-home spouses of the fidelity of those who are away on assignment; or it may simply have worried that extramarital affairs often lead to trouble that it would rather have its officers avoid. Most likely, however, this policy simply reflects a long-standing commitment to punish what the military services considered to be immoral conduct by those who are, in effect, understood to be "on duty" all the time.³⁴ Interestingly enough, one apparent reason for covert violation of this rule is the perception of both adultery and divorce as impermissible personal moral failings that may result in negative career impacts.³⁵

Discrimination on the basis of sexual orientation is another widely publicized issue. For this discussion it will be assumed that homosexual conduct is, at least in some senses, a "lifestyle" and therefore part of the topic under examination here. However, I want to avoid dealing with the bigger question of whether one's sexuality is a matter of "choice." Indeed, because discrimination on the basis of sexual orientation has been written about so much, it will not be a matter of special focus here.

The ongoing controversy over gays and lesbians in the military is but one prominent example of this sort of discrimination. As another example, not too long ago headlines featured a lesbian lawyer who was denied a government job by Georgia's state attorney general—a man who had successfully defended the state's sodomy laws in the U.S. Supreme Court (and later admitted having had a heterosexual extramarital affair).³⁶

Finally, we should not forget that in the recent past, women who married, got pregnant, and/or had children were unabashedly unwelcome at many places of employment.³⁷ Those clearly sex-based policies are now governed by core civil rights laws dealing with sex discrimination and enhanced by pregnancy discrimination laws.³⁸ In Part IV, I will return to the connection between those laws and legal rules that do, or might, protect employee privacy interests. For now, I'll simply note that facially *sex*

34. See Michael Woronoff, *Public Employees or Private Citizens: The Off-Duty Sexual Activities of Police Officers and the Constitutional Right of Privacy*, 18 U. MICH. J.L. REFORM. 195 (1984).

35. This may also explain military figures that the rate of divorce is higher among young recruits in the military. See Eric Schmitt, *Military Marriage Seen as No Threat*, N.Y. TIMES, Dec. 16, 1993, at A23.

36. See *Court Says a Lesbian Can Be Denied a Job*, N.Y. TIMES, June 1, 1997 at A27; Kevin Sack, *Georgia Candidate for Governor Admits Adultery and Resigns Commission in Guard*, N.Y. TIMES, June 6, 1997, at A29.

37. See *Cleveland State Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

38. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), 42 U.S.C. § 2000e(k) (1994). In 1978 Congress amended Title VII of the Civil Rights Act of 1964 "to prohibit sex discrimination on the basis of pregnancy." The Pregnancy Discrimination Act amended the "Definitions" section of Title VII, 42 U.S.C. § 2000e, adding a new subsection (k).

neutral employment policies based on marital and/or parenting status that employers might have today are plainly a form of lifestyle discrimination and hence squarely part of my subject.

For example, as noted above, in the fall of 1993, the U.S. Marines announced that it would henceforth only accept unmarried enlisted men and women. Concerns about employee turnover apparently lay behind that decision; studies had shown that married recruits re-enlist at a far lower rate.³⁹ Defense Secretary Les Aspin overturned the policy, however, before it was put into effect.⁴⁰ Later, President Clinton signed an executive order banning discrimination by certain employers against people on the ground that they are parents.⁴¹ Apparently, the President found it socially undesirable that a number of employers had decided that parents were too distracted to be reliable employees.

B. Civic/Political Activities

For many people, a central feature of their identity concerns their participation in civic or political affairs and the underlying beliefs out of which that conduct arises. Voting, running for office, and campaigning are three obvious examples, but simply joining a group with political goals or speaking out on civic and political issues should also be included. But, many workers have lost jobs over what they would view as the exercise of their free speech rights off the job (even if First Amendment protection technically wasn't available to the worker because it requires government action).⁴²

Some examples in this category involve workers having taken a political stand on an issue that the employer views as directly contrary to its business interests.⁴³ Perhaps the worker spoke out at a public hearing in opposition to some legal variance, planning permit, or local ordinance that the employer was trying to obtain. Maybe the employee complained about her job to friends or co-workers during non-working hours. Or she may have complained to others (including perhaps government agencies) about the firm's working conditions in general. Some employers, however, don't

39. *Marines' Married Recruit Ban Rescinded*, WORLD NEWS DIGEST, Aug. 19, 1993, at A1.

40. Krauss, *supra* note 12; *Marine Madness*, *supra* note 12.

41. *Clinton Gives Parents Protection at Work*, S.F. CHRON., May 3, 2000, at A7. *See also* Exec. Order No. 13,160, 65 Fed. Reg. 39,773 (June 23, 2000); Exec. Order No. 13,152, 65 Fed. Reg. 26,115 (May 2, 2000).

42. *See, e.g.*, *Novosel v. Nationwide Insurance Co.*, 721 F.2d 894 (3d Cir. 1983) (holding public policy as derived from the state constitution may apply the values of the 1st Amendment, freedom of speech and association, to a private employer).

43. *See, e.g.*, *Sims v. Metropolitan Dade County*, 972 F.2d 1230 (11th Cir. 1992). *See also* Lewis Kurlantzick, *John Rucker and Employee Discipline for Speech*, 11 MARQ. SPORTS L. REV. 185 (2001).

tolerate their employees taking these concerns outside the firm.⁴⁴

In other instances, the connections with the employer's business interests are less direct. Maybe the employee's political activities and public statements have been considered extremely offensive (such as being a grand dragon of the KKK, or speaking out in support of pornography or pedophilia), and the employer may say it is responding to pressures from other employees and customers.⁴⁵ Other times, the worker's politics may simply be in conflict with those of a boss who prefers to have like-minded people working for the enterprise.

C. Leisure Activities

Although many people devote much of their private time to political and/or religious life, others concentrate on leisure activities—either as participants (for example in sporting and recreational activities, like basketball, tennis, hiking or gardening) or as observers (such as watching movies, or going to football games or concerts). The list is endless. Some people spend their time at the race track, others reading, some playing music, others making home repairs.

Some employers have ruled out in advance certain of these pastimes; others have discharged or disciplined workers upon learning that employees had engaged in specific leisure pursuits. Often, the employer fears that an employee will be injured, thereby losing her services and incurring higher health plan costs. Typical examples are dangerous activities like hang-gliding and sky-diving.⁴⁶ Such prohibitions are especially common in the contracts of professional athletes and theatre and film stars—situations in which, because of the difficulty of hiring an acceptable substitute, the loss of the employee's services due to injury might be particularly harmful to the employer.⁴⁷

44. Thomas Palmer, *Giving Baseball a Bad Name; No One Wins when Racism Conflicts with Freedom of Speech*, BOSTON GLOBE, Dec. 6, 1992, at A33. However, some state whistleblower statutes protect these types of employee activities. See CAL. LAB. CODE § 1102.5 (Deering 2003); Johnston v. Del Mar Distributing Co., 776 S.W.2d 768 (Tex. App. 1989); Ellis v. City of Seattle, 13 P.3d 1065 (2000, order changing opinion June 8, 2001).

45. See Hill & Delacenseri, *supra* note 16, at 147-48 (citing Baltimore Transit Co., 47 Lab. Arb. Rep. (BNA) 62 (1962) (Duff, Arb.)).

46. See generally *Can Smoking or Bungee Jumping Get You Canned?*, *supra* note 6. See also Eric W. Bond & Keith Crocker, *Smoking, Skydiving, and Knitting: The Endogenous Categorization of Risks in Insurance Markets with Asymmetric Information*, 99 J. POLITICAL ECON. 177 (1991).

47. One particularly noteworthy case on this involves the former baseball star Ron Gant, who was injured in a motorcycle accident while under contract with the Atlanta Braves. The team eventually waived him. See *Off-Field Injuries Sticky Issue; Braves' Thinking on Gant Contract Could Change*, ATLANTA J. AND CONSTITUTION, Feb. 5, 1994, at B2. ("According to Paragraph 5(a) in the uniform player's contract, a player can be in breach of his contract if participation in certain other sports impairs or destroys his ability and skill as a baseball player."); Brian Schmitz, *Braves Aren't Cracked up About Gant's Cycle Spill*, ORLANDO SENTINEL, Feb. 8, 1994, at B1; I. J. Rosenberg, *Braves Might Ask Gant to*

Employer objections to leisure activities are not restricted to health risks, however. Sometimes, for example, the enterprise has “image” or “integrity” concerns.⁴⁸ In professional sports, for instance, Pete Rose was banished from the game of baseball (and therefore prevented from being elected to the Hall of Fame) after having been accused of placing bets on baseball games;⁴⁹ and at one time much was made of basketball super-star Michael Jordan’s gambling and his association with gamblers.⁵⁰ Other far less visible employees have been discharged for associating with known criminals or their relatives.⁵¹

Employers have found some leisure-time pursuits sufficiently distasteful to have employment decisions turn on them. For example, in one case an employee was dismissed after he “streaked” the baggage claim area of the airport (he was an airline employee, but it was on his own time, and, obviously, he was not in uniform—although news reports did connect him to the airline).⁵² In another, the employee was fired after he “mooned” someone; by contrast in yet another case, the employee was discharged for his unwillingness to join in a mooning escapade.⁵³

D. Moonlighting

Although some people choose to devote their off-duty time to leisure, others decide to, or feel they need to, hold more than one job. So they try to use their available time for more work. But “moonlighting” too has, in some circumstances, run the afoul of the policies of at least one of their employers.⁵⁴

Some employers, for example, forbid either working for competitors or

Renegotiate \$5.5 Million Deal, ATLANTA JOURNAL AND CONSTITUTION, Feb. 25, 1994, at C9; Terrence Moore, *Release of Injured Gant Might Seem Harsh, But That’s Baseball*, ATLANTA JOURNAL AND CONSTITUTION, Mar. 17, 1994, at E2. Mike Freeman, *Pro Football: Notebook; Behave Well, or Else: Bonuses Have Strings*, N.Y. TIMES, July 13, 1997, at H4.

48. See, e.g., Palmer, *supra* note 44; Blanton, *supra* note 18.

49. See Matthew B. Pachman, *Limits on the Discretionary Powers of Professional Sports Commissioners: a Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409 (1990).

50. See Steve Kelley, *Judgment Call: Air or Err Jordan?*, SEATTLE TIMES, June 13, 1993, at C1; Michael Wilbon, *Morality, Popularity and Reality in the NBA*, WASH. POST, June 11, 1993, at C1; Topol, *supra* note 11 (reporting that NBA was not banning gambling and that NFL, worried about integrity, once ordered Joe Namath to sell nightclub because of gamblers there).

51. See, e.g., *Wilson v. Taylor*, 658 F.2d 1021 (5th Cir. 1981) (police officer dismissed for associating with the daughter of a reputed crime figure).

52. *Air California*, 63 Lab. Arb. Rep. (BNA) 350 (1974) (Kaufman, Arb.) (overturning decision to dismiss employee).

53. See Hill & Delacenseri, *supra* note 16, at 159 (citing 77 Lab. Arb. Rep. (BNA) 19 (1981) (Edes, Arb.)).

54. See generally HILL & WRIGHT, *supra* note 13, at 220.

operating a competing part-time business of one's own.⁵⁵ In these cases the employer may be especially worried about the loss of trade secrets and/or the loss of customers.⁵⁶ Other firms, worried about their image, balk at certain types of objectionable work. For example, in one case the employee was discharged because she had posed as a "centerfold."⁵⁷ Still other firms ban moonlighting altogether, justifying the decision on the ground that a person who works at more than one job will be too tired to perform at her highest ability. Professors at colleges and universities are frequently restricted in the amount of outside "consulting" work they may do as a way of trying to assure their institution that they are actually devoted to being a "full time" professor.⁵⁸

E. Daily Living

The focus next shifts to activities of daily living carried on outside of the workplace, including employees' eating, drinking, smoking, driving and other habits. Here, too, some employers have made decisions that affect what employees (or applicants) are permitted to do off the job. For instance, it was estimated some years ago that six percent of employers were refusing to hire people who smoked cigarettes in their own homes,⁵⁹ as illustrated by the Turner Broadcasting System example given at the outset of this Article. No-smoker policies have been justified as limiting health care costs, facilitating workplace no-smoking policies, and avoiding employees who are likely to be absent more than average.⁶⁰

55. *Id.* at 221 (citing Brauer Supply Co., 97 Lab. Arb. Rep. (BNA) 526 (1991) (Cipolla, Arb.) (supply company had rule prohibiting employees from working for or operating businesses that installed heating and air conditioning equipment)).

56. *Id.* (citing Dispatch Servs., Inc., 67 Lab. Arb. Rep. (BNA) 632 (1976) (Matten, Arb.)).

57. *See* Borges v. McGuire, 107 A.D.2d 492 (N.Y. App. Div. 1985) (reversing dismissal for posing nude in "men's magazines" prior to becoming police officer).

58. *See, e.g.*, University of California Academic Personnel Manual § 25 (Conflict of Commitment and Outside Activities of Faculty Members), available at <http://www.ucop.edu/acadadv/acadpers/apm/sec1-pdf.html> (last visited May 14, 2003). For a discussion of law professors, specifically, see Rory K. Little, *Law Professors as Lawyers: Consultants, Of Counsel, and the Ethics of Self-Flagellation*, 42 S. TEX. L. REV. 345 (2001).

59. *See* Michele Tyler, *Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO. L.J. 783, 790 (1998).

60. *See, e.g.*, Kurtz v. City of North Miami, 625 So. 2d 899, 900 (Fla. Dist. Ct. App. 1993) (complaint alleged that Miami job required applicant to sign an affidavit that she did not smoke, city claimed it was legitimate because it met the purpose of reducing health care costs); Grusendorf v. City of Oklahoma, 816 F.2d 539 (10th Cir. 1987) (upholding regulation preventing off-duty smoking by firefighters). *See generally* Deborah Crumley and Gregory Hearing, *Where They Smoke, They May Get Fired: An Overview of Significant Workplace Smoking Issues*, FLA. BAR J., Oct. 1994, at 108; Julie Kosterlitz, *Bad Habits*, NAT'L J., Dec. 16, 1989, at 3077 (opposing smokers' rights); Elson, *supra* note 6. For a general discussion of this issue, see Stephen D. Sugarman, *Disparate Treatment of Smokers in Employment and Insurance*, in *SMOKING POLICY: LAW, POLITICS, & CULTURE* 161 (R. Rabin & S. Sugarman eds., 1993) (hereinafter Sugarman, *Disparate Treatment of Smokers*).

Some employers have sought to influence how their employees drive their cars. As noted above, Coors offered financial rewards to those using seat belts (hoping in part to reduce its health care costs).⁶¹ Other employers try to control what vehicles their employees drive; a service worker at a Ford dealership was disciplined after he purchased a competitor's car.⁶² This latter type of policy is generally based on public image.

Sometimes private choices about eating can wind up disqualifying people from employment. It is widely believed that blood pressure, weight and cholesterol levels are markedly influenced by private lifestyle choices and can be altered through conscientious dietary efforts, even though it is also generally agreed that, in some cases, these health indicators are beyond individual control, even through medication. The main point here is that some people like to eat foods that others say are bad for them, to eat more than others say they should, to be couch potatoes instead of fitness freaks, and so on.⁶³ On the whole, employers who will not hire such applicants seem to be most concerned about potential health care costs.⁶⁴

In other cases, an employee's desired appearance off the job may unavoidably carry over to how he or she looks on the job and thereby run into employer objections. Hair style (including facial hair) is perhaps the best example; tattoos and piercings may be another.⁶⁵ The employee weight-limits traditionally imposed by airlines on flight attendants were once justified by safety concerns, although they were more likely adopted for image reasons.⁶⁶ Regardless of the rationale behind the policies, they do impact on how employees can conduct themselves off the job.

Some employers are likely only to care about certain off-duty behavior when it is done in public or becomes public. That is, they would be willing to ignore the conduct if no one else knew about it; or put differently, they

61. Clifford, *supra* note 9.

62. MICHAEL MARMO, ARBITRATION AND THE OFF-DUTY CONDUCT OF EMPLOYEES 26 & n.59 (1985).

63. Peter Byrne, *As a Matter of Fat*, SF WEEKLY, Jan. 17, 2001, at 22. (criticizing San Francisco's weight discrimination policy, and discussing genetic basis of obesity).

64. See American Civil Liberties Union (ACLU), Legislative Briefing Kit: Lifestyle Discrimination in the Workplace, Introduction to Lifestyle Discrimination in the Workplace, at <http://www.aclu.org/WorkplaceRights.cfm?ID=9080&c=34> (last visited May 9, 2003).

65. For a case dealing with hair length, see *Kelley v. Johnson*, 425 U.S. 238, 248 (1976). See also *Carswell v. Peachford Hosp.*, 27 Fair. Empl. Prac. Cas. (BNA) 698 (N.D. Ga. 1981) (employee dismissed for wearing cornrows).

66. *In the Air, a New Battle Over Weight*, N.Y. TIMES, Apr. 2, 1990, at A-12; Lucy Broadbent, *Fat Chance*, SUNDAY TIMES, July 24, 1994; Greg Jaffe, *Weighty Matters*, S.F. EXAMINER, Feb. 22, 1998, at J1. See also *State Div. of Human Rights v. Xerox Corp.*, 480 N.E.2d 695 (N.Y. 1985) (obesity can be a disability under state law); *Philadelphia Elec. Co. v. Pa. Human Relations Comm'n*, 448 A.2d 701, 707 (Pa. Commw. Ct. 1982). (obesity not a handicap); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex 1981) (class action challenging height-weight requirements for flight attendants); *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (Alabama prison guard standards on weight and height).

would be happy to be ignorant of the behavior if it were generally unknown. But once the conduct becomes known, the employer becomes subject to pressures from others to take a stand and may feel it needs to act to protect itself. For example, a school district may care that one of its teachers attends "swinger" parties where group sex takes place only after this becomes publicized.⁶⁷ Certain military leaders may feel the same way about homosexual conduct and adultery among the ranks, hence the support for a "don't ask, don't tell" policy.⁶⁸ This point is not invariably true, of course. For example, an airline might wish to no longer employ someone who "streaks" the baggage claim area even if the event did not receive publicity. The employer's decision is motivated by concerns other than (or more than) its image: e.g., the airline may believe that a person who acts this way does not have the sort of judgment that the firm thinks is appropriate to perform the job.

F. Illegal Acts

A final category to be discussed concerns illegal acts that are not carried out in the person's role as employee. (Crimes committed in the course of one's employment are outside this topic.) Some employers may be unforgiving of (virtually) every off-the-job illegal act, while others may pick and choose.⁶⁹ In each case, it is assumed that the worker is not currently imprisoned so that she is actually available to perform the job.

People have lost jobs, or failed to obtain them, for a wide range of criminal conduct. Violent crime seems especially likely to have employment repercussions, primarily because of fellow employee, customer and public sentiment.⁷⁰ Yet property crime might readily lead to job loss too, especially if the employer believes it indicative of a risk of employee theft of employer property (e.g., a bank teller or bookkeeper shown to have

67. See, e.g., *Pettit v. State Bd. of Ed.*, 513 P.2d 889, 890-91 (Cal. 1973) (holding that teacher that joined "swingers" club was properly terminated for immoral and unprofessional conduct evidencing unfitness to teach).

68. See 10 U.S.C. § 654(b) (1994). For support of this policy, see Capt. John Carr, *The Difference Between Can and Should: Able v. United States and the Continuing Debate About Homosexual Conduct in the Military*, 46 A.F. L. REV. 1 (1999).

69. See Bruce E. May, *The Character Component of Occupational Licensing Laws: a Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187 (1995); *Drug Policy Governing Off-Duty Conduct Upheld Under Management Rights Clause*, 61 U.S.L.W. 1048 (1992); *Worker Fights Dismissal for Medical Marijuana Use*, N.Y. TIMES, Mar. 2, 1997, at A18; *Still Teaching, 4 Years After Conviction*, N.Y. TIMES, Dec. 11, 1996, at B3.

70. See, e.g., *Police Officers—Discharge*, CONN. LAW TRIBUNE, Feb. 22, 1993, at L9 (police officer discharged due to off-duty drunken fight—'sensational negative publicity'). See also Mark Minuti, *Employer Liability under the Doctrine of Negligent Hiring: Suggested Methods for Avoiding the Hiring of Dangerous Employees*, 13 DEL. J. CORP. L. 501 (1998); Note, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048 (1996).

defrauded a local non-profit agency or a neighbor).⁷¹

Three types of crimes that seem to be most controversial when negative employment decisions follow are those involving traffic offenses (especially drunk driving), drug use, and sexual activities.⁷² Employers who reject people who have engaged in such conduct may well argue that it shows the sort of bad judgment that could be harmful to the firm. This behavior also may simply be morally unacceptable to the employer.⁷³

It is important to note that some off-the-job crimes may be closely connected to the employer even if committed during off-work hours. For example, the illegal behavior may involve or victimize other employees or customers (e.g. sex crimes with fellow employees, supervisors or subordinates; sex crimes with students or patients); or the crime may have been carried out in uniform or on the premises (even if not in the course of work).⁷⁴

Certain crimes suggest a much greater risk of future on-the-job misconduct than do others. Contrast, for example, a school teacher convicted of child molesting with a janitor convicted of speeding. Some crimes present a much greater risk of on-the-job impairment than others, and the nature of the job may make that impairment more or less worrisome.⁷⁵ Compare, for example, an airline pilot convicted of using illegal drugs to a pilot convicted of income tax evasion or to a gardener convicted of using illegal drugs.

Some criminal acts may have recently been detected (or allegedly so) and are in the prosecutorial process—there may have been an arrest, an indictment, and so on. But the employer may decide not to wait for an official determination of guilt. For example, a salesman for a dairy was suspended following his arrest for the illegal sale of alcohol, pandering, and conducting obscene exhibitions.⁷⁶ Pro-sports leagues have several times faced the problem of having to decide what to do with players who are accused of rape or assault or other serious crimes, and, in some cases, are

71. Jess Bravin, 'Stolen' Soda May Lead to Big Precedent on Firing, WALL ST. J., Sept. 2, 1998, at CA1.

72. See, e.g., Susan Sword, *Muni Driver whose Bus Struck and Killed Pedestrian Won't be Charged*, S.F. CHRON., Oct. 28, 1999, at A20 (municipal transportation service changing policy on off-duty drunken driving).

73. See Michael Woronoff, *supra* note 34.

74. For an extreme example of this, see *Coath v. Jones*, 419 A.2d 1249 (Pa. Super. Ct. 1980). In this case, a company was found liable for the actions of an employee it had fired. The ex-employee had entered the house of a woman he had done work for by representing himself as an employee, and raped her.

75. See, e.g., *Haddock v. City of N.Y.*, 553 N.E.2d 987, 992 (N.Y. 1990) (New York neglected duty in hiring parks worker with past record of rape and assault).

76. See MARMO, *supra* note 62, at 28 n.71 (citing *Menzie Dairy Co.*, 45 Lab. Arb. Rep. (BNA) 283).

awaiting trial on such charges.⁷⁷

On some occasions, for one reason or another, there may never be a formal conviction or punishment in the criminal courts, even though the employer has no doubt about what the worker did. For example, the key evidence may have been illegally seized, or the criminal justice system may permit the worker to go through some "diversion" program, or charges may have been withdrawn in return for testimony against another defendant.

In still other cases, the criminal acts have occurred in the past, the worker was imprisoned (and/or fined) and has now "paid his debt to society." Employers may believe that such people are just too problematic as employees, and given all the other applicants they have, they would simply prefer to reject anyone with a conviction record, or even an arrest record. Other employers may be somewhat less restrictive, perhaps automatically excluding anyone who had been convicted of a felony or of a violent crime. Still others may be selective, matching the nature of the job and the nature of the crime in ways noted above with respect to current employees who commit (or are accused of committing) crimes.

IV.

IMPLEMENTING EMPLOYER CONCERNS ABOUT OFF-DUTY BEHAVIOR

Having explored why a wide range of off-work conduct could cost someone a job, this Part looks more generally at (1) why employers find it efficient to rely on such off-work behavior in predicting future consequences to the firm, as well as (2) how they find out about such conduct.

A. Applicants

If there are several applicants for an open position, employers need to have some ways (formal and/or informal) to winnow the prospective employees in order to make a final selection. Frequently, there will not be a single or simple way to determine precisely who is most likely to be the best employee. For example, there are many positions that do not have a specialized test, like the pre-employment examination given to potential typists. Moreover, for reasons already noted, employers may prefer someone other than the individual who has the best technical skills for the open job. Other features about the person may make her more attractive, on balance, than more technically competent applicants.

The role of *prediction* can't be over-emphasized. Of course,

77. See, e.g., E.J. Montini, *From Locker Room to Jail Cell and Back*, ARIZONA REPUBLIC, Nov. 10, 2002, at B3; Jean-Jacques Taylor, *Polishing an Image*, DALLAS MORNING NEWS, July 20, 1997, at B1 (detailing problems with Cowboys players, including Michael Irvin).

employers could randomly hire applicants and see how they actually turn out, but this would often be a recipe for bankruptcy. Typically, the key to financial success will be to figure out in advance who is probably going to be good for the firm and who is probably going to be bad for the firm and then hire appropriately. To be sure, performance to date on the job may be the best indicator of future value to the firm, and past performance in another job or in school may be good indicators as well. But, as explained in Part II, many employers conclude that past or current off-work conduct are valid predictors of who will be a valuable employee, or more likely, who won't be.⁷⁸

Furthermore, employers will find it worthwhile investing only so much time, money and effort in the selection process. For this reason, rules-of-thumb may often be utilized to include or exclude applicants from the next "cut" in the process. While a more expensive, intensive and individualized process might in the end yield a more desirable employee, the employer chooses to forego that opportunity on the ground that the costs outweigh the benefits.

Especially when there are large numbers of seemingly adequately or well-qualified applicants for one or several positions, employers may be quick to resort to rules-of-thumb, knowing that even though some able people may be thereby excluded, this is not very likely to matter much. In other words, the employer is willing to rule people out through sorting procedures that she knows involve many of what may be called "false negatives."

The use of lie detectors illustrates this point. Suppose 1000 applicants for security guard positions are given a lie detector test in hopes of screening out those who are likely to steal from the company. Suppose further that the underlying rate of thieves is 10%, so that a perfect test would identify the 100 thieves from among the 1000 applicants. The polygraph, let us assume, does not do too bad a job in terms of false positives; that is, suppose it successfully identifies 90 of the 100 thieves, allowing only 10 of them to pass as honest (i.e. false positives). But in order to catch such a high proportion of the thieves, suppose the test also generates a lot of false negatives, say, two incorrect for every one correct identification. In other words, assume that 270 of the 1000 are identified as thieves, 180 of them improperly so.

From the applicant viewpoint, those 180 who are now blocked from further consideration for a job with this employer find the lie detector very unfair. But, from the employer's viewpoint, this is nearly irrelevant. On the numbers imagined, there are still 730 people left in the pool, containing now only 10 would-be thieves—their incidence having been reduced from

78. See generally HILL, *supra* note 13.

10% to less than 1.5%. And, if, say, 150 are actually going to be hired, then the pool of applicants who are left after the lie detector screen may well be quite large enough from the employer's viewpoint. In short, it may just not be worth any additional expense to try to figure out just who are the 180 who have been eliminated by erroneously being identified as potential thieves.⁷⁹

In the lingo of economists, market pressures are supposed to stimulate employers in the direction of engaging in "efficient" selection processes (at least processes that are "efficient" from the employer's viewpoint). According to this way of thinking, employers who inefficiently either search too much or search too little will pay the price in lower profits. In this respect, the hiring process may be analogized to the practices of insurance companies, who, according to this same economic theory, are meant to be forced by competitive pressures to classify risks "efficiently." That is, they are expected to fine tune the prices they charge to different groups of insureds to the extent it is worth it at each point in the process to further investigate and assign insureds to ever smaller classifications which are charged differential insurance premiums. But, because fine tuning is often expensive to carry out and the categories that would be created are often difficult to monitor, insurers frequently make only fairly gross distinctions among insureds based upon broad rules-of-thumb. This is explained on the ground that the costs of further investigation outweigh the benefits of identifying a lower risk pool.

Returning to the employment setting, then, employers may also choose simply to rule out some applicants in a rather crude way on the ground that taking these people on as employees might prove to be undesirable. From the employer's viewpoint, it need not be anything close to certain that this undesirable consequence will occur before it makes economic sense to reject the applicant. Rather, as previously noted, it is a matter of prediction, and even relatively low probabilities may be efficiently disqualifying. It all depends, of course, on who else is in the pool, how high the probability of harm is, how great the harm is likely to be if it occurs, and other such

79. In fact, Congress has banned the use of lie detectors as a pre-employment screening device in private employment. *See* Employee Polygraph Protection Act of 1988 (EPPA), 29 U.S.C. §§ 2001-2009 (1988). The passage of the statute was motivated by several factors, including the concern that such tests violate the spirit of the Fifth Amendment ban on self-incrimination and the concern about trickery and deception often accompanying their use. H.R. REP. NO. 100-208, at [REDACTED] (1987); H.R. CONF. REP. NO. 100-659, at [REDACTED] (1988). However, Congress allowed the polygraph to be used with respect to applicants for certain private sector jobs involving national security (e.g., contract employees working for the FBI or intelligence services) or private security services (e.g., armored guards transporting valuables). 29 U.S.C. 2006 (1988). With respect to those highly sensitive jobs, objections to lie detector tests were evidently trumped by the risk of hiring unreliable employees, who, Congress apparently believed, might be excluded through the use of such tests.

factors.⁸⁰

For example, the employer may find it efficient to exclude everyone who appears, based upon some rule-of-thumb, to present a substantial risk of significantly higher than average costs of health insurance, sick leave or worker's compensation claims. Or, the employer may rule out those who present noticeable risks of theft or dishonesty, disloyalty, poor relations with other employees or supervisors, lower productivity (owing either to competence or effort), becoming a hassle to manage, or endangering the firm's image by lowering customer and public opinion of the enterprise, etc. If many applicants have to be turned down anyway, and if several other seemingly qualified ones do not present these concerns, why keep the riskier ones in the pool? And, to re-emphasize the point for our purposes, past or present conduct by the applicant outside of work may well be the thing (or at least one of the things) to which the excluding rule-of-thumb is applied.

Employers do have to worry, however, about how their employment criteria impact their applicant pool. For example, if there were enough public revulsion against the use of lie detector tests, then employers might voluntarily forego their use for fear that the selection benefits from using the test would be more than offset by the loss of high quality applicants who would refuse to work for firms that use them. It is also worth noting that an employer's willingness to resort to off-work conduct as key hiring factors may vary with the labor market; that is, when the market is tight and employers are very eager to find new workers, they may be less "picky" than when the market is loose and finding qualified new employees is easy. This perhaps explains why "lifestyle discrimination" seemed to be in the news much more during the slower economic times of the early 1990s than during the late 1990s, when employers were scrambling more for workers, and why stories about this sort of discrimination seem to be re-emerging in the early 2000s as the labor market loosens.

B. Employees

In regard to current employees, it appears that employers tend to follow two approaches, often utilizing them in combination, in order to control off-duty conduct in advance and to punish unacceptable off-duty conduct when it occurs.

One strategy is to adopt and announce rules or policies, specifying particular off-duty employee behavior that is forbidden in order to reduce

80. See generally Severin Borenstein, *The Economics of Costly Risk Sorting in Competitive Insurance Markets*, 9 INT'L REV. L. & ECON. 25 (1989); Hugh Gravelle, *Insurance Law and Adverse Selection*, 11 INT'L REV. L. & ECON. 23 (1991); Bond & Crocker, *supra* note 46.

risks of harm to the employer.⁸¹ These policies may reiterate criteria used in the hiring process, but they may also differ, excluding some things and/or including new matters. For example, current moonlighting for a competitor may be barred, whereas past employment for a competitor may not have mattered in the hiring process; or, by contrast, being married to an employee might block initial employment, but marrying a fellow employee might not lead to a discharge.⁸²

Especially when what is at stake is the control of those who are already employees, employers have to balance the potential negative impact on employee morale that can arise from imposing limits on employee off-duty behavior against the benefits of reducing risk.⁸³ Presumably, varying circumstances influence that weighing. Whether employees are easily replaced, whether many are affected by the rule, and the popularity of the barred out-of-work conduct are just a few concerns that may tip the scale.

As with rules-of-thumb for screening out applicants, an enterprise's policies regulating employee off-work conduct are generally based on predictions that such conduct will lead to financial harm to the employer. That is, the employer is worried about the risk that an employee who marries a competitor's executive, for instance, may be less loyal.

But employers are often unwilling to rely exclusively upon specific policies that are announced in advance. Unexpected events occur that trouble them, and they will want to be able to exercise their discretion to take appropriate action to protect their interests. They may try to make employees aware of this possibility in advance by promulgating a general policy stating that employees may not do things that bring harm to or threaten to bring harm to the enterprise. But vague notices like this provide little warning about what might concern the employer unless a "common law of the firm" is developed over time through which employees are able to appreciate how a standardless provision of this sort is actually applied. At issue here is the exercise of individualized discretion in response to situations as they unfold. Maybe no employee has ever appeared as a "centerfold" before and the employer had not thought about how it would feel about this. Indeed, the employer might not even know precisely how she feels until she sees how the act "plays" with her various constituencies.

This illustrates that where conduct occurs that is troubling to the employer, but was not specifically forbidden in advance, the employer may only know after the conduct occurs just how damaging the conduct has actually been. For example, a law firm might find itself quickly losing

81. Many employers produce and distribute booklets containing an elaborate list of personnel policies that may well include specific mention of off-work behavior. See Leap, *supra* note 18.

82. See Janice Miller, et al., *supra* note 14.

83. See Jan Duffy, et al., *supra* note 14.

clients when it is revealed that one of its lawyers stole money from his child's Little League team and still is retained by the firm. Moreover, the greatest risk of negative impact on the employer from the employee's behavior could lie primarily in the continued employment of the person once the questionable conduct has become known. For example, perhaps a law firm will sense that its clients are waiting to see how it deals with the lawyer who stole from the Little League before deciding whether they will take their business to other attorneys.

Obviously, sometimes the benefits that an employee brings to the enterprise outweigh the costs associated with her off-duty conduct so that the employer may tolerate the latter for the sake of the former. For example, a top salesman who comes into the home office to fill out paperwork while drunk might be given leeway that would not be granted to others. Yet, even here, individualized treatment may not always be the wisest course of action from the employer's perspective. The advantages of having bureaucratic rules routinely applied and of avoiding undesirable spill-over consequences to other workers may cause a firm to forego the services of a troublesome employee despite her considerable contribution to the firm's profit when viewed in isolation.

C. Finding Out About Off-Duty Conduct

Employers use a variety of means to obtain and verify information about employee and applicant conduct off the job. One method is routinely to ask applicants and employees questions about such conduct, and/or to instruct employees to come forward and reveal when conduct of certain sorts takes place.⁸⁴ If applicants and employees are forthright (and remember to report), then employers may learn what they want to know through direct admissions and declarations.

Of course, employers have reason to be concerned that employees and applicants might not always be forthcoming, especially if the workers know that truthful disclosure may well cost them the job.⁸⁵ Hence, employers may turn to indirect sources.⁸⁶ Some information may come their way in a haphazard manner. For example, there may be news accounts of an employee's off-work conduct that the employer (and the rest of the community) might never have known about absent such publicity. Employers might also obtain information from "tips" from other applicants,

84. For a discussion of issues raised by this method, see John W. Jones, *Protecting Job Applicants' Privacy Rights When Using Preemployment Honesty Tests*, in *PREEMPLOYMENT HONESTY TESTING*, 229-46 (John W. Jones, ed., Quorum Books, 1991).

85. *Id.*

86. For a discussion on worldwide trends in this area, see Paul Gerhart, *Employee Privacy Rights: Introduction and Overview*, 17 *COMP. LAB. L.J.* 1 (1995).

other employees, and members of the public. Although the enterprise might simply receive those tips by chance, it could adopt a policy of systematically encouraging them (e.g., by rewarding those who provide the information).⁸⁷

Employers may also seek information about workers from both public and private records. Private records may include things like credit ratings that are maintained by credit bureaus, at least in part, for this very purpose. Other private records include the records of former employers, although those employers may or may not be willing to share their information with a new employer. Public records might reveal matters such as marital status, address, political party, criminal record, and so on.

Employers may also engage in systematic investigations. Private investigators might be engaged in very special circumstances. Individualized physical examinations by physicians are frequently used.⁸⁸ Very common is the use of routine "tests." Important examples are "paper and pencil" tests of employee/applicant propensity for honesty and/or psychological makeup; and blood, urine, saliva, breath and other tests of bodily condition carried out in search of things such as drug use, tobacco use, cholesterol level, blood pressure, etc.⁸⁹

These screening devices may have as high a rate of false negatives as I have earlier supposed exists for polygraphs.⁹⁰ That is, many more of those who are tested may be erroneously identified as undesirable workers than ideally should be from the employer's viewpoint. But, again, excessive caution may nonetheless be worth it from the employer's perspective. Consider, for example, the issue of smokers who are refused employment out of employer fears of high health care costs. Although employee smokers as a group may make higher average claims on the firm's health

87. See, e.g., Barbara Ehrenreich, *Warning: This is a Rights-Free Work Place*, N.Y. TIMES MAG., Mar. 5, 2000, at 88-92.

88. See Susan Mendelsohn & Anne Libbin, *Employee Alcohol-and-Drug-Testing Programs*, PERSONNEL, Sept. 1988, at 65. Using physicians can cause its own problems. In *Bratt v. IBM*, 785 F.2d 352 (1st Cir. 1986), a court found that a company physician had breached the duty of confidentiality to his patient by disclosing mental illness to the patient's superiors.

89. See *Performance Tests are Entering Workplace as Employers Seek to Gauge Fitness for Duty*, DAILY LAB. REP., Jan. 29, 1993, at A-5. See also Barbara Ehrenreich, *supra* note 87 (drug testing reduces productivity 29 percent); Susan Mendelsohn & Kathryn Morrison, *Employee Searches*, PERSONNEL, July 1988, at 20; Jones, *supra* note 84; Eugene Stone & Dianna Stone, *Privacy in Organizations: Theoretical Issues, Research Findings, and Protection Mechanisms*, in PERSONNEL AND HUMAN RES. MGMT. 349-411 (1990).

90. See William Holstein, *Finding a Better Way to Test for Drugs*, N.Y. TIMES, Nov. 28, 1993, at C11. See generally Wayne Cascio et al., *Setting Cutoff Scores: Legal, Psychometric, and Professional Issues and Guidelines*, 41 PERSONNEL PSYCHOLOGY 1 (1988); M.T. Bradley & J. Rettinger, *Awareness of Crime-Relevant Information and the Guilty Knowledge Test*, 77 J. APPLIED PSYCHOL. 55-59 (1992); Eitan Elaad et al., *Detection Measures in Real-Life Criminal Guilty Knowledge Tests*, 77 JOURNAL OF APPLIED PSYCHOL. 757-67 (1992). See also *supra* note 79 and accompanying text on the reliability of polygraph tests.

care plan than would non-smokers hired in their place, a substantial proportion of employee smokers might not have higher health care claims than the average non-smoking employee who is hired instead. Indeed, smokers may be neglectful of their health and most may actually use health care services less than average (so long as they don't suffer from a grave illness). At the same time, a few smokers, not readily identifiable in advance, are likely to be very expensive. As a result, for reasons already indicated, an employer might conclude that the best and cheapest thing to do would be to simply tolerate all the false negatives and refuse jobs to all smokers.

Of course, some employer screening devices are justified on more sweeping grounds. For example, as noted earlier, an employer may choose not to hire smokers so as to make it easy to enforce a no smoking policy at the workplace or for the public health symbolism of it. In these circumstances, the false negatives problem does not arise.⁹¹

V.

EMPLOYEE-PRIVACY OBJECTIONS

So far, I have sought to explain why and how employers make decisions based upon people's off-work conduct. Now I consider the various senses in which employees and applicants may feel that these practices unfairly invade their privacy.

A. Analogies to Other "Privacy" Rights

It is helpful first to consider the nature of the "privacy" right claimed here in the wider context of other well-recognized privacy rights.

One familiar area is tort law, which protects several different privacy interests.⁹² Most fundamentally, tort law imposes liability for intrusion.⁹³ The core idea is that people have a right to do things in private—especially in their homes—without being observed. The original legal rule was that, in order for the victim to have a claim against you, you had to intrude physically into the private space—in effect, trespass—in order to watch, or listen to, what someone was doing. With the advent of sophisticated listening and viewing devices, intrusion today is better understood to arise through the observation itself—at least so long as the one observed has a reasonable expectation of privacy in the location of the activity.⁹⁴

91. Privacy concerns of employees have not always trumped these concerns. *See* *Horne v. J.W. Gibson Well Serv.*, 894 F.2d 1194 (10th Cir. 1990) (rejecting the argument that public policy protects employees from invasions of privacy due to unreasonable drug testing policy).

92. *See generally* DAN B. DOBBS, *THE LAW OF TORTS* 1197-1211 (2000).

93. RESTATEMENT SECOND OF TORTS § 652B (1977).

94. *See* Matthew Finkin, *Employee Privacy, American Values, and the Law*, 72 CHI.-KENT L.

The goal behind forbidding intrusion is twofold: first, to protect people from the discomfort of actually being spied upon (or later learning that they were spied upon) while doing something that they don't want others to observe, and second, to keep the would-be snooper both from knowing what the spied-upon is doing and from telling others. Indeed, tort law separately and additionally protects against the disclosure to third parties of private facts about a person, even if knowledge of these facts innocently came into the hands of the gossip-spreader without improper intrusion.⁹⁵

Underlying these privacy rights, I suggest, is a deeper notion—the importance we place on giving people the liberty to shape and act out their own lives as they wish, free from the scrutiny of how others might think about that conduct or what they might say about it.⁹⁶ Put differently, tort law's rules suggest that we want people to have the *autonomy* to create their self-identity and their public-identity: to do that, they must be able to keep some aspects of their lives secret from others.⁹⁷ Moreover, by being able to present to the world an identity that is more limited than your full self, you may also have some ability to protect yourself against behavior by others that would be disadvantageous to you. That is, others in a position to cause you harm might do so if they knew about your secret life and they disapproved of it—regardless of whether it involves kinky sex or pasting stamps in albums. Hence, to give protection to private life is to make possible this distance between the public self and the private self. There is arguably an important collective benefit here as well, because unless people have a private realm where they can be as they want and act at they wish, our society risks losing the diversity that has been so central to the American experience.

Privacy-rooted constitutional law doctrine concerning family life is another area to consider. The substantive due process rights that the U.S. Supreme Court has identified are also based on a fundamental commitment to personal autonomy and tolerance of difference.⁹⁸ In the abortion and contraceptive rights area, that commitment is especially concerned with the personal autonomy to control your own body with respect to reproduction.⁹⁹ But in the cases under which parent's rights with respect to their own

REV. 221 (1996).

95. RESTATEMENT SECOND OF TORTS § 652D (1977).

96. See generally Robert Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989); Robert Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087 (2001).

97. Gary L. Bostwick, Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447 (1976).

98. This issue is contested. See David Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQ. L. REV. 975 (1992).

99. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

children are protected,¹⁰⁰ it is really a broader sense of self-identify that is at stake. After all, it is through deciding to have children and the way we raise them that many of us shape both who we are and what we stand for. If the rest of society were able to control our private family life, then this central aspect of human freedom would be compromised.

A very different way in which constitutional law protects privacy is through the Fourth Amendment's prohibition on illegal searches of people and their homes by public officials, typically police officers. Like the fundamental tort law right discussed above, the Fourth Amendment, at its core, is about providing each of us with a private space free from intrusion, a space in which we can behave in ways that are largely unaccountable to outsiders.

To be sure, the privacy claim of employees about their off-work behavior is not exactly analogous to the privacy rights just discussed. For one thing, we are by no means talking exclusively about conduct that is carried out in places that have an expectation of privacy. Rather "private" here is meant to encompass everything done outside of work, even if, for other purposes, it might be considered public, not private, behavior.

Nevertheless, the sentiment underlying the claim for employee privacy is akin to those underlying these other privacy rights. That is, people want to have control of their own identity in their lives away from their work—to be able to shape and control their own lives during what they consider to be their own (private) time. So, just as the privacy rights recognized by tort law and constitutional law create a protected sphere for the exercise of liberty, workers also seek a sphere that is free from control by employers.

This concern, I believe, is similar to those put forward by Charles Reich in his justly famous writings about the "new property."¹⁰¹ The benefit of the "old property," as Reich saw it, was that it bought you liberty. With wealth you could obtain a space (or travel to places) where you could broadly do as you like. In short, traditional land wealth was the means by which you could garner the private sphere in which you could express your self-identity.

Reich feared that liberty was being lost as we moved away from a time when property was fully owned and thus truly private and into a time when wealth was to be found in new forms of property created by government. This "new property" included things like licenses to engage in businesses or professions, franchises to operate certain enterprises (like the media or the airlines), public income transfers (whether public welfare or social insurance), contracts to provide goods and services to government, and even public employment.

100. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

101. *See generally* Charles Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

In principle, these new forms of property could be created and distributed with as little interference in people's private lives as Americans historically experienced with respect to the ownership of objects and intangible financial interests. But, in practice, Reich saw that the government seemed increasingly to attach conditions to the ownership of this new property—conditions that radically restricted personal autonomy. For him, restrictions attached to the receipt of welfare vividly illustrated the point: many single mothers were being told that they could obtain this type of new property only if they surrendered both their sexual/reproductive freedom (e.g., the qualification rules forbidding sexual relations outside of marriage and having additional children) and their expectation of privacy in their own homes (e.g., the "midnight raids" on the homes of welfare recipients).¹⁰²

To the extent that people were growing more dependent upon the new property, and the government simultaneously was attaching more conditions on obtaining it, personal autonomy was seriously endangered. Insidiously, government could destroy this sphere of privacy without resorting to criminal law prohibitions: instead, because the government was the source of the new property, it could simply buy up people's autonomy.¹⁰³

Reich's call, then, was to reject these attached conditions, especially any that threatened fundamental human autonomy. The targets of his concern, of course, were conditions attached by government, including those imposed in its role as employer. The concern I address in this article, by contrast, is directed only at employers, both private and public. The underlying sentiment is similar.

Moreover, the most important capital for most people today is their human capital. It is not the money or property they inherit from their family, or the job in the family business into which they step when it is time to work, or even the individual business they start. Instead, people generally go off into the employment market with whatever skills and related talents they individually have. Hence, at any one time their most valued asset is, in effect, their job. If, however, employers attach conditions to jobs that restrict personal autonomy, their privacy is as restricted as it would be were the conditions attached by government.

To be sure, there are differences between acts of government and those of individual employers (including government acting in this role)—perhaps most importantly, that no individual employer controls job access in the way that government can control access to the new property. As we

102. Charles Reich, *Individual Rights and Social Welfare: The Emerging Social Issues*, 74 *YALE L.J.* 1245, 1247-48 (1965).

103. See generally Reich, *The New Property*, *supra* note 101.

will see later, this difference may be pivotal in terms of what sort of legal rules ought to govern. For now, however, it is sufficient to note that for somebody with a job, or looking for a job, with a particular employer, privacy-restricting conditions imposed by that employer have the same effect as those imposed on the new property. You are put to the unwelcome choice of surrendering the job or surrendering part of your identity.

I don't mean to suggest that the privacy rights discussed above—those that are recognized by tort law and constitutional law—are absolute. After all, private facts are not protected by tort law if they are newsworthy.¹⁰⁴ Searches by public officials are permitted by the Fourth Amendment if they are reasonable, and parental autonomy with respect to children is plainly circumscribed by abuse and neglect laws.¹⁰⁵ Hence, it might also be desirable if some, but not all, personal lifestyle decisions were ruled off-limits as criteria for job decisions.

B. Personal Autonomy and Individualized Treatment

Many employees may object in a second, but somewhat related, way when employers rely upon off-work conduct to make employment decisions. As discussed earlier, employers typically use off-work conduct as an indicator to predict future detriment to the enterprise. But, many workers will insist that, whatever its prediction value in general, the rule-of-thumb being employed is simply untrue for them. For example, someone will argue that even if some those who marry employees of competitors may sometimes be disloyal to the firm, she would never be; or that, while some intra-firm dating risks sexual harassment, theirs is a completely consensual love affair; or that while some embezzlers are recidivists, she is totally reformed and would never steal again.

This way of putting the objection projects a notion of personal autonomy or self-identity that Americans seem increasingly to assert.¹⁰⁶ The underlying claim is that the employer is not treating me as a person and is showing no *respect or concern for me as an individual*. Instead, the employer is treating me like a statistic, as part of a group to which I have been involuntarily assigned.

This outlook is reflected, for example, in the widespread objection that motorists have to insurance companies charging them premiums on the basis of their ZIP codes.¹⁰⁷ It is, more generally, part of the demand for due

104. RESTATEMENT SECOND OF TORTS § 652D, cmt. g (1977): "Included within the scope of legitimate public concern are matters of the kind customarily regarded as 'news.'"

105. See generally IRA MARK WELLMAN, PAUL M. KURTZ, & ELIZABETH S. SCOTT, FAMILY LAW 1217-1388 (3d ed. 1998).

106. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1976); *U.S.D.A. v. Moreno*, 413 U.S. 528 (1973).

107. This sentiment was part of the reason behind the adoption by California voters of Proposition

process and individualized treatment that we see throughout the law in recent decades.¹⁰⁸ This objection can also be made to an employer's use of rules-of-thumb based upon behavior carried out *inside* the workplace. But it is perhaps understandable if workers especially object to this sort of depersonalized treatment when applied to off-duty conduct: in effect, the employee is saying "not only don't you respect my autonomy to do what I want while away from work, but you don't even respect me enough to learn that in my case you don't have to worry about that conduct."

C. Privacy-invading Means of Collecting Information About Private Conduct

Although the core of the employee claim is that off-duty behavior is none of the employer's business, once the employer starts intruding on off-duty conduct, this generates an additional two-fold privacy objection from workers. Many of the methods described above that are used to collect the information are unacceptably privacy-invading in the first place, and, in turn, the collection and storage of this information sometimes creates a significant risk that private information will be revealed to those who have even less business knowing about it than the employer.¹⁰⁹

If, for example, a firm will not hire smokers, then smokers may object, not only to the employer's interference in what they are allowed to do at home, but also to the coerced blood test that is utilized to detect evidence of nicotine consumption. Indeed, non-smokers, too, may be quite unhappy about the privacy-invading nature of the test, even though the limit on outside conduct itself has no direct bite. Workers may also worry about what else their blood might be tested for and exactly who may be able to gain access to those results. For example, will blood allegedly being tested for the presence of nicotine also be tested for HIV? And, how secure are the test results once they are logged in the employer's files?

The same concerns apply to drug testing. Many people may be highly offended by having to urinate in front of a test-giver, especially those employees who know they are not drug users and thus have nothing to fear from the test results (unless, worse, it yields a false positive).¹¹⁰ Even paper and pencil tests (as well as the polygraph) may be objected to by some on the ground that, because of the nature of the questions asked, they permit

103 in 1988 which intended, among other things, to reduce sharply the ability of auto insurers to rely upon one's address in setting rates. See generally Stephen D. Sugarman, *California's Insurance Regulation Revolution: The First Two Years of Proposition 103*, 27 SAN DIEGO L. REV. 683 (1990).

108. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970).

109. See, e.g., Charles Piller, *Bosses With X-Ray Eyes*, MACWORLD, July 1993, at 118; David Neil King, *Privacy Issues in the Private-Sector Workplace: Protection from Electronic Surveillance and the Emerging "Privacy Gap"*, 67 S. CAL. L. REV. 441 (1994).

110. See *Hill v. NCAA*, 865 P.2d 633 (Cal. 1994).

the employer to penetrate too far into the private realm of the person being tested. Such testing may force the revelation of matters (including those that the employer, in the end, does not really care about) that the subject believes should be shielded from other peoples' knowledge, such as their sexual behaviors and their religious and political beliefs, which are often probed in psychological tests, to gauge the pattern of the interviewee's responses.¹¹¹

The collection methods themselves vary in their offensiveness. Blood and urine tests (and the way they are carried out) are probably more bothersome and intrusive to most people than are breath or saliva tests; questioning one's neighbors is probably more objectionable than obtaining information from public record offices. So, too, the sensitivity of what is collected varies enormously. Most people are not only content, but often eager, for others to know whether they are married or have children, even if they strongly object to employment decisions being made on that basis. On the other hand, private sexual behavior, drug use, and certain other recreational activities are typically matters that some people want kept secret, at least from "outsiders." The same point applies to leakage of personal information to others. For example, it seems fair to assume that people are generally more worried about it becoming general knowledge that they once were in prison or that they test HIV-positive than that they enjoy sky-diving.

On the other hand, it must be emphasized that none of the harms arising from the manner of information gathering is critical to the fundamental objection about personal autonomy discussed earlier. Indeed, often times the employee's off-work behavior will be carried out in a place or manner in which there can be no possible expectation of secrecy (e.g. she runs for public office) or, indeed, in a setting in which the employee is indifferent to the employer knowing about the behavior (e.g., she testifies against the employer's request for a zoning variance). Nonetheless, even in such situations, the core objection holds that to base employment decisions on this conduct unacceptably intrudes on the person's private life.

D. Fundamentalists, Pragmatists and Others

Professor Alan Westin, a prominent scholar on privacy matters, has suggested that those favoring privacy rights may be broadly divided into two groups, the fundamentalists and the pragmatists.¹¹² Privacy

111. Reynolds Holding, *Rejected Job Seeker Files Suit: Illegal Political Queries Disqualified Him, He Says*, S.F. CHRON., Oct. 21, 1994, at E8 (law suit over political questions in job application—Should marijuana be legalized? Do most companies make too much profit?); *Job Seeker Challenges "Political Litmus Test"*, ACLU News, Nov.–Dec. 1994, at 2 (Questions about attitudes concerning politics).

112. Alan F. Westin, *Privacy in the Workplace: How Well Does American Law Reflect American Values?*, 72 CHI.-KENT L. REV. 271, 272-73 (1996).

fundamentalists would favor a very strong presumption that workers' interests in their personal autonomy off the job trump employers' economic justifications for restricting private life. This view is roughly analogous to the view of free speech absolutists.¹¹³

This does not mean that employers could *never* pay attention to off-work conduct. After all, even free speech fundamentalists generally concede that words constituting a "clear and present danger"—like shouting "fire" in a crowded theater¹¹⁴ or saying "fighting words" that clearly threaten to provoke violence¹¹⁵—may be restricted. Similarly, privacy fundamentalists would probably admit that private behavior that is well understood to contribute directly to poor work performance—e.g., coming to work drunk—is a legitimate basis for employer action: Perhaps they would concede that employers could base negative work decisions upon certain criminal conduct off-the-job, such as refusing to hire as a day care worker someone who had raped little children. But, a compelling case of this sort would have to be made before fundamentalists would find it acceptable for employer decisions to be based upon off-duty behavior.

Privacy pragmatists are those who take a less absolutist approach. This group would put much weight on the interests of workers to act as they wish on their own time and not suffer on the job as a result. Yet, as I see it, privacy pragmatists are much more willing to acknowledge employer interests, too. What they dislike is adverse employer decisions based on off-duty behavior that they consider *insufficiently* work-related, given the employee privacy interests at stake.

As explained in Parts I and II, except when mistakes are made, employers always have some reason, and from their point of view a telling reason, for the decisions they make. Put differently, from the employer's perspective, there is always a relevant *nexus* between the criterion employed and the employer's interests. Privacy pragmatists would find employer decisions acceptable only when that nexus is close and strong. Yet, they observe employers basing decisions on connections to off-duty conduct that seem weak and distant. For example, they may believe that the employer is using a rule-of-thumb (or some other test or measure designed to predict future harm) whose prediction value is low. One result (as we saw from the polygraph example above)¹¹⁶ is that many people may be punished for, or discouraged from, exercising their freedom to act as they

113. For further discussion, see Matthew W. Finkin, *Employee Privacy, American Values, and the Law*, 72 CHI.-KENT L. REV. 221 (1996). See generally *ACLU Accuses U.S. Employers of Violating Workers' Civil Rights*, Daily Rep. for Executives, Dec. 19, 1990 at A-13 (ACLU wants all other categories than reasonably related to job performance off-limits).

114. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

115. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

116. See *supra* note 79 and accompanying text

wish on their own time when most of those private acts would not turn out to be harmful to the employer and/or when most of those who acted in the forbidden way would not turn out to be less desirable employees because of it.

As I will discuss further below, some privacy pragmatists would probably focus specifically on the nature of the off-duty conduct, arguing that sometimes its privacy value is especially high, while acknowledging that other times it is not. In short, they would see a need to balance the strength of the employer's interests against those of the employee. The concern of privacy pragmatists remains, however, that left unregulated, too many employers will draw that balance in ways that inappropriately devalue the employee's personal autonomy.

Why would this happen? Consider, by way of analogy, the pricing of life insurance on the basis of race. Until this practice is outlawed (which it has been), it may make economic sense for insurers to charge higher premiums to African-Americans than to whites because the former, as a group, have a decidedly lower life expectancy.¹¹⁷ To be sure, there may be ways to classify applicants for life insurance other than by race that, if used, might eliminate race's predictive validity for actuarial purposes. But it might also be expensive to determine and reliably apply those classifications. Race, by contrast, is relatively cheap and easy to use as a way to divide up the applicant pool.

So, except to the extent that pricing on the basis of race were thought odious by the population at large and would therefore lead to a boycott of the insurer by non-black applicants who are offended by the practice, the "efficient" thing for an individual insurer to do may be to price by race. And, for the very reason that this sort of classification practice would lead to relatively lower costs for whites, it is reasonable to doubt that most whites would put principle ahead of premiums and refuse to deal with the insurer on account of such a pricing strategy. Moreover, once one insurer acts in this way, this gives other insurers a strong incentive to adopt the same practice. If they do not, then they risk earning lower profits as the pooling of the risk change. That is, if they charge all of their insureds, black and white, what their competitors charge whites, then they will have a higher mortality rate among their pool of insureds; but if they try to charge enough to everyone to maintain prior profits, they risk losing their white insureds to firms that act to exclude high-risk buyers.

But what might be thought "efficient" for the insurance industry fails to take into account the interests that individual African-Americans desiring

117. See Pamela J. Smith, Comment, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003, 2037 (1992) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE STATISTICAL ABSTRACT OF THE UNITED STATES at 73 (11th ed. 1991)).

to buy life insurance have in not being singled out on this basis.¹¹⁸ They suffer a double-barreled harm—the insult of having their skin color determine how much they pay for something and the reminder that white-dominated institutions are once more excluding them for being black. In short, we can readily see how the insurer, by maximizing its own interests, may well ignore important interests of others, interests that society may well want taken into account. Hence, one way for society at-large to force all insurers to structure their premium classifications differently is the adoption of legal rules forbidding race-based premiums. Whether or not such rules are actually effective in achieving the goal is another matter, however, to which I will return below. For now, I simply note that some insurers might react to restrictions on race-based premiums by using other more subtle mechanisms to turn away riskier African-American business—such as by deciding to locate their agencies in places that are inconvenient to black buyers.¹¹⁹

This same sort of analysis applies to the employment setting. Take, for example, the Marines' temporary decision, noted above, to hire on the basis of marital status. From its own selfish perspective, the Marine Corps had what it thought was a good economic reason to start rejecting married enlistees, as they re-enlist at a lower rate than unmarried marines. But this decision simply did not give any weight to the autonomy interest individuals might have in simultaneously being married and joining the Marines. When President Clinton objected to the proposed policy, he presumably was saying that from the overall social perspective, the benefit to the Marines would have been more than offset by the undesirable consequences for married people.¹²⁰

This discussion may be put more generally. People may come to the job with what the employer considers to be "costs" attached to them, costs that are the result of the worker's private behavior. In the abstract, we might imagine that, in the bargaining process between employers and workers, employees themselves could simply "internalize" these costs in a monetary way and thereby still be able to both obtain the job and continue the private conduct. There are two problems with this "solution," however.

First, sometimes our collective judgment is that it is simply unfair to make the employees in question internalize the costs. This takes us back to the example of higher life insurance premiums for African-Americans. Indeed, forcing all blacks to internalize the higher costs that are actuarially associated with race is precisely what society finds offensive. So, too, it

118. For an in depth discussion of efficiency in insurance pricing, see Kenneth S. Abraham, *Efficiency and Fairness in Insurance Risk Classification*, 71 VA. L. REV. 403 (1985).

119. Gregory D. Squires, *Insurance Redlining: Still Fact, Not Fiction*, 79 SHELTERFORCE Jan./Feb. 1995, available at <http://www.nhi.org/online/issues/79/isurred.html> (last visited May 9, 2003).

120. Krauss, *supra* note 12.

would be equally unacceptable to have African-Americans, as a class, be paid less by employers for the same job based on statistics showing that blacks had been/are likely to be less productive in that job. Even if this was viewed as a rational or efficient way to choose pay rates for employees, it would still be impermissible discrimination. And, presumably, by the same token, President Clinton would also have blocked a proposal by the Marines to pay single enlistees more than married enlistees as a way to offset the losses the Marines apparently were suffering by having married Marines re-enlist at lower rates.

Second, even if it were not thought objectionable to force the worker to internalize the—costs of his private behavior, sometimes it is simply not practical to do so. Hence, as a practical matter, the employer may be stuck either bearing the costs or not employing the worker at all. For example, exactly how is the employer to decide precisely how much less to pay its employees who start dating each other in order to force them to internalize the sorts of costs that the employer concludes tend to come from this sort of socializing among fellow workers?

To be sure, this hurdle is not always an insurmountable one. For example, an employer might be able to determine how much more to charge employees for their health insurance who decide to hang glide or sky dive on the weekends, or smoke regularly at home. But even this solution is fraught with difficulties. For one thing, forcing these employees to pay, as a group, for the extra health care costs that they, as a group, are likely to incur because of their off-duty behavior does not help the employer with other costs that come with higher rates of injury, illness and death of its employees—costs of training, temporary replacements and the like. That would presumably push the employer back to having multiple-track pay scales based on off-work conduct. But trying to maintain differential pay rates is probably a bad idea from the employer's viewpoint for a variety of structural and inter-personal reasons.

Secondly, and returning to an earlier theme, individual risk-rating within the employer's group health insurance plan compromises the strong value of collective risk-sharing that characterizes employer-based health plans generally. That is, even where higher health care premiums might be a practical solution for the employer, or at least a partial solution, we are back to the question of whether making certain employees internalize these extra costs is socially acceptable. Having African-Americans pay higher premiums towards employee group health plans plainly would not be thought acceptable in modern U.S. society. Having smokers pay extra is perhaps a more tolerable idea. For now, however, I simply want to note that although some privacy pragmatists might be willing to accept some of these cost internalizations, privacy fundamentalists would surely not accept such cost internalization by employees.

This discussion also suggests that privacy fundamentalists and privacy pragmatists exist on a continuum and that other viewpoints are possible. Some people believe that, when it comes to the job market, it is perfectly all right if people have to bear the costs associated with their own private conduct, and they would tend to leave it to market (including social pressures) to determine how those costs are borne. Hence, they would not find it objectionable if someone had to pay more for employee group health insurance or had to suffer lower wages because of his off-duty behavior; also, and more importantly, they would not protest if someone lost a job entirely because of the costs associated with that conduct. All those consequences would be the fair price for the exercise of one's personal autonomy. People in this camp may feel rather differently about race because that is an unavoidable status, whereas we are talking here about chosen lifestyles. I will shortly return to this distinction.

Nevertheless, even people with the viewpoint just expressed may well oppose criminalization (or other government coercive control) of the off-duty conduct in question. That is they would object to making it official public policy to condemn such conduct. Rather, they want it left to private parties to work out for themselves how people wind up behaving on their own time. Therefore, people in this camp may be said to endorse the value of personal autonomy at least to some degree. Perhaps such people might be termed privacy "minimalists."

By contrast, still other people are at the opposite end of the continuum from privacy fundamentalists. They are altogether less tolerant of individual autonomy during hours off the job. They may be eager to discourage—through multiple channels—many of the behaviors that are at stake here. Such conduct might include bungee jumping, smoking, homosexual conduct, driving without seat belts, excessive drinking, and adultery. This is just an arbitrary list. Different lists might include very different items. Whatever the items, people in this camp might not only favor criminalization and other public measures to discourage the private conduct that they oppose, but they may also affirmatively encourage employers to discriminate against such people, applauding those who do so.

People with these views might, for example, urge formal boycotts of companies who don't discriminate against those engaging in certain off-work conduct. For example, the decision in 2002 of a large Baptist group for its members to boycott Disney products and services was, in important respects, based upon objections to the off-duty conduct of some of the people that Disney employs in producing its entertainment products.¹²¹

Put more broadly, people at this end of the continuum are probably the

121. Adelle M. Banks, *Baptists Stick to Disney Boycott*, THE TIMES-PICAYUNE, June 15, 2002, at 22.

primary sources of customer and community pressures that employers often say they are responding to when they make hiring decisions based on off-duty conduct in order to protect their patronage or general reputation. People with these views might be termed “paternalists” or “coercive social norm setters.”

E. Analogous to Core Civil Rights Protections?

How analogous is lifestyle discrimination to those categories of employment discrimination that are already widely agreed to be properly forbidden by the law, most importantly, discrimination on the basis of race, sex, national origin/ancestry, religion, age, and disability?

As already suggested above, some may reject the analogy because race, sex, age and ancestry/national origin are generally understood to be matters of status, that is, a characteristic that one cannot avoid.¹²² By contrast, the lifestyles at issue here are generally understood to be matters of choice. If the central idea of existing civil rights laws is that it is unfair to receive worse treatment on account of personal factors about which one has no control, then the rationale does not apply to lifestyle discrimination.

Discrimination on the basis of disability and religion introduce complexity to this dichotomy, however. While it is true that many disabled people suffer from birth defects, illnesses, or injuries over which they had no control, the protection of the disabled in our civil rights laws does not depend upon the reason why a person is disabled. For example, people who carelessly disable themselves by knowingly taking unreasonable risks are nonetheless disabled and hence entitled to invoke the law’s protection.¹²³ In short, their voluntary choice is somewhat akin to the choice to lead a certain lifestyle. Still, perhaps the distinction may be preserved by recognizing that when disabled people present themselves for work, they are generally not in a position to retract any earlier choice they may have made to make themselves able-bodied once more.¹²⁴ By contrast, many workers can still change their lifestyle (albeit at a high cost to their personal autonomy) so as not to run afoul of an employer’s policies.

But that latter fact is true, at least in one important sense, of religion as well. Many people would say that one can, at any time, abandon one’s religious belief, or adopt a new one. In this respect, religion may be even closer to lifestyle. Indeed, I would say that the *practice* of one’s religion is

122. See Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149 (1992).

123. Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. For a general overview of the Act, see Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923 (1989).

124. See Robert Silverstein, *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy*, 85 IOWA L. REV. 1691, 1697 (2000).

a lifestyle. On the other hand, religion also has some status aspects. Initially at least, people tend to have their religion given to them by their parents, which means that it is effectively imposed on them. By contrast, most of the lifestyle choices at stake when an employer makes employment decisions based on off-duty conduct are the product of deliberate adult decisions, at least if we do not go too deeply into the psychological (or genetic) underpinnings of people's choices. Also, many people have a specific religious label attached to them, regardless of their personal beliefs. Surely this is often the case with many "Jews" and "Catholics"; that is, often others will consider you and treat you as Jewish or Catholic even if you are a non-believer or have embraced a different faith. In such circumstances, religion is, in effect, a version of ancestry, not choice. In short, I am suggesting that, with a little maneuvering, disability and religion can be shoe-horned back into the "status" category.

And yet, a wider perspective makes it clear that "status" alone cannot explain why certain things are covered by existing laws while others are not. For example, disability has not been defined to include mere physical characteristics, such as having green eyes or being left-handed. Hence, discrimination against either of those two minority groups is not forbidden by existing civil rights laws even though membership in each group is largely involuntary. At this point one might argue that "status" is a necessary but not sufficient condition for legal protection against discrimination. The green-eyed and the left-handed are not included essentially because no one thinks they really need such protection (at least not today—I say this as a southpaw well aware of historic mistreatment of lefties). Put differently, were these groups to be seriously discriminated against, they would probably attract protection as well.

In sum, this line of analysis suggests that those seeking to draw an analogy between lifestyle discrimination and the discrimination now outlawed by our core civil rights laws need to find a common feature that can overcome this status-choice divide. This can be attempted using a two step method. The first step is to show that lifestyle discrimination is widespread (like gender or disability discrimination and unlike discrimination on the basis of eye color). For the moment, let us assume that this has been demonstrated in the earlier parts of this article (although I will return to this issue). The second, and most important, step is to show that this sort of discrimination is unfair for the same sorts of *underlying* reasons that make unfair discrimination on the basis of race, sex, etc.—in other words, to show that underlying our objection to "status" treatment are notions that also apply to lifestyle discrimination.

Our nation has a long history of mistreatment of racial minorities (especially African-Americans) based on what is now widely agreed to be irrational bigotry. Women, Jews and Catholics, the disabled, certain

“foreigners” and the like have also been victims of widespread negative group stereotyping leading to systematic mistreatment both by public authorities and private actors with economic power. At one level, this sort of discrimination does not seem to be the same as lifestyle discrimination. Lifestyle discrimination is more about individual autonomy. And yet, individual members of traditionally disadvantaged groups are, in some respects, making the same basic claim as those seeking lifestyle protections—“treat me as a person.” And, to the victim of lifestyle discrimination, that disadvantageous outcome may also feel like the same irrational bigotry.

In this way, some employment decisions based on certain types of off-work behavior may seem like mistreatment because of religious beliefs. These days we generally would find it objectionable if people were grouped together in their business by religion (apart from specifically religious groups). Consider, then, employment decisions that are based on off-work political and other speech, especially when the speech in question does not attack the employer. The parallel idea, then, is that if employers cannot exclude workers because of their religion, why should they be allowed to exclude people from their employment rolls on the basis of political beliefs?

In the end, the key question may be whether we feel strongly enough that employers have an obligation to accommodate the employee’s private time autonomy (in the fashion that employers have a duty to accommodate the disabled, that is, even at an extra cost to the employer). In short, how strongly do we value privacy after all, and how wrong do we think it is for employers to run over this interest of workers? Put that way, it is clear to me that beyond Westin’s categories of “fundamentalists” and “pragmatists” individual Americans will feel differently about the different privacy matters at stake. Thus, many people will distinguish between legal and illegal conduct, and as among legal behaviors, those that are widely approved of and thought important to be able to do (e.g., marry) and those that are not (perhaps smoking or engaging in kinky sex).

VI.

EXISTING LEGAL REGIMES

Having explored the employee’s privacy interests that are invaded through lifestyle discrimination, I turn now to a consideration of how those interested might be protected by the law. First, I will describe the existing legal regimes and then in Part VI I will explore a typology of alternatives.

A. Broad Limits on Lifestyle Discrimination

In less than a handful of states—two, arguably three—legislatures recent years have adopted sweeping provisions that forbid discrimination in

employment on the basis of off-duty behavior. The two clear cases are Colorado and North Dakota.¹²⁵

It is perhaps more than a little ironic that the first reported case from Colorado under its statute involved discrimination on the basis of sexual orientation, which the court concluded was clearly forbidden by the new law.¹²⁶ The irony I refer to is that Colorado is the state which had previously passed (albeit by popular initiative) a specific rule designed to permit employers to discriminate against gays and lesbians.¹²⁷ This rule was overturned by the U.S. Supreme Court,¹²⁸ but there seems to have been a lack of awareness that the Colorado lifestyle discrimination law was going to put into effect the diametrically opposite position from that attempted by the initiative.

The third state that perhaps belongs in this category is New York, which enacted a wide-ranging lifestyle discrimination statute that lists four broad categories of off-duty conduct that employers generally may not use in making employment decisions.¹²⁹ They are: legal recreational activities, consumption of legal products, political activities, and membership in a union.¹³⁰

The question of how sweeping the New York statute should be read arose in the first two reported cases under the new law. Both involved discrimination on the basis of personal relationships—i.e., dating. In the Wal-Mart case already noted, fellow workers were dating in violation of company policy.¹³¹ In the other case, a female employee persisted in dating a former employee who went to work for a competitor and was discharged.¹³² Seeking the statute's protection, the workers in both cases cleverly argued that dating is a recreational activity and should therefore be

125. COLO. REV. STAT. § 24-34-402.5 (2003) ("[i]t shall be a discriminatory or unfair practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours. . ."); N.D. CENT. CODE §§ 14-02.4-03 ("[i]t is a discriminatory practice for an employer to fail or refuse to hire a person; to discharge an employee; or to [otherwise discriminate with respect to] participation in lawful activity off the employer's premises during nonworking hours. . ."). See also Alyce H. Rogers, *Employer Regulation of Romantic Relationships: The Unsettled Law of New York State*, 13 TOURO L. REV. 687 (1997); Jessica Jackson, *Colorado's Lifestyle Discrimination Statute: A Vast and Muddled Expansion of Traditional Employment Law*, 67 U. COLO. L. REV. 143 (1996).

126. *Borquez v. Ozer*, 69 Fair. Empl. Prac. Cas. (BNA) 1415 (Colo. Ct. App. Nov. 9, 1995).

127. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993).

128. *Romer v. Evans*, 517 U.S. 620 (1996).

129. N.Y. LAB. LAW § 201-d (McKinney 2003). See also Michael Starr, *NY Legal Activities Law Protects Employees*, N.Y. L.J., Sept. 3, 1992, at 5.

130. *Id.* See Barbara Franklin, *New Law Protects 'Legal Activities' of Workers*, 208 N.Y. L.J. 117 (1992).

131. *State of New York v. Wal-Mart Stores, Inc.*, 621 N.Y.S. 2d 158 (1995). See Steinberg, *supra* note 8; *Discount Dating Ban Gets State Judge's OK*, *supra* note 8 (Walmart dating ban doesn't violate NY labor law).

132. *Pasch v. Katz Media Corp.*, 94 CIV. 8554 (RPP), 1995 WL 469710, at *1 (S.D.N.Y. 1995).

covered by the New York law.¹³³ The two lower courts have split on the question reaching alternative results.¹³⁴

B. Specific Protections

Looking out across the nation to the remainder of the states, one finds, here and there, a somewhat bewildering variety of statutes that generally protect specific forms of off-duty conduct from being used to make employment decisions.

Legal Products. Perhaps the broadest of these statutes, which six states have enacted, forbids employment discrimination against those who consume legal products off the job.¹³⁵ This rule (which mimics a portion of the New York law) is actually an expanded version of a far narrower rule that applies in about half of the states forbidding discrimination against smokers. One of the “legal products” states, Missouri, is in between, as its law focuses specifically on tobacco plus alcohol.¹³⁶

Smoking. “Smokers’ rights” laws swept through more than two dozen legislatures in the early 1990s as a result of the combined lobbying of the American Civil Liberties Union (ACLU) and the tobacco industry.¹³⁷ These laws were provoked primarily by reports that a significant number of firms already refused to hire smokers and a fear that the trend was growing. At the urging of the ACLU and others, once smokers’ rights proposals got into the legislative process, they were broadened in some jurisdictions, in the ways already noted, to cover alcohol, to cover all legal products, to cover other specific behavior, as in New York, and to cover all off-work behavior, as in North Dakota and Colorado.

Marital Status. Another common provision, dating from an earlier period, prohibits discrimination on the basis of marital status. Laws like this exist in nearly half of the states, including Colorado and North Dakota,

133. See *id.*; Steinberg, *supra* note 8.

134. See generally Seth Howard Borden, *Love’s Labor Law: Establishing a Uniform Interpretation of New York’s “Legal Recreational Activities” Law to Allow Employers to Enforce No-dating Policies*, 62 BROOK. L. REV. 353 (1996) (analyzing both cases). See also *McCavitt v. Swiss Reinsurance. Am. Corp.*, 89 F. Supp. 2d 495 (S.D.N.Y. 2000) (explaining *State v. Wal-Mart*).

135. Illinois, 820 ILL. COMP. STAT. ANN. 55/5 (West 2003); Minnesota, MINN. STAT. ANN. § 181.938 (2002); Montana, MONT. C. ANN. § 39-2-313 (2002); Nevada, NEV. REV. STAT. ANN. § 613.333 (West 2002); North Carolina, N.C. GEN. STAT. § 95-28.2 (2003); Wisconsin, WIS. STAT. ANN. § 111.321 (West 2003).

136. MO. ANN. STAT. § 290.145 (West 2002).

137. Gilbert Roman, *Smoking Outside of Workplace Sparks New ‘Civil Rights’ Laws*, ROCKY MOUNTAIN NEWS, July 31, 1994, at 2C; Milo Geyelin, *The Job is Yours – Unless you Smoke*, WALL ST. J., April 21, 1989, at B1; Elizabeth Thompson, *The Constitutionality of an Off-Duty Smoking Ban for Public Employees: Should the State Butt Out?*, 43 VAND. L. REV. 491 (1990); Lisa Frye, *“You’ve Come a Long Way, Smokers”*: *North Carolina Preserves the Employee’s Right to Smoke Off the Job in General Statutes Section 95-28.2*, 71 N.C. L. REV. 1963 (1993). See generally SUGARMAN, *Disparate Treatment of Smokers*, *supra* note 60, at 161.

whose more recent broader statutes probably cover this ground as well.¹³⁸ After all, getting married and staying single are both probably "lawful activities" within the meaning of those laws.

These "marital status" laws have been interpreted very differently when employers make an adverse employment decision because of *who* someone's spouse is. The issue typically arises pursuant to either an anti-nepotism policy (the employer won't hire an existing employee's spouse) or a conflict-of-interest policy (because of concerns of losing profits or secrets, the employer won't hire someone married to a competitor's employee). Some jurisdictions conclude that those policies constitute marital status discrimination and prohibit them; others, however, read their statutes more narrowly, concluding that one is not being discriminated against because one is married (which the statute would bar), but rather, because of who your spouse is (which has been found to be a legal basis for employer decisions).¹³⁹ Similar ambiguities might arise under these laws when a married employee has an affair, divorces and is fired. Was this discrimination on the basis of marital status (no longer being married) or on the basis of conduct (adultery) while married?

Sexual Orientation. Less popular are prohibitions against employment discrimination on the basis of sexual orientation. About ten jurisdictions (nine states plus the District of Columbia) have specific statutes of this sort.¹⁴⁰

As noted above, Colorado's general statute has been interpreted to cover discrimination on this basis; presumably North Dakota's would be as well.

Politics. A majority of states have laws concerning the rights of workers to involve themselves in politics and still retain (or obtain) their job. However, these laws vary from place to place.¹⁴¹ Moreover, some of

138. See COLO. REV. STAT. § 24-34-402(h) (2002); N.D. CENT. CODE § 14-02.4-03 (2002). See also, e.g., ALASKA STAT. § 18.80.220(1) (2002); D.C. CODE § 1-2512 (2002); N.Y. EXEC. LAW § 296(1)(a) (2002).

139. Compare *River Bend Community Unit School District No. 2 v. Illinois Human Rights Commission*, 597 N.E.2d 842 (Ill. App. Ct. 1992) (finding that school district discriminated against teacher on basis of marital status when it denied her transfer request to a school where her husband was principal), with *Ortiz v. Los Angeles Police Relief Ass'n*, 98 Cal.App.4th 1288 (2d Dist. 2002) (employees right to privacy does not include right to marry prison inmate).

140. CAL. LAB. C. §§ 1101-1102 (2002); CONN. GEN. STAT. ANN. §§ 46a-81c (West 2002); Human Rights Act, D.C. Law 10-129 (1977); HAW. REV. STAT. § 378-2 (2002); MASS. GEN. LAWS. ch. 151B, § 3(6) (2002); MINN. STAT. ANN. §§ 363.01 et seq (West 2002); N.J. STAT. ANN. 10:5-12; Tit. 10, c.5, §§ 12, 29.1 (West 2002); R.I. GEN. LAWS § 28-5-7 (2002); VT. STAT. ANN. Tit. 21, § 495 (West 2002); WIS. STAT. ANN. §§ 101.22, 111.321, 111.36 (West 2001).

141. See, e.g., CONN. GEN. STAT. ANN. § 2-3a (West 2003) (prohibits discrimination against employees who are candidates or elected to office); DEL. CODE ANN. § 5110 (2002); MINN. STAT. ANN. §§ 202A.135, 204B.195 (West 2002) (prevents employers from penalizing employees for taking time off to attend party meetings when they are members of the party machinery); MONT. CODE ANN. § 2-18-620 (2002) (requires that employees elected to office receive leaves of absence); OKLA. STAT. ANN. tit. 26,

these laws are designed to keep public employees out of politics, in a sense to protect public workers from the fear that unless they support a certain candidate, they will lose their jobs.¹⁴²

Connection to the Criminal Justice System. Some states forbid employers from discriminating on the basis of a worker's arrest record.¹⁴³ A greater number of states have laws prohibiting employers from asking an applicant about his or her arrest record.¹⁴⁴ Workers would probably be best protected by a combination of those two rules. On their face, both laws have loopholes: the former does not explicitly preclude an employer asking (although this might be implied from the statute), and the latter does not preclude discrimination on the basis of an arrest record that the employer learns about by indirect means (although that too might be implied from the statute).

Massachusetts goes further, prohibiting employment discrimination not only on the basis of arrests, but also on the basis of various specified misdemeanor convictions and on the basis of any misdemeanor conviction more than five years in the past.¹⁴⁵ California singles out conviction for possession of marijuana as a forbidden basis for employment discrimination.¹⁴⁶

Going even further, five states broadly prohibit *public* employers from engaging in criminal-record discrimination, i.e., on the basis of *arrest* or *conviction*.¹⁴⁷ Three states, Hawaii, New York and Wisconsin, have the most sweeping laws of this sort, generally banning *all* employers from using arrest or conviction records in making employment decisions.¹⁴⁸ Behind the laws of all of these eight states is a policy of trying to enable ex-cons to become employed.

§7-101 (West 2002) (requires an employer to provide 2 hours to vote); OR. REV. STAT. §§ 171.120, 171.122 (2001) (prohibits discrimination against and requires reinstatement of employees elected to the Legislative Assembly); WIS. STAT. ANN. §12.07 (West 2001) (requires time off to vote, prevents prohibiting employee from being an elected official).

142. See Hatch Political Activity Act, ch. 410, 53 Stat. 1147 (1939) (codified as amended in scattered sections of 5 U.S.C. and 18 U.S.C.); ARIZ. REV. STAT. ANN. § 41-772 (2002).

143. See, e.g., HAW. REV. STAT. §§ 378-1 to -9 (2002); N.Y. CORRECT. LAW § 750-55 (McKinney 2002); N.Y. EXEC. LAW § 296(15), 296(16) (McKinney 2002); WIS. STAT. ANN. § 111.31 (West 2001).

144. See, e.g., 775 ILL. COMP. STAT. ANN. S 5/2-103 (West 2003); other such states are Colorado, Kansas, Maryland, Missouri, and Montana.

145. MASS. GEN. LAWS ANN. Ch. 151B § 4(a) (2002).

146. CAL. LAB. CODE §§ 432.7, 432.8 (2002).

147. CONN. GEN. STAT. ANN. §§ 46a-79 to -81 (West 2002); FLA. STAT. ANN. § 112.011 (West 2002); MINN. STAT. ANN. §§. 364.01-.10 (West 2002); N.J. REV. STAT. ANN. § 11A:4-11 (West 2002); WASH. REV. CODE §§ 9.96A.010-.050 (2002).

148. HAW. REV. STAT. ANN. §§ 378-1 to -9 (2002); N.Y. CORRECT. LAW § 750-55 (McKinney 2002); N.Y. EXEC. LAW § 296(15), 296(16) (McKinney 2002); WIS. STAT. ANN. § 111.31 (West 2001)

C. Related Issues

Applicants as well as employees? The statutes described above are not consistent about who is covered. Although they generally cover anyone who is already employed, the coverage of applicants is mixed. Even as to employees, many expressly cover the range of adverse employment decisions (e.g., wages and promotions) but some are restricted by their language to discharge.¹⁴⁹

Private as well as government employers? As noted already in the discussion of rules covering employee political behavior and crime-related conduct, sometimes the state rules apply only to public employers. Nevertheless, most of the statutes described above cover private employers as well.

Remedies. A common legislative strategy is to tack the off-duty conduct in question onto the state's existing employment discrimination laws concerning race, sex and the like.¹⁵⁰ If so, then claimants charging lifestyle discrimination will have the same remedies and will have access to the same procedures as already provided for in existing employment discrimination laws. But sometimes, lifestyle discrimination provisions stand alone, raising the question of whether successful claimants can obtain job reinstatement, back pay, general damages (i.e., tort-like recovery for the insult and pain and suffering that follow), punitive damages, and so on.¹⁵¹ Under the stand-alone provisions, the question also arises as to whether there is any state agency that will get involved in the administrative handling of complaints, whether there is access to alternative dispute resolutions procedures ("ADR"), and related procedural questions.

Preventing lifestyle discrimination with existing core civil rights laws. As discussed above, discrimination on the basis of off-duty conduct is sometimes very closely connected to core prohibitions of standard civil rights laws. Hence, in a few settings litigants and/or scholars have proposed attacking a specific employment decision with those laws. For example, race discrimination claims were made in cases of adverse employment decisions based on inter-racial marriage and on renting out rooms to lodgers of a different race;¹⁵² sex discrimination claims have been asserted against anti-nepotism policies that have had an adverse impact on

149. See, e.g., N.Y EXEC. LAW §296(15) (McKinney 2002) ("It shall be an unlawful discriminatory practice . . . to deny . . . employment to any individual by reason of his having been convicted of one or more criminal offenses").

150. *Id.*

151. See, e.g., MINN. STAT. ANN. § 181.931 et. seq. (West 2002); S.C. CODE ANN. § 8-27-10 et seq. (Law. Co-op. 2002); WIS. STAT. ANN. § 230.80 (West 2001).

152. See *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986), *remanded to* 657 F.Supp 1022 (M.D. Ga. 1987); *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205 (N.D. Ala.1973).

women;¹⁵³ and disability discrimination laws have be argued to cover smokers, those with high blood pressure, and the like who are denied jobs on these health-related grounds.¹⁵⁴ Yet, if autonomy as to off-work conduct is the real objection, then existing core civil rights laws miss the mark.¹⁵⁵ Moreover, even if these laws might be stretched to help some deserving claimants, they fail to protect other equally deserving claimants.

Defenses. Although I have so far described the various lifestyle discrimination laws as generally prohibiting discrimination on one basis or another, in fact, many of them contain specific defenses which employers are able to rely upon. Before discussing these defenses, it should be noted that, as a general matter, the core civil rights laws provide that if an employer intentionally discriminates on the basis of, say, ancestry, religion, or sex, then the only available defense is the “bona fide occupational qualification.”¹⁵⁶ Ordinarily, this defense will simply not be available.

Three other points deserve attention as well. First, disability discrimination, in effect, is allowed if the disabled person is asking for or requires more accommodation than it is reasonable to ask the employer to provide in order to make the workplace suitable for the disabled person.¹⁵⁷ Hence, employers are permitted to avoid what are viewed as excessive costs of affirmative action that would help the disabled. Second, race and sex cases are sometimes brought on behalf of groups of applicants or employees who argue that statistical showings concerning one or more of the employer’s practices demonstrate a “disparate impact” on a protected group, suggesting that illegal discrimination is taking place.¹⁵⁸ In response to such a showing, the burden of justifying the resulting employment pattern shifts to the employer.¹⁵⁹ Although Congress and the Supreme Court have at various times re-phrased the language of what the employer must show, generally speaking, the employer must make a decidedly convincing showing that it has a very good business reason for using the

153. See generally Dennis Alerding, *The Family that Works Together. . . Can't: No-Spouse Rules as Marital Status Discrimination under State and Federal Law*, 32 U. OF LOUISVILLE J. OF FAM. L. 867 (1994).

154. See, e.g., Mark W. Pugsley, *Nonsmoking Hiring Policies: Examining the Status of Smokers under Title I of the Americans with Disabilities Act of 1990*, 43 DUKE L.J. 1089 (1994); Jimmy Goh, Note, “Smokers Need Not Apply”: *Challenging Employment Discrimination Against Smokers Under the Americans with Disabilities Act*, 39 U. KAN. L. REV. 817 (1991).

155. See *supra*, Section IV.E.

156. WEST’S EMPLOYMENT DISCRIMINATION HORNBOOK § 5.29(b), at 281 (definition of BFOQ); see also *UAW v. Johnson Controls*, 499 U.S. 187 (1991).

157. 42 U.S.C. § 12111(10). See Shaller, “Reasonable Accommodation” Under the Americans with Disabilities Act—What Does it Mean? 16 EMPL REL L J 431, (1991).

158. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

159. See generally Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

practices in question.¹⁶⁰ Third, the various federal laws that protect employees or applicants in one way or another tend to have exemptions for small employers, although the number of employees one is permitted to have and still qualify for an exemption varies considerably.¹⁶¹ All of these issues deserve attention when adopting statutory regimes dealing with lifestyle discrimination.

As of now, it seems unlikely that many lifestyle discrimination cases would be launched as disparate impact cases, although as a practical matter, statistical showings that certain employment screening criteria impact negatively on, say, smokers or on married people, are clearly imaginable. Rather, I believe that most legislators who have sponsored the laws described above envisioned instances of deliberate treatment on the basis of off-work behavior that the legislator believes should be impermissible. Of course, one concern is that officially banning the use of certain criteria will cause employers to disguise their use—for example, secretly refusing to hire married applicants without being open about it. Such measures can be partially fought with rules that forbid asking certain questions of applicants, although this is difficult to police and, often, employers could use alternative sources to acquire this information. Like the current trend in race and sex discrimination cases, employers could move from overt discrimination to more subtle forms.¹⁶² Such law-evading tactics would, in turn, lead some to call for the use of disparate impact litigation in response.

It is worth noting that the sweeping Colorado lifestyle discrimination law also contains generous defenses for restrictions that (a) are reasonably/rationally related to the employment activities of the particular employer, (b) constitute a bona fide occupational requirement, or (c) are necessary to avoid a conflict of interest or the appearance of conflict of interest.¹⁶³ North Dakota's broad lifestyle discrimination law somewhat vaguely allows employers to take into account activities that are in direct conflict with the essential business-related interests of the employer.¹⁶⁴ New York's provides a defense for activities that create a material conflict of interest.¹⁶⁵ Based upon some more specific provisions in the narrower smoker's rights laws enacted during the same time period, it seems clear that, although those legislatures did not want most employers refusing to

160. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (cutting back on what is required for business necessity in a Title VII case); Civil Rights Act of 1991, 21 U.S.C. 2000e (1998).

161. *E.g.*, Title VII of the Civil Rights Act of 1964 applies only to entities with fifteen or more employees. *See* 42 U.S.C. § 2000e (1998). The Age Discrimination in Employment Act, 29 U.S.C. § 630(b) (1998) applies to entities with twenty or more employees. The Family and Medical Leave Act, 29 U.S.C. § 2611(4) (1998) applies to entities with fifty or more employees.

162. *See generally* Krieger, *supra* note 159.

163. COLO. REV. STAT. ANN. § 24-34-402.5 (West 2003).

164. N.D. CENT. CODE §§ 14-02.4-01 to -21 (2001).

165. N.Y. LAB. LAW § 201(d) (McKinney's 2003).

hire smokers, at least some of them felt differently about employers like the American Lung Association, whose identity is clearly tied up with anti-smoking attitudes, or fire departments, which also traditionally have refused to hire smokers (although it appears that it has more frequently been a matter of lower workers' compensation costs than an ideological objection to products that start avoidable fires that has motivated such fire department policies).¹⁶⁶

D. Employment Other Than "At will": No Discharge Without "Cause"

The traditional American default rule is that workers are employed "at will."¹⁶⁷ An employee's "contract" right to continued employment may be terminated by the employer at any time—as is commonly said, "for good reason, bad reason or for no reason." In short, under this common law rule, just as employees may quit their jobs at any time for their own reasons, employers don't have to justify their unilateral decisions to let people go at any time.

Of course, the employment discrimination laws, already discussed, are an important limit on this principle. They change the rule to: one can be denied employment "for good reason, bad reason or for no reason, so long as it isn't one of the forbidden reasons."

Some employees, however, are not hired "at will," and this means that they are protected against unilateral dismissal. These employees are primarily in three categories: unionized workers; government employees who are not unionized; and high earners with specific employment contracts. The first two groups typically work under contract or statutory provisions that protect them from being discharged (or otherwise suffering an adverse employment decision) without "cause."¹⁶⁸ Union workers have won these protections through collective bargaining; many public employees have won theirs through the political process.

These provisions are primarily aimed at protecting workers from arbitrary treatment relating to their conduct at work; and they also are meant to assure that individual workers are not singled out because of their union activities or because they are not in favor with elected political officials. Nevertheless, the critical issue for our purposes is that beneficiaries of a "cause" provision may sometimes be able to block an employer from discharging them because of off-duty conduct. That happens because, if an

166. For an early case, see *Grusendorf v. City of Oklahoma*, 816 F.2d 539 (10th Cir. 1987) (upholding regulation preventing off-duty smoking by firefighters under rational basis review). See generally Sugarman, *Disparate Treatment of Smokers*, *supra* note 60.

167. See Charles Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 3.

168. See generally MARMO, *supra* note 62.

employer wants to let the worker go because of her behavior outside of work, the employer must justify that behavior as constituting good "cause."¹⁶⁹

Disputes under "cause" provisions are generally handled by arbitrators in the union context and by hearing officers in the non-union public setting.¹⁷⁰ Generally speaking, those judging these cases insist that the employer demonstrate that its legitimate interests have been sufficiently harmed or clearly put at risk so as to justify the proposed sanction (whether discharge, demotion, suspension or the like).¹⁷¹ Routinely, decision-makers say they are looking for the *nexus* between the employee's conduct and the employer's concerns.¹⁷² This implies that some off-duty conduct is too remote to the employer's legitimate interests to be the basis of a justified adverse employment decision.

However, in the application of the "nexus" test, these decision-makers reach inconsistent conclusions in close cases. Since there is almost always some arguable nexus, it becomes a matter of judgment as to whether the nexus is sufficiently strong. Basically, the cases seem to turn on the extent of evidence about the future harm to the employer that is required. Some arbitrators appear to accept what they see as reasonable, generalized speculation about future detriment if the employee is retained; others are scornful that this sort of proof is mere speculation and without firmer evidence treat the employer as not having cause for the discharge.¹⁷³

Moving beyond unionized workers and civil servants, some, often highly-paid, employees sign individual employment contracts. They may not be discharged unless they breach their contracts. Sometimes, these contracts contain provisions specifically relevant to off-duty conduct. Indeed, certain off-duty conduct is sometimes clearly forbidden. Often it is

169. See generally HILL, *supra* note 13, at 167.

170. *Id.* at 167, 197.

171. See Robert Kearney, *Arbitral Practice and Purpose in Employee Off-Duty Misconduct Cases*, 69 NOTRE DAME L. REV. 135 (1993). See generally HILL, *supra* note 13 at 167; MARMO, *supra* note 62.

172. See Hill & Delacenseri, *supra* note 16, at 164 ("In general, arbitrators are reluctant to sustain discipline or discharge based on off-duty misconduct or lifestyle absent some relationship or nexus to the job."). See also Robert Kearney, *Arbitral Practice and Purpose in Employee Off-Duty Misconduct Cases*, 69 NOTRE DAME L. REV. 135 (1993).

173. The same point applies to decisions concerning civil servants. For a variety of California personnel board cases from a two year period that illustrate this point, see *In re Galvan*, California State Personnel Board Case No. 27820, Apr. 7, 1992 (officer involved in drunken fight outside of work); *In re Martinez*, Case No. 28242, May 5, 1992 (prison worker fired for belligerence to police in traffic stop); *In re Owens*, Case no. 25506, July 13, 1992 (traffic officer used marijuana); *In re Kominsky*, Case No. 28961, Nov. 3, 1992 (off-duty drunk driving accident led to five percent salary reduction); *In re Reyes*, Case No. 29009, Jan. 12, 1993 (youth counselor fired for brandishing handgun in high school); *In re Vasquez*, Case No. 31038, Mar. 3, 1993 (fired for shoplifting); *In re Miranda*, Case No. 28269, Apr. 6, 1993 (peace officer employee fired for drunk driving); and *In re Hildreth*, Case No. 31358, Aug. 3, 1993 (correctional officer suspended for drunk driving).

dangerous conduct, especially in the case of, say, athletes or lead actors whose presence is critical to an employer because the specific employee is not easily replaced. Other times, it is moonlighting or other connections with businesses that compete with the employer. The collective bargaining, statutory and individual contract provisions just discussed apply only to employees. Hence, they afford no legal rights to applicants.

This section should highlight, then, that it is the “at will” doctrine that provides the underlying basis for employers to dismiss for off-duty conduct they don’t like. Were that rule replaced, presumably with a “cause” standard or similar protection for all employees, then the basic ground rules would be dramatically altered. However, that change does not seem imminent. “At will” employment has been criticized by many scholars, various task forces, and so on.¹⁷⁴ It is not the rule in Europe or Japan, for example.¹⁷⁵ Yet, for the present, only Montana has replaced it, and there is little reason to believe that other states will soon be added to the list.¹⁷⁶

E. Federal Constitutional Protection for Public Employers

Because public employers are state actors, their conduct is subject to federal constitutional scrutiny that does not apply to private employers.¹⁷⁷ Most importantly, this means that public employees may assert First Amendment claims concerning their out-of-work conduct. School teachers, police, and other public employees have been involved in a variety of litigation in which they have been able to use the First Amendment to save their jobs in settings in which private employees would not have this legal weapon available to them.¹⁷⁸

Other federal constitutional protections that public employees may claim with respect to their off-duty conduct are Fourth Amendment privacy claims and Fifth and Fourteenth Amendment due process claims. These rights have been asserted by public employees especially against drug testing and other mechanisms that their employers have used to find out about their off-work conduct.¹⁷⁹

174. See generally Theodore St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 362 (1994).

175. *Id.* at 382 & n.80.

176. MONT. CODE ANN. § 39-2-901 (1987). See generally Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 58-65 (1988).

177. See Gerhart, *supra* note 85.

178. On the other hand, police and teachers are often held to what appear to be higher standards than other public employees. See Woronoff, *supra* note 34; Joel Shafferman, *The Privacy Plight of Public Employers*, 13 HOFSTRA L. REV. 189 (1994).

179. See generally John B. Wefing, *Employer Drug Testing: Disparate Judicial and Legislative Responses*, 63 ALB. L. REV. 799, 804 (2000) (“The Supreme Court decisions thus stand for the proposition that before random or suspicionless drug testing of current public employees can be carried out by their employers, there must be some showing of “special needs” justifying the testing.”).

F. Protection Against "Wrongful Discharge"

In recent times, modest inroads have been made on traditional contract law rules covering employment. For example, in some states it is now possible to demonstrate that there is an individual employment contract even if there is no specific written contract. Instead, this contract is implied from the parties' ongoing relationship.¹⁸⁰ If someone is abruptly and arbitrarily fired who has such an implied contract, the worker is entitled to sue for breach of contract. Because courts, in effect, imply a "cause" requirement into these implied contracts, for my purposes here, this essentially puts an employee with such a contract in the same position as those unionized or public employees discussed above. They may challenge their discharge, and if the employer tries to justify it by reference to out of work conduct, they may respond that in the specific circumstances, the employer's interests are insufficiently endangered.

There is a different sort of "wrongful discharge" claim, however, that needs further attention because it is understood to arise under tort law rather than contract law. Basically, if an employer violates a clear public policy the damages awarded are not merely the conventional contract damages (like back pay), but also general tort-like compensatory damages for the emotional distress and pain and suffering caused by the wrongful firing, and in some cases punitive damages as well.¹⁸¹ A good example is where the employer asks the employee to lie to government officials about tax evasion or other criminal behavior that the employer has been engaging in. Suppose the employee refuses and is fired. This would be a tort in states that recognize this cause of action. The central idea is that employers ought not be able to condition employment on getting employees to behave in a way that goes against public policy.

For this discussion, therefore, the issue is the extent to which employees may bring this sort of tort claim in situations where they have been fired for their off-duty conduct. Doctrinally, this category is, or is meant to be, reserved for cases in which the employer's demand on the employee's out-of-work time is outrageous. For example, many would probably agree that an employee should have a tort claim when the employee is fired for taking boarders into his home of a different race. However, examples of actual tort cases along these lines are difficult to find.

180. Muhl, *supra* note 167, at 3. See generally DOBBS, *supra* note 92, at 1291-96.

181. A leading case in this area is *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974), which found an unlawful discharge where a married woman was fired for refusing to go on a date with supervisor. See also *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (unlawful discharge where the employee refused to engage in illegal behavior and was fired).

VII.

A GENERAL TAXONOMY OF WAYS TO RESOLVE LIFESTYLE
DISCRIMINATION DISPUTES

Part VI described existing law covering lifestyle discrimination. This Part sets out a taxonomy of alternative solutions, recasting the prior material (and some additional ideas) in a more abstract and systematic manner.

A. The Market

One solution to the problem of lifestyle discrimination is to leave it to the market. This is the position ascribed to those termed “privacy minimalists” in Part IV D. The core idea is that workers who do not like employer intrusions into their private lives should choose to work for an employer who does not seek to control the off-duty behavior that the employee engages in. This solution means that the law would tolerate employer decisions not to hire or to fire people because of how they act off-the-job.

From the viewpoint of employee privacy, the affirmative argument for this solution is that society should count on the power of workers to vote with their feet and the desire of employers to attract and keep good employees to ensure that employers do not make unreasonable demands on employees’ private time. This solution may also count on general public sentiment against certain types of lifestyle discrimination to help curtail employers from acting in violation of that sentiment. That is, supporters of this view may believe that consumers and existing employees not directly impacted by specific sorts of discrimination will nonetheless bring economic pressure to bear on employers whose privacy-invading conduct violates community norms. This approach also implicitly assumes that employees whose off-duty conduct may impose considerable costs on some employers will tend to be sorted into those jobs where those costs are less, and this type of sorting would be viewed as mutually benefiting both employers and employees.

Three other arguments may also be made on behalf of the market solution. The first is that, at least for now, the problem of lifestyle discrimination is not seen as a terribly serious one (i.e., it is not pervasive). If this were true, then one might well conclude that society’s legal weapons should be reserved for more pressing problems, such as employment discrimination on the basis of race. In support of this claim, Professor Westin has pointed out that surveys of personnel managers and of employees are in fairly strong agreement that at least certain sorts of

lifestyle discrimination are inappropriate.¹⁸² (I will say a bit more about this claim below, in Section VII).

A second argument for leaving this issue to the market is that lifestyle discrimination laws might not be very effective.¹⁸³ The concern here is that formal rules against lifestyle discrimination might largely drive such practices underground. In short, the risk is that employers will still discriminate, but more subtly. This, in turn, may make it very difficult for employees, and nearly impossible for applicants, to determine and prove that they were indeed discriminated against on the basis of their private behavior.

Third, since it would be easy to make a claim of lifestyle discrimination, it may be feared that creating a legal right would generate many frivolous claims. Even if frivolous, however, these claims could have nuisance value that might force employers to waste money on dispute resolution mechanisms and/or pay off undeserving claimants. Worse, if the public were to gain the impression that too many incompetent and legally undeserving employees were filing this sort of claim, this could undercut the ability to protect against lifestyle discrimination in the future.

B. Contract

This second solution is something of a variation on the first. The focus here, however, is on the notion that employees and employers could negotiate provisions contained in the employment contract that specify aspects of employee privacy that are to be respected and/or subject to employer control.

In the more extreme "market" model previously discussed, the idea was that employers will respond to employees' willingness to work under various conditions by unilaterally setting policies about off-duty conduct that best assure that they will attract and keep the workforce they want. From the employee perspective, one's "remedy" in the face of unacceptable conditions is to refuse a job or leave it.

By contrast, the idea here is that employees will stay and press employers to agree to change their policies, or will negotiate specific terms as a condition of joining the firm initially. In short, this solution imagines direct haggling between workers and employers over the extent to which

182. Westin, *supra* note 112, at 274-75. See Woolsey, *supra* note 14 (Human Resource Management's conference panel supports employee privacy over concerns like health care costs).

183. For discussions of how employers respond to "wrongful discharge" and employment discrimination laws, see JAMES DERTOUZOS & LYNN KAROLY, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY (RAND Corporation Paper No. R-3989-ICJ, 1992); Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC. REV. 47 (1992); Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC. REV. 497 (1993).

employee lifestyle may be regulated. As with the prior solution, employees would have no “right” to be free from lifestyle discrimination, apart from those rights they obtain in negotiations with their employer.

For the overwhelming majority of employees, however, it is hard to imagine how, as a practical matter, this solution could be put into effect, apart from the process of collective bargaining on behalf of all (or at least most) employees in the enterprise. And, of course, in the American context that has meant via unionization. In other words, it is generally implausible for employers to negotiate with individual employees. Not only would the transactions costs be very high, but also having different regimes applied inconsistently to different employees threatens to create an enforcement nightmare in enterprises of all sizes.

Where unions exist today, they do indeed bargain for contract provisions that protect employees’ private lifestyles. However, as already pointed out, this has not generally occurred through negotiations targeting specific types of off-duty conduct. Rather, as noted, unions have bargained for general provisions that protect against dismissal (or other adverse decisions) without “cause.”

There is the possibility of giving specific attention to off-work conduct in the fairly unusual situation in which an individual employment contract is negotiated. I am not aware, however, of employees of this sort (who are typically highly paid) who are asking for their employers to agree that specific off-work behaviors are to be allowed. Rather, as noted already, it is the employers who are more likely to insist that these key employees not engage in certain off-work behavior. The employee with this sort of contract instead tends to rely on either a general “for cause” provision and/or an automatic “buy out” (or termination pay) right which requires the employer to make a lump sum payment to end the contract. In short, these employees, it would seem, feel sufficiently protected because the essence of having an individual employment contract is that the employer has given up the right to discharge at will.

In sum, as a practical matter for most employees, if the contract solution is to amount to anything, then this analysis suggests that it will mean the elimination of “at will” employment and its replacement with “cause” limits on adverse employment decisions generally.

C. Formal Legal Protection Against Lifestyle Discrimination

If the market and individual contract negotiations are thought insufficient to protect the rights of applicants and employees to be free from adverse employment decisions based on off-work conduct, then those championing such employee privacy rights will have to seek protective legislation. But, as we saw in the prior section, such legal protections can

dramatically vary in form.

1. Legal protection against outrageous employer decisions

Legal protection against outrageous lifestyle discrimination by employers is the minimum substantive right that employees might obtain. The idea here allows for employers to retain broad discretion with respect to hiring and firing, unless the community finds the discrimination outrageous. Then, the employer's discretion would be curtailed. Exactly what sort of lifestyle discrimination would fit this category is probably controversial.

One way to imagine implementing such a regime is via legislation. Indeed, existing statutes that focus on marital status, smokers, and the like could be viewed as illustrating discriminatory practices that currently offend community norms to such a degree as to be entitled to special legal prohibition. The spotty adoption of these statutory prohibitions around the nation may further suggest that community norms about these issues vary widely from place to place. Smokers' rights might be a good example of this.¹⁸⁴ On the other hand, it is also possible that some legislatures have not acted on, say, marital status discrimination, simply because there is a lack of perception that significant discrimination on this basis exists.

A regime that singles out certain sorts of employment decisions concerning off-work behavior as outrageous could also be implemented through the executive of the federal and state administrative branches. Indeed, President Clinton seemingly concluded that refusing to hire someone because she/he is a parent and refusing to allow a married person to enlist in the Marines were outrageous policies, prompting him to act to his fullest capacity to block them. It is also imaginable that existing civil rights agencies and commissions could be charged with the added duty of identifying outrageous lifestyle discrimination in employment. To determine the community norms, public agencies could draw on public opinion polls that were conducted on the relevant issues.

Finally, the judicial process could be called upon to determine what type of lifestyle discrimination is outrageous. This is the way that courts have developed the tort of intentional infliction of emotional distress, which requires a finding of outrageous conduct by the defendant. On an incremental, case-by-case, basis, misconduct in a variety of settings has been found to be outrageous or not by judges and juries.¹⁸⁵

184. For example, California is a strong tobacco control state and does not have a smoker's rights provision while Kentucky, a strong tobacco rights state does. *See* KY. REV. STAT. ANN. § 344.040 (Mitchie 2002)

185. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1977); Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Even-handedness: Intentional Infliction of Emotional Distress by*

In developing the tort rights of employees who have been discharged in violation of public policy, courts around the nation have been taking divergent routes to determining when employers are liable. More liberal courts are pursuing the traditional common law approach, deciding whether the discharge violated public policy with reference to general social norms as applied from case to case.¹⁸⁶ More cautious courts, by contrast, require employees to point to clear and strong statements of public policy found, say, in specific state statutes or in the state constitution.¹⁸⁷

2. Legal protection against unreasonable employer decisions in general (i.e. "for cause" rights)

Stronger protection of employees could come through statutory "for cause" protection against discharge as a general matter. Or, conceivably, a more restricted "for cause" rule could be adopted that governed only discharges and discipline for off-work behavior. Most employees in Europe and Japan today already have this sort of right with respect to both at-work and off-work behaviors. And public employees in the U.S. also have statutory protection of this sort. As I suggested earlier, this is a legislative solution that those who Westin called "privacy pragmatists" are likely to prefer because it involves a balancing of employer and employee interests on a case by case basis.

In adopting this sort of regime, one needs also to pay close attention both to the forum in which complaining employees may seek relief and the nature of the recovery awarded to those who have been wronged. For example, are grievances to be made before arbitrators, administrative law judges, or regular judges? And does a successful claim yield some or all of the following: back wages, re-employment, pain and suffering damages, and punitive damages?

3. Civil rights protection against lifestyle discrimination generally

A strong civil rights approach to lifestyle discrimination in employment would adopt the general position that employers, rather than employees, must internalize costs that are associated with employee privacy. This is the position associated with "privacy fundamentalists." This approach certainly would mean that no weight would be given to arguments by employers that their business would suffer based on other

Outrageous Conduct, 82 COLUM. L. REV. 42 (1982).

186. See, e.g., *Nees v. Hocks*, 536 P.2d 512, 516 (Or. 1975).

187. See, e.g., *Adler v. American Standard Corp.*, 538 F. Supp. 572, 577-78 (D. Md. 1982).

employees or customers disliking the off-work behavior in question or that the employee in question is likely to impose a higher health care costs on the firm. And, except perhaps in very special and compelling circumstance, employers could no longer use off-work conduct as a predictor of risk in employment decisions.

This, on the face of it, is akin to the Colorado and North Dakota solution, which gives workers the same sort of protection against any sort of lifestyle discrimination as they would have with respect to discrimination on the basis of race, sex, religion and so on.

Yet it must be recognized that such protections could be seriously compromised by rather generous defenses, especially those that recognize assertions of merely "reasonable" business interests of the employer. Such defenses could, in the end, convert what superficially appears to be a civil rights-like statute into something that only protects against outrageous behavior by employers. "Privacy fundamentalists" might find the more limited defense of the sort that now exists in the Fair Labor Standards Act and the Family and Medical Leave Act acceptable. These laws, in effect, allow employers to deny rights to employees if to grant those rights will "unduly disrupt" the employer.¹⁸⁸

VIII.

PUBLIC POLICY FOR THE FUTURE?

Speaking generally, racial minorities seem to have won civil rights protection through moral claims (and political pressure) that generated sufficient white support to win the day in Congress. This point also applies to the disabled. Protection against religious discrimination is a more subtle matter. Although a strong majority of Americans would term themselves religious, I believe that only a minority fears religious discrimination. Hence, once more, gaining legal protection against religious discrimination probably requires winning over those who do not view themselves as direct personal beneficiaries of the law. In short, citizens support anti-discrimination principles primarily because they believe such rules are just.

This pattern probably applies to lifestyle discrimination as well. That is, a great many of those who suffer adverse employment decisions based on off-work conduct are probably doing things that only a minority of people do, like smokers, swingers, hang gliders, drunk drivers, offending political protesters, and the like. To be sure, others who have been victims of lifestyle discrimination like parents or those who are married are not in

188. See 29 U.S.C. § 207(o)(5), a provision of the Fair Labor Standards Act concerning the right of public employees to use compensatory time off, and 29 U.S.C. Sec. 2612(e)(2)(A), a provision of the Family and Medical Leave Act concerning when employees with planned medical treatment may take time off for such treatment.

the minority. Nonetheless, most of the people who have chosen to act in that way probably cannot imagine themselves being discriminated against on this basis, just like those who are religious, and unlike those who are black or disabled.

Thus, for a majority of the public to support laws restricting lifestyle discrimination, more than narrow self interest must be brought into play. To be sure, advocates of such laws can cast them in ways that try to appeal to the self-interest of most citizens, for example, by calling for the protection of *all* legal off-work behavior and thereby appealing to a plausibly vague worry that nearly everyone might have that he or she could sometime, somehow, be mistreated because of some off-work conduct of theirs. Nevertheless, in today's world of political unrest, lifestyle discrimination is not likely to be the most important issue for most voters.

Earlier, I termed some people as "coercive social norm setters" with respect to off-work conduct because they go beyond disapproval of certain off-work behavior to wanting to discourage or even preclude such conduct. Notice, therefore, that if these "coercive social norm setters" were but few in number, then there would likely be less lifestyle discrimination in employment. That is, employers would probably not be reacting to employee off-work behavior unless their customers' or employees' reactions were numerous or severe. (Of course, employers would still have other financial concerns triggered by off-work conduct). This means that, on the one hand, the more tolerant we are as a society of others' private conduct, the less lifestyle discrimination there is likely to be (other things equal). But, on the other hand, the very existence of a substantial group of "coercive social norm setters" makes it likely that there will be concentrated political opposition to the enactment of lifestyle discrimination legal protections, at least where such protections would cover behaviors that powerful norm-setters dislike.

This discussion, of course, assumes a somewhat simple model of the political process, although we know that the real world of politics is more complex. In the first place, sometimes special interest groups can achieve political gains against the diffuse wishes of the majority. And, secondly, elected officials who are political entrepreneurs can sometimes successfully manage legislative initiatives that are better understood to be leading public opinion than following it. Hence, predicting the future for lifestyle discrimination laws is very difficult.

Historically, the existing statutory provisions have been the product of special moments in which an issue surfaced in a way that generated the needed political support. The campaign for smokers' rights laws is a good example. Since the Surgeon General's Report on Smoking in 1964, there has been a vast decline in adult smoking prevalence in the U.S., the development of a strong anti-smoking movement, and the growth of

restrictions on the conduct of smokers. These changes appear to have the widespread and growing support of the American public.¹⁸⁹ But, when it began to be clear that more and more smokers were going to be denied jobs because they smoked away from work, this galvanized certain political actors to come to their defense.

Perhaps unsurprisingly, the leaders in this effort were the ACLU and the tobacco industry. Individual smokers were not well organized in an association, unlike gun owners through the NRA. The ACLU position has a decided appeal among many non-smokers, who view smokers as victimized addicts.¹⁹⁰ From this perspective, even someone who is eager to make all public places and workplaces smoke free may think it unfair for those who cannot manage to quit smoking in their own homes to be denied jobs. But, because the tobacco companies have generally argued that smoking is a matter of personal choice and not addictive, their support for these laws probably turned away the support of some non-smokers. Perhaps this helps to explain why, at least in several states, when presented with bills to protect smokers, legislators expanded the sweep of the laws enacted to cover consumers of other products as well.

But, notice that expanding protection to cover consumers of all legal products, for example, abandons the "sympathy for the addict" argument that some have found appealing in laws restricted to smokers. Instead, the broader statutes rest on a much wider ideological commitment to personal liberty that I have associated with "privacy fundamentalists."

These views suggest two possible future political scenarios that could lead to the enactment of new lifestyle discrimination laws. In one, the rules will remain as they are until some new event or series of events galvanizes legislators around the occasion. Such events might lead to yet another special protection law, or possibly in some states, to the broadening of a proposed new law to cover more or most workers. Alternatively, the rules will remain as they are until some citizen-based political forces or political entrepreneurs generally supportive of employee off-work privacy organize a campaign broadly to protect that privacy. Although labor unions might at first be thought the logical group to lead such a campaign, because of the "cause-based" protection that existing unionized employees already have, it is not easy to see why a fight for stronger statutory protection would become a high priority issue for most unions who rely on contract language. One might imagine that other civil rights groups that care a great deal about privacy might organize such a campaign, but it is not clear whether there

189. See generally Robert A. Kagan & William P. Nelson, *The Politics of Tobacco Regulation in the United States*, in REGULATING TOBACCO 11 (R. Rabin & S. Sugarman, eds., 2001).

190. ACLU, Legislative Briefing Kit: Lifestyle Discrimination in the Workplace, Introduction to Lifestyle Discrimination in the Workplace, at <http://www.aclu.org/WorkplaceRights.cfm?ID=9080&c=34> (last visited May 9, 2003).

really are such groups, apart from the ACLU. And in any event, those groups with some interest in employee privacy can be easily distracted to focus on other issues in this realm - including, of late, employee privacy *at work*. For example, of high current interest are employer searches of desks and lockers and employer monitoring of telephone calls, e-mail, and web-surfing of their workers.

Therefore, for the lifestyle discrimination issues I have raised here to become a front-burner item, there will have to be a greater sense of public urgency on this issue. That could occur were it thought that this is a serious and growing problem. As I have earlier suggested, however, whether lifestyle discrimination today actually is such a problem is not clear. Although we know that it occurs, evidence is sketchy as to the rate at which it occurs.¹⁹¹ As already noted, some argue that seriously objectionable lifestyle discrimination in employment is not frequent, at least in large enterprises, because firms, through their personnel managers, agree that most off-work conduct by employees should be ignored. But this ignores smaller firms, harder cases in which personnel managers may not give much weight to the employee privacy at stake, and individual cases in which managers and supervisors react negatively to reports of specific off-work conduct regardless of firm policies that are generally tolerant of employee off-work privacy.

Developments since the terrorist attacks on September 11, 2001 have made "privacy" an increasingly salient policy issue. That our government, for the present, has moved to reduce some of our privacy rights in the name of national security certainly does not mean that the American public no longer values privacy—although these events have made us more acutely aware of the possible costs of keeping the government's nose out of the lives of ordinary people. Recent disputes concerning the internet have also thrust non-national security privacy issues to center stage, including the question of what privacy rights, if any, employees should have with respect to their use of computers at work. In this environment, were suitable

191. In order to gain a richer understand of the extent to which lifestyle discrimination in employment occurs and trends in the types of discrimination that is taking place, I have begun to study a fairly new California law that permits employees to complain to the Labor Commissioner if they believe they are being unfairly treated based upon off-work conduct. *See* CAL. LAB. CODE § 96(k) (West 2000). Where the complaints are viewed as valid, the employee may, through this fairly low visibility process, be entitled to modest relief. So far, I have been able to obtain all of the claims that were filed during the first year following the adoption of this new law, and my aspiration is to track these filings over several years. This is not the place to describe in detail what I have learned so far from those initial filings. However, I note that there were approximately 50 complaints filed from across the state in the first year concerning matters that may be viewed as lifestyle discrimination. As we gain more experience with this new law, it should be possible to determine more clearly a) whether that number is changing (and in which direction), b) the pattern of the complaints, and c) to what extent the complaints are considered to be valid by the Labor Commissioner and, in such cases, the extent to which employees are gaining satisfactory relief.

legislative sponsors to emerge, it is certainly imaginable that lifestyle discrimination in employment could become a hot issue in many legislatures, just as it was in the early 1990s, when debate on lifestyle discrimination was centrally focused on smokers' rights laws.

The prospects of this happening are probably greater if considerable media attention were given to specific examples of people losing their jobs for off-work behavior in contexts that seem unfair to the general public. The most recent examples in the news, however, may not win widespread public sympathy. Although some would argue that what the University of Alabama's football coach does when he is out of state on his own time should not be of concern to the University (at least so long as his conduct is not illegal), nevertheless, others will agree that he deserved to be fired if, as was reported, he spent the night partying with strippers in his hotel room. In the same vein, even though public opinion nationally supported the war on Iraq, surely many would agree that individuals ought not lose their jobs from protesting the war away from work. Yet, when, as recently happened, a journalist is fired for this conduct, the issue becomes more complex. After all, many would acknowledge the press' goal of conveying to its readers the image that its news reporters are neutral, rather than ideologically committed, on crucial events of the day.

Putting aside individual firings that are important enough to be featured in the news, several factors could combine to make lifestyle discrimination appear, as a general matter, to be of growing concern. First, as noted earlier, in today's labor market, employers can afford to be pickier than they were in the late 1990s and so there is reason to expect that more will look to off-work conduct as a factor in hiring and firing. Second, the loss of privacy in other realms could, in response, cause more people to speak out about the unfairness they see of employer control over their off-work behavior. At the same time, the fact that many in the human resources field reportedly sympathize with these feelings of privacy could make employers who discriminate on the basis of lifestyle appear to be outliers who are out-of-tune with dominant social norms.

While most of our past history suggests that state legislatures would respond to specific examples of lifestyle discrimination by proposing new targeted laws, there is the possibility that this would not be the way things play out next time. Because we now have at least some experience with the broad lifestyle discrimination laws of Colorado, North Dakota and New York, political entrepreneurs might conclude that more sweeping laws both better reflect the desirable pro-privacy stance as a general matter and have not caused any noticeable harm to the business community in those states.

Whether the ACLU (and its allies) could be counted on both to encourage and support such legislative activists is not entirely clear. For now, the ACLU appears to have abandoned its lifestyle discrimination

project. Whether or not this is the result of criticism of the ACLU for being too connected to the tobacco industry, with the ACLU on the sidelines, it is not obvious what other interest groups would make lifestyle discrimination in employment a high priority issue. This is especially so because, as noted earlier, unionized employees are, relatively speaking, least in need of new protective legislation of this sort.

Perhaps instead the initiative to contest lifestyle discrimination in employment might come from liberal campus activists at colleges and universities around the nation if they see some of their classmates blocked from employment opportunities for behavior they have engaged in outside of work, behavior which student leaders view as inappropriately disqualifying. Hence, just as students have pressured universities to treat employers that discriminate against gays and lesbians as unwelcome to recruit on campus, so too students might become energized to rally against lifestyle discrimination in employment generally.